CHAPTER 14

Approval of the UBS Loan

– Part the NEC

Summary

This chapter discusses the process by which the NEC approved the UBS Loan.

1. The National Executive Council

1.1 The UBS Loan was approved by the NEC The NEC is established by s. 149 of the Constitution.
which relevantly provides that:
(1) A National Executive Council is hereby established
(2) The Council shall consist of all the Ministers (including the Prime Minister when
he is present as Chairman)

(3) The Functions of the Council are –

a. to be responsible, in accordance with this Constitution, for the executive government of Papua New Guinea

b. such other functions as are allocated to it by this Constitution or any other law

(4) Except where the contrary intention appears, nothing in this Constitution prevents the powers, functions, duties or responsibilities of the Council from being exercised, as determined by it, through a Minister

(5) Subject to any Organic Law or Act of the Parliament, the procedures of the Council are as determined by it'

1.2 There is no Organic Law made under this provision. There is no Act of Parliament that specifically provides for the procedures of the NEC.

1.3 The Prime Minister and National Executive Council Act 2002 (PM&NEC Act) contains limited procedural provisions. Whilst that Act does not make reference to s. 149(5) of the Constitution, it does refer to 'the procedures' of the NEC in s. 23(3)(c). Section 23 provides for the 'secretarial services' function of the NEC Secretary, which include 'to receive submissions to the National Executive Council and to ensure their compliance with procedures of the National Executive Councif2.

1 4 The evidence before the Commission is that, prior to 2017, there were no procedures codified by the NEC, save for 'ministerial conduct requirements' for bringing submissions before the NEC,2 which were issued when Grand Chief Sir Michael Somare was Prime Minister and remained in use. Those instructions have not been produced to this Commission.

1.5 The Hon Kerenga Kua stated that:

There is no prescribed procedure on how NEC meetings should be conducted.

Generally, Cabinet tries to arrive at decisions by consensus, but the system does have its

weaknesses because there are no prescribed set procedures so sometimes you can have let us say, out of the 33, 20 or 25 might say no to a proposal or submission, but if the chairman, the prime minister is as chairman feels that it should go forward, he can override the 25.

He can override and say; yes, I hear all of you but we are going to give this one a go. ... We do not – we never vote. We just agree. Agree or keep our disagreements quiet.'

1.6 On 24 August 2017, the NEC promulgated the National Executive Council Handbook (NEC Procedures Handbook) under s. 195(5) of the Constitution. No witness who was a minister in 2014 made mention of any handbook in use then. In any event, the Handbook 'superseded all previous instructions'9. The Handbook is in evidence.6

1 7 In 2020, s. 23 of the PM&NEC Act, was amended by inserting s. 23A7 to give effect to the NEC Procedures Handbook. Section 23A relevantly provides:6

(a) pursuant to s. 149(5) of the Constitution, the procedures of the NEC are as determined by the NEC in accordance with the NEC Procedures Handbook
(b) a decision of the NEC 'is a privileged and confidential document, and is non-justiciable'
(c) a Court of competent jurisdiction 'can inquire into a question whether or not, the procedures and processes of the Council have been complied with according to law'

1.8 There is a Parliamentary Executive that is 'collectively answerable to the People, through the Parliament, for the proper carrying out of the executive government of Papua New Guinea and for all things done by or under the authority of the National Executive'.9 The Prime Minister is appointed by the Parliament and he appoints the Ministers that constitute the NEC.

1.9 As a collective body, the decisions of the NEC should be made in compliance with established procedures that ensure Ministers are given sufficient notice of the proposed meeting and the agenda and material to be discussed, Ministers participate meaningfully during the deliberations

and the best decision that takes into account all relevant matters is made.

1.10 As measure of good governance and in the interest of good public administration, the NEC is duty-bound to promulgate its own procedures and consistently comply with them. Those procedures must be designed to facilitate the orderly and proper conduct of the business of the NEC. The procedures must make provision for standard procedural provisions that reflect best practices. Those include due notice of meeting date, time and venue to be given to members; meeting agenda; prior distribution of agenda materials to members; quorum; conduct of the meeting by its Chairman; presentation of submissions by its sponsor; deliberation on the submission by members; decision by members on contested and uncontested matters; method of decision-making on contested and uncontested matters; meeting minutes, record keeping, and reporting to the decision-making body's appointing authority.

Consideration of evidence as to the NEC's established practice in 2014

1.1 In the absence of a formal and comprehensive set of procedures in 2014, the NEC conducted its meetings in accordance with established practice. Brief evidence on those procedures was given by the Hon Peter O'Neill[10] and the Hon Kerenga Kua.

1.2 Mr O'Neill stated that there were 'ministerial conduct requirements' for bringing submissions before the NEC that were approved and distributed by the NEC and in the time of Prime Minister Somare but 'other than that; I am not aware' of any procedures. The practice was that that the

Central Agencies Co-ordination Committee (CACC), which consisted of five of the most senior departmental heads,[11] vetted Ministerial submissions before they were brought to the NEC and ensured that the State Solicitor's legal clearance and Treasury's clearance (if funding was

involved) were obtained. When a submission came before the NEC, the Minister responsible presented the submission and members deliberated on the submission. If the Minister asked for deferral to give more time to seek advice, the matter was deferred. After the deliberations, a decision was made.

1.3 The current practice was that ministers 'take a vote but it is not normally the case. You will see the balance of the arguments and then announce the decision, I call whether there is any objection and if there is no objection, then it is carried'.12 Mr O'Neill was not asked and did not make any statement on how decisions on disputed matters were reached. The NEC Procedures Handbook 'strengthened that process. It reduced the ability of ministers to just walk into cabinet with papers without proper clearance from the departmental heads (and) proper clearance from Central Agency. No meeting minutes were kept." The meeting was tape recorded and transcribed but these were confidential and for that reason he did not ask for the transcripts.

1 4 Mr Kua said:14

> There is no procedure on how NEC meetings should be conducted. Generally, Cabinet tries to arrive at decisions by consensus, but the system does have its weaknesses because there are no prescribed set of procedures so sometimes you have let us say, out of 33, 20 or 25 might say no to a submission, but if the chairman, the prime minister is as chairman feels that it should go forward, he can override it.

1.5 The NEC Procedures Handbook is well structured and appears comprehensive. It covers most aspects of the decision-making process. These include underlying principles of collective decision-making, notices of meeting, attendance, quorum, the procedure for bringing submissions, deliberation, decisions to be reached by consensus and record keeping. However. the NEC Procedures Handbook omits some important procedural matters, for example:

(a) provisions for meeting agendas and material to be circulated in advance to ministers 'summoned' to attend a meeting by the Prime Minister
(b) how matters that are disputed by those in attendance are resolved by vote or otherwise
(c) meeting minutes

1 .6 The Commission finds that in 2014, the practice in calling meetings was largely unwritten and ad hoc. Meetings were called by the Prime Minister, no formal agenda and material was circulated to members in advance, submissions were brought by the Minister responsible and distributed at the meeting, Ministers deliberated on the submission and decisions were made by consensus by those Ministers in attendance and the Prime Minister prepared and signed the decision document which was distributed by the NEC Secretary to designated persons.

1.7 If there was a difference of opinion among Ministers, the question was not put to the vote; the Prime Minister's decision carried. During the meeting, a Minister had the right to seek deferral of consideration of the submission and was granted. Cabinet confidentiality and solidarity was observed at all times.

1.8 As in jurisdictions whose systems of government are based on the Westminster model, cabinet confidentiality is regarded as of fundamental importance to allow the members to debate policy fully and without concern for subsequent public disclosure. But records are kept and consistently with provisions in public records legislation are disclosed publicly many years later – 30 years for

most records in Australia. Laws of the State make provision for record keeping and maintaining confidentiality of those records. Section 19 of the National Library and Archives Act 1993 provides for deposit by 'government instrumentalities' of government publications on conditions including conditions of secrecy. 'Government instrumentalities' is defined to include any 'government body',15 which therefore captures the NEC.

1.9 Equally important is the convention of cabinet solidarity – the executive government must speak with one voice after deliberation. A member of cabinet who cannot support a cabinet decision

must, necessarily, resign their ministry and return to the back bench.

2. NEC Policy Submission 67/2014

2.1 The NEC was informed of the proposed loan and acquisition through Policy Submission 67/2014.16 Save for the Prime Minister, whose submission it was, and the Treasurer who saw the submission the night before the meeting, this lengthy and complex document was provided for the first time to all NEC members at the meeting. NEC members thus had no time to consider its detail.

2.2 Some idea of the scope and complexity of Policy Submission 67/2014 comes from its stated purpose which was:

1. To inform the NEC of proposed financial arrangements for an acquisition by the State of 149;390,244 shares in the listed public company Oil Search Limited ('Oil Search), which involves the following:

   a. for the State to obtain a 10.01% interest in Oil Search

   b. the State's shareholding will partially replace the IPBC shareholding under the previous exchangeable bond transaction with the International Petroleum Investment Corporation of Abu Dhabi (IPIC), which on 5 March 2014 is exchanged and converts to a shareholding by IPIC in Oil Search, resulting in !PIC [SIC] holding no shares in Oil Search

   c a loan to the State of A$1.239 billion from UBS AG (Australia Branch) (UBS) initially comprising two facilities (a A$335 million bridge loan facility and a A$904 million dollar loan facility), together with the engagement of UBS as advisors to the State on the acquisition of Oil Search shares and arranger of the financing, including that UBS implement (on behalf of and upon the request of the State) a sovereign bond issue to replace the bridge loan

2. To inform the NEC of the commercial arrangements announced on 27 February 2014 by Oil Search and the Pacific LNG Group that involve the acquisition by Oil Search of an interest of approximately 22.8% in the Elk Antelope gas development

project, which has an expected completion date of Tuesday, 11 March 2014.

3. To seek the following statutory approvals from the NEC in relation to the commercial transactions described above, comprising:

a. approvals under the Public Finances (Management) Act 1995 relating to the acquisition of shares in Oil Search by the State and the engagement of UBS

b. approvals and directions by the Secretary of Finance and the Treasurer in relation to the proposed borrowing by the State for the purposes of the Loans (Overseas Borrowings) No. 2 Act

c. approval of the transaction documents to be entered into by the State for the purpose of the transactions referred to above, which are listed in Schedule A to this Policy Submission ('Transaction Documents)

d. advice to the Governor General to execute relevant Transaction Documents on behalf of the State pursuant to section 47 of the Public Finances (Management) Act 1995

e. advice to the Governor General to approve and agree the terms of the borrowing by the State for the purposes of the Loans (Overseas Borrowings) No. 2 Act

f. all other necessary approvals

4. For the NEC to receive a certificate of correctness from the State Solicitor in relation to the Transaction Documents to which the State is a party, which is set out in Schedule E.

5. To inform the NEC of necessary or convenient statutory authorisations of other State

agencies that are being sought in parallel with this submission given the urgency of the matter, including:

a. issue of a certificate of inexpediency to tender by the Central Supply and Tenders Board, and an authority to pre-commit expenditure by the Secretary of Finance, under the Public Finances (Management) Act 1995 relating to the acquisition of shares in Oil Search by the State and the engagement of UBS

b. approvals and directions by the Secretary of Finance and the Minister of Treasury in relation to the proposed borrowings by the State for the purposes of the Loans (Overseas Borrowings) No. 2 Act

c. approval of a payment direction deed to be given by National Petroleum Company of PNG (Kroton) Limited (NPCP) concerning payments from Papua New Guinea Liquified Natural Gas Global Company LDC, with the approval of the Minister for Finance on the recommendation of the Managing Director of the IPBC pursuant to section 468 of the Independent Public Business Corporation of Papua New Guinea 2002 [sic]

d. approval of the payment direction referred to in paragraph (c) by the IPBC pursuant to section 110 of the Companies Act 1997

e. all other necessary approvals17

2.3 The 'Purpose' section of Policy Submission 67/2014 further stated that:

> ... these transactions are extremely time critical for the State and its agencies, as there is a deadline of 4PM (Port Moresby Time) on Thursday 6 March 2014 for the State and its agencies to approve the acquisition of shares and financing package (including approvals and signature by the Head of State), with relevant documentation to be executed by 5PM (Port Moresby Time) on the same date.18

2.4 The 'Background' section of Policy Submission 67/2014 provided a summary of the lead-up to the proposed transaction, including the following matters:

(a) Oil Search's acquisition of a 22.835% gross interest in PRL 15, and the State and Oil Search's agreement under which the State will be issued 149.39 million shares in Oil

Search at AUD 8.20 per share and resulting in the State holding a 10.01% shareholding in Oil Search following the placement19

(b) Oil Search's agreement to acquire a 22.835% gross interest in Elk Antelope through the acquisition of the PAC LNG companies for USD 900 million2°

(c) Oil Search's intention to fund its acquisition through the placement of 149.39 million shares to the State at AUD 8.20 per share21

(d) InterOil's press announcement stating that it welcomes Oil Search as a joint venture partner, noting that:

> Oil Search's acquisition provides for pre-emptive rights and influence over the development plans for Elk Antelope, which potentially opens doors for co-operation with ExxonMobil and other PNG LNG project participants.22

(e) the maturity date of the Exchangeable Bonds, being 5 March 2014, noting that:

> The proceeds raised from the Exchangeable Bond financing were used to fund the State's share of project capital expenditure for PNG LNG, which is expected to begin commercial production during 2014. Repayment of the IPIC financing is via the bonds being exchanged for the current stake in Oil Search held by the IPBC.23

(f) Oil Search having expressed a 'strong desire' for the State to maintain a material shareholding in Oil Search 'so that the State shares in the additional upside from Oil Search's completed and producing gas projects'24

2.5 The 'Issues' section of Policy Submission 67/2014 provided the following summaries of key defined terms:

(a) 'Placement Price', which summarised the price to be paid for the Oil Search shares,25 noted that:

> The acquisition of 149.39 million shares at A$8.20 through the Oil Search placement is likely to be significantly cheaper than any

alternative strategy available to the State including negotiating the acquisition of shares from IPIC.28

Oil Search's share price is trading at all-time highs. The uncertainty regarding the outcome of the Exchangeable Bond discussions between the State and IPIC, Oil Search's strategic acquisition of the state in Elk Antelope and the completion of PNG LNG project development has weighed on Oil Search's share prices since mid-2013. However, the Oil Search share price reacted positively to the Elk Antelope announcement and intended State placement with the share price increasing 4.1% since the announcement to the market.27

The majority of research analysts have a positive outlook for the Oil Search share price. The average target price is A$9.69 over the next 12 months.28

(b) 'IPIC Exchangeable Bond, which summarised the status of the IPIC Exchangeable Bond, including that IPBC had received a mandatory exchange notice from IPIC in relation to the Exchangeable Bond, and that it was 'highly unlikely that IPIC would sell a portion of its shareholding to the State at a discount 'given the prospects for the company and the market analysts' price expectations'25

(c) 'Financing Package', which summarised the proposed UBS loan structure30

(d) 'Security and support requirements for Bridge Loan', which noted that:

The Bridge Loan provided by UBS requires recourse to any Oil Search shares not utilised as collateral by the Collar Loan and NPCP's equity cash flow form PNG LNG ('PNG LNG Cash Flow Recourse), such cash flows to be utilised to prepay the Bridge Loan to the extent the Bridge Loan is

not previously refinanced. The PNG LNG Cash Flow Recourse is not a security interest and will not breach the sovereign negative pledge requirements. The PNG LNG Cash Flow Recourse has been structured to allow the exercise of the Project Area Landowner Call Option as contemplated by the Umbrella Benefits sharing agreement entered into by the state.31

Provided that the State exercises its option to extend the maturity of the Bridge Loan for another 6 months, the State and NPCP will undertake to use their reasonable endeavours to procure within 1 month of the extension a first ranking security the be granted by NPCP over NPCP's interest in PNG LNG for the benefit of UBS under the Bridge Loan.32

2.6 The 'Documentation' section of Policy Submission 67/2014 provided summaries of the following documents:

(a) the Subscription Agreement33
(b) the Bridge Loan and Collar Loan transaction documents34
(c) the UBS Advisory Engagement Letter35
(d) the UBS Bridge Take-out Engagement Letter
(e) the KPMG Engagement Letter37
(f) the NRFA Engagement Letter35

2.7 Policy Submission 67/2014 stated that 'the Prime Minister has put and fully supports this Policy Submission'.39

2.8 Policy Submission 67/2014 stated that it was also endorsed by the Minister of Treasury, the Minister of Finance and the Minister for Public Enterprises, and that the view of other Ministers would be 'sought during Cabiner.40 The inaccuracy of the statement regarding the prior endorsement of Ministers was made clear in evidence to the Commission.

2.9 In his evidence before the Commission on 11 August 2021, Mr Dairi Vele - who took responsibility for the content of the submission - was questioned about the statement that the Minster of Treasury had endorsed Policy Submission 67/2014, as follows:41

Q: And so how was it then that the NEC submission itself records and we will show you this and the views of other ministers, the Minister for Treasury is identified as having endorsed the NEC Policy Submission?

A: Again, I was not a party to the drafting of the NEC decision ultimately so cannot say
what was captured.

Q: Let us look this document up shall we? What I am talking about is not the decision at
all but the submission which you signed off on and the Prime Minister signed off on which
was what was provided to Cabinet. So anyway let us have a look at it. It is under
heading, D. This is the policy submission which you have already given evidence about
is something which you own, although others have done some of the drafting. What I am

suggesting to you is that the statement in paragraph D about endorsement by other
ministers is not correct?

A: Well Dr Renwick, again this would go towards the idea that the treasurer at that time
in my view was not opposed to the transaction but he was opposed to who was going to
be the counterparty to the transaction. Secondly, I did not think it was appropriate for me
to single out the Minister for Treasury as having an opposing view to a submission that
the Prime Minister was sponsoring and so in the drafting I put in there everyone was fully
cognizant that the Treasurer has some issues and that / was going to be discussing
Cabinet.

Q: Mr Vele, is that a serious answer?

A: I beg your pardon?

Q: Is that a serious answer Mr Vele when you look at what is said there under heading D
which goes out under your name?

A: I believe so Dr Renwick.

Q: There is a world of difference Mr Vele you would agree

between the silence about concerns of the Treasurer and saying here that it is endorsed i.e., positively approved of by three ministers. Do you not agree?

A: Again it was - yes.

Q: You regret that use of language?

A: I do.

Q: It was not endorsed also - sorry, it also was not endorsed by the Minister for Finance or the Minister for Public Enterprises to your knowledge, is that not right?

A: I was not told at that time that the Minister for Finance opposed it and I was not told of the time that the Minister for Public Enterprise opposed it.

Q: Were you told they endorsed it or supported it?

A: I beg your pardon?

Q: Were you told they endorsed it or supported it?

A: In the briefings we had there was an expectation that they had roles to play and they had not said that they were going to not fulfill those roles.

Q: That is what you mean by endorse is it?

A: Yes.

2.10 Policy Submission 67/2014 dubiously stated that there were nil Employment Implications, Legislative Implications, Constitutional Implications, Planning Implications, Environmental Implications or Political Implications.42

2.11 Policy Submission 67/2014 recommended that the NEC:
(a) note the contents of the submission, including the proposed transaction documents and the transactions contemplated by them43

(b) note the receipt of a certificate of correctness from the State Solicitor in relation to the transaction documents to which the State is a party

(c) confirm the authority of the Minister of Treasury to agree and finalise on behalf of the State any of the terms of the Transaction Documents referred to in Policy Submission 67/2014 which, for reasons of commercial sensitivity or otherwise. are not set out in this submission or its attachments'45

(d) advise the Head of State to:

(i) approve the borrowing for the purpose of the purchase of shares in Oil Search and for the purpose of meeting the expenses of the 'Borrowing' and of the services of the State, and to agree with UBS the manner and terms and conditions of that Borrowing, pursuant to s. 2(1) of the Loans (Overseas Borrowings) (No. 2) Act 197646

execute under his signature on behalf of the State those agreements, deeds and other documents to which the State is party pursuant to s. 47 of the Public Finances (Management) Act 199547

(e) advise the Minister of Treasury to:

(i) issue a direction pursuant to s. 2(11) of the Loans (Overseas Borrowings) (No. 2) Act that ss. 13 and 14 of the Public Finances (Management) Act 1995 do not apply to the State in relation to the Borrowing48

(ii) execute under his signature on behalf of the State those of the agreements, deeds and other documents to which the State is a party pursuant to s. 2(7) of the Loans (Overseas Borrowings) (No. 2) Act 1976 and which are attached to the State Solicitor's certificate49

(iii) authorise in writing and appoint as the State's Authorised Representative the Secretary of the Department of Treasury and any other officers of the Department of Treasury as the Minister may determine and authorise each of them to execute any of the documents referred to in paragraph

(b) and any documents as may be necessary to give effect to, or which are ancillary to, the documents referred to in paragraph (b), including any drawdown notice and any certificates50

(f) note that the transaction documents are subject to the issue by other State agencies of necessary or convenient statutory authorisations that are being sought in parallel with this submission and to endorse the issue of any such authorisations for the transaction, including, without limitation:5'

(i) issue of a certificate of inexpediency to tender by the CSTB under s. 40(3)(b), and an authority to pre-commit expenditure by the Secretary of Finance under s. 47B, of the Public Finances (Management) Act 199552

(ii) issue of a certificate by the Secretary of Treasury certifying that after the full amount of the borrowing pursuant to the Transaction Documents, the total value of overseas commercial debt which will be owed by the State will not exceed 125% of the estimated internal revenue of the State for the calendar year 2014 within the meaning of s. 2(3) of the Loans (Overseas Borrowings) (No. 2) Act 197653

(iii) execution of a Payment Direction Deed as one of the Transaction Documents by NPCP (Kroton) Limited concerning payments from Papua New Guinea Liquified Natural Gas Global Company LDC, with the approval of the Minister for Finance on the recommendation of the Managing Director of IPBC pursuant to s. 468 of the Independent Public Business Corporation of Papua New Guinea 200254

(iv) approval of the payment direction deed referred to in paragraph (c) by IPBC pursuant to s. 110 of the Companies Act 199755

2.12 Policy Submission 67/2014 was signed by then Prime Minster Peter O'Neill, its sponsor in the NEC:58

3. The NEC Meeting of 6 March 2014

3.1 On 5 March 2014, Mr Daniel Rolpagarea, the State Solicitor, issued a letter to Mr Vele, providing 'clearance' for the transaction documents to be provided to the NEC.57

3.2 On 6 March 2014, the NEC met and passed Decision No. 79/2014.58

3.3 Based on oral and documentary evidence before the Commission the attendees of the NEC meeting held on 6 March 2014 included at least the following:

(a) Mr O'Neill59
(b) The Hon Don Polye, Treasurer—88.81,
(c) Mr Vele, Acting Secretary for Treasury62
(d) The Hon Ben Micah, Minister for Public Enterprises and State Investments83
(e) The Hon Chief Sir Leo Dion, Deputy Prime Minister84
(f) The Hon Mr Charles Abel, National Planning Minister—85
(g) The Hon James Marape, Minister of Finance
(h) The Hon Sir Puka Temu67
(I) The Hon Sir Ano Pala88
(j) The Hon Mr Richard Maru69

4. Witness Evidence

4.1 Evidence before the Commission varies as to how the meeting was conducted and how the decision was reached. Set out below is the material evidence given in relation to the circumstances and events at that meeting.

4.2 In his Statutory Declaration to the Commission dated 3 June 2021. Mr O'Neill did not refer to the 6 March 2014 NEC meeting, except to say that he was only able to rely on the documents presented to the NEC to inform his knowledge of the UBS Loan." Policy Submission 67/2014 was signed by Mr O'Neill and stated that Mr O'Neill 'has put and fully supports this Policy Submission'.71

4.3 On 17 June 2021, Mr O'Neill stated the following about the NEC meeting on 6 March 2014:

(a) he was the sponsor of Policy Submission 67/2014

> ... given that I am a trustee shareholder in the Oil Search shares in the SOEs holding those shares ...

(b) he 'find[s] it hard to believe' that the Minister for Treasury, Mr Polye, had not been informed of Policy Submission 67/2014 prior to the NEC meeting on 6 March 2014[73]

(c) Policy Submission 67/2014 was an urgent submission[74]

(d) Policy Submission 67/2014 was not drafted solely by Mr O'Neill and Mr Vele

> ... prime ministers do not write up Cabinet submissions. It is work done by government officials and of course brought to the attention of ministers and prime minister who signs it and present it together with the officials in Cabinet. So that is normal practice.[75]

(e) Mr O'Neill was 'thoroughly informed on the submission' before he presented it to cabinet at the NEC meeting on 6 March 2014[76]

(f) ... 'every minister and treasurer including [sic] expressed their views in respect to this submission to Cabinet' at the meeting[77]

(g) ... there are 32 ministers at any given time in Cabinet so I am sure you will find that NEC decision is like a collective decision 76

(h) the practice of providing submissions to cabinet ministers for the first time in cabinet meetings was normal

> .. to most ministers but those who have got relevant line responsibilities and ministerial responsibilities to those submissions are usually briefed by their officials[79]

(i) the Treasurer should have seen Policy Submission 67/2014 before the NEC meeting on 6 March 2014[8°]

4.4 On 9 August 2021, Mr O'Neill stated further as to the NEC

meeting on 6 March 2014:

(a) Mr O'Neill disagreed with the suggestion that the NEC meeting on 6 March 2014 took 'no more than an hour', stating

I think that is much longer than that. I do not think that is quite true'

(b) with regard to whether cabinet Ministers had been briefed prior to the meeting, he stated

A: The senior ministers who had carriage of this transaction, their officials who have been involved in the negotiations of this transaction for over two years. I will be very concerned if the ministers did not get proper briefings about those discussions during that time. I got regular briefings.

Q: Mr O'Neill, just looking at that open, go on; please complete your answer.

A: ... But you do not expect 32 ministers who are in Cabinet, not all of them are familiar with financial transactions of this magnitude and size and complexity. Of course, it will require our officials to take them through and of course Secretary Vele and his team took us through that transaction during that NEC meeting82

(c) Mr Vele 'brought a team of officials from Treasury' to the meeting on 6 March 2014, and Mr Vele was the 'lead presenter'33

4.5 In his oral evidence given before the Commission on 7 February 2022, Mr O'Neill was questioned further about the NEC meeting on 6 March 2014:

(a) regarding the assertion that he had rushed the decision at the meeting:

Q: ... What I suggested to you and I do so now again is that by not giving your Cabinet sufficient time to understand and, if necessary, question the UBS deal, you deprived yourself of the benefit of your colleagues'

views. They might have
pointed out some of these problems if you had given them a chance.

A: I think you are just assuming that this has happened when you are getting
testimonies from critically motivated opponents and this is the fear that this
Commission will end up. It is going to be criticized because you believe in
statements from people who are simply lying. Not one of them - - -

Q: And who were they, Mr O'Neill, who is lying?

A: Not one of them objected in Cabinet - there was of course long and lengthy
discussions going on - objected to the transaction. Not one of them came to me
after the NEC decision to suggest that we revisit this. The only objection came
from the Treasurer because he refused to sign the NEC documents - authorized
documents and he had to be replaced.84

(b) regarding the quorum present at the meeting:

COMMISSIONER WHITE: ... Now, you have said in response to Dr Renwick's
questions that the members of the NEC had an opportunity over a number of
hours to raise issues about the UBS Loan, when you brought that submission to
cabinet. It is my understanding that it was not a regular meeting of the NEC and
in that in fact, there were many members of cabinet who were not present in Port
Moresby. They were back in their own villages and electorates at that time. I am
not asking you to say, who particularly was present. But can you recall the
numbers now?

A: Weft normally if you do not have one third of the present members or cabinet
present, you do not have a quorum to start a meeting. So obviously, there was
quorum and from - that was few years back so I cannot recall the exact numbers,
but there were a quite a number of key ministers who were in there. But the
people that you have had on this Commission are people who are on the
opposite side of politics to me. So you know I do take into question some of the
issues they have brought about. But our government made

a decision, we will
stand by it, we are not going to shy away from it and we are not going to blame
anybody. But I think you know we have tried to do it for the best interest of our
country and our people and to participate in the resource development in the
country. And we acted at that time to make decisions on best advise that was
available from our officials and our very highly paid advisors and consultants as
we see now, so we will take it on from there. But to come to this Commission and
deflect responsibility by some of my previous colleagues is understandable. We
are heading towards an election and trying to picture a brighter position for
themselves is something that they are aspiring to do and that is understandable.
But I hope we do not make this as a critical event but hopefully we will get some

good recommendations that we can take into account and correct some of the
processes and legislations that we need clarity.
Q: Mr O'Neill, perhaps just to clarify, you may recall from the very beginning,
there has been an invitation to anyone who wish to give evidence to the
Commission, that might be relevant to the terms of reference to come forward
and do so. And so, we have not heard particularly from those you say - had we
heard from, we would have a different story.
A: Well, I am sure there is - - -
Q: Now, can I just - yes.
A: I am sure the cabinet secretary has got a list of ministers who were there so
you can have the benefit of that also.85

(c) regarding the CACC's vetting of the proposal:

our Central Agency Committee which is made up of the five most senior
departmental heads85 normally vet all the submissions before they go there. They

must comply with process, law, get proper legal advice and until then it ends up at NEC. So that process was started by the Somare Government and we continued to maintain it. 87

(d) regarding Mr Polye's attendance at the meeting and his reaction to the decision:

Q [MR SHEPPARD, Counsel for Mr O'Neill]: Do you recall whether the Treasurer was present at the NEC meeting that considered that?
A: He was present, yes.
Q: Did he complain to you that he was sidelined?
A: It was after the NEC decision and a few days after I believe.
Q: No, no before
A: No.
Q: At the meeting?
A: No.
Q: Is it possible for the meeting to resolve to be adjourned so that members could consider things that they felt were not properly considered?
A: If they request that we adjourn and he seeks counsel from his officials, yes.
Q: Was any such request made on this occasion?
A: No.
Q: In fact, such requests are made very often during Cabinet meetings, are they?
A: Yes, the minister who is responsible normally says, I want to defer the paper until I seek further advice or further views on what is being expressed by the ministers.
Q: And do you recall how the vote went when the decision was made?

A: I understand that current practice is they take a vote but it is not normally the case. You will see the balance of the arguments and then I announce the decision and when I announce the decision, I call whether there is any objection and if there is no objection, then it is carried.88

4.6 In his statement dated 1 June 2021, Mr Polye, the then Treasurer, stated the following about the NEC meeting:

(a) that the NEC Policy Submission 67/2014 did not include any due diligence report of any SoE board decisions[89]

(b) that Policy Submission 67/2014 did not include 'any clear easy to understand Terms and Conditions of the A$1.239 billion loan'9"3

(c) that, at the time of the NEC meeting, he had not been informed of Policy Submission 67/2014

(d) that 'other systems of governance had been avoided along with the National Executive Council's own Ministerial Committees System'[91]

(e) that Policy Submission 67/2014 had been solely prepared by Mr O'Neill and Mr Vele[92]

(f) that he advised Mr O'Neill at the NEC meeting to address the deficiencies and the lack of due diligence documents, including incorporating the State Solicitor's advice, before he would execute the documents as Treasurer[93]

(g) that, in the NEC meeting, he expressed the view

> ... that the acquisition of 10.01% Oil Search Share at A $1.239 billion was a gamble in a speculative market, hence was not prudent. The reasons being that firstly, the collar loan is securitized against the 10.01% Oil Search Shares which means that in the event the State is unable to repay the loan through the National Budgetary allocations, UBS will sell the Shares and recoup the amount of A$904 million. Secondly, the Bridge loan is the additional loan securitized against the NPCP LNG cash flow outside of the Sovereign Wealth Fund (SWF) and the Parliamentary Budgetary Process.[94]

4.7 On 18 June 2021, Mr Polye stated the following about the NEC meeting on 6 March 2014:

(a) the meeting

> ... was not a – I do not think it was a normal or ordinary meeting. It was a special meeting of extraordinary type; it was a one-off type of meeting; a type of paper and the contents shown in the meeting that I had not experienced in other meetings in the past[95]

(b) no agenda was circulated to any Ministers prior to the meeting[96]

(c) the meeting took 'much less than one hour',[97] and it was a 'very quick, highly expressed

meeting which took place over the course of '30-40 minutes'";8
at the meeting, not many minsters spoke, probably because they had not been given access to understanding the substance of the paper ...99

(d) at the meeting,
... Cabinet rushed, and pressed and imposed upon to make a decision because of some urgency.

So we were, it was like a gun held to the head of Cabinet100

(e) that Policy Submission 67/2014 'was not drafted by Treasury or by any state entity for that matter' and that Policy Submission 67/2014,
... had been done by UBS and pushed down the throat of Papua New Guineans to the Papua New Guinea Cabinet to drive their business agenda that never served our interest. So, it was not a state paper because the only person who would be responsible for a state paper like this is the Treasurer and the Department of Treasury. And I can tell you ... that no Treasury officers were involved in it; none. I protested it and that is not civilized. We are better than that.101

(f) at the meeting, 'not even a minister spoke because the discussion is very hor1°2

(g) there were no representatives from any SoE present at the meetingl°3

(h) the absence of copies of SoE board resolutions in Policy Submission 67/2014 was 'very, very unusuars:4

(i) he and Mr Vele did not discuss Policy Submission 67/2014 prior to the meeting105

(j) the other attendees at the meeting 'did not want to come in to discuss' and that he (Mr Polye) 'tried to solicit support to block (the transactions the subject of Policy Submission 67/201411°6

(k) had he known about the proposal and the Policy Submission prior to the meeting, he 'would have addressed it quite differently' and 'would have a time to lobby and to bring some affluence [sic] to the ministers and other members of the Cabinet but [he] did not have the time to lobby support to stop this paper"07

(I) at the meeting, Mr Vele 'never sat where he would normally sit at the back of me. He stood away from me''=-

(m 'when the Prime Minster was presenting the paper. [Mr Vele] spoke in support to the Prime Minister"c.';

(n) during the meeting, he proposed to the NEC that there be a deferral of the consideration of the proposa1,11° including that he stated

> ... Prime Minister, Peter O'Neill, with due respect to you, can you give me this paper and I will process for you and the government to make sure that it is good, it is a benefit to our people.'"

4.8 In his oral evidence given before the Commission on 12 August 2021, Mr Polye provided the following additional evidence about the NEC meeting on 6 March 2014:

(a) prior to the meeting, he had 'personal one-on-one meetings with various ministers ... leading [him] to that open discussion in Cabinet because [he] did not want to cause any inconveniences or embarrassment or offend anybody'112

(b) during the meeting, he told Mr O'Neill that the Oil Search shares were in a 'speculative market' and that

> It is an industry that the government should not go into business in and therefore we should not because it is a gamble. That is one of the first points that was raised and that is probably the first point I raised. Second, although or also did raise that being Treasurer I had already laid the Budget for 2014 in 2013.113

(c) during the meeting, he expressed that the Collar Loan and Bridge Loan looked 'quite

significant and that 'the Bridge Loan must be properly articulated`

(d) during the meeting, he stated to Mr O'Neill,

... look, 1 kindly ask you if we can delay this and process it through, 2014 is there, we can consider the issue you are raising we can get a collective view from everybody and see a way forward and I also mentioned this. I said, if we can spend this kind of money on agriculture, on downstream processing, on some investments that can give us some return based on a cost benefit analysis, so what is the cost of this, what is the benefit at the end of it.119

(e) he did not sign or otherwise endorse NEC Policy Submission 67/2014 prior to it being presented at the meeting116

4.9 Mr Vele stated that Mr Polye only 'took issue' with the loan sitting with the State instead of the NPCP, and that Mr Polye was otherwise 'not opposed to the transaction'.117 Mr Polye asserted that this was an 'absolute lie'.118

4.10 Mr Vele provided a number of statements and affidavits to the Commission.

4.11 In the affidavit dated 26 April 2021, Mr Vele stated the following about the NEC meeting of 6 March 2014:

at the meeting, a lengthy NEC Submission was made containing details of the entire IPIC Bond and the genesis of the proposal to buy Oil Search shares and the use of UBS AG as Financier, as well as consultants. ... The Written Submission covered every necessary point.119

(a) he presented the purchase of Oil Search shares in a neutral format12°

(b) he advised the NEC on how the deal would be structured if the NEC approved the purchase of the Oil Search shares, as well as the consequences to the State if the NEC did not approve the purchase of the shares121

(c) Mr Polye argued against the purchase of shares by the State, as Mr Polye wanted the purchase to be carried out by the NPCP122

(d) Mr Polye did not argue against the actual purchase of Oil Search shares, and Mr Polye wanted the purchase to go ahead122

(e) Mr Polye was 'not given the discretion to refuse to sign'

and '[Minister Polye] was to implement parts' of the NEC decision12'

(f) there was no communication or representation by the Minister for Justice and Attorney General, Mr Kua, to the Department of Treasury before or after the NEC meeting of 6 March 2014, and Mr Kua was:

... unhappy or in opposition to anything that had been determined or any of the procedures and processes that were being followed. He was completely silent',125

and

'[ift is only at the time [Mr Kua] was removed from his position as Minister and

Attorney General on 18 June 2014 for an unrelated reason that (Mr Kua] started to make complaints about any of the processes involved in the transaction'. 126

4.12 In his subsequent affidavits dated 26 April 2021, 29 April 2021, 24 June 2021, 5 August 2021 and 17 February 2022, Mr Vele did not provide any further evidence about the NEC meeting on 6 March 2014.

4.13 In his oral evidence, Mr Vele stated the following about the NEC meeting on 6 March 2014:

(a) '[i]t is not unusual' that the draft of NEC Policy Submission 67/2014 was prepared by parties outside of government, including UBS, NRFA and PLG

IWThen you are dealing in particular transactions where there are external advisers, particularly in legal elements, again, it is not uncommon that the legal advisers would make sure that the drafting of the approvals of the substance of the submission is technically and legally compliant with the laws in whichever

jurisdiction is being dealt with.127

(b) NEC Policy Submission 67/2014 was prepared by Mr Vele and sponsored by Mr O'Nei11128

(c) prior to the meeting, Mr Polye had not seen a copy of Policy Submission 67/2014 and rather had 'a general discussion' with Mr Vele12t

4.14 Further, Mr Vele stated the following:

(a) in relation to the drafting of NEC Policy Submission 67/2014, and the involvement of UBS, NRFA and PLG

It is not uncommon to have technical elements, a good example is where they are legal in nature, my staff and I would not be drafting the legal sections of the legal components in that NEC submission. We would get the lawyers to do that. Whether that is the State Solicitor, whether that is the external advisors to the State Solicitor, we are always careful that those elements are very tidy and they are legal. Similarly, if there are financial elements or technical elements relating to science or petroleum for example, we make sure that because the NEC decision ends up being policy and the direction to which we all are following that it is not uncommon at all to have external resources either draft or verified would be involved in the drafting of these submissions.130

(b) Mr Vele agreed with the proposition that 'external advisors drafted the documents for [Mr Vele] to consider and then pass on to [MrO'Neillf

(c) in relation to Mr Polye's understanding of the Policy Submission 67/2014, prior to the NEC meeting on 6 March 2014, Mr Vele stated,

... the final draft of the NEC submission generally is the culmination of different briefing papers and different papers along the way and they are all compiled or elements of them are compiled into the final NEC submission. So, in relation to the documents that I would have provided [to Mr Polye] or briefed him and his briefing notes, diagrams of how certain things were going to play out, I would have shown them to him over the course of time.131

(d) in relation to Mr Polye's objections at the NEC meeting on 6 March 2014:

... (Mr Polye's) objection was not so much on whether to do the transaction or not but rather that if the transaction were to be done, it should be on the State-owned enterprise balance sheet132

and

UBS as the lending party did not see a newly established NPCP as having the financial wherewithal to be the counter party to this transaction. 133

4.15 In his oral evidence given before the Commission on 11 August 2021, Mr Vele provided the following evidence:

(a) regarding who drafted the NEC submission:

Q: ... Mr Vele, can we start please with the NEC submission of 6 March 2014 which you will be very familiar with. We will start with page one of that document that you can see that that is indeed policy submission 67 of 2014 and this is one that was signed by the Prime Minister. Can you just remind the Commission of your role in relation to the drafting and finalization of this submission?

A: I would have finalized the draft if some of the advisors would have put the more technical elements into the submission and it would have come to me to finalize and present to the Prime Minister.

Q: And certainly the submission - let us leave aside the attachment for a minute - the submission is something you would have checked for accuracy before providing it to the Prime Minister for him to sign off?

A. To the best of my ability, yes.

Q: All right thank you. If we can go to page 8 of it you see there paragraph 30(d),
this policy submission is also endorsed by the Minister of Treasury, that is to say,
the Treasurer, the Minister of Finance and the Minister for Public Enterprises, the
views of other ministers will be sought during Cabinet. Now, you knew, did you
not that the Treasurer did not endorse the submission?

A: Counsel, we have had this discussion before. The submission was originally
drafted for the Treasurer in which this was left in a very short period of time.

It came clear that the Minister for Treasury, the Treasurer was not going to sign
the submission, so we changed certain elements. And I guess. there was an
oversight on my part.134

(b) regarding whether Mr O'Neill had any input or made any changes to the NEC submission:
Q: ... Did Mr O'Neill have any input when - became state of affairs when treasury
would not sign so (Internet issues) carriage (Internet issues). I did not catch your
answer to that question. Did Mr O'Neill, the Prime Minister make any change,
just that; yes or no?

A. To the best of my knowledge, no 135

(c) regarding the procedure and responsibilities for preparing the NEC submission:
THE CHAIRMAN: ... This is in relation to the NEC submission that was prepared
or you prepared on 6th of - dated 6 March. The preparation of a NEC
submission, that is the responsibility of the minister responsible; is it not? How is

that the minister responsible gets the departmental head to prepare it?
A: Chief, I think it had the process in its way through and I would have prepared it
and given it to the minister; is that what you are asking or you are asking because
it is a petroleum issue that the Petroleum Department should have prepared it?
Q: In this case, the minister responsible was the treasurer and later turned out to
be the Prime Minister. It is that particular minister's responsibility to prepare that
NEC submission?
A: Generally, when it is technical information inside, the officials, the advisors put
these all together and we take it to the responsible minister; be it my minister or
another minister. In Progeria and P'nyang for example, sometimes I prepare the
submissions but I give it to the prime minister as supposed to the mining minster
so we gave it to - we thought we complied with our instructions to give it to the
treasurer. When he refused to sign the discussion, instructions were then to give
it to the Prime Minister Prime Minister responsible to the cabinet.
Q: So, the practice is that the departmental head, if he is asked to prepare a
submission NEC submission that the departmental head prepares a draft; is it -
draft for the minister responsible?
A: Correct.
Q: And it is up to the minister responsible to do whatever he likes to do with
change the draft and so forth; is that?
A: Correct. In my tenure with Honourable Polye in that very short period because
we were doing budget, for example, I would have prepared many NEC
submissions and accompanied him into cabinet on the budget issues on many
occasions and each time I prepare the budget documents, prepare the
spreadsheets, prepare the presentations, t would give him, you know, if he asked
me for his speech or his points, his part of the presentations, I prepare those as
well for him and Treasurer Polye and I, of course, he was a great orator so he
might introduce something, run me to [through] the technical elements and then
he would bring the thunder and lightning in his speech. So that is the way we

operate and certainly with Treasurer Polye.
Q: So in the case, you prepared the draft and then submitted it to the treasurer
for his perusal, change, signature, so forth. Treasurer Polye refused to sign and
it went to the Prime Minister and the Prime Minister put his name to it and he
signed it accordingly to the records. Do you know if the submission that exactly
went before cabinet was after amended in anyway by the then Prime Minister
Peter O'Neill?
A: I do not think so and I can never be 100 percent sure but my recollection is
that you are required to also provide 60 copies submission to cabinet so that
particular submission we were required to make 60 copies as well so you get the
signature page and you include that in the fresh copy of the submission and you

make 60 copies and 60 copies was what was given to cabinet. So the 60 copies I
made as I understood it, it was the submission that I drafted. / took responsibility
for.

Q: So, if the minister were to ask you to prepare a submission in draft, you
prepare one and then you submit it to the minister responsible; that would have to
be an allowance of sufficient time for that exchange to take place and for the
minister to change the contents if he wants?

A: Yes, Chief Commissioner. I work for treasurers where they make extensive
changes and then I work with some treasurers who want to be walked through
the submissions as long as the main elements are there for them then they are
okay with that. Each has a different style but yes, the question is; did Peter
O'Neill have enough time; you can ask Peter O'Neill, how

he felt.

(d) regarding whether the downside risk of the transaction was adequately explained to Cabinet at the NEC meeting, Mr Vele stated as follows:

Q. ... When we looked then at F at the financial implications, you have agreed with me that there was a loss of some sort. Why did you not ensure that the possible downside of the transaction or the possible losses were not flagged for the benefit of Cabinet?

A: In E - sorry, Financial Implications. F is Employment Implications. In relation to the drafting- - -

Q: Yes, E Financial Implications.

A: We were giving the – we were explaining very simply to a non-technical audience about the expectation of the transaction that was being conducted. We walked through how the collar worked and the idea about the collar in relation to the upside and the downside. The whole structure was chosen specifically because it mitigated certain elements of risk, and so accompanying this submission was a presentation that I gave. I have that only at the time of putting all of these together. But I believe there was a discussion on it and to the extent that there are some to the attachments which I have not had a look at for a long time. There was an explanation and there were several tables in relation to what could happen if the share price went either way but at that time to a non-technical audience, we were talking about relative orders of magnitude and the benefits of the collar.

Q: With the benefit of hindsight, do you agree that under the heading The Financial Implications, you should also have set out in the Draft Submission the risks of the transaction, including the risks of significant losses?

A: Short answer is yes, and then it becomes an issue around drafting. Are we talking about a $1 reduction in the share price from

$8.20? Are we talking about
a $20 reduction in the share price of Oil Search? I think the benefit of having the
attachment and the presentation that went through it, went through what would
happen. But I think it is quite fair to say that if the Oil Search share price was
going to reduce, then it had negative implications for the State beyond the certain
point which is obviously beyond the floor of the collar.

Q: So. you are there talking about gains and losses due to the movement of the
Oil Search. Should you also have pointed out any other potential problems with
the documents which the UBS people had produced?
A: I need some clarity on the second part of your question, but my read of E,
Financial Implications, is to explain value that we were receiving by obtaining Oil
Search under this particular scenario which seemed to be of benefit; and what
was the value to be gained by an increase in the Oil Search share price from
where it currently was and the associated downside scenario of reductions in the
Oil Search share price were also in the attachments.
136

and again, the following day:

Q: ... Mr Vele, yesterday I asked you some questions about where in the NEC's
submission of 6 March 2014 you had indicated the potential downside of the UBS
deal? Are you able to indicate anywhere in that document or the annexures
where that is indicated?
A: Unfortunately, the copy that we have did not have or did not have the
attachments that were actually in Cabinet. So we have got a series of documents
but I was not able to ascertain which ones were actually put into Cabinet. But

again, I would like to think this is a discussion around form rather than substance.
The idea of the monetized collar is a discussion around risk. I guess if we were
to explain the reason why you choose a monetized collar over some of the other
offerings and exchangeable bond or a straight-out margin loan is specifically
because the monetized collar by its very nature manages the issue of risk. So
the whole submission in various parts in explaining the submission points out that
these are the points in the collar – I think on the high side, $10, and on the low
side, $8.35, at that number – and the explanation submission completely reads
about the idea that if price of Oil Search is within that collar then by its nature you
are protected.
The issue is if it goes on the high side, so say it goes to $12 then the counter
party in this case UBS gets to keep that $2 extra. You get the 10 they get the
two. If you go below the current share price of Oil Search but within the band the
collar protects it. That is the whole idea of the collar is that hedge, if it goes
below, the bottom or floor of the collar then it is a collateralized loan that we take
that manages that particular risk. Where you pointed it out in point number - - -
Q: We will put it up on the screen for you. We will put it up on the screen.
A: Or (e) financial implications on page 8 of the submission.
Q: Yes, there it is.
A: Yes and again maybe it is a drafting style but I was representing in point (e)
financial implications is what is the value of doing this transaction at the present
time. I do not explain in there that this is a value to the State if the Oil Search
share price goes up by X amount. I do not explain in there if the oil price goes
down by a certain amount. As to risks other than financial, those are government
policy issues that; I guess I would have expected the ministers to explain
because it is a government policy

Q: So, you are saying that a Cabinet submission which you had the ultimate
responsibility for drafting did not need and did not set out any potential risks, is
that what you are saying?

A: The main issue there is the financial risk at this particular time. Are you
referring to what happens if a general discussion on what the strategic direction
of Oil Search might be in the future or if there is a change in government then
there is a strategic change in government policy, are those the risks of the
financial that you are referring to?

Q: Mr Vele, it is a very simple question. At the minute you have not be able to
identify anything in any documents before Cabinet which point out the potential
risks of losses arising from the UBS deal despite being given an opportunity to do
so. My question therefore to you is: are you saying as the person who took
responsibility for the ultimate drafting of the document that it was not necessary to
point out to Cabinet that there could be losses as indeed occurred, are you
saying that?

A: No, we are saying that the structure of the transaction that we have entered
into because we get to choose the structure of the transaction inherently
manages the risks as we know at this point in time. The collar is specifically set
where we think the Oil Search share price is going to be in the term of the loan. I
am not sure how we can say - are you looking for a specific worked example
where I pointed out in the submission or in the attachments that should the Oil
Search share price go from $8.20 or $8.55 to $7, what is the outcome there. As a
part of the attachments and again I am not sure which version that I have did not
have the attachments but I have got a whole series of the

other documents. I am
just not sure whether there were these attachments or not but the one jumps out
to me of course is the KPMG report.

But also, there was in the engagement of the UBS there is a briefing note I think
on the how the collar works in which it does set out the different variations that
can occur from $8.55 to $10 and above. And the chronology of that of course is
$8.55 to $7.30. Again, I need to be precise on the numbers in the submission.
What happens and where the collar is set and the implications of that. But is
there a worked example in the NEC submission on me choosing different points
and working through? I do not think so but the explanation of the collar is all
about the risk – I – am I missing something?

Q: Let me ask you a different question, Mr Vele. I have given you every
opportunity to answer my question. The different question is; the Commission
has evidence from Braille and from Mr Sonk that the UBS Loan has novated
resulting in an enormous loss to the people of the Independent State at least
A$350 million Australian dollars. That is what they say, and I gave you an
opportunity to indicate what you say the loss was and you decline to nominate a
figure, although I think you have agreed there was a loss. Given we know that,
do you think the Cabinet submission should have pointed out the possibility of the
loss?

A: Two things. First of all, there is a cost to the transaction. There is a cost
because you are using - you are conducting a financial transaction; you are
borrowing money to go ahead and to purchase an asset. So, is there a cost to it?

Yes, there is a cost. If you are to spend $1.2 billion – borrow $1.2 billion to buy
the Oil Search shares, the cost of that is the $1.2 billion. If you were to borrow
$1.2 billion to build some schools, there is a cost to that: financial $1.2 billion
directly and indirectly there is an opportunity cost. If you are building $1.2 billion
worth of schools, you miss the opportunity to build $1.2 billion worth of hospitals.
So, there is a cost element and I think that is the number that they end up getting,
the 300 and whatever million; so I accept that there is a cost to this. In relation to
the loss, this is where there is some discussion and as you know, we try to get a
second opinion on that. By its very nature if the price of Oil Search goes up;
there is a gain, there is profit. If the price of Oil Search goes below the 8.55,
there is a loss. That loss however is crystalized when you choose to exit the
transaction. So you choose the point in time in which this can occur. I guess the
question that I have in my mind is because I was not a part of the exit of the
transaction. If I was in a situation where I was choosing to exit this transaction
when the price of Oil Search was very low and, therefore, it would crystalize a
potential loss. One of the losses that we would have explained in Cabinet
because by its very nature if the price of Oil Search goes down it is going to
crystal – there is a potential loss. When you exit when the price of Oil Search is
low, it crystalizes that potential loss. So, the question is: is that the right time to
sell the Oil Search shares? I was not a party of that particular decision as we
established from our discussion yesterday; and so, yes, there is a loss that would
have been mitigated. First of all, I was not a part of the decision to choose at
what point in time we were going to exit and what the Oil Search share price was
at that time. And I think the second thing is what is the order of magnitude of that
loss. From Brattle, if you take that 333 or $340 million number and they say the
loss that crystalized when we exited from this transaction when the State exited
was around $178 million. Again, I want to check if

that 178 million if the Maths on
the 178 million – if the methodology used to arrive at that 178 million is
appropriate and in best practice.137
!e; regarding Mr Polye's lack of involvement in the NEC submission:
Q: I want to ask you some questions to be sure I understand your evidence
about the awareness that Mr Polye – Treasurer Polye – about the NEC
submission of 6 March 2014. If I can summarize it this way and I can certainly
take you to the evidence if you wish. Mr Polye says that the UBS Loan was a
surprise to him that he was cut out of any involvement or understanding of what
was being proposed and apart from anything else, he thought it was wrong that if
that was so. So, you can assume that is some of the evidence. Am I right in
understanding that you worked directly with Prime Minister O'Neill about the UBS
Loan and you personally did not take it upon yourself to also advise your Minister
the Treasurer about the negotiations and the eventual proposal which was put up
to the Cabinet on 6 March 2014?

A: Well, first of all, I have never accepted that I did not brief the then Treasurer
Minister Polye. I understand that he says I did not. Different treasurers, they
have different styles. With the Treasurer, I did not meet with him every day; I did
not meet with him every week on this particular matter; I did not raise the issue on
this particular transaction. Every time we met, the Prime Minister had made the
decision that he would be a part of this and, therefore, I was working with him.

It is the same type of briefing that I give to the treasurer that I have just left in the
office. He is not part of the negotiations as much; I

think he has attended three in
the now 14-15 months that we have been negotiating Porgera, for example. He
has been in the room two or three times. I have discussed with him when
something is going to cabinet. These are all works in progress and, therefore, 1
relay the main issues to him. But, again to my recollection, I briefed Honourable
Po/ye the same amounts of times as I have briefed the Honourable Ling Stuckey
and, in both instances, the Prime Minister was the team captain of the
negotiations. I speak to Prime Minister Marape on a daily basis about the
transactions that we are conducting, and he makes the decisions for our team
just very similarly to Prime Minister O'Neill. I have had other treasurers in
between who want to be very involved.

They are part of the negotiations team and we do brief each other, we discuss
matters, negotiation tactics, lines of discussion on a daily basis. I am sorry that
Treasurer feels that I did not brief him enough but 1 felt 1 briefed him adequately at
that time and I guess it was my first time as Secretary for Treasury and he was
the first Treasurer and 1 hope to think -1 would like to think that I have learned
from that.138

and

Q: ... you appreciate, do you not that Mr Polye's evidence is not just that he was
not told about anything to do with this transaction until 5 March that he was never
told about it? 1 take it you deny that; you did brief him about the substance of this
deal on occasions other than 5 March.

A: On elements of this particular transaction, yes.
Q: Such that you were confident that he would sign off on it on 5 March. That
much follows, does it not?
A: Well, I was confident that he had enough information for him to make a
decision as to whether he should sign it or not.
Q: Well, this is a very significant deal, you would agree with that?

A: Yes.
Q: Prime Minister had made it very clear to you how

important it was in his
opinion for this deal to take place, you agree with that?

A: Yes.

Q: And so, appreciating that it was all done in a hurry, looking back, do you not agree that you should have involved the Treasurer more so that he would have been comfortable signing off the deal indicating his opposition much earlier in the process; you would agree with that, would you not?

A: Well, 1 think there is two different things here. One is the preparation of technical work required to be in a position to make the deal and then one is the ultimate policy decision whether you make the deal or not. The technical work that went into dealing with the exchangeable bond from 1PIC at maturity in 2014 was done by another group of people well before 2014. My involvement came formally in 2013. I thought we went through a process that is defensible. We

ended up with a technical, you know, a transaction. Ultimately, I believe that we gave Treasurer Polye enough information to decide whether he was going to sign the submission or not. The issue around whether the State should be involved in the policy element, I mean, and I do not think that is an issue for technical Maths or legal drafting, that is to say they have this Cabinet feel, each administration feel about being involved in commercial activities in the resources space.

Although, I was surprised to read through Ben O'Dwyer's affidavit over the last couple of days that indeed he had been briefing Treasurer Polye On this particular matter and on this night of 5 March, he claims that he had a meeting with Treasurer Polye where he briefed Treasurer Polye on the transaction and that

Treasurer Polye left armed with notes provided by Ben O'Dwyer and maybe he referenced those notes in this discussion. I did not know that; I do not know if that is true or not but that was a surprise that Ben O'Dwyer would think that or sign off on that.139

(f) regarding Mr Polye's objections to the transaction itself:

Q: But on your version of what happened, Mr Vele, you must have been astounded that Mr Polye objected the night before, is that not right?
A: Not astounded. I have worked with politicians long enough to know that they are – that they have minds of their own. Did I give Treasurer Polye enough information in my view to sign the submission and support the decision, yes.
Whether did I understand that Don Polye or Treasurer Polye could have gone in there and Cabinet could have voted down or that he could vote another way; yes.
I mean, that all gets brought to a head when you put the NEC submission in front of him.

Q: But let us just take the way you put it here; your recollection at 351. Your recollection is his principal objection to the draft Cabinet submission was that he wanted the loan to be through a State-Owned entity rather than directly with the State. That is what you are saying there at 351, is it not?
A: Yes. We had just come out of our budget process in which debt to GDP was an important feature so it did not surprise me whether this was on the State's balance sheet or whether it is off balance sheet was a topical issue at that time for him.

Q: And if you go down to 353, your recollection was that he was indeed concerned about the breach of debt to GDP ratios. And just pausing there, that was at least one of the reasons for the novation later that year, was it not, to avoid being in breach of the debt to GDP ratio?

A: Yes. And I think the Treasurer at that time in my view misunderstood how the

debt to GDP is calculated on an annual basis it being ex-post measure rather
than a particular point in time so to the extent that the State was going to be
borrowing and the debt was going to be held on the State's formal balance sheet
for a while. The State had at that time in March another 9 months to, in a sense,
novated off balance sheet and so that it is no longer on the State's balance sheet.
And really that was according to how debt to GDP was measured at that
particular point in time. Come to 2018 and now anything that is remotely
connected to the State is State debt.14c

4.16 In his affidavit dated 20 May 2021, Mr Micah stated the following about the NEC meeting on
6 March 2014:
the proposal by the State to purchase the Oil Search shares, to be funded by the UBS
Loan, was first announced by Mr O'Neill at the meeting, and that announcement came
Yrnluch to the surprise and consternation of (Mr Micah] and many members of the NEC"'
(b) Mr Vele was 'present to give technical details of the proposed purchase and loan to support
Prime Minister Peter O'Neill's proposal at the Cabinet'142
(C) there was a very heated argument between Mr Don Polye ... and Prime Minister Peter
O'Neill which almost came to physical exchanges between the two leaders. Minister Polye
opposed the proposal stating that it was a speculative investment which could result in 4 to
5 billion kina loss to the people of Papua New Guinea143
(d) Prime Minister Peter O'Neill was, I believe, able to convince the NEC members to agree to
the proposal when he told NEC that this transaction did not require the approval of
Parliament as stated under section 209 of the Constitution requiring Parliamentary approval
in certain oversees (sic) borrowing 144
(e) at the meeting, he and other attendees were
... given huge bundles of documentation containing

information supporting the proposal to purchase the Oil Search shares which most of us did not have the time at all to read, digest, undertake our own due inquiries and due diligence.145

(f) the meeting was 'bulldozed through by Prime Minister O'Neill without any regard to due diligence'146

(g) the NEC, 'as a collective' made its decision, and he 'considered this decision as a lawful NEC decision' and that, as Minister, he was duty-bound to execute it147

4 17 On 22 June 2021, Mr Micah stated the following about the NEC meeting on 6 March 2014:

(a) with regard to the heated exchange between Mr Polye and Mr O'Neill which was described in his affidavit:

Mr Polye was very firmly and strongly opposed to committing 1.2 billion of state funds to acquire shares that he considered and he stated very strongly speculative and, in the end, what he said proved to be true. He said we are putting people's money that is coming from revenue from a non-renewable resource into an uncertain investment that could improve as Prime Minister you were saying the shares could go up to $11 dollars or they could go down to $6 dollars exactly that is what he said and we sold when the shares went the below $7 dollars.

So, that was his main argument, Mr Polye, was that as treasurer he was against putting such a large amount of money of State funds into a speculative investment and it would rather be proper for such funds to be put into roads, education, health and things like that and he argued very strongly but the prime minister was quite determined. All other ministers did not say much, only somebody I believe could have been Puka Temu who asked if there was a requirement for parliament to give approval to the NEC decision to get the loan but other than that none of us said much and the meeting finished abruptly and I believe, like I myself walked away very confused about how such a decision could have been made which we were put on the spot. Very

were just given to us at the meeting, normally we are given ample time to study the submissions but these ones just came in and we hardly had any time to study the documents and it is rather unfortunate that on hindsight we could have done better.148

(b) in response to Sir Puka's question about Parliamentary approval:

Prime Minister [Mr O'Neill] said that it was not necessary. He said that it was not necessary and Mr Dairi Vele supported his comment and there was no further discussion on that.149

(c) he was aware of announcements regarding the State purchasing shares in Oil Search which were made prior to the NEC meeting on 6 March 2014190

(d) Mr Micah recalls '15 or 18' Ministers were present at the meeting, and that this was less than the '20 to 3C who would normally be present, due to the fact that the meeting was 'an extraordinary meeting that was called purely' for the UBS Loan proposal151

(e) the meeting lasted '40 to 45 minutes' and 'only ex-Treasurer Poyle and the Prime Minister and Dairi Vele were speaking so it took them about that time'152

(f) he 'should have been the one taking Cabinet through the papers', but ' ... in this case, the Prime Minister himself took the submission through and [he] was not very happY153

4.18 On 5 August 2021, Mr Micah gave the following evidence:

(a) the statement contained in Policy Submission 67/2014 that 'Whis policy submission is also endorsed by the Minister for Treasury and Minister for Finance and the Minister for Public Enterprises' was not a correct statement. Mr Micah expressly denied that he ' ... was even

consulted on the contents of the submission"54

(b) with regard to Mr Polye's assertion that Mr Polye had attempted to solicit support from him, he recalled:

... that discussion and ... I could see that the Prime Minister, the Chairman of NEC was totally adamant to get this submission through and there was point every single Cabinet member would have been slaughtered including Don and myself so that is what I said to him.155

(c) he 'had absolutely nothing to do with [NEC Policy Submission 67/2014]. I never saw one word of that submission, neither did I sign it'166

4.19 In his oral evidence given before the Commission on 11 February 2022, Mr Micah spoke again about how the submission was brought to the NEC on 6 March 2014:

... You mentioned the UBS Loan coming to NEC, that is, the loan to purchase the Oil Search shares about which we have heard, of course, a great deal of evidence on 6 March and you said that it was owned by the Prime Minister and Treasury. Would it be, however, usual because of course the debt was to be novated to Kumul or IPBC and that IPBC was to sign a directive for the proceeds as all the receipts of the PNG LNG to be used in repayment of the debt, would it be usual a practice to include other ministries that would be affected by an NEC decision in the presentation of the submission?

A: Well, like I said earlier, the submission should have come from the Minister responsible for State Investment, which was myself. I had no part in that submission. I also believe that the treasury minister who is responsible for 30 public funds and fiscal policy of the State - of the Government was not the sponsor of the submission.

> So, obviously, it came from Prime Minister himself who presented the submission to us in the Cabinet and it is quite unusual for such a thing to have happened that way because when the Prime Minister under the Ministerial Determination Act delegates his powers and responsibility by that law to us as ministers, we then become responsible for whatever aspect of government that falls within our portfolio. And in this instance, State investments, State enterprises were my responsibility by law under the Ministerial Determinations Act which the Prime Minister signed and listed all my responsibilities including shares in Oil Search; shares in BSP and soon to be shares in PNG LNG Project and all the State-Owned Enterprises. I was quite not happy when that submission came in that way.157

4.20 In his statement dated 10 June 2021, Chief Sir Leo Dion stated the following about the NEC meeting on 6 March 2014:

(a) he could recall attending a NEC meeting on 6 March 2014, where he was present with other Ministers

> .„ including the Minister for Treasury, Don Polye, who at the time who was my party leader, when a big book of files, including a submission to the NEC, were distributed to those at the meeting.158

(b) his first-time learning about the UBS Loan was upon receiving the documents at the meeting159

(c) the meeting was run by Mr O'Neill as chair of the NEC16°

(d) when presented with the NEC Policy Submission 67/2014 it was

> ... a comprehensive report of many figures and details and it would take some time for me or some of us to read it through to understand what it was all about. However, I was not informed by anyone or had any prior knowledge of or discussion concerning that submission.161

(e) Mr Polye questioned NEC Policy Submission 67/2014 'because of fundamental issues that had greater implications on the budget and future revenue raising in the country' and

> ... at that point i realised it was a sensitive issue and it became a heated debate. I then knew that I cannot support this submission from deep in my heart, and I did

not agree with it.162

(f) the books' containing the NEC Policy Submission 67/2014 were immediately taken back by Secretary Lupari, and Sir Dion kept nothing163

(g) he could not recall if NEC Policy Submission 67/2014 was voted on at the meeting

(h) Ministers normally vote by voice only, and 'the PM is the one that makes up his mind and the NEC was a rubber stamp'165

( ) despite his role as Deputy Prime Minister, he was 'kept in the dark and not privy to anything'166

4.21 In his oral evidence to the Commission on 23 June 2021, Chief Sir Leo Dion provided the following evidence about the NEC meeting on 6 March 2014:

(a) 'the ministerial committees should have been screening [the UBS Loan] before it comes through finally to the NEC167

(b) the material distributed at the meeting

... was a large file in the book that it would take, obviously, for the ministers to read for a long time because it was full of details and figures and so forth.168

... I know for a fact there are processes to be followed then and the ministers who were supposed to be responsible for it were more or less also surprised.189

(c) Mr Polye

... had some debate, very strong debates when the Prime Minister introduced this particular UBS papers on the floor of the NEC.17°

(d) he agreed with the views of Mr Polye expressed at the meeting171

(e) he did not learn at the meeting who prepared NEC Policy Submission 67/2014 72 and he did not think that Mr Polye was the sponsor of Policy Submission 67/2014173

(f) in his opinion, the Ministerial Economic Committee

should have been briefed prior to the meeting[174]

(g) 'as far as I am concerned, no one was talking for [the UBS transaction] as far as / can remembe✓178

(h) Mr Polye addressed his arguments to Mr O'Neill and to the NEC generally[176]

(i) as chairman of the NEC, the Prime Minister (at that time being Mr O'Neill) 'accepts all responsibilities' [177]

(j) his (Chief Dion's) attendance at the NEC meeting was the extent of his involvement in the UBS Loan[178]

(k) regarding the process for making decisions at the NEC meeting

> The process is that there is no voting process, there is just by the voices of the members of the National Executive Council. `7`
>
> and
>
> ... there is no process or procedure or standing orders for the NEC.18c

4.22 On 2 August 2021, Mr Isaac Lupari, who had been Mr O'Neill's Chief of Staff, stated that he was not present at the NEC meeting on 6 March 2014, and that 'filhe Chief of Staff does not sit in the NEC meetings.'[181]

4.23 In his letter to the Commission dated 6 March 2020, Prime Minister James Marape stated that he was 'bound by NEC decision 79/2014, which was decided at the meeting on 6 March 2014)82

4.24 In his affidavit dated 31 May 2021, Mr Marape gave the following evidence about the NEC meeting on 6 March 2014:

(a) NEC Policy Submission 67/2014 was introduced in the NEC meeting on 6 March 2014[183]

(b) the NEC noted the contents of Policy Submission 67/2014 and. in its Decision 79/2014

> ... approved for the State to borrow 1.2 Billion Dollars from UBS AG to facilitate the purchase of 149,390,244 shares ... from OSL instead of refinancing the IPIC loan in accordance with NEC Decision 479/2013.[184]

(c) he 'only became aware' of the proposed transaction on 6 March 2014

... when O'Neill introduced [NEC Submission 67/2014] ... on the basis that IPIC decided to retain our OSL shares which was used as a security to obtain the loan to finance the State's equity participation in the PNG LNG project.185

(d) NEC Policy Submission 67/2014
... was treated as urgent prima facie as we were misled that the IPIC maturity date was nearing and we would need finance to off-set this and redeem our own shares mortgaged in the IPIC loan.186

The UBS loan involved a web of intricate financial transactions which myself and my other colleague ministers had no time to peruse and take a position. PM O'Neill bulldozed the submissions.187

(e) as the Finance Minister at the time, Mr Marape was neither aware of the transaction nor was he consulted 'by the relevant players in this transaction' until it was brought forward at the meetingl?'8

4.25 In his supplementary affidavit dated 9 August 2021, Mr Marape provided the following evidence about the NEC meeting on 6 March 2014:

(a) the meeting was 'expedited by [Mr O'Neill!
Cabinet was rushed into him approving the State's acquisition. We (Cabinet) were all caught off-guarded (sic) as we had no time to read those voluminous documents pertaining to the transaction. In fact, we did not properly read and comprehend and assess the matters in the documents.189

(b) at the meeting, Mr O'Neill
emphasiz[ed] the importance of the State's involvement to maintain its presence in OSL mainly due to OSL's contribution to our local communities in providing employment opportunities for the country and thus contributing to the

economy (tax, royalty, dividends etc.).190

(c) at the meeting, Mr Polye,

... objected to [NEC Policy Submission 67/2014] to the effect where he stated that investing in a speculative industry will be detrimental to our budget and will also be in breach of our constitutional laws being the Constitution and the Organic Law on the Sovereign Wealth Fund and other statutes specifically the Loans (Overseas Borrowings) Act 1973, and the Papua New Guinea Fiscal Responsibility Act 2006.191

(d) Mr O'Neill

... construed the objection by Hon. Polye as causing instability in the GoPNG and further side lined him as the treasurer, with his official de commissioning on or around 10th or 11th March 2014.192

(e) while Cabinet was deliberating on its Decision 79/2014, he 'noticed that all transaction documents were pre-planned and awaiting approvals'193

4.26 In his oral evidence to the Commission on 21 June 2021, Mr Marape provided the following further evidence about the NEC meeting on 6 March 2014:

(a) the meeting was a 'special Cabinef194

(b) the proposal 'had a lot of details attached to it' and 'the conversation was definitely quite complicatecfl 95

(c) Mr Polye 'stood in the way of [NEC Policy Submission 67/2014] being bulldozed through'196

Usually in Cabinet decorum when the prime minister has a submission presented in most instances everyone sort of submits to the submission. He uses his power; you know we are ministers by delegation

from his authority but then treasurer the Honourable Don Polye was the one who opposed this submission.197

4.27 On 10 August 2021, Mr Marape stated further the following about the NEC meeting on 6 March 2014:

(a) in response to Mr O'Neill's oral evidence that the decision made on 6 March 2014 was a collective one, his view that Mr O'Neill had 'bulldozed' NEC Policy Submission 67/2014 remained unchanged:

The submission was brought in, [then-Prime Minister Mr O'Neill] was the sponsor of the submission and it was a huge file that came in, and in fact on record one of the shortest sessions we had in a very important and huge submission. It took a short time for us to get through this one. Our Treasurer then was protesting but to no avail and it was eventually allowed to go through.

In some sense he is technically correct when the whole of Cabinet endorses the paper then it is the whole of government sort of decision at the time but being the chief sponsor of the paper and the coerce and upfront as the chair of the Cabinet, you know, and I speak today as the serving Prime Minister that when the chairman submits a paper in most instances, ministers will follow suit and even though they all would offer contrary views but the final resolution becomes a whole of Cabinet's sort of resolution.

So, yes, it arrived at what seemed like a unified position but there was definitely contrast views and I do not regret using the word, bulldozed. It was bulldozed as a submission that had urgency in it, it was time bound. Those word sort of used urgent, it was time bound, we need to get it done today. As / did indicate in my earlier submissions there was no prior policy announcement on this matter, It arrived on 6 March at that time and then it was processed then.198

(b) with regard to the urgency to reach a decision at the meeting on 6 March 2014

... there was no seemingly urgency at the time except what the then Prime

Minister expressed as urgent. At the time we had no sufficient information.
That paper [NEC Submission 67/2014] that never followed the Cabinet's due
process arrived in Cabinet with the word 'Urgent' for us to approve. And when
the boss says it is urgent, the rank and file sometimes or in most instances do
comply. The boss was Prime Minister Peter O'Neill then.199

c) 'Mr Vele and others were invited into the room to make presentation and it was presented
but in less than 20 minutes, we were done with the paper'"

(d) 'the only minister who stood in the way of this paper was the then Treasurer, the
Honourable Don Polye in a substantial manner'201
(e) at the time when the meeting took place on 6 March 2014
... there was no indication to us what Oil Search would do with the money that we
were paying for 10.01 per cent stake in Oil Search. The rational given was that
Oil Search has a substantial interest in PNG which is very correct."2

4.28 In his oral evidence before the Commission on 31 January 2022, Mr Marape was further
questioned about the decision-making process which took place at the meeting on 6 March 2014
The Chairman: ... These approvals you gave, I assume; are pursuant to the NEC
Decision made on 6 March to approve the UBS Loan. Can you elaborate on the
kinds of pressures, if any, that were brought to bear upon yourself to grant these
approvals; if there were any such pressures that were brought upon you by the
Chairman of the National Executive Council or the Prime Minister at that time
Honourable Peter O'Neill, or any other member of Cabinet at that time, given that
you were a participant in the decision-making process

to approve the UBS loan
on 6 March?
A: All right, thank you Chairman, Sir lnjia. My involvement as stated in
paragraph 9 of this supplementary affidavit, comes at the back of a Cabinet
decision, Cabinet Decision No 79/2014. The Cabinet sat on 6 March 2014 that
approved the entire transaction. So. the chain of events started then. That
approval gave rise for us to ensure that documents pursuant to section 468 of the
IPBC Act and then the section 6(1) approval from the PFMA had to be bound
from our part.
On your issue on the pressure, let me inform this Commission of Inquiry that the
then Treasurer called me and said that he was present to sign; these documents
need to be signed and he did not sign. But the treasurer's involvement is a little
bit different from my involvement. My involvement is like at the bottom end of the
process. They approve everything and it comes to me to sign off. So, the
originating documents starts at – in this instance – from the National Kumul
Petroleum Company and the State-owned Enterprise Minister or comes from the
Treasury and it comes to me to sign off as Finance Minister, prepared by our
departments. In this instance; it was the office of the Prime Minister was driving
this proposal. The Treasurer was decommissioned; then Honourable Don Polye
was decommissioned so myself as Finance Minister, all the papers were brought
to my office, he said you need to sign this to clear off this transaction; it is urgent,
it is important for us to get it done with. All these papers were reassembled and
brought to Finance Department for us to sign off on. So, in some way you could
assume we were impressed that it was time-bound. He had the former Treasurer
sacked and there was a need for me to sign off this one based on the papers that
were presented before me.203

4.29 In his statement dated 3 August 2021, Sir Puka Temu gave the following evidence about the NEC
meeting on 6 March 2014:

(a) Pie decision to purchase Oil Search shares was made by NEC on 6 March 2014'204

Ilvihen the UBS/Oil Search transaction came to NEC I did support it as I was aware that Papua New Guinea always had Oil Search shares as it has always

been a government policy mandated by the Constitution to participate in resource development so that Papua New Guineans have a say in such development and are not mere bystanders.205
and

I was aware that this was the same type of loan as that negotiated to pay IPIC if they had determined to return the shares.2°6

(b) Minister Polye objected
... saying that the lender should be Petromin and it being explained to him that it was not possible for Petromin to borrow in the first instance and they could provide no equity, but that it would be transferred to Petromin or some other State-owned enterprise before the end of the year, thereby the GDP upper level would not be breached.207

4.30 In his oral evidence given before the Commission on 9 August 2021, Sir Puka provided the following evidence about the NEC meeting on 6 March 2014:
(a) the meeting was adjourned 'for some time' at his request, as he had insisted that Mr Loi Bakani, Governor of the Central Bank, and Mr Vele be in attendance, and that the meeting proceeded upon their arriva1208
(b) Mr Vele and Mr Bakani provided a joint presentation to Cabinet, and, at the end of the presentation, Sir Puka supported the submission, saying:
I am comfortable with your views and because you are the entities that Cabinet relies on, I rely on your goodwill and explanation so I accept the submission209
(c) Mr Vele 'led the presentation with comments from the

Governor of the Central Bank';21°
(d) because Sir Puka and others in Cabinet 'do not have the qualifications that are needed to do full assessment of the technical details', Sir Puka 'relied on the Central Bank and Treasury to say that we are comfortable with this loan that we are proposing that is before Cabinet'211
(e) when Mr Vele and Mr Bakani gave their presentation, Sir Puka

... was comforted by the fact that the State entities were part of the process which was all I wanted, as long as they were there because they were the key advisors to the executive government without which some of us would not understand the technical details, or cannot make decisions, or cannot make discussions in Cabinet.212

(f) he was satisfied that Mr Bakani and Mr Vele both had a sufficient involvement and understanding of the transaction2'3
(g) he had discussions with Mr O'Neill prior to the NEC meeting on 6 March 2014, and Mr O'Neill was 'trying to gauge [his] views', but he did not see this as Mr O'Neill 'canvassing support prior to the NEC meeting214

4.31 In his oral evidence given before the Commission on 11 August 2021, Sir Puka was not asked to elaborate further on his recollection about the NEC meeting on 6 March 2014.

4.32 The Hon Richard Maru stated the following regarding the NEC meeting on 6 March 2014:
(a) he was not involved in any prior discussion, negotiations nor did [Mr Maru] sight any documentation on the UBS loan until the papers were presented at the NEC meeting on 6 March 2014.215

(b) ... during [the NEC meeting on 6 March 2014] ... it was evident that the Secretary of Treasury Dairi Vele and the Governor of [the] Central Bank Loi Bakani were the people who negotiated the loan and brought the submission to cabinet for endorsement 216

(c) the meeting attendees, were informed that we had to make a decision that day to approve the UBS Loan Facility so we can purchase the shares or completely lose our shares in the PNG LNG Project. We did not have sufficient time to think through many critical issues like whether we could obtain a cheaper concessional loan from other sources of funds like the ADB than a commercial loan from UBS217

(d) the Attorney General, Mr Kua was not present at the meeting, and Mr Kua's attendance ... was really needed at that time to guide the NEC in such critical decision-making involving a substantial loan to the State.21t

le) Due to Mr Maru's non-involvement in prior discussions on the UBS Loan, including the loan negotiations, Mr Maru did not have the benefit of considering this important loan submission adequately within the time constraint.219

4.33 Mr Benjamin O'Dywer, a principal of Backwell Lombard Capital who had given financial briefings to ministers in the past, was not in attendance at the NEC meeting on 6 March 2014.

4.34 Mr O'Dwyer referred to an interaction with Mr Polye, which took place following the NEC meeting:

On March 4 2014, 1 was in PNG. On the evening of 6 March 2014, I had an urgent call from Hon Don Polye to ask if I could meet with him. I stated I was at my hotel and that I would be happy to meet him there. The time of that call was about 6.15pm PNG local time. Hon Polye arrived about 30 minutes later and handed me a copy of the NEC paper that was presented earlier that day. He said that he was likely to be removed as he refused to approve the transaction and that he needed some urgent advice as to my thoughts on the NEC paper and if he was wrong about his stand. Hon Polye said that he would give me an hour and return to discuss if I could

immediately look at the documents.

On 6 March 2014, I provided notes to Minister Polye about 3 hours after he handed me the documents. Minister Polye briefly read the typed notes, said thank you and that he was doing the right thing for the State and then left.222

4.35 Counsel for Mr Vele submitted that it is incorrect to state that Mr Polye had no knowledge of the transaction until the NEC meeting oI 6 March 2014. It was submitted that the transaction was announced by the Prime Minister and reported in national newspapers on 3 March 2014: 'ft]his was not a State secret. It was an open on market transaction and most on government knew it was being planned.

4.36 The evidence from Mr Polye was that he did not know about the transaction before 6 March 2014. This was in the context where other Ministers also gave evidence that 6 March was the first time they learned of the potential transaction.

4.37 Counsel for Mr O'Neill submitted that it is incorrect to suggest that Mr O'Neill 'undermined cabinet process' on the basis that ytihere is no evidence concerning such procedures, or that the NEC procedures established under s 149(5) of the Constitution were not followed'. The submissions contend that:

(a) every member of the NEC had notice of the relevant meeting, and were at liberty to attend

(b) every participating member of the NEC received a copy of the relevant submission

(c) every participating member of the NEC was able to answer questions, or discuss the issue at the NEC meeting

(d) there is no evidence that any member of the NEC was 'stood over' to support the submission against his will

(e) importantly, there is no evidence that any member of the NEC was not free to move a motion for the deferral of the decision and request

further information
(f) no one in the NEC ever at the material time raised any concerns in this regard, or sought
an adjournment of the decision. Consequently, the Cabinet process 'was not undermined.
Under s 149(3)(a) of the Constitution the responsibility for this decision stops with the NEC,
and nobody else. We respectfully suggest that it is not open to find that Mr O'Neill
'undermine cabinet process'

5. Conclusions

5.1 Having regard to the matters referred to above, the Commission finds, in conclusion that:
(a) the Policy Submission 67/2014 to approve the UBS Loan was sponsored by Mr O'Neill and
approved by the NEC
(b) the submission was clear in explaining that Oil Search would use the funds to buy into PRL
15, which contradicts Mr O'Neill's evidence that he was unaware of any connection
between the two transactions
the submission was exceptionally large in volume and complex in content, and, most
unusually, it had been largely drafted by persons other than public officials
then Treasurer Mr Polye had no substantive (if any) forewarning as to the policy
submission, which was central to his Ministerial responsibility – at the Prime Minister's
direction Mr Vele had limited the Treasurer from policy formulation of and knowledge
concerning the UBS Loan
other Ministers at the NEC meeting had no sufficient (if any) forewarning as to the policy
submission
Sir Puka Temu's evidence is accepted that Governor Bakani was requested to attend the
meeting in order to present the NEC submission with Mr Vele. The evidence before the
Commission demonstrates that Governor Bakani was actively involved in the UBS Loan
and the decision to purchase Oil Search shares in the leadup to the NEC meeting on
6 March 2014221
(g) Mr Vele presented the policy submission to the NEC and took ultimate responsibility for its
contents although ?arge parts were drafted by external advisors. It was seriously deficient
at least in so far as it:
(I) falsely stated the Treasurer supported its recommendations when Mr Vele knew
he did not, and stated that two other Ministers

whose portfolios were closely

affected by the subject-matter of the submission supported it with no basis for doing so

(ii) failed to set out any potential problems with or downside to the UBS Loan

(iii) failed to canvass at all the financial risks (beyond those inherent in a collar loan) for the State in borrowing such a very large sum for a speculative purpose

(iv) otherwise offered no contestability, which is the traditional role of the Treasury, to what was proposed

(v) failed to explain that the urgency to approve the many processes in the submission originated in Oil Search's need to complete a time-bound contract using the State's funds

(v failed to explain how the Collar Loan was to be repaid or make it sufficiently clear that if the Collar Loan was not repaid, it would be repaid through the put options, meaning that the State would lose the shareholding upon which it placed so much value

(vii) failed to set out the fees to be paid to UBS and the various advisers and intermediaries

(h) there was not sufficient time at the NEC meeting for the Ministers to consider the documentation presented to them, before the NEC decision was made and the opportunity was lost to properly debate and question the proposal

(i) there was no report of the CACC tabled or discussed

(j) the Treasurer refused to carry out the NEC decision requiring his approval of the loan

documentation and he was dismissed by the Head of State, on the advice of the Prime Minister

5.2 This was an exceptional policy proposal that should have been promulgated to the NEC well before the meeting, to allow proper consideration by those who were to attend. It was very complex and lengthy. The Treasurer should have put the proposal to the NEC. The Attorney-General should have been provided with the policy proposal prior to the meeting, so as to be able to confirm the legality or otherwise of what was proposed. The benefits of debate and consideration by the NEC were undermined by Mr O'Neill's decision to put to the NEC a UBS Loan of enormous complexity, based on a cabinet submission which no other Cabinet member including the Treasurer had prior sight of, and which did not fairly set out the arguments against as well as for the proposal.

5.3 Further recommendations regarding the process for approving State borrowings are made in another Chapter of this Report.

Recommendation

1. The 2017 NEC handbook sets out processes designed to ensure model practice by the NEC. However, no handbook can mandate to ensure that a

similar circumstance to that
which occurred in March 2014 will not occur again. The Commission recommends
amendment of the legislation on overseas commercial loans by the Government,
requiring prior parliamentary approval above a certain level, in order to make less likely
the procedural failures in 2014 in the NEC.

Constitution of the Independent State of Papua New Guinea, s 149.
%Prime Minister and National Executive Council Act 2002, s. 23(3)(c).
3 Transcript, Peter O'Neill, 7 February 2022, pages 3808-3810.
Transcript, Kerenga Kua, 18 June 2021, page 1527.
5 See foreword of NEC Procedures Handbook, 24 August 2017, Exhibit 220, W17.001610110006.
6 NEC Procedures Handbook, 24 August 2017, Exhibit 220, WIT. 0016.0003.0006.
7 Inserted by PM & NEC (Amendment No. 2 of 2020) Act (No. 19 of 2020).
8 Prime Minister and National Executive Council Act 2002, s. 23A(2),(3) & (4).
9 Constitution, s. 141.
" Transcript, Peter O'Neill, 7 February 2022, pages 3808-3810.
" Prime Minister and National Executive Council Act 2002, ss. 24-28.
12 Transcript, Peter O'Neill, 7 February 2022, page 3811.
13 Transcript, Kerenga Kua, 18 June 2021, pages 1526-1527; Transcript, Don Polye, 18 June 2021, pages 1558-1559
" Transcript, Kerenga Kua, 18 June 2021, page 1527.
th National Library and Archives Act 1993, s. 2.
" Policy Submission 67/2014, 6 March 2014, Exhibit 387, WIT. 0016.0001.0610 at page 0638
11 Policy Submission 67/2014, 6 March 2014, Exhibit 387, WIT. 0016.0001.0610 at page 0638.
" Policy Submission 67/2014, 6 March 2014, Exhibit 387, WIT. 0016.0001.0610 at page 0638.
19 Policy Submission 67/2014, 6 March 2014, B(1)(a), Exhibit 387, WIT.0016.0001.0610 at page 062E.
20 Policy Submission 67/2014, 6 March 2014, B(1)(b), Exhibit 387, WIT.0016.0001,0610 at page 0638.
21 Policy Submission 67/2014, 6 March 2014; B(1)(c), Exhibit 387, WIT.0016.0001.0610 at page 0638.
22 Policy Submission 67/2014.6 March 2614, B(1)(d), Exhibit 387, WIT.0016.0001.0610 at page 0638.
23 Policy Submission 67/2014, 6 March 2014, 6(1)(e), Exhibit 387. WIT.0016.0001.0610 at page 0638
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25 Policy Submission 67/2014; 6 March 2014, B(2)(a)(i)-(iii), Exhibit 387; WIT.0016.0001,0610 at page 0638.
29 Policy Submission 67/2014, 6 March 2014, B(2)(a)(ii), Exhibit 387, WIT.0016.0001.0610 at page 0638.
37 Policy Submission 67/2014, 6 March 2014, B(2)(a)(iii), Exhibit 387, WIT.0016.0001.0610 at page 0638.
28 Policy Submission 67/2014, 6 March 2014, B(2)(a)(iv), Exhibit 387, WIT.0016.0001.0610 at page 0638.
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31 Policy Submission 67/2014, 6 March 2014, B(2)(d)(1v), Exhibit 387, WIT.0016.0001.0610 at page 0638.
92 Policy Submission 67/2014, 6 March 2014, B(2)(d)(v), Exhibit 387, WIT.0016.0001.0610 at page 0638.
12 Policy Submission 67/2014, 6 March 2014, B(3)(a), Exhibit 387, WIT.0016.0001.0610 at page 063E.
3° Policy Submission 67/2014, 6 March 2014, B(3)(b), Exhibit 387, WIT.0016.0001.0610 at page 0638.
-55 Policy Submission 67/2014, 6 March 2014, B(3)(c), Exhibit 387, WIT.0016.0001.0610 at page 0638.

3° Policy Submission 6712014, 6 March 2014, 8(3)(d), Exhibit 387, WIT.0016.0001.0610 at page 0633.
31 Policy Submission 67/2014, 6 March 2014, B(3)(e), Exhibit 387, WIT.0016.0001.0610 at page 0638.
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63 Policy Submission 67/2014, 6 March 2014, D, Exhibit 387, WIT. 0016.0001.0610 at page 0638.
61 Transcript. Dairi Vele, 11 August 2021, pages 3043-3044.

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• Policy Submission 67/2014, 6 March 2014, M(1), Exhibit 387, WIT.

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'14 Policy Submission 67/2014, 6 March 2014. M(2), Exhibit 387, WIT. 0016.0001.0610 at page 0638.

4' Policy Submission 67/2014, 6 March 2014, M(3), Exhibit 387, WIT. 0016.0001.0610 at page 0638.
46 Policy Submission 67/2014, 6 March 2014, M(4)(a), Exhibit 387, WIT.0016.0001.0610 at page 0638.

47 Policy Submission 67/2014, 6 March 2014, M(4)(b), Exhibit 387, WIT.0016.0001.0610 at page 0638.
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5° Policy Submission 67/2014, 6 March 2014, M(5)(c), Exhibit 387, WIT.0016.0001.0610 at page 0638.
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52 Policy Submission 67/2014, 6 March 2014, M(6)(a), Exhibit 387. WIT.0016.0001.0610 at page 0638.
63 Policy Submission 67/2014, 6 March 2014, M(6)(b), Exhibit 387, WIT.0016.0001.0610 at page 0638.
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55 Policy Submission 67/2014, 6 March 2014, M(6)(d), Exhibit 387, WIT.0016.0001.0610 at page 0638.
56 Policy Submission 67/2014, 6 March 2014, Exhibit 387, WIT. 0016.0001.0610 at page 0638.

51 Letter D. Rolpagarea to D. Vele, Financial Accommodation for the Independent State of Papua New Guinea, 5 March 2014, Exhibit GC, WIT.0007.0004.0034.
58 NEC Decision No. 79/2014, 6 March 2014, Exhibit 5, NRF. 001.004.3111.
5° Witness statement of the Honourable Don Pomb Poyle, 1 June 2021, [2]–[7], Exhibit EE, WIT.0051.0008.0001.
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6' Witness statement of the Honourable Don Pomb Poyle, 1 June 2021, [2]471, Exhibit EE, WIT.0051.0008.000.
62 Affidavit of Dairi Vele, 26 April 2021, [354)4356], Exhibit QQ, WIT. 0014.0007.0001.
83 Affidavit of Ben Micah, 20 May 2021, (21)–[23), Exhibit LL; WIT. 0052.0006.0003.
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°° Transcript, Don Polye, 18 June 2021, page 1534.
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73 Transcript Peter O'Neill, 17 June 2021, sage 1471.

76 Transcript. Peter O'Neill, 17 June 2021. page 1472.
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" Transcript, Peter O'Neill, 7 February 2022, pages 3792-3793.
a" Transcript, Peter O'Neill, 7 February 2022, pages 3797-3798.

89 Prime Minister and National Executive Council Act 2002, s. 24 provides that these roles are: Department of Prime Minister and National Executive Council who is Chairman, Department of Treasury who is Deputy Chairman, Department of Personnel Management, Department of Planning and Monitoring, Department of Justice and Department of Provincial and Local-Level Government.
8' Transcript, Peter O'Neill, 7 February 2022, pages 3806-3809.
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9" Transcript, Don Polye, 18 June 2021, page 1533.
98 Transcript, Don Polye, 18 June 2021, page 1533.
°Transcript, Don Polye, 18 June 2021, page 1533.
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t°1 Transcript, Don Polye, 18 June 2021. page 1536.
10? Transcript, Don Polye, 18 June 2021, page 1537.
103 Transcript, Don Polye, 18 June 2021. page 1538.
104 Transcript, Don Polye, 18 June 2021, page 1538.
'°5 Transcript, Don Polye, 18 June 2021, page 1539.
106 Transcript, Don Folye, 18 June 2021, page 1539.
107 Transcript, Don Polye, 18 June 2021, page 1540.
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110 Transcript, Don Polye, 18 June 2021, pp 1545-6
`11 Transcript, Don Polye, 18 June 2021, page 1546.

'12 Transcript, Don Polye, 12 August 2021, page 3171.
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121 Affidavit of Dairi Vele, 26 April 2021, [355], Exhibit QQ, WIT.0014.0007.0001.
122 Affidavit of Dairi Vele, 26 April 2021, [356], Exhibit QQ, WIT.0014.0007.0001.
123 Affidavit of Dairi Vele, 26 April 2021, [356], Exhibit QC, WIT.0014.0007.0001.
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129 Transcript, Dairi Vele, 24 June 2021, page 1902.
'35 Transcript, Dairi Vele, 11 August 2021, page 3022.
131 Transcript, Dairi Vele, 11 August 2021, page 3022.
'32 Transcript, Dairi Vele, 11 August 2021, page 3042.
'3' Transcript, Dairi Vele, 11 August 2021, page 3042.
184 Transcript, Dairi Vele, 17 February 2022, pages 4117-4118.
115 Transcript, Dais Vele, 18 February 2022, page 4233
628 Transcript, Dairi Vele, 17 February 2022, pages 4120-4121.
in Transcript, Dairi Vele, 18 February 2022, pages 4169-4172.
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15' Transcript, Ben Micah, 22 June 2021, page 1729-30.
151 Transcript, Ben Micah, 22 June 2021, page t733-4
'52 Transcript, Ben Micah, 22 June 2021, page 1734.
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185 Affidavit of the Honourable James Marape, 31 May 2021, [14], Exhibit GG, WIT,0007.0004.0008

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221 See, e.g., Letter L. Bakani to M. Turner, Re; Refinancing the International Petroleum Investment Corporation (IPIC) Exchangeable Bond (EB), 30
January 2014, Exhibit GGG.1t, WIT.0010.0006.0044, which accepted UBS' proposal to refinance the IPIC Exchangeable Bond. See also Email L.
Bakani to A. Latimer, RE' bridge facility term sheet (2802286), 25 February 2014, Exhibit 5, NRF.001.001.5101, where Mr Bakani discussed remaining
options for refinancing the IPIC Exchangeable Bonds and noted Whatever the outcome, we have the OSL option available to pursue also'; Email M.
Turner to D. Vele; RE: PM briefing paper, 22 February 2014, Exhibit 5, NRF.001.001.5054, which specifically provided Governor Bakani with a copy of
the Briefing Paper which was prepared for Mr O'Neill to rely on when discussing the purchase of Oil Search shares with Mr Soften; Email L. Bakani to
D. Vele, RE: PM briefing paper, 23 February 2014, Exhibit 5, NRF. 001.001.5061, where Mr Bakani confirmed receipt of the Briefing Paper from UBS
and stated 'Agree that we keep it confidential under our belt and present it to PM'.

CHAPTER 14

Approval of the UBS Loan - Part Ill - Execution of documents

Summary
This Chapter sets out the process by which the transaction documents were executed by the State.

1. Chronology of document execution

1.1 The complex and lengthy documents which gave effect to the UBS Loan were executed very quicky.

1.2 On 9 March 2014, the NPCP held Special Board Meeting No. 2 of 2014 and resolved that NPCP execute the payment direction deed and any other transaction documents required to give effect to the payment direction deed.1 At that meeting, the Chairman of NPCP, Mr Frank Kramer:

> ... expressed concern about the manner in which the State had bulldozed the transaction without regard for due process and without giving each State part including NPCP, sufficient time to understand nature of the transaction, for NPCP to be able to have foresight of its [sic] and the full extent of its exposure. He also expressed concern about the consequences of such behaviour by the State for integrity of NPCP and its Board and for the fact that such behaviour erodes and undermines the independence and credibility of a Board comprised of private persons with hard-earned integrity in the business and wider community. In addition, the Board were unanimous on the view that NPCP was directed to deal with this matter by the State as

ultimate shareholder, and that despite the irregularity in due process, NPCP Board was obligated to follow the direction or instruction issued to it.2

1.3 On 10 March 2014, IPBC held Special Board Meeting No. 3 of 2014, where it unanimously resolved to approve the transaction documents and to authorise their execution on behalf of IPBC.3

1.4 On 10 March 2014, IPBC issued a Resolution in Lieu of Meeting of Shareholders, resolving to agree to and concur in the execution by NPCP Kroton of the transaction documents.'

1.5 On 10 March 2014, the State entered into a subscription agreement with Oil Search for the purchase of 149,390,244 ordinary shares at a price of AUD 8.20 per share.5

1.6 On 10 March 2014, the State and Oil Search entered into an agreement under which Oil Search or UBS could specify an earlier completion date under the subscription agreement if 'Hedging Disruption' under the Collar Financing occurred.€

1.7 On 10 March 2014, Grand Chief Sir Michael Ogio, the Governor General, approved the borrowing of AUD 1.239 billion from UBS for the purchase of Oil Search shares pursuant to s. 2(1) of the Loans (Overseas Borrowings) (No. 2) Act 19 76 (Chapter 133A).7

1.8 On 10 March 2014, the Hon Peter O'Neill issued a direction, as Minister for Treasury, the former Treasurer having been dismissed, using power under s. 2(11) of the Loans (Overseas Borrowings) (No. 2) Act 1976 (Chapter 133A) to direct that the provisions of ss. 13 and 14 of the Public Finances (Management) Act 1995 did not apply to sums borrowed for the purpose of the purchase of the Oil Search shares.8

1.9 On 10 March 2014, Mr Dairi Vele, as Secretary of the Treasury, issued a certificate confirming that the UBS Loan would not cause the State's level of overseas commercial debt to exceed the limit specified in s. 2(3) of the Loans (Overseas Borrowings) (No. 2) Act 1976 (Chapter 133A).9

1.10 On 10 March 2014, Mr Wasantha Kumarasiri, as Managing Director of IPBC, issued a verification certificate, certifying as complete and up to date, copies of:

(a) the minutes of IPBC Special Board Meeting No. 3 of 2014, containing the resolutions which authorised execution by NPCP of the Payment Direction Deed

(b) the shareholder resolution of IPBC in its capacity as sole shareholder of NPCP dated 10 March 2014 which authorised the execution by NPCP of the payment direction deed/8

1 11 On 10 March 2014, Mr Daniel Rolpagarea, the State Solicitor, issued a letter to the Governor General attaching the transaction documents and advising the Governor General to execute the transaction documents on behalf of the State pursuant to s. 47(1)(a) of the Public Finances (Management) Act 1995, upon receipt of advice from NEC.11

1.12 On 12 March 2014, Mr Vele, as an 'authorised representative of the Independent State', executed a Drawdown Notice for a drawdown in the amount of AUD 335,000,000.00 for payments to:

(a) Oil Search
(b) the 'Finance Parties' (UBS)
(c) Ashurst Australia
(d) NRFA
(e) KPMG Corporate Finance
(f) 'the Equity Derivative Financier (UBS)12

1.13 On 12 March 2014, NRFA sent an email to Aliens giving notice that all of the conditions precedent to funding under the financing arrangements had been satisfied or waived.13

1.14 On 12 March 2014, UBS sent an email to NRFA confirming that UBS was proceeding to settle the transaction.14 Emails from NRFA indicate that there was a brief disagreement between UBS, Ashurst and NRFA as to the process for execution of the documents by the Governor General.

1.15 Mr Carl Okuk, Mr Nathan Chang and Mr Kingsford Wamp were present for the signing ceremony of the UBS Loan documents by the Governor General.

1.16 Mr Okuk witnessed the signing of the UBS Loan documents by the

Governor General. There has been some controversy around Mr Okuk's role in this regard. The Ombudsman Commission made the following findings:

> In the opinion of the Ombudsman Commission, the conduct of Mr Carl Okuk was wrong and improper when he commissioned the documents on the borrowing of the UBS AG Loan by the Governor-General of Papua New Guinea.15

> and
>
> The execution of all documents by the Governor-General and witnessed by Mr Okuk, Lawyer, is not proper as Mr Okuk was not a registered lawyer as required under Section 35 of the Lawyers 1986 Act and improperly acted as a Commissioner of Oath which was contrary to Section 12A of the Oaths, Affirmations and Statutory Declarations Act (Chapter 317).16

(a) Mr Okuk's evidence to this Commission on this issue is as follows:

> I had advised the Ombudsman Commission then and I advise the Commission of Inquiry now that I had merely used my Commissioner for Oaths stamp to identify my witnessing signature. I advise that at no time was I impersonating a registered lawyer or commissioning the loan documents as alleged. I strongly stated then as I now again that I believe the Ombudsman had committed an gross error when it stated I had commissioned the loan documents.
>
> I did admit that it was a lapse in personal judgement to have used my Commission for Oaths stamp in such a manner but that I believed that that in itself had no bearing on the legitimacy of the loan

documents executed by (the
Governor Genera11.17

(b) The Commission is of the view that Mr Okuk's role in witnessing the Governor General's signing of the UBS Loan documents does not have any effect on the validity of those documents.

(c) The Commission did not call Mr Okuk to appear and provide oral evidence.

1.17 On 12 March 2014, the following transaction documents were executed:

(a) Bridge Facility Agreement's
(b) Security Trust Deed
(c) Participant Sponsorship Agreement2°
(d) Payment Direction Deed2'
(e) Specific Security Deed (CHESS securities)22
(f) Confirmation Letter23
(g) Confirmation Side Letter24
(h) Nominee Deed2

1.18 On 14 March 2014, NRFA sent an email to Mr Chang attaching a draft substantial shareholder notice and draft covering letter for Mr Vele to sign.26

1 19 By letter dated 14 March 2014, Mr Vele issued to Oil Search and to the Port Moresby Stock Exchange Limited a Form 3 (Notice of Substantial Shareholding pursuant to s. 115(2)(a) of the Securities Act 1997) in respect of the State's acquisition of Oil Search shares as at 12 March 2014.27

2. Conclusion

2.1 The Commission is of the view that Mr Okuk's role in witnessing the Governor General's signing of the UBS Loan documents does not have any effect on the validity of those documents.

3. Table of documents and signatories

3.1 The following table sets out each of the transaction documents, identifying which parties executed each document, the capacity in which the signatory executed

the document and the date when the document was signed:

Document Title	Signatories & capacity	Date(s) signed
Bridge Facility • Agreement"	The State Signed by: The Hon Peter O'Neill CMG MP Witnessed by: Mr Dairi Vele UBS AG [Redacted]	12 March 2014
Security Trust Deeds°	The State Signed by: The Hon Sir Michael Ogio GCL GCMG CBE Witness: Mr Carl Okuk UBS AG [Redacted]	12 March 2014
Participant Sponsorship Agreements°	The State Signed by: The Hon Sir Michael Ogio GCL GCMG CBE Witness: Mr Cad Okuk UBS AG (Redacted}	12 March 2014
Payment Direction Deeds'	The State Signed by: The Hon Sir Michael Ogio GCL GCMG CBE Witness: Mr Carl Okuk NPCP Signed by: Mr Wapu Sonk Witness: Mr Rogen Wato UBS AG [Redacted]	12 March 2014
Specific Security Deed (CHESS securities)[32]	The State Signed by: The Hon Sir Michael Ogio GCL GCMG CBE Witness: Mr Carl Okuk UBS AG [Redacted]	12 March 201
Confirmation Letter[33]	The State Signed by: The Hon Peter O'Neill CMG MP Witnessed by: Mr Dairi Vele UBS AG (Redacted] Oil Search Signed by: Mr Stephen Gardiner	12 March 2014
Confirmation Side	The State	12 March 2014

Letters* Signed by: The Hon Peter O'Neill CMG MP

Witnessed by: Mr Dairi Vele
UBS AG
[Redacted]

Extract of minutes of NPCF Special Board of Directors meeting No. 2 of 2014, 9 March 2014, Exhibit 163, WT.0026.0001.0924.
'Minutes of NPC? Special Board of Directors meeting No. 2 of 2014, 9 March 2014, page 2, Exhibit FF, WIT.0036.0001.0280

3 Extract of minutes of IPBC Special Board Meeting No. 3 of 2014, 10 March 2014, Exhibit 208, WIT.0007.0004.6330.
4 Resolution in Lieu of Meeting of Shareholders, 10 March 2014, Exhibit 209, WIT.0015.0001.2179.
Subscription Agreement, 10 March 2014, Exhibit V, WIT. 0015.0001.1382.

6 Letter Agreement, 10 March 2014, Exhibit 376, WIT. 0015.0001.1405.
?Agreed terms and conditions of borrowing, 10 March 2014, Exhibit 221, WIT.0015.0001.1593.
Direction of the Minister of Treasury, 10 March 2014, Exhibit 222, WIT.0015.0001.1908.
Certificate of secretary, 10 March 2014, Exhibit 223, WIT. 0015.0001.2028.

19 Verification Certificate, 10 March 2014, Exhibit 224, WIT. 0015.0001.2170.
Letter, D. Rolpagarea to M Ogio, Financial Arrangement for the State's Acquisition of Shareholding in Oil Search Limited, 10 March 2014 Exhibit
397, WIT.0019.0002.0594.
12 Drawdown Notice. 12 March 2014, Exhibit 328, ASH. 002.003.0695.
13 Email, S. Moe to J. Donnan, Re: OSH, 12 March 2014, Exhibit

5, NRF.001.003.5951.

Email, V. Casamento to B. Sharkey, Re: Draw-down notice, Exhibit 5, NRF.001.003.5965.

ix Ombudsman Commission Report, December 2018, page xlvii [18], WIT.0031.0001.0049.

1" Ombudsman Commission Report, December 2018, page xlix [11], WIT.0031.0001.0049.

17 Statutory Declaration of Mr Carl Okuk dated 17 July 2021, [111112], Exhibit 74, WIT.01C5.0002.0002.

i" Bridge Facility Agreement (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0475.

Ix Security Trust Deed (executed), 12 March 2014, Exhibit 6, UBS.0001.0001 0557.

29 Participant Sponsorship Agreement (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0591.

21 Payment Direction Deed (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0608.

22 Specific Security Deed (CHESS Securities) (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0630.

"Confirmation Letter (executed), 12 March 2014, Exhibit 6, UBS. 0001.0001.0666.

24 Confirmation Side Letter (executed), 12 March 2014, Exhibit 6, UBS,0001.0001.0688.

Nominee Deed (executed), 12 March 2014, Exhibit 37, W11.0036.0005.0185.

2" Email, S. Moe to N. Chang, RE: State substantial shareholder notice, 14 March 2014, Exhibit 5, NRF.001.003.8256.

77 Letter, D. Vele to Oil Search and to Port Moresby Stock Exchange Limited, 14 March 2014, Exhibit 1460, OSL.5018.0001 0212

2'7 Bridge Facility Agreement (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0475.

'9 Security Trust Deed (executed), 12 March 2014, Exhibit 6, UBS. 0001.0001.0557.

"'Participant Sponsorship Agreement (executed), 12 March 2014, Exhibit 6, UBS.0001.00010591.

31 Payment Direction Deed (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0608.

32 Specific Security Deed (CHESS Securities) (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0630.

ro Confirmation Letter (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0665.

24 Confirmation Side Letter (executed), 12 March 2014, Exhibit 6, UBS.0001.0001.0688

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CHAPTER 14

Approval of the UBS Loan

Part IV - The certificate of inexpediency

1. Summary

1.1 On 6 March 2014, Mr Dairi Vele wrote to the Chairman of the CSTB, requesting, as a matter of urgency, that it consider and approve an enclosed request for a certificate of inexpediency to cover the advisory fees of:

(a) PLG and Pacific Capital Limited up to a limit of PGK 9,000,000

(b) UBS, Ashurst, NRFA and KPMG up to AUD 14,555,759

1.2 The next day the CSTB did so.

1.3 The Commission concludes that the certificate of inexpediency should not have been issued, and the contracts for this work should not have been made without public tender, and fees for this work should not have been paid until they had been properly assessed according to law, which they never were.

1.4 The certificate of inexpediency was contrary to clauses 11.1–11.2 of Financial Instruction 1N05 because:

(a) there was no declared natural disaster. defence emergency, health emergency, or situation of civil unrest in existence

(b) it was issued retrospectively

(c) the request for the certificate was also deficient on its face and should have been recognised as such

1.5 There was no power in the Public Finances (Management) Act 1995 for the CSTB to issue a conditional certificate of inexpediency, to the extent that it purported to do so.

2. Statutory Framework

2.1 Section 40(1) of the Public Finances (Management) Act 1995 requires that tenders must 'be publicly invited and contracts let for the purchase or disposal of property or stores or the supply of works and services the estimated cost of which exceeds' a prescribed amount. However, s. 40(3)(b) provides an exception to s. 40(1), where a Supply and Tenders Board certifies that the inviting of tenders is impracticable or inexpedient, hence the expression a 'certificate of inexpediency'.

2.2 Section 117 of the Public Finances (Management) Act 1995 allows for Financial Instructions to be issued relating to any matter covered by the Act, where they are necessary or desirable for carrying out or giving effect to the Act and in general for the better control and management of public moneys and public property. so long as the instructions are not inconsistent with the Act.

2.3 Financial Instruction 1N05 ('Supply and Tenders Board Operations') is such a Financial Instruction. Clause 11.1 relevantly provides that a certificate

of inexpediency cannot be issued
retrospectively to cover a contract already 'executed'. Clause 11.2 provides that:

(a) a certificate of inexpediency will only be issued in situations where a declared natural disaster, defence emergency, health emergency, or situation of civil unrest exists, and procurement processes must be undertaken urgently to remedy the situation

(b) 'Lack of forward planning by departments is no longer acceptable. Departments must now be planning their major procurements in a timely manner'

2.4 Schedule 2, clause 3 of the UBS side letter' and the Bridge Facility Agreement2 included as a condition precedent the issuing of a certificate of inexpediency.3 The Commission notes that it received no evidence of PLG, the State Solicitor or Ashurst advising as to the legality of this condition precedent in the circumstances.

2.5 On 6 March 2014, Mr Vele wrote to the Chairman of the CSTB, Mr Philip Eludeme, requesting that the Chairman urgently consider and approve the enclosed request for certificate of inexpediency to cover the advisory fees of PLG and Pacific Capital Limited up to a limit of PGK 9,000,000 and to UBS, Ashurst, NRFA and KPMG up to AUD 14,555,759.4

2.6 The Commission was provided with what appears to be a separate 'Request for Certificate of Inexpediency', possibly in draft form, which is signed and dated '07/02/2014', however the Commission notes that the document has a further timestamp which reads '7 March 2014'.5 This request was different from the one described above in that it only made a request for PGK 9,000,000. The proposed contractors were listed as NRFA, PLG and Pacific Capital Limited. The 'reason for urgency referred to a separate attached appendix however the appendix does not appear to have been provided to the Commission.8 It appears that this Request for Certificate of Inexpediency was not issued as it was overtaken by the Request which included the additional amount of AUD 14,555,759.00 for KPMG and others.

2.7 The request for certificate of inexpediency was a pro forma document. There was a section titled 'Reason for Certificate', which listed the four grounds in clause 11.2 of Financial Instruction 1A/05 as boxes to be ticked.? However, none of the boxes were ticked. In the request, the explanation

for urgency was expressed as that the State had until 4pm on Thursday, 6 March 2014 to approve a share placement and an hour later, until 5pm on the same day, for the relevant documentation to be executed, failing which the State would not secure a shareholding in Oil Search and be exposed to costs of up to AUD 18,000,000.8

2.8 On 7 March 2014, the CSTB met and resolved to issue the certificate of inexpediency. The minutes of the meeting noted that the CSTB 'is satisfied that all process have been followed and the award was made in accordance with the Provisions of the Public Finance[s] (Management) Acr.9 The decision was not expressed to be conditional. The State Solicitor was not present at this meeting but his alternate, Deputy State Solicitor Jeklin Talonu, was present.1°

2,9 On 10 March 2014, Mr Eludeme wrote to Mr Vele explaining that the CSTB had approved the issue of certificates of inexpediency in respect of the local and international advisers but qualified that approval by noting that it was subject to the State Solicitor's clearance and receipt of the original authority to pre-commit,"

2.10 On 12 March 2014, the Acting Board Secretary of the CSTB, Mr Babaga Naime, wrote to the State Solicitor seeking advice in relation to the certificate of inexpediency. 12

2.11 In a letter from Ashurst to UBS dated 12 March 2014. Ashurst set out a table of the status of all conditions precedent which confirmed that the condition precedent relating to the certificate of inexpediency had been 'Isiatisfied by way of attachment to the verification certificate of the State'. 13

2.12 On the same day, the State entered into the Bridge Loan and Collar Loan with UBS, relying on the provision of the certificate of inexpediency to satisfy

the conditions precedent referred to above.

2.13 On 20 March 2014. the State Solicitor wrote to Mr Naime declining to give the required legal clearance for the certificate of inexpediency on the basis that it was not requested for one of the four grounds listed in the relevant Financial Instructions and could not be issued retrospectively to cover a contract that had already been performed. However, he advised that: 'Treasury and the Central Bank may consider paying for the services rendered by the Consultants on a Quantum Meruit basis,' and noted that 'the payment for legal services should be done in consultation with the Attorney General."

2.14 On 28 March 2014, Mr Eludeme wrote to Mr Vele attaching the letter from the State Solicitor dated 20 March 2014 and noting that the certificate of inexpediency cannot be issued nor could the CSTB retrospectively approve the payments of services for the engagement of the consultants.15 Mr Eludeme advised instead that: 'The engagement and payment of legal services from private firms must be done in consultation with the Attorney General. Payment for the provision of legal services should be made on Quantum Meruit basis provided the State is fully satisfied with the services rendered."

2.15 On 31 March 2014, the State Solicitor sent an email to Mr Jimmy Maladina in relation to the State Solicitors letter of 20 March 2014:

My advice is already there to pay based on quantum meruit.

Treasury can pay everybody including lawyers based on that.
What I meant in my last paragraph is that Secretary 'may' (not mandatory) inform (I used the word consult) the AG based on SS advised we paid based on quantum meruit from Treasury Secretary's vote.
He can use my advise [sic] to make payments17

2.16 On 1 April 2014, the Treasury relied on advice regarding payment of the legal and financial advisers provided by the State Solicitor via telephone.'8

2 7 On 3 April 2014, the CSTB met and resolved to rescind its decision to engage the consultants in reliance on the State Solicitor's advice in relation to the certificate of inexpediency.19

2.18 On 10 April 2014, Mr Eludeme wrote to Mr Vele advising of the CSTB's rescission of its decision and advising that this 'effectively nullifies the issuance of the Certificate of inexpediencies for these engagements. '20

2.19 Before the Commission Mr Vele incorrectly contended that the CSTB had an 'unfettered discretion' to issue a certificate of inexpediency if it determined that it was inexpedient or impracticable to require a tender process. Mr Vele also contended the Financial Instructions which limited the grounds on which a certificate of inexpediency can be issued were inconsistent with the Public Finances (Management) Act 1995.2'

2.20 However, the Commission's view is that clauses 11.1-11.2 of Financial Instruction 1A/05 are not inconsistent with the Public Finances (Management) Act 1995. It is not inconsistent with s.40(3) of the Public Finances (Management) Act 1995 for Financial Instructions to be made which prescribe the grounds on which the CSTB may certify that the inviting of tenders is impracticable or inexpedient. This facilitates the better control and management of public moneys and public property.

2.21 Further, in Robmos Ltd v Punangi [2008] PGNC 70; N3372 (14 May 2008) (a case cited by the State Solicitor in his advice dated 20 March 2014), the relevant Financial Instructions were in issue and there was no suggestion or finding that they were invalid.22 The National Court also held that the Financial Instructions have 'similar force and effect' as the Public Finances (Management) Act 1995.

2.22 It is clear that the issuing of the certificate of inexpediency by the CSTB on 7 March 2014 was contrary to clauses 11.1-11.2 of Financial Instruction 1A/05.

This is because:
(a) there was no declared natural disaster, defence emergency, health emergency, or situation of civil unrest in existence
(b) the request for the certificate was also deficient on its face and should have been recognised as such

2.23 Further, there was no express power in the Public Finances (Management) Act 1995 for the CSTB to issue a conditional certificate of inexpediency, to the extent that it purported to do so.

2.24 It is unclear whether 'executed', in relation to the prohibition against certificates of inexpediency being issued retrospectively to cover a contract already 'executed', means signed or performed. If it is the former, which is the normal meaning of 'executed', it appears as though all of the contracts had not already been executed (signed) when the certificate of inexpediency was issued.23 However, as the apparent purpose of the CSTB is to ensure proper government contracting and expenditure, it seems more likely that 'executed' means either signed or performed.

2.25 It is unclear whether the improper issuance of a certificate of inexpediency would invalidate a contract, or prevent payment being made on a quantum meruit basis. However, routine payment on a quantum meruit or contractual basis would remove the CSTB as an effective check on proper government contracting and expenditure. From the advisers' (and UBS') perspective a condition precedent had not, strictly, been complied with but since the same result was achieved there was no complaint.

Recommendations

1. The Commission therefore recommends a review of the circumstances in which work done in breach of the Public Finances (Management) Act 1995 and the Financial Instructions made under it can be paid on a quantum meruit basis.

3. Conclusion and Recommendations

3.1 In relation to the approval by Mr Vele of the advisory fees paid to:

(a) PLG and Pacific Capital Limited up to a limit of PGK 9,000,000

(b) UBS, Ashurst, NRF and KPMG up to AUD 14,555,759

The Commission concludes that the certificate of inexpediency should not have been issued, the contracts for this work should not have been made without public tender, and fees for this work should not have been paid until they had been properly assessed according to law, which they never were.

3.2 The Commission accordingly concludes that the CSTB failed to discharge its duties. As such, one of the checks and balances on government expenditure failed.

3.3 Ashurst and PLG should also have appreciated that the certificate of inexpediency could not lawfully be issued and advised their clients accordingly

Recommendations

1. The Commission recommends a review by the Attorney-General of the circumstances in which work done in breach of the Public Finances (Management) Act 1995 and the Financial Instructions made under it can be paid on a quantum meruit basis.

'Letter UBS to State, 12 March 2014. Exhibit 5, NRF. 001.003.5499.

Bridge Facility Agreement - Project Kumul, 12 March 2014. Exhibit 5, NRF.001.003.5690.

3 See also Statement by UBS AG dated 4 August 2021, 197(b)]. Exhibit 6, UBS.0001 0002.0007.

Letter D. Vele to P. Eludeme, 6 March 2014, Exhibit 395, WIT 0019.0002_0435.

Request for Certificate of Inexpediency, 7 February 2014 (sic], Exhibit 18, WIT.0023.0001.0017.

Request for Certificate of Inexpediency, 7 February 2014 [sic], Exhibit 18, WIT,0023.0001.0017.

7 Request for Certificate of Inexpediency, 7 February 2014 [sic], Exhibit 18, WIT.0023.0001.0017.

'Certificate of Inexpediency - Request for Certificate of Inexpediency, Exhibit 396 7 February 2014 [ski, WIT9019.0002.0438.

9 Minutes of CSTB meeting no. M-0/14, 7 March 2014, Exhibit 23, WIT.0023.0001.0028 at page 0033

ix Minutes of CSTB meeting no. M-0/14, 7 March 2014, Exhibit 23, WIT.0023.0001.0028.

Letter P. Eludeme to D. Vele, 10 March 2014, Exhibit 00.1, WIT.0019.0004.0038.

12 Letter D. Vele to D. Rolpagarea, 12 March 2014, Exhibit 394. WIT.0019.0002.0431

13 Letter Ashurst to UBS, 12 March 2014, Exhibit 6, UBS. 00019001.0857.

17 Letter D. Rolpagarea to B. Naime, 20 March 2014, Exhibit 399, WIT.0025.0001.0190 at page 0193.

IS Letter P. Eludeme to D. Vele 28 March 2014, Exhibit 401, WIT.0025.0001.0203.

ix Letter P. Eludeme to D. Vele, 28 March 2014, Exhibit 401, WIT.0025.00019203.

II Email J. Maladina to W. Isu and D. Vele, Fwd. PAYMENT, 1 April 2014, Exhibit TT, WIT.0014.0013.0049.

ix Email A. Hamou to W. Isu and D. Vele, 1 April 2014, RE: Payments for Pacific Legal Group Lawyers and Pacific Capital Limited, Exhibit TT,
WIT.0014.0013.0050.

'9 Minutes of CSTB meeting no. M-05114, 3 April 2014, Exhibit 400. WIT.0025.0001.0194 at page 0199

20 Letter P. Eludeme to D. Vele, 10 April 2014, Exhibit 28,

WIT. 0023.0001.0046.
21 Affidavit of Dairi Vele sworn 26 April 2021,1521j, Exhibit 00, WIT.0014.0007.0001_
22 See in particular Robmos Ltd v Punangi [2008] PGNC 70; N3372 (14 May 2008) (58]-(59], [61], [63].
23 The NRF contract (retainer) was signed prior to the certificate being issued. It is likely also that the Ashurst retainer (with UBS) was signed prior, but
the Commission did not receive any direct evidence in that regard. Similarly, the KPMG contract aopears to have been entered into prior but the
Commission did not receive the signed contract into evidence. There was no signed retainer with FLG

CHAPTER 15

The lawfulness of the UBS Loan

Summary

This chapter considers whether the right statutory procedures were used for the approval of the UBS
Loan.

1. Relevance of this chapter to the Terms of Reference

1.1 This Chapter concerns items 1(h), (i) and (m) of the Terms of Reference:

(h) Whether legal and administrative processes were followed regarding the loan from UBS, including not limited to:

(i) How was the process commenced?
(ii) How was UBS selected?

(iii) What process was utilized?
(iv) What were the terms of the loan?

(i) What processes have been utilised in the past to obtain loans?

(m) Whether legal and administrative processes were followed to buy Oil Search

shares in 2014.

1.2 The State's compliance with s. 209 of the Constitution and the Loans (Overseas Borrowings) (No. 2) Act 1976 (Loans Act No. 2) in obtaining the UBS Loan is among the core issues in this Inquiry. The relevant terms of those Acts are set out below.

The Liquefied Natural Gas Project (State Participation) Act 2008

1.3 With one exception, State practice since Independence is that the raising of loans from overseas financiers has been effected under the Loans (Overseas Borrowings) Act 1973 or the Loans Act No. 2.

1.4 The one exception concerns the Exchangeable Bond Transaction, with the enactment of the Liquefied Natural Gas Project (State Participation) Act 2008, albeit with no specific reference to IPIC and the terms of the transaction. The legislation was necessary for the purpose of facilitating the Exchangeable Bond Transaction' by permitting IPBC to issue the bonds. It was required by clause 2.1(d) of the Subscription Deed between IPBC and IPIC2 and does not set a precedent.

1.5 By s. 1(6) of that Act, it was declared:

(6) In so far as this Act is a law to authorise the raising of loans, it is hereby declared that this is a law to authorise and control the raising of loans for the purposes of Section 209 of the Constitution and that it is a law that is made on the recommendation of the Head of State, acting with, and in accordance with, the advice of the National Executive Council, as required by Section 210 of the Constitution.

1.6 Section 7 states:

7. AUTHORISATION OF LNG PROJECT BORROWING PROPOSAL.

(1) Notwithstanding any provision of the Independent Public

Business Corporation of
Papua New Guinea Act 2002, the LNG Project Borrowing Proposal (including any
document contemplated by it and whether executed before or after this provision comes
into effect), and the raising of financial accommodation and the expenditure of moneys
pursuant to the financial arrangements referred to in the LNG Project Borrowing Proposal
(including any document contemplated by it and whether executed before or after this
provision comes into effect), are hereby ratified and approved and, without limitation,
IPBC is authorised to proceed with the financial arrangements substantially in
accordance with the LNG Project Borrowing Proposal.

1 7 The Liquefied Natural Gas Project (State Participation) Act 2008 was certified on 22 December
2008. It is important to note that, as mentioned above, such an Act was a contractual pre-
condition to the operation of the Exchangeable Bond Transaction contract: the Act is neither a
recognition that a separate statute should always be enacted nor a precedent of relevance for the
UBS Loan.

1.8 As to this, Mr John Leahy, a Papua New Guinean lawyer retained to advise IPIC on aspects of
local law, relevantly stated:
I recall that in conversations between the various legal advisers, consideration was given
to issues that needed to be addressed in order for the IPIC Exchangeable Bond
transaction to proceed. One of the issues considered was obtaining the appropriate
approvals under Section 209 of the Constitution. ...

I recall the Subscription Agreement was expressed to be subject to a number of
conditions precedent including:

(a) that the ... Parliament enact necessary legislation to provide for IPBC to be the state
nominee in relation to the PNG LNG project; and

(b) that the PNG LNG borrowing proposal be authorised by legislation of the ...
Parliament in accordance with Section 209 of the Constitution of the Independent State of
Papua New Guinea, which was ultimately passed. ...

The effect of the conditions precedent referred to in paragraph 20(b) is that the loan could

not have proceeded unless the Parliament of Papua New Guinea authorised the loan in accordance with Section 209 of the Constitution.

2. The UBS Transaction – relevant chronology of events

2.1 Those involved in preparing the UBS Loan documentation were conscious of the need to comply with s. 209 and, eventually, the Loans Act No. 2, although different views were expressed as to what was required for compliance. The details are set out comprehensively elsewhere in this Report, however the following matters may be mentioned here.

2.2 On 5 March 2014, Mr Dairi Vele wrote to Mr Daniel Rolpagarea, the State Solicitor, requesting that the State Solicitor review the documents relating to the proposed UBS Loan and 'provide clearance' before the documents went to the NEC on 6 March 2014.3 The documents were provided to the State Solicitor by PLG earlier on 5 March 2014.4

2.3 On 5 March 2014, the State Solicitor replied to Mr Vele's letter. The State Solicitor advised that 'section 209 of the ... Constitution also requires the Parliament's approval be obtained for this Bridge and Collar Loans which totals up to Australian dollars 1.225 billion through the budgetary process.'5

2.4 On 6 March 2014, the NEC held Special Meeting 08/2014.6 At that meeting:

(a) the Hon Peter O'Neill, over the objection of Treasurer the Hon Don Polye, introduced an urgent submission to the NEC for the purchase of 149,390,244 million Oil Search shares for AUD 1.239 billion, funded by UBS
(b) the NEC by majority endorsed that submission
(c) the NEC advised the Governor General to approve the UBS Loan pursuant to s. 2(1 j of the Loans Act No. 27

2.5 When Mr Polye declined to give effect to the NEC decision

he was removed by Mr O'Neill, who took on the Treasury portfolio, so that he could sign relevant documents in that capacity Subsequently, the Hon Patrick Pruaitch became Treasurer.

2.6 On 7 March 2014, Mr Vele wrote to the State Solicitor advising him of the NEC decision and requesting the State Solicitor's 'legal clearance'.8

2.7 On 9 March 2014. the State Solicitor Mr Rdpagarea replied to Mr Vele's letter. he:

(a) referred Mr Vele to his 5 March 2014 letter

(b) advised that the appropriate person to execute loan agreements on behalf of the State was the Treasurer, pursuant to s. 2(7) of the Loans Act No. 2

(c) referred to the need to comply with s. 209 of the Constitution, but, given the urgent nature of the transactions, confirmed the Treasurer could execute the documents9

2.8 On 10 March 2014:

(a) the State Solicitor advised the Governor General to execute the LABS Loan documents upon receipt of advice from the NEC1°

(b) the IPBC board approved the execution of the Payment Direction Deed by NPCP Kroton, while noting the State Solicitor's advice in respect of s. 209 of the Constitution"

2.9 On 12 March 2014, the various contracts necessary for the UBS Loan were executed.

2.10 On 26 March 2014, some two weeks later, Mr Vele sent another letter to the State Solicitor regarding the s. 209 constitutional approval for the UBS Loan. The letter requested confirmation, in writing, of the advices given and steps taken by the Office of the State Solicitor to obtain the necessary authorisation of the Parliament pursuant to s. 209(1) of the Constitution.''

2.11 On 27 March 2014:

(a) the State Solicitor replied to Mr Vele's letter'3

(b) the NPCP Kroton board met and discussed the UBS Loan and the advice received from external lawyers, including concerns about the application of s. 209 of the Constitution. The NPCP Kroton Company Secretary, Mr Rogen Wato, sent a text message to Mr Stephen Lewin, a lawyer at Leahy Lewin Lowing Sullivan Lawyers, regarding this concern. Mr Lewin responded, 'reaffirming his view that the State/UBS loan transaction has not

been in breach of s 209 of the Constitution', but asked that management obtain a second opinion and provide it to the NPCP Kroton board"

2.12 In his reply to Mr Vele of 27 March 2014, the State Solicitor advised that:
(a) s. 209 approval could be obtained retrospectively and that this was appropriate for the UBS Loan, as it was impracticable for the NEC to recall Parliament at the time it made its decision, due to the urgency of the matter. The State Solicitor also noted s. 212 of Constitution, regarding expenditure without prior Parliamentary approval
(b) Parliament could invoke its power under s. 212 of the Constitution to facilitate the transaction' that had already been entered into. The State Solicitor said it was important that the approval by Parliament be expressed to have retrospective effect

2.13 The failure to obtain parliamentary approval or ratification of the UBS Loan rapidly became controversial.

2.14 Thus, on 19 May 2014, former Treasurer Mr Polye filed an application in the Supreme Court, pursuant to s. 18(1) of the Constitution. seeking declarations that, on the proper interpretation and application of s. 209 of the Constitution and the Organic Law on the Sovereign Wealth Fund 2012, the executive actions of the Prime Minister and the NEC in entering into the UBS Loan without parliamentary approval were unconstitutional and illegal and that the transaction was illegal and unenforceable against the State.16 There was no final court determination on this issue. The Supreme Court application was discontinued in 2017.16

2.15 Further, on 23 May 2014, the Ombudsman Commission, anticipating its eventual conclusions, sent a letter to Mr Vele in relation to the UBS Loan asserting

that:

(a) the required legal and financial processes were not followed
(b) consultation with the relevant State agencies did not occur
(c) the UBS Loan was not approved by the National Parliament
(d) the Prime Minister did not raise the proposed loan with Parliament
(e) the proposed loan exceeded the GDP to debt ratio of 35%
private law firms were engaged without approval from the Attorney-Genera
(g) the borrowing exceeded 125% of the estimated internal revenue
(h) the borrowing was not appropriated in the 2014 budget and therefore breached the Appropriation Act 2014
the General Business Trust of NPCP could not be used as security and
(jj the UBS Loan did not comply with s. 40(3)(b) and s. 47B of the Public Finance (Management) Act 1995 in relation to the issue of a Certificate of Inexpediency and authority to pre-commit17

2.16 On 18 August 2014, Mr Anthony Yauieb sent an email to various members of the Treasury Department attaching a draft bill for Parliament to 'correct some of the constitutional breaches with respect to the UBS loan'.18 No such bill was introduced.

2.17 On 5 September 2014, Mr Pruaitch, as Treasurer, made a Ministerial Statement to Parliament in relation to the UBS Loan.19 The draft Hansard suggests that Mr Pruaitch tabled the UBS Loan

transaction documents in Parliament in the following terms: 'Mr Speaker, this brings me to the question of specific elements of financing the transaction which are being fabled today '.2°

2.18 However, Mr Pruaitch's oral evidence to the Commission was that he did not recall whether documents were actually 'tabled' or otherwise presented to Parliament. Instead, he merely gave a

Ministerial Statement for Parliament to note. Mr Pruaitch was questioned in this Commission as follows:

Q: And if we could go to page 7 of that Hansard, and the underlined section, it states:
'Mr Speaker, this brings me to the core question of the specific elements of financing the transaction which I tabled today.' Can you see that at the Hansard?
A: Yes.
Q: Does that confirm that you tabled the documents that you confirm that that in fact happened?
A: It is not a document; it is a ministerial statement.
Q: Yes. What you said there if you could read that it says: 'The elements of the financing of the transaction which have been tabled today.'
A: I do not recollect tabling any documents relating to UBS on the floor of Parliament. / remember giving a ministerial statement.
THE CHAIRMAN: You gave a full statement about that loan and described all the elements.
A: Chief Commissioner, a statement is a ministerial statement. Ministerial statements are always noted by Parliament. ...
Q: No, I am talking about the content. I think she is trying to get to the content. You gave a full – in this statement you gave a full explanation about this loan and the - - -
A: Well, I had to do that explanation - - -
Q: - - - necessary elements of the loan.
A: I had to do that explanation because this event happened earlier. But I do not recollect tabling any documentation pertaining to [the] UBS transaction.21

2.19 On 18 November 2014, Mr Pruaitch presented the 2014 Supplementary Budget and the 2015 National Budget to Parliament. Mr Pruaitch stated in Parliament that: ' ... the O'Neill-Dion Government made the decision to purchase 10.1 per cent stake in Oil Shares as part of the 2014 Supplementary Budget in accordance with Section 209 of the Constitution :22

2.20 The Supplementary Budget, passed on 25 November 2014, appropriated additional interest on loans.23 The acquisition of Oil Search shares was mentioned by Mr Pruaitch in that budget, albeit only once.

2.21 Hansard records that the Supplementary Budget was debated on 25 November 2014.24 On 25 November 2014, Mr Polye delivered the 'Budget in Reply' speech on behalf of the Opposition. During that Parliamentary sitting:

(a) PGK 204.3 million in the 2014 Supplementary Budget was allocated to additional interest costs arising from the bridge loan
(b) Mr O'Neill, as Prime Minister, referred to and justified the Oil Search transaction
(c) Mr Polye referred to PGK 190.7 million of funds in interest costs which had not been allocated to a particular transaction in the Supplementary Budget. He noted that, due to LNG inflows, there was no need to obtain a PGK 2.2 billion loan and create budget deficits; and stated: 'the Government [had] been shifting its focus for providing services to direct involvement in risky business ventures ... '
(d) the Hon Byre Kimisopa made statements, noting the high debt levels, and suggested the proposition of balancing the budget in 2017 was unlikely. Mr Kimisopa also said:

> I am of the view that if there is any move to bring the debt under control, we start to seriously consider the Government offloading some of its shares in Oil Search. We hold 10.1 per cent shares, which is approximately 149 million shares that the PNG Government has in Oil Search ... The company as it is has a very poor dividend history. The highest it has paid by way of dividend since 2012, is 12 cents in a dollar. It has never paid more than 20 cents. Going by the Budget book, it had returned only K7.9million into the PNG consolidated budget this year, by way of dividend.

(e) the Hon Belden Namah said that:

> As part of the 2014 Supplementary Budget and in accordance with section 209 of the Constitution, we have appropriated for interest payments and it is anticipated in the next month National Petroleum Company (sic] that PNG will refinance this transaction and take ownership of the shares.
>
> ... this Budget is bordered on fraudulent misrepresentation because this statement is a testimony of the rush and irresponsible nature of Government's decision to buy or to purchase the shares while disregarding the established norms and practices.
>
> They have no idea where the shares will be parked. They have not considered loan servicing plans and this is obvious from the loans financing agreement which ... states that in the event that the Government fails to service the loan, TUBS] has the first call on the proceeds of the LNG Project.
>
> ... One man has signed the UBS loan unilaterally without prior approval of the Government and this is what I call bordered on fraudulent misrepresentation.
>
> Furthermore, the Government has now seen the importance of constitutional compliance with Section 209 and try to slip in to make it look right by legitimising the crime that they have already committed.25

2.22 On 25 November 2014, Parliament passed the Supplementary (Appropriation) Act 2014. Section 4(d)(vi) of this Act provided that PGK 204,300,000 was approved to be allocated to the Treasury to cater for additional interest costs, although the UBS Loan was not referred to expressly.

Further references to Legislation

2.23 Section 2(1 of the Loans (Overseas Borrowings) Act 1973 states:

The Head of State, acting on advice, may, on behalf of the State, borrow from or through overseas financial institutions, in such manner and on such terms and conditions as are agreed on by the Head of State, acting on advice, and the institutions, sums not exceeding in total the sum of K65,000,000.00 or the equivalent in other currencies, for [various listed purposes].

2.24 Section 2(1) of the Loans Act No. 2 is in similar terms, although relevant differences include that one of the listed purposes for borrowing is 'the purchase of equity in companies'. Section 2(3) states that the sum that may be borrowed should be such that the total value of overseas commercial debt does not exceed 125% of the estimated internal revenue for the year in which the borrowing takes place except as a result of bridge financing. Section 2(8) requires the Minister to cause a copy of the loan agreement to be 'laid before the Parliament for its information' Ms soon as practicable after the execution of a loan agreement'.

2.25 The Loans Act No. 2 appears to have been enacted because the view was taken that the borrowing authority under the Loans (Overseas Borrowings) Act 1973 had been exhausted, although the 1973 Act remains in force. This view is confirmed by the second reading speech for the Loans (Overseas Borrowings) (No. 2) Bill 1976 by (the then) Minister, the Hon Chief Sir Julius Chan. His second reading speech also indicates that:

(a) the purpose of the Bill was to enable the Government to borrow through financial and banking institutions in overseas capital markets

(b) the inclusion of the 'additional purpose' in s. 2(1)(c) was 'considered necessary to enable the Government to use money raised overseas so as to finance investments in companies which are of national important[cej

(c) two limitations were intended: first, an 'important principle' that loans should contribute to growth in revenue and be self-funding; second, relating to Parliamentary approval and control: 'if the Government wishes to spend any borrowed moneys, it will be necessary for Parliament to approve its expenditure in an Appropriation Bill. The new loans authority, like the old one it replaces, is subject to all the

safeguards on Parliamentary control[s] of
Government expenditure that are in [the]
Constitution'26

2.26 Sir Julius Chan reinforced those matters in his oral evidence to the Commission.27 But neither
that evidence nor the second reading speech suggested that prior parliamentary approval was
required before borrowing under the Loans Act No. 2.

2.27 Sections 35 and 36 of the Public Finances (Management) Act 1995 state:
35. Restrictions on borrowing

(1) The State may not borrow money except under and in accordance with an Act
of the Parliament.
(2) Moneys borrowed under Subsection (1) from whatever sources shall not
exceed the limit provided for by the Central Banking Act 2000.
(3) All debt charges for which the State is liable in respect of loan moneys shall be
charged on the Consolidated Revenue Fund.
36. Advances and overdrafts

(1) The Minister may, for and on behalf of the State, borrow moneys–

(a) from such domestic and external sources; and

(b) on such terms and conditions.
as the Head of State, acting on advice, approves, in order to meet temporary
deficiencies in revenue in a fiscal year.
(2) Moneys borrowed under Subsection (1) from whatever sources shall not
exceed the limit provided for by the Central Banking Act 2000.

(3) The principal and interest on moneys borrowed under Subsection (1) shall be
charged to the Consolidated Revenue Fund and are payable

from the Fund.

2.28 The limit provided for in the Central Banking Act 2000 is PGK 100,000,000 (or such other
adjusted amount as agreed by the Governor and the NEC from time to time and published in the
National Gazette for the sole purpose of taking into account movements in the general level of
prices in Papua New Guinea): s. 55(4)(a) of the Central Banking Act 2000.

3. Evidence as to whether legal and administrative processes were followed

3.1 The Commission received much evidence as to whether the s. 209(1) and the Loans Act No. 2
were complied with: the evidence of the key witnesses is canvassed below.

3.2 Former Prime Minister Mr O'Neill stated that:
(a) the UBS Loan was an investment and therefore did not 'fall' within the scope of s. 209[28]
(b) investments and expenditure by SoEs were not required to be approved by Parliament[29]
(c) there was no requirement that the UBS Loan be approved by the Parliament before it was
entered into, and by the time the Budget Papers were presented in November 2014, the
loan did not need to be included because it had been novated to an SoE[30]

3.3 Mr O'Neill also said (with some justification):

> Parliament in my recollection has never [sat] for every specific [loan] or parliament [has
> not been] recalled for every specific loan approval of transaction ... so the usual process
> is that it comes through the budgetary process and budgets are presented either through
> supplementary budget or through the normal budget presentation at the end of its year.
> And that is done in November or – November – December session of parliament.[31]

3.4 Former Treasury Secretary, Mr Vele said that:
(a) The process for loans from the private sector is the Loans (Overseas Borrowing) (No. 2)
Act 1976[32]
(b) '[a]// types of Loans must also have Section 209 of the Constitution authorisation by way of
the budgetary process'[33]
(c) where a loan is negotiated, executed and drawn down in the same year, the authorisation
for the purposes of s. 209 is obtained by way of a supplementary budget

(d) his understanding of the requirements of s. 209 and other relevant legal requirements was that the UBS Loan could be entered into on the basis that at some point, ideally before the next budget, it would be included in a budget or otherwise approved by the Parliament35

(e) he had identified 288 external loans that the State had obtained, without Parliamentary approval being obtained prior to execution; those loans were reflected in the budget for that year or in a supplementary year36

(f) 'sometimes it is impractical to have [approval of] Parliament prior to a loan being done'37

(g) if the loans had been novated to an SoE by the time the Budget / Supplementary Budget was delivered, it would not have been necessary to give consideration to s. 209 of the Constitution3E.

(h) he followed the advice of Ashurst and NRFA that the 'mechanics' of s. 209 were contained in the Loans Act No. 2 and that by fulfilling the requirements of this statute the requirements of s. 209 were complied with.39 In summary, Ashurst advised that under the Constitution, the State may only acquire, hold and dispose of property, raise loans and make contracts, in accordance with an Act of Parliament. They advised that the relevant Act for raising loans overseas is the Loans Act No. 2, which permits borrowing by the State through overseas financial institutions for specified purposes, including the purchase of equity in companies. NRFA (PLG) agreed with the Ashurst advice40

(i) he followed the advice of the State Solicitor of 5 March 2014, that parliamentary approval could be obtained through the budgetary process and that such approval could be given after the relevant NEC decision"

0) on 18 November 2014, the Treasurer (Mr Pruaitch) placed the UBS Loan transaction

documents on the desk of the Clerk of Parliament.42 (This positive recollection must be set against Mr Pruaitch's inability to confirm whether that had occurred.)

3.5 Mr Isaac Lupari considered that retrospective Parliamentary approval was possible.43

3.6 Then Attorney-General, the Hon Kerenga Kua, stated that:

(a) the Constitution begins with the phrase 'notwithstanding anything else in the Constitution or elsewhere', which he took to mean that whatever the Loans Act No. 2 states, the Constitution overrides and prevails"

(b) the 'minimum requirement of section 209 ... is the retention of the power to approve or reject [a] particular loan ... done by a law made by Parliament once all the preparatory work is done and brought to the parliament for approval45

(c) retrospective approval pursuant to s. 212 of the Constitution was possible in limited circumstances, not including borrowings or revenue raising for the purposes of commercial investment46

(d) s. 209 had been 'breached' in the context of the UBS Loan, irrespective of the urgency of the transaction. If the State wanted to proceed with the UBS Loan, it should have brought a bill urgently before Parliament and sought parliamentary approval even if this involved the urgent recalling of Parliament.47

3.7 Mr Rolpagarea,48 the then (and now) State Solicitor gave a statement to the Commission which included the following evidence:

The Act(s) of Parliament referred to in Section 209 prescribe in detail the requirements and processes for revenue generation activities or expenditure within the broad limits set by Parliament for any given year. These Acts of Parliament include inter alia: the Public Finance[s] (Management) Act 1995 (PFWIA), the Loans (Overseas Borrowings) Act

[1973] Chapter 133 (Loans Act), and the National Procurement Act 2018 (NPA), and are applied depending on the aspect of Section 209 which it regulates.

... The Loans Act is the principal Act of Parliament that exists for the purposes of Section 209(1) regarding the obtaining of loans ...

In summary, the Parliament sets the parameters for the activities of the Executive by passing Acts of Parliaments to regulate activities prescribed under Section 209, through legislation such as the Loans Act. The Parliament further exercises continuous control and authorization by scrutinizing annual budget submissions and by passing annual Appropriation Acts, whereby it sets ceilings on certain revenue generation activities and expenditure. 49

3.8 In oral evidence to the Commission, Mr Rolpagarea:

(a) said that 'borrowing or the expenditure by the State must first be approved and authorized by Parliament and then it can be processed through the legislation'50

(b) noted that s. 4 of the Loans Act No. 2, which provides that yafil payments of principal and interest and other charges payable under a loan agreement shall be made out of the Consolidated Revenue Fund' and indicated that even if a loan was effected under that statute, it still had to be reflected in the Budget process51

(c) in relation to the possibility of retrospective approval, said that '[ojutside of Section 212, I am of the view that prior parliamentary approval is mandatory for all matters concerning revenue raising and expenditure'52

(d) in relation to the UBS Loan, said that it 'ought to have been pre-approved by Parliament during the 2014 budgetary process' and that the requirements of s. 209 were not complied with53

(e) consistent with his advice to Mr Vele on 27 March 2014,54 agreed that it is possible for loans executed during a fiscal year to be appropriated in a subsequent supplementary budget55

disagreed that 'most' loans were only included in the budgetary process once they had been drawn down56

3.9 Dr Lawrence Kalinoe, the Secretary for Justice, agreed with the State Solicitor's advice of 27 March 2014.57

3.10 Former Treasurer, Mr Polye, in his affidavit sworn on 8 June 2021, stated that one of the reasons he did not agree to 'sign for the K3 billion loan' (the UBS Loan), as Treasurer, was because it would breach the 2014 Appropriation Act, in particular because 'the loan had not been planned nor budgeted [for] in the 2014 Budget. '58

3.11 The Prime Minister, the Hon James Marape, in his evidence to the Commission, said that in the 2013 Budget there should have been an indication to the Parliament as to the UBS Loan which was to occur in 2014.59

3.12 Significantly, former Treasurer Mr Pruaitch:

(a) stated that s. 209 was not complied with in relation to the UBS Loan69

(b) did not recall preparing a bill for the UBS Loan

(c) did not believe that Parliament had approved the UBS Loan appropriately and compared the process to that of the Exchangeable Bond Transaction, during which the approval was 'done earlier than the actual transaction'61

3.13 Mr Anthony Yauieb, in his statement dated 28 July 2021:

(a) stated that the UBS Loan did not comply with s. 209 of the Constitution

(b) stated that no appropriation bill was passed by Parliament for the purchase of the Oil Search shares or the interest costs of the UBS Loan62

Consideration and Conclusions

3.14 Although, as earlier noted, this Commission, unlike a Court, cannot make binding declarations as to the law or determinations of legal rights, nor review the conclusion of the Ombudsman Commission, it must, within those limits, seek to answer

the Terms of Reference. The Commission has carefully considered the evidence including the different views of witnesses and lays out the principal approaches to the questions of whether the UBS Loan came within s. 209(1) of the Constitution and, if so, whether its provisions were complied with; that is, whether the Loans Act No. 2 standing alone was a sufficient compliance with constitutional requirements and if so, was that Act complied with.

3.15 For the reasons explained below, the Commission does not think it appropriate to resolve the alternative views about the lawfulness of the UBS Loan. But these issues are of critical importance to the State's fiscal regime. They have not been raised and debated in Parliament and in government circles prior to 2014 as they have been before this Commission. The Commission is of the view that the Supreme Court should now resolve these important questions.

Recommendation

1. The Commission strongly recommends that a constitutional reference be brought by an authority specified in s. 19(2) of the Constitution without delay, as the Court's decision will guide future commercial loans that may be contemplated by the State for other projects that may be in the pipeline.

3.16 Should those charged by the Constitution to bring such a reference delay or fail to do so due to their 'perceived inability, neglect or apathy'63 any concerned citizen with sufficient interest may bring those proceedings under s. 18(1) of the Constitution.

CHAPTER 15 > The lawfulness of the UBS Loan

Recommendation

1. The Commission recommends that the following questions be referred to the Supreme Court under s. 19(1) of the Constitution.

A. Does s. 209(1) require pre-approval by the Parliament of all foreign loans to the State, and if so, may this be done by any and if so which of the following:

(a) Prior Act of Parliament

(b) Prior reference to the loan in an annual or supplementary budget estimate

(e) Prior mention of the substance and amount of the loan in Parliament by a Minister

B. Is the Loans (Overseas Borrowings) No 2 Act 1976 inconsistent with s. 209(1) of the Constitution in that it makes no provision for prior approval of the loan by Parliament either under the national budget process or a supplementary budget or by a specific Act of Parliament?

The competing arguments

3.17 The starting point is the proper construction of s. 209(1) of the Constitution. The section provides:

> (1) Notwithstanding anything in this Constitution, the raising and expenditure of finance by the National Government, including the imposition of taxation and the raising of loans, is subject to authorization and control by the Parliament, and shall be regulated by an Act of the Parliament.

3.18 It is to be construed in the context in which it appears in the

Constitution. Section 20964 appears along with ss. 210, 211 and 212 in the Constitution, Part VIII 'Supervision and Control, Div 1 'Public Finances', Subdivision A The Parliament and Finance'.

3.19 It will be noticed that s. 209(1):

(a) is a provision which applies 'Notwithstanding anything in this Constitution'

(b) concerns 'the raising and expenditure of finance by the National Government, including the imposition of taxation and the raising of loans'

(c) provides that such activity is 'subject to authorization and control by the Parliament'

(d) mandates that such matters 'shall be regulated by an Act of the Parliament'

3.20 Sections 209(2), 209(26) and 209(3) deal with related topics, namely the estimates of finance to be raised, expenditure proposed and annual and supplementary budgets and appropriations, for each of the three branches of government: Parliament, general public services and National Government, and judiciary. The interaction of s. 209(1) with these provisions is a key issue

3.21 Section 21265 deals with public expenditure of funds without prior budget approval but in accordance with an Act of Parliament, up to a limit of one third of the previously budgeted expenditure for the year.

3.22 Section 21066 requires Head of State recommendation in accordance with the advice of the NEC for the 'imposition of taxation, raising of loans or expenditure of public money'. There is no doubt the UBS Loan complied with s. 210.

3.23 Section 21167 requires that 'moneys of or under the control of the National Government cannot be expended except under the Constitution (a reference to ss. 209 and 212) or Act of Parliament,

and such moneys must be accounted for in accordance with law.

3.24 Sections 210, 211 and 212, and ss. 209(2), 209(2B) and 209(3) are important, but they do not detract from the primacy of s. 209(1), as its opening words, 'Notwithstanding anything in this Constitution', make clear.

3.25 Section 209(1) clearly vests ultimate authority on Parliament for 'the raising and expenditure of finance by the National Government, including the imposition of taxation and the raising of loans'

3.26 Such provisions are not uncommon, particularly but not only in constitutions with a Westminster heritage. As the plurality (Prentice DCJ and Williams J) of the Supreme Court said in Main v Tololo, Secretary for Education [1976] PGSC 9:

> This provision in s. 209 (1) of the Constitution is similar in kind to that first introduced in England by the Bill of Rights in 1689, 1 Wm. & M. sess. 2, c. 2. ... In accordance with the Constitution it is necessary to give this constitutional section its fair and liberal meaning, and to construe it so that it will take effect and not become attenuated. We consider that it must be construed so that it will maintain parliamentary responsibility for revenue raising and ultimate parliamentary control over public moneys, as contemplated by the recommendations of the Constitutional Planning Committee (Final Draft, Chapter 9, at 2, 3 and 5).

3.27 The cited provision of the Bill of Rights 1689 stated: 'That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.' By that provision, the struggle between the monarch/government on the one hand and Parliament on the other in England on this topic was decisively resolved in favour of Parliament. So, it is in the State through s. 209(1) of the Constitution.

3.28 But the other key part of this passage in Main v Tololo is the statement that emphasises 'ultimate parliamentary control over public moneys, as contemplated by the recommendations of the Constitutional Planning Committee'.

3.29 The Constitutional Planning Committee Report relevantly

states:

2. The Committee recognises that the National Parliament cannot exercise detailed control over each individual revenue-raising measure or every item of government expenditure. The executive arm of the government requires some flexibility in its negotiations with potential lenders or aid givers. It must be capable of responding quickly and effectively to changes in the international economy or in economic conditions in Papua New Guinea, so as to safeguard the situations of difficulty or urgency as they arise.

3. Parliament may do no more than set the broad limits within which loans may be negotiated, taxes imposed, aid received, and government funds spent. It may establish procedures to ensure the honesty of those who handle government funds, and to hold them

accountable for their actions. The National Parliament should we believe, scrutinise very carefully any proposal to delegate the power to levy or alter revenue-raising measures, to authorise loans, or to spend public monies, to another body. It should be wise to limit the National Parliament constitutionally in respect of these matters. Parliament cannot exercise detailed control over every aspect of the management of public funds. In a system of responsible government, the parliament entrusts certain responsibilities to the executive, while the executive, in turn, must display respect for the parliament. Our recommendations are designed to ensure that ultimate authority over all aspects of public finance shall be vested in the National Parliament.

6. Similarly the Committee recognises that the National

Parliament cannot approve the precise details of every government loan. The executive must be able to seek money where it is available on reasonable terms. But the National Parliament must be able to keep at least general control over the country's indebtedness. It must be able to prevent the raising of unnecessary loans, to determine the framework within which loans are negotiated, and to guard against Papua New Guinea becoming unduly dependent upon particular lenders.

3.30 Thus, the Constitutional Planning Committee report and the dicta in Main v Tololo recognise that. subject to Parliament's ultimate authority as expressed in its statutes, raising of loans by government may be urgent, and prior approvals may not always be feasible, the details of raising and expenditure of money being a matter for government.

3.31 There is a question whether the Loans Act No. 2 is inconsistent with s. 209(1) and thus invalid. Such a finding by a court would be very significant as so many actions since 1976 would thereby be potentially invalid.

3.32 The Commission however finds that there is a strong basis for concluding that the Loans Act No. 2 is in fact valid.

Loans Act No. 2

3.33 This Act, as substantially amended in 1986, relevantly provided as follows in 2014:

2. GENERAL BORROWING POWERS.

(1) The Head of State, acting on advice, may, on behalf of the State, borrow from or through overseas financial institutions, in such manner and on such terms and conditions as are agreed on by the Head of State, acting on advice, and the institutions, such sums as are specified in Subsection (3), for the purpose of–

(a) meeting the expenses of borrowing; and

(b) works and services of the State; and

(c) the purchase of equity in companies; and

(2) The Minister may, on behalf of the State, borrow from or through overseas financial

institutions, in such manner and on such terms and conditions as are agreed by the Minister and the institutions, sums for the purpose of–

(a) refinancing, swapping debt, substituting, replacing, rescheduling and prepaying the total or any portion of any debt owed by the State; or

(b) bridge financing, provided such borrowing shall not remain outstanding for more than six months.

(3) The sums which may be borrowed under Subsection (1) shall be such that the total value of overseas commercial debt which will be owed by the State after any borrowing shall not exceed 125% of the estimated internal revenue for the year in which the borrowing takes place except only as a result of any bridge financing and subject to Subsection 2(b).

(5) Any sum borrowed under Subsection (1) shall be applied only in accordance with the loan agreement, with such modifications (if any) as are agreed on by the Head of State, acting on advice, and the institution concerned.

(7) A loan agreement shall be made in the name of the State and be executed on behalf of the State by the Minister or a person authorized in writing by the Minister.

(8) As soon as practicable after the execution of a loan agreement, the Minister shall cause a copy of the agreement to be laid before the Parliament for its information.

(9) Nothing in this section or in a loan agreement constitutes an appropriation of the proceeds of a loan.

4. MONEYS FOR REPAYMENT OF LOANS.

All payments of principal and interest and other charges payable under a loan agreement shall be made out of the Consolidated Revenue Fund.

Arguments in favour of nothing further being required

3.34 Section 209(1) expressly provides that 'the raising and expenditure of finance by the National Government, including ... the raising of loans, is subject to authorization and control by the Parliament' and shall be regulated by an Act of the Parliament'. Although the Loans Act No. 2 does not expressly mention s. 209(1), its Long Title is that it is an Act to 'provide for the raising of loans overseas% clearly a reference to the subject matter of s. 209(1). It falls squarely within s. 209(1) and it is difficult to argue that it is not a valid exercise of legislative power. However, the question remains whether compliance with the Loans Act No. 2 is sufficient in the absence of prior parliamentary approval or mention of the loan.

3.35 The remainder of s. 209 contains machinery provisions, no doubt important, but far from requiring that all decisions on loans be approved by legislation prior to being entered into; they concern the machinery of how estimates of finance proposed to be raised, estimates of likely expenditure, and how resulting appropriations, are to occur. Nowhere in s. 209 does the Constitution require prior Parliamentary approval of loans either in the form of sufficient mention in the annual or supplementary budget and/or by specific Act of Parliament.

3.36 That conclusion can be more confidently reached given other provisions in the Constitution which expressly require prior Parliamentary approval before Executive Government action.

3.37 Section 117 concerns Government entering into international treaties. Section 117(3)-(5) of the
Constitution makes clear that prior Parliamentary approval is a pre-condition as follows:

(3) Subject to Subsection (5), the consent of Papua New Guinea to be bound as a party
to a treaty shall not be given—
(a) unless a treaty document relating to the treaty has been presented to the Parliament
for at least ten sitting days; or
(b) if within ten sitting days of the Parliament after the day on which the treaty document
was presented to the Parliament the Parliament, by an absolute majority vote,
disapproves the giving of the consent.
(4) The fact that the Parliament has disapproved the giving of the consent of Papua New
Guinea to be bound as a party to a treaty does not prevent the re-presentation to the
Parliament of a treaty document relating to the treaty, and in that event Subsection (3)
once again applies.
(5) Subsection (3) does not apply if—
(a) the Parliament has, by an absolute majority vote, waived the requirements of that
subsection; or
(b) both the Speaker (acting on behalf of the Parliament) and the Prime Minister are
satisfied that the giving of the consent of Papua New Guinea to be bound as a party
to the treaty is too urgent a matter to allow of compliance with that subsection, or
that compliance would not be in the national interest.

3.38 Similarly, s. 205(2, concerns the Defence 'r'orce be ng sent overseas and provides:

(2) The Defence Force or a part of the Defence Force may not be ordered on or
committed to—
(a) active service; or
(b) an international peace-keeping or relief operation, outside the country without the prior
approval of the Parliament.

3.39 The absence of such provisions in s. 209(1) is telling, as is the stated pre-eminence of that
provision. If this view is correct, it leads to the conclusion, consistently with State practice since
1976, both that:
(a) the fact that a proposed loan is not mentioned in an annual or supplementary budget
cannot undermine the legality of a law made under s. 209(1), as the Loans Act No. 2

evidently is
(b) the Loans Act No. 2 is valid

Alternative View

3.40 The alternative view strongly held by many significant witnesses, notwithstanding the involvement of a number in giving effect to the opposite view in practice, is that it is implicit in s. 209, read in its context, that ultimate Parliamentary authority over all expenditure and loans requires at least one of the following in every case:

(a) prior Act of Parliament
(b) prior reference to the loan in an annual or supplementary budget estimate
(c) prior mention of the substance and amount of the loan in Parliament by a Minister

3.41 While each of these forms of at least implicit approval requires Parliamentary involvement, the final option — mere mention and its corollary, debate — does require Parliament to be urgently

recalled in a case where one of the other two steps has not been taken. That is arguably consistent with the Constitutional Planning Committee report.

3.42 Because the Commission cannot definitively answer that question for the reasons discussed above, there should be a reference to the Supreme Court under s. 19 of the Constitution at the suit of one of the persons there mentioned to resolve the matter.

Compliance with the Loans Act No. 2

3.43 The next question concerns whether the UBS Loan to the State was validly made under the Loans Act No. 2. The loan was stated to be under s. 2(1). and it was:

(a) a borrowing by the 'Head of State. acting on advice . on behalf of the State' from or through overseas financial institutions'

(c) for the purchase of equity in companies and also meeting the expenses of borrowing
(d) 'on such terms and conditions as are agreed on by the Head of State. acting on advice'

3.44 What of the formai requirement in s. 2(7) that 'A loan agreement shall be made in the name of the State and be executed on behalf of the State by the Minister or a person authorized in writing by the Minister'? It is not clear that s. 2(7) was applicable at all as the UBS Loan was made under s. 2(1) whereas s. 1(1) of the Act states: 'In this Act, 'loan agreement' means an agreement of a kind referred to in Section 2(2) or (3) whether known as a loan agreement or a bond purchase agreement or otherwise; that is, not an agreement made under s. 2(1). Be that as it may, the UBS Loan documents were either signed by Mr O'Neill (as Acting Treasurer) or as authorised by him following the NEC decision. by the Head of State or the Treasury Secretary.

3.45 Section 2(3) provides that:
(3) The sums which may be borrowed under Subsection (1) shall be such that the total value of overseas commercial debt which will be owed by the State after any borrowing shall not exceed 125% of the estimated internal revenue for the year in which the borrowing takes place except only as a result of any bridge financing and subject to Subsection 2(b).

3.46 What of the large sums borrowed under the UBS Loan which, until novation, might have exceeded '125% of the estimated internal revenue for the year in which the borrowing takes place'? Section 2(4) defines 'ordinary revenue' for the purposes of s. 2(3). However, 'ordinary revenue' is not used in s. 2(3) (and 'internal revenue' is not elsewhere defined in the Act). It is assumed that the definition of ordinary revenue is applicable: –ordinary revenue" includes revenue from taxes. levies: duties, fees; rents and royalties and also from profits and income from any investment or undertaking of the State, but does not include any loans, grants or other forms of external aid or any capital raised. Having regard to the Treasury identification of estimated revenue for 2014, broken down by type; only 'Total Grants' and 'Total Borrowings' should be excluded from the total 'receipts' figure (PGK 20,584.9 million). This would make the ordinary revenue / internal revenue for 2014: PGK 20,584.9

million (total receipts) - PGK 1.696.2 million (total grants) - PGK 7.871.4 million (total borrowing) = PGK 11,017.3 million (approximately AUD 4,923.7 million).`-`

3.47 The closing words of s. 2(3), which are an exception to the 125% limit, apply where the debt is only 'as a result of any bridge financing and subject to Subsection 2(b).' Bridge financing is not a defined term but includes short term loans as a matter of ordinary language. and the reference to

sub-section 2(b) brings in the six month loan limit. Thus, where there is bridging finance for six months or less the 125% limit is inapplicable.

3.48 In this case, the Bridge Loan should not have been considered to be an exception to the limit in s. 2(3), if that is what the State thought. On its terms, the initial six month term could be extended to 12 months and indeed, the loan was outstanding until it was repaid as a result cf the December 2014 novation tc KPHL. The 125% limit appears not tc have been breached in any event as the NEC was asked in the 6 March 2014 meeting to approve a certificate being issued to confirm compliance with section 2(3). The certificate was issued on 10 March 2014, signed by Mr Vele.e.9

3.49 What of the requirement in s. 2(8)? Mr Vele's affidavit sworn on 22 June 2021 attaches a draft Hansard record of a speech given to Parliament on 6 September 2014 by Mr Pruaitch regarding the acquisition of the Gil Search shares. The Hansard relevantly records:

> Mr Speaker, this brings me to the question of specific elements of financing the transaction which are being tabled today.7°

3.50 In his oral evidence, Mr Vele said:

> So, / sought formal clarification and advice from the State Solicitor to say, in your view how should this work? He provided advice to say that this is the way we do it and therefore we are after the fact mentioned it on the floor and I think as part of the Loans (Overseas Borrowings) (No.2) Act it also involves a tabling of the documents to

Parliament as a pad of in what I would say is section 209 approval. And on 18 November 2014, as it were, as a part of that budget process in approving the supplementary budget subsequently approving the National Budget, the Treasurer did walk across and laid the transaction documents on the desk of the Clerk of Parliament!'

3.51 As noted, Mr Pruaitch's oral evidence to the Commission was that he did not recall whether documents were actually 'tabled' or otherwise presented to Parliament. Instead, he merely gave a Ministerial Statement for Parliament to note. As noted, he was questioned in this Commission as follows:

Q: And if we could go to page 7 of that Hansard, and the underlined section, it states: 'Mr Speaker, this brings me to the core question of the specific elements of financing the transaction which i tabled today.' Can you see that at the Hansard?

A: Yes.

Q: Does that confirm that you tabled the documents that you confirm that that in fact happened?

A: It is not a document; it is a ministerial statement.

0: Yes. What you said there if you could read that it says: 'The elements of the financing of the transaction which have been tabled today.'

A: I do not recollect tabling any documents relating to UBS on the floor of Parliament. I remember giving a ministerial statement.

THE CHAIRMAN: You gave a full statement about that loan and described all the elements.

A: Chief Commissioner, a statement is a ministerial statement. Ministerial statements are always noted by Parliament.

Q: No, I am talking about the content. I think she is trying to get to the content. You gave a full – in this statement you gave a full explanation about this loan and the

A: Well. I had to do that explanation - -

Q: – – – necessary elements of the loan.

A: I had to do that explanation because this event happened earlier. But I do not recollect tabling any documentation pertaining to [the] UBS transaction.72

3.52 It is necessary to resolve the conflict of oral evidence between Mr Vele and Mr Pruaitch concerning whether the UBS Loan documents were actually tabled in Parliament (which would amount to compliance with s. 2(8) of the Loans Act No. 2 if the tabling was deemed to be within a reasonable time), or whether only a Ministerial Statement was read without any documents being tabled (which may mean that there was non-compliance with s. 2(8) of the Loans Act No. 2).

3.53 The Commission prefers the evidence of Mr Vele. Mr Pruaitch's evidence was equivocal and is also inconsistent with the statement he gave to Parliament as recorded in Hansard. Mr Vele being sure it was, Hansard supporting him on this point, but Mr Pruaitch being, at least tentatively to the contrary, tabling probably was done as required. Assuming it was not done, the only consequence can be a matter for the Parliament. It cannot be the case that belated or eventual non-compliance with s. 2(8) could lead to retrospective invalidity of the loan, not least because such a construction would mean no foreign banker would lend to the State.

4. Conclusions

Recommendations

1. The Commission recommends that the following questions be referred to the Supreme Court under s. 19 (1) of the Constitution:

A. Does s. 209(1) require pre-approval by the Parliament of all foreign loans to the State, and if so may this be done by any and if so which

of the following:

(a) Prior Act of Parliament

(b) Prior reference to the loan in an annual or supplementary budget estimate

(c) Prior mention of the substance and amount of the loan in Parliament by a Minister

B. Is the Loans (Overseas Borrowings) No 2 Act 1976 inconsistent with s. 209(1) of the Constitution in that it makes no provision for prior approval of the loan by Parliament either under the national budget process or a supplementary budget or by a specific Act of Parliament?

4.1 The size of the UBS Loan and the ease with which the 125% limit and inherent safeguard could be avoided suggest the need for an anti-avoidance legislative amendment. This could take the form of an amendment to s. 209 (1) of the Constitution to provide for an Organic Law on overseas loans. Anything less, legislatively, is too easily repealed or amended by the government of the day with sufficient numbers in the Parliament. Much has changed since 1974 when overseas borrowings were largely seen to be from international partner agencies. This may be an opportunity for the State to move to a more proscribed form of fiscal discipline than the current practice demands and would ensure more certainly that the fiscal disaster of the UBS Loan could not happen again.

Recommendations

1. It is recommended that the Constitution be amended in accordance with Part II Division 2 Subdivision B of the Constitution to enable an Organic Law to be made concerning overseas loans and borrowings which will include provisions requiring the prior consent of the Parliament before a loan from an overseas source is executed and has binding effect above an amount of money determined by reference to a stated formula.

2. The Parliament should establish a Working Party or refer to a Parliamentary Committee to investigate and recommend an appropriate model for carrying into effect the last recommendation.

National Executive Council – Decision No. 244/2008, 19 November 2008, Exhibit 9.132, WIT.0015.0001.0585.

▪ Subscription Deed dated 23 November 2008, Exhibit 134, WIT. 0056.0006.0108.

Statement of Daniel Rolpagarea dated 22 June 2021, Annexure B, Exhicit 00.1, WIT.0019.0004.0010

Statement of Daniel Rolpagarea dated 22 June 2021. Annexure A, Exhibit 00.1, WIT.0019.0004.0006.

' Statement of Daniel Rolpagarea dated 22 June 2021, Annexure C, Exhibit 00.1, WIT.0019.0004.0012.

6 National Executive Council – Decision No. 7912014, 6 March 2014, Exhibit 91.3, WIT.0099.0007.1162.

'Advice to the Governor-General – Policy Submission No. 6712014, 6 March 2014, Exhibit 9.134, WIT.0019.0002.0392.

Statement of Daniel Rolpagarea dated 22 June 2021, Annexure C, Exhibit 00.1, WIT.0019.0004.0015,

'Statement of Daniel Rolpagarea dated 22 June 2021, Annexure E, Exhibit 00.1, WT.0019.0004.0316.

1° Letter C. Rolpagarea to Governor-General, Financial arrangements for Staters acquisition of shareholding in Oil Search Limited – transaction
documents, 10 March 2014, Exhibit 9.135, WIT.0019.0003.0030.

1' Statement of Don Pomic Poyle dated 1 June 2021, Annexure F, Appendix (II), Exhibit EE, WIT.0051.0008.0045.

12 Letter D. Vele to D. Rolpagarea, Section 209 Constitution of the Independent State of Papua New Guinea: NEC Decision No. 79/2014: State
acquisition of shareholding in Oil Search Limited and consequential borrowing, 26 March 2014, Exhibit 9.136, WIT.0007.0004.0844.

Letter D. Rolpagarea to D. Vele, Section 209 Constitution of the Independent State of Papua New Guinea: NEC Decision No. 79/2014: State
acquisition of shareholding in Oil Search Limited and consequential borrowing, 27 March 2014, Exhibit 9.140, WIT.0007.0004.0751.

14 Minutes of Meeting No 2 of 2014 – Held on 27 March 2014 at 9.14 AM, 27 March 2014, Exhibit FF, WIT.0036.0001.0284 at page 0287.

15 Application Pursuant to the Constitution, Section 18/1), 19 May 2014, Exhibit 9.137, WIT.0035.0001.5718.

16 Letter D. Polye to Commission, 18 July 2020, Exhibit 1488, page 3, WIT.0051.0002 0001.

1? Letter Ombudsman to D. Vele, Your request for interest payment obligation of State – AUD$1.238B UBS Loan, 23 May 2014, Exhibit 9.138,
WIT.0015.0001.1039.

18 Email A Yauieb to A. Hamou, UBS loan validation bill, 18 August 2014, Exhibit BBB, WIT.0104.0002.0137.
18 Draft Hansard, 5 September 2014, Exhibit PP, WIT.0014.0012.0015 at pages 0017-0025.

26 Draft Hansard, 5 September 2014, Exhibit PP, WIT.0014.0012.0015 at page 0022.

• Transcript Patrick Pruiatch, 3 Augvet 2021, pages 2605–2336

22 Hansard, 18 November 2014, pages 3–30.

Svpirlenteritaty lApp“apriettoo) Act 201,1

24 Draft Hansard, 25 November 2014, Exhibit PP, WIT. 0014.0012.0105.

25 A breach of s. 209(1) of itself is not a crime.
26 Hansard /iine parp14: 13,73–1437i3

27 Transcript, Julius Chan, 12 May 2921, pages 282–285, 288

28 Transcript, Peter O'Neill, ,7 .,une 202, r.,Btli

29 Transcript, Peter O'Neill, 37 June 2021 page 1494.

30 Transcript, Peter O'Neill, 17 June 2021, pages 1475–1476

m Transcript, Peter O'Neill, 17 June 2021 pages 1475.

.r) Affidavit of Dairi Vele sworn 5 August 2021, [57], Exhibit MMM, WIT.0014.0016.0012.

33 Affidavit of Dein Vele sworn 5 Ath:21).5i. 2021. ii";71–[58I Exttibit MMM, WIT 0014 0016 0012
34 Affidavit of Dairi Vele sworn 5 August 2021 [6714681, WIT.0014.0016.0012.

• Trartscnpl. Owl Vele, 24 Juno 2021, pogo 1908
TAn5cripi, Dairi Vein, 24 ,I11110 202 t page 1908

• TiAnscripi, Dairi Vale, 24 thine 2021 page 9903.

38 TramIcript, Dairi vale 24 June 2021, purl, 1910

39 Affidavit of Dairi Veto sworn 20 April 2021, (5501.p301, Exhibit 00 WIT 0014 0007 0001

40 Email J. Beattie to S. Moe, RE: Confidential, 27 February 2014. Exhibit 5, NRF.001.001.5925.

41 Affidavit of Dairi Vele sworn 26 April 2021, [563], Exhibit QC), WIT.0014.0007.0001.
42 Transcript, Dairi Vele, 24 June 2021, pages 1908-1909.

43 ItaaC 1-1.1r.,.11 2 AUWil 2021 ;:age 2508
44 Transcript, Kerenga Kua, 8 June 2021, page 1512.

45 Transcript, Kereo9a Kua, 2 August 2021, page 2522.

46 Transcript, Kerenga 4 52

Kerenga Kua, 8 June 2021, pages 1517-1518.

48 The State Solicitor, Mr Rolpagarea, referred specifically to the Supreme Court decision in Papua New Guinea Forest Industries Association Inc v Tomuriesa [2017] PGSC 24; SC1601 (1 September 2017) in support of the proposition that statutes for the purposes of s. 209 should not seek to restrict the exercise of overall financial control by Parliament. Papua New Guinea Forest Industries Association Inc v Tomuriesa was a proceeding which concerned the validity of s. 121 of the Forestry Act 1991. Section 121 purported to empower the Minister, after consultation with the relevant Board, to fix by notice levies in respect of certain matters. The Supreme Court held: 'The vesting of wide and ambiguous taxation powers on the Executive to make decisions on essentials of the imposition of taxation in the form of a levy of the type fOund in s 121 ... cannot be Constitutionally justified'. Rather, the Supreme Court held that s. 209 of the Constitution required 'the essentials of imposition of taxation to be determined by an Act of the Parliament'. However, the Supreme Court also held that s. 209(1) of the Constitution did, in principle, permit a statute to authorise a revenue system outside of the National Budget framework found in s. 209(2).

lx Statement of Daniel Rolpagarea dated 28 July 2021, [5]-[7], Exhibit 00.2, WIT.0019.0005.0003.

Rolpagarea 24 Jule 2021, page 1;23
" Rolpagarea. 24 ..!L le 202' nage 1324

52 Statement of Daniel Rolpagarea dated 28 July 2021, [10], Exhibit 00 2, VVIT.0019.0005.0003

53 Statement of Daniel Rolpagarea dated 28 July 2021, [18]-[19], Exhibit 00.2, WIT. 0019.0005.0003.

Letter D. Rolpagarea to D. Vele, Section 209 Constitution of the Independent State of Papua New Guinea: NEC Decision No. 79/2014: rtate
acquisition of shareholding in Oil Search Limited and consequential borrowing, 27 March 2014. Exhibit 9.140. WIT. 0007.0004.0751. which advised Mr
Vele that retrospective approval was permitted.

55 Transcript, Daniel Rolpagarea, 28 July 2021, page 2223; see also Transcript, Isaac Lupari, 2 August 2021, pages 2506-2507.

56 Transcript, Daniel Rolpagarea, 28 July 2021, page 22231

5' Brief to Attorney General. Revenue and Expenditure Without Prior Approval of Parliament - Gls,e AcrQ,,:aan of Shareholding in Oil SearC.1 Limited
Related Expenditure Outside Budget, 5 May 2014, Exhibit 8.26, WIT 0019 0002.0506.

• ArQleve ca D,:r■ Porill, CoNe $,v0A, 1 2021,1151 E1441tf..EE, WIT.0051.0008.0001.

59 Transcript, James Marape, 21 June 2021, .page 1643.

E0 Affidavit of Patrick Pruaitch sworn 28 June 2021, [75]-[77], Exhibit ZZ, WIT.0028.0003.0002.
61 Transcript, Patrick Pruiatch, 3 August 2021, page 2645.

n Statement of Anthony Yauieb dated 28 july 2021, [47], [49], Exhibit EBB. WIT. 0104.0002,0239.

n Sir Salamo Injia & Gregory J Lay, Constitutional Law in Papua New Guinea (2018), National jucicial Service Publicarion, at page 12; see Name v
Pato (2014) SC1304, Unreported Supreme Court Judgement 29 January 2014 (per Salika OCJ, Sairorai Kantakasi, Canrings and Pove JJ); also see
Application of na Geno (2014) SC1313, Unreported Supreme Court Judgement 28 February 2014 (per Salika DCJ, Sakora, Hartshorn and Poole JJ).

54 209. PARLIAMENTARY RESPONSIBILITY.
(1) Notwithstanding anything ir. this Constitution, the raising and expenditure of finance oy the National Government, including the imposition of
taxation and the raising of loans, is subject to authorization and control by the Par—flamer—it, and shall be regulated by an Act of the Parliament.
(2) For each fiscal year, there shall be a National Budget comprising—
(a) estimates of finance proposed to be raised and estimates of proposed expenditure by the National Government in respect of the fiscal year; and
(0) separate appropriations for the service of that year in respect of—
(i) the services of the Parliament; and
(ii) general public services; and
(Pi) the services of the Judiciary; and
(c) such other supplementary Budgets and appropriations as are necessary.
(2A) For the purposes of this Subdivision—
(a) 'the services of the Parliament' include the salaries and allowances (financial and otherwise) of the Members of Parliament the maintenance of the
precincts of the Parliament, and the Parliamentary Service established under the Parliamentary Service Act 1995; and
(5) the services of the Judiciary' include—
d) the salaries and allowances (financial and otherwise) of Judges of the
Supreme and National Courts; and
(ii) the maintenance of the Supreme and National courts; and
(EH) the National Judicial Staff Service established under the National Judicial
Staff Service Act 1987; and
(iv) the salaries and allowances (financial and otherwise) of all persons
appointed under the Supreme Court Act 1975, the National Court Act 1975
and the Sheriff Act 1973.
(2B) For the purposes of Subsection (2)(b)(i) and (iii). the Speaker of the Parliament and the Chief Justice respectively shall, before 30 September
each year, submit to the Prime Minister estimates of expenditure for the services of the Parliament and the services of the Judiciary respectively in the

following fiscal year.
(3) Before any Budget or appropriation is prepared for submission to the Parliament, the National Executive Council shall consult with any appropriate
Permanent Parliamentary Committee, but this subsection does not confer any rign t or impose arty duty of consultation after the initial stages of the
preparation of the Budget or appropriation.

65 212. REVENUE AND EXPENDITURE WITHOUT PRIOR APPROVAL.
(1) If at the beginning of a fiscal year the Parliament has not made provision for public expenditure by the National Executive or expenditure by the
Parliament or the Judiciary for their respective services for that year, the National Executive, the Parliament or the Judiciary, as the case maybe, may,
without authorization other than this section but in accordance with an Act of the Parliament, expend amounts appropriated out of the Consolidated
Revenue Fund for the purpose not exceeding in total one-third of its respective budgeted expenditure during the immediately preceding fiscal year.
(2) The authority conferred by Subsection (1) lapses when the Parliament has made
provision for the public expenditure for the fiscal year in question, and any amounts expended by virtue of that subsection are a charge against the
expenditure so provided for and shall be properly brought to account accordingly.

lir 210. EXECUTIVE INITIATIVE.
(1) The Parliament shall not provide for the imposition of taxation, the raising of loans or toe expenditure of public moneys of Papua New Guinea
except on the recommendation of the Head of State, acting with, and in accordance witn, the advice of the National Executive Council.

(2) Sub;ect to Subsections (3) and (4); Parliament may reduce, but snail not increase or re-allocate, the amount or incidence of, or cnange the purpose
of, any proposed taxation, loan or expenditure.
(3) Where, in the opinion of the Parliament, the proposed expenditure for the services of the Parliament or the services of the Judiciary is below the
estimate submitted by the Speaker or Chief Justice respectively and is insufficient adequately to meet the requirements of that service, the Parliament
may increase the expenditure to an amount not exceeding the original estimates
submitted by the Speaker or the Chief Justice, as the case may be, under Section 209(2B).
(4) For the purposes of Subsection (3), the Parliament may re-allocate, or reduce and re-allocate, the amount of expenditure appropriated for any

purpose.

61 211. ACCOUNTING; ETC., FOR PUBLIC MONEYS.
(1) All moneys of or under the control of the National Government for public expenditure and the Parliament and the Judiciary for their respective
services, shall be dealt with and properly accounted for in accordance with lay.
(2) No moneys of or under the control of the National Government for public expenditure or the Parliament and the Judiciary for their respective
services: shall be expended except as provided by this Constitution or by or under an Act of the Parliament.

68 Papua New Guinea Department of Treasury website, accessed 25 March 2022:
https://www.treasurvoov.pd/htmUnational budoet/files/2014/buddet documents(Vo12%20Part-1ANolume%202%20Part%201A-Summary%20Tablestudf.

6' Exhibit 223, Certificate of Secretary dated 10 March 2014, WIT. 0015.0001.2028.

n Draft Hansard, 5 September 2014. Exhibit PP, WIT.0014.0012.0015 at page 0022.

7' Transcript, Dairi Vele, 24 June 2021, page 1909.

72 Transcript, Patrick Pruiatch, 3 August 2021, pages 2635-2636.

CHAPTER 16

The Oil Search shares held

from 2014 until sold in 2017

Summary

This chapter explains the dealings with the Oil Search shares

from after their accuisluon in March 2014 to
their sale in September 2017, including the December 2014 novation to KPHL and the February 2016
refinancing of the collar loans in place at that time.

1. Relevance of this chapter to the Terms of Reference

1.1 This chapter concerns items 1(aa) and (bb) of the Terms of Reference.
(aa) The rationale as to why the State/Kumul Petroleum Holdings Limited sold the Oil
Search shares in 2017.
(bb) Whether legal and administrative processes were followed in the sale of the Oil
Search shares?

2. Dealings with the Oil Search Shares between 2014 and 2017
The Kumul Consolidation Agenda

2.1 In late 2013, the Government confirmed what was succinctly described as the Kumul
Consolidation Agenda, The Kumul Consolidation Agenda was intended to consolidate all State-
held petroleum and mining assets into a new corporate structure to be known as the Kumul Trust,
which would hold shares in KCHL, KPHL and Kumul Mining Holdings Limited for the State as
beneficiary of the Trust. The NEC decided that KPHL would hold the State's interests in
petroleum projects., It was initially proposed that there should be more than one trustee to be the
serving Prime Minister and such past Prime Ministers as the serving Prime Minister might select.
The issoe of the selectlon of the norn:riee to hold the State's interest is addressed further tpelo,.,/

2.2 The intention of the Kumul Consolidation Agenda was to remove inefficiencies as to duplication
and oiler-lapping of participation in resource assets thought to he inherent in the existing
arrangements. Then Prime Minister O'Neill was reported in the media as explaining that its
purpose was to 'streamline these assets into one company so it becomes very transparent and it's
accountable to the peop/e.'2

2.3 On 20 February 2014, proposed changes to the Constitution and Organic Law were published in
the National Gazette, consistent with the Kumul Consolidation Agenda:,
The State novates the UBS Loan and transfers the Oil Search shares to NPCP in December 2014

2.4 The State was never able or intended to be the long-term borrower from UBS. That is because it could not have done so without breaching its debt-to-GDP ratio limit. The debt-to-GDP ratio limit of 35% was established by the Papua New Guinea Fiscal Responsibilities Act 2006 (as amended in 2013 and 2014 and as discussed elsewhere in this Report). Accordingly, to avoid that, the State always intended to transfer the loan to another entity in order to remove the loan from the State's balance sheet. As the loan was connected with the purchase of the Oil Search shares, it followed that the State's rights in relation to the Oil Search shares should also be transferred to the same entity.

2.5 However, UBS required the State to be the initial borrower and shareholder. According to Mr Vele, this was because an equity 'cushion' was needed to secure the lending and the State was the only entity that could provide that 'cushion' and secure the Bridge Loan. It was therefore not possible for an SoE, such as NPCP or IPBC, to be the initial borrower, but the loan and shares would be transferred to such an entity before the end of the 2014 financial year when the loan to GDP ratio would be assessed.4

2.6 In a letter to the Ombudsman Commission dated 23 May 2014, Mr Vele submitted that the Papua New Guinea FiScal Responsibilities Act 2006 provided guiding principles, as opposed to creating rights and obligations and expressly permitted the borrowing threshold to be exceeded. Furthermore, since GDP is an ex post facto figure, the loan could not have resulted in a breach of the 35% debt to GDP threshold.5 Mr O'Neill's evidence was also that there were no issues

regarding the debt to GDP ratio.6

2.7 The initial intention had been for Petromin to hold the loan and shares, notwithstanding the Kumul Consolidation Agenda. On 4 March 2014, there was an email exchange between Ms Wendy Tom-Isu of the Treasury, and Mr Asigau of Pacific Legal Group concerning various documents to be created for the purposes of the UBS Loan, one of which was a letter to the Chair of Petromin which would state that the shares would be 'parked with Petromin in the meantime'.? Ms Tom-Isu noted that this letter was outstanding. Mr Asigau replied that he had been informed that Petromin would not be part of the deal anymore and that this should be confirmed with Mr Vele.e

2.8 On 6 March 2014, Mr O'Neill submitted Policy Submission 67/2014 to the NEC.9 This submission requested the NEC to approve (and arrange for others to approve) the UBS Loan. The submission contemplated that NPCP Kroton would enter a Payment Direction Deed by which NPCP Kroton would agree to use revenues from the PNG LNG Project to meet payments due under the Bridge Loan should those payments not otherwise be met. The submission did not request the NEC to nominate Petromin as the State's eventual nominee for the Oil Search shares.

2.9 Nevertheless, that same day, the NEC issued decision 79/2014 based on Policy Submission 67/2014.10 Relevantly, NEC decision 79/2014 approved the State acquiring the Oil Search shares and nominated Petromin as the State's eventual subscriber for the Oil Search shares.

2.10 As at 9 March 2014, the Board of NPCP Kroton considered that Petromin being nominated as the eventual holder of the Oil Search shares was 'an interim measure pending the implementation of the Kumul Consolidation Agenda'.11

2.11 When the State entered into the subscription agreement with Oil Search on 10 March 2014, the State was named as the subscriber, not Petromin nor NPCP Kroton.12

2.12 On 12 June 2014, the NEC issued NEC Decision No. 186/2014.13 Resolutions 1 to 6 of that decision noted the need to consolidate the State's petroleum and mining assets into a corporate

structure and to allow IPBC and the Department of Treasury to focus on endeavours other than petroleum and mining investment. In resolutions 7 to 10 of that decision, the NEC endorsed consolidating the State-held petroleum and mining assets into Petromin's corporate structure. The decision made it clear that this was an interim measure taking advantage of the already existing Petromin structure whilst the Kumul Consolidation Agenda was being implemented.

2.13 The NEC Later changed its position as to which entity should hold the petroleum assets. On 2 September 2014, the NEC issued NEC Decision No. 264/2014.14 This decision rescinded resolutions 7 to 10 of NEC Decision No. 186/2014 (the resolutions nominating Petromin as the entity to hold the State's petroleum and mining assets). The NEC acknowledged the establishment of NPCP 0.iiihich later changed its name to KP'riL) as a wholly owned subsidiary of IPBC. It directed that all petroleum assets of the State, including the Oil Search shares held by the Treasury, be consolidated into NPCP and NPCP Kroton.

2.14 Accordingly, on 29 September 2014, the Board of NPCP Kroton resolved:

(a) to novate the Bridge Loan component of the UBS Loan from the State to NPCP and

(b) to discharge the Bridge Loan component of the UBS Loan by repaying most of it through letters of credit and converting the remainder of the loan into a collar loan.15

2.15 In October 2014, IPBC commenced implementing NEC Decision 264/2014. This involved IPBC seeking advice from the State Solicitor. The State Solicitor advised on the correct method to give effect to NEC Decision 264/2014 and whether doing so would interfere with the Ombudsman Commission investigations which were on foot at that time.16

2.16 NPCP also received a written report on the proposed

novation dated 22 October 2014 from Mr Tony Kelly in addition to legal advice from Gadens Lawyers.17

2.17 Ultimately, the Board of IPBC resolved on 27 November 2014 to approve NPCP rsubsewenfiy KPHL) replacing the State in the Bridge Loan and Collar Loan by means of novation.

2.18 The resolutions included the novation of the Collar Loan and Bridge Loan and the discharge of the Bridge Loan to be replaced by a new collar loan on similar terms from UBS for about AUD 100 million with respect to 12.4 million Oil Search shares and a new syndicated loan to replace the remainder of the Bridge Loan in the sum of about USD 235 million.18 IPBC's approval was required pursuant to s. 89 and 110 of the Companies Act 1997 and s. 468(1) of the Independent Public Business Corporation of Papua New Guinea Act 2002. There were circular resolutions on 4 and 8 December 2014 to ensure the resolution was legally effective.18 Circular resolutions are signed by directors of a company and allow resolutions to pass without a meeting of directors.

2.19 In the result, the final figures were slightly different, with the new collar can being for AUD 77.8 million and the loan AUD 270.3 million drawn down from letters of credit totalling USD 275 million to pay off the Bridge Loan.

2.20 Whilst the chronology is set out below, in summary, by December 2014:

(a) the Bridge Loan component of the UBS Loan had been ncvated from the State to NPCP

(b) the Bridge Loan component of the UBS Loan had been discharged by repaying most of it through letters of credit and converting the remainder of the loan into a collar loan

(c) the Oil Search shares held by the State had been transferred to NPCP.

2.21 In short, both the asset (the shares) and the debt became the concern of NPCP (subsequently

KPHL).

2.22 On 11 December 2014, IPBC requested the Minister for Finance, the Hon James Marape, to

approve NPCP entering into the necessary transactions to novate the UBS Loan. The Minister for

Finance issued those approvals the same day.2c'

2.23 On 17 December 2014, the shares of NPCP Kroton were transferred from IPBC to NPCP.

2.24 On the same day, the State, UBS, NPCP Kroton, NPCP Investments, UBS Nominees and UBS

Securities entered into a Global Novation and Amendment Deed. The effect of the deed was for

NPCP Investments to replace the State in the UBS Loan.21

2.25 On the same day, NPCP (subsequently KPHL) raised USD 275 million, through letters of credit

from ANZ Banking Group for USD 200 million and Westpac for USD 75 million.22 It used AUD

270.3 million of this to repay part of the Bridge Loan and entered into a new collar loan with UBS

using the 12 million Oil Search shares that had provided the security under the original Bridge

Loan.23

2.26 On 17 December 2014, the State filed a notice of cessation of substantial shareholding with the

Australian Stock Exchange recording the end of its shareholding in Oil Search. The document

recorded that as at 17 December 2014, the State had held

9.81% of Oil Search's shares, which was less than the 10% that the State had previously given as one of the principal reasons for acquiring the original share placement in March 2014.24

Development of Government Corporate Entities

Development of Relevant Corporate Entities

KM-T-1;'11/

Independent Public Business Corporation

Kumul Conslidated Holdings

National Petroleum Company of PNG (Kroton) Limited (20.06.2008 - 23.09.2010)

Kumul Petroleum (PNG LNG) Limited (28.01.2016 - Present)

Kumul Petroleum (Kroton) [Kroton No.2 Limited (25.09.15 28.01.2016)

Limited (24.092010 - 25.09.2015)

Petromin PNG Holdings Limited (29.03.2007 01.12.2015)

Kumul Minerals Holdings Limited (01.12.2015 - Present)

2.27 Relevant individuals within KPHL are listed below for reference.

Title	Year	Name
Managing Director	2013 - present	Wapu Sonk
Chairman	May 2020 - present	Dr Benedict Thomas Yaru
Chairman	April 2019 - April 2020	Andrew Baing
Chairman	30 March 2017 - 24 October 2018	Sir Moi Avei

Name	Year	Title
Frank Kramer	4 March 2014 - 30 March 2017	Chairman
Rogen Wato	January 2014 - present	Chief Legai Officer
	4 March 2014 - 11 August 2014	Cc-rpely Secretar1
The Prime Minister of the day	September 2015 - present	Trustee

KPHL a reluctant holder of the Oil Search shares

2.28 The report elsewhere discusses and refutes Mr O'Neill's asserted strategic purpose in obtaining the UBS Loan. Certainly, the strategic purpose was not shared by KPHL. Simply put. KPHL never had an 'appetite' to hold the Oil Search shares. Mr Wapu Sonk, the Managing Director of KPHL. was quite definite about this. Mr Sonk said

(a) the Board of KPHL did not consider it part of their mandate - which was pursuant to section.
7 of Kumul Petroleum Holdings Limited Authorisation Act 2015 (KPHL Act) to hold and
develop gas and oil interests, including participation in the exploration. development,
production, processing, transportation and marketing of oil and gas products - to include
holding shares for investment on behalf of the State, whether in Oil Search or any other
company25

(b) from the outset, the Board 'never wanted KPHL to hold the Oil Search shares' and washed
tc dspcse of them as the shares and their associated debt was a burden on KPHL26

(c) as a result the Board of KPHL commenced looking for ways to dispose of the Oil Search
shares almost as soon as they were novated to KPHL27

2.29 The evidence of Mr Frank Kramer, the Chairman of NPCP Kroton, was to the same effect.28

2.30 In Mr Sonk's view, the dividends received from the shares were minimal and far outweighed by
the cost of the prepaid interest on the UBS Loan and the other transaction costs.23

2.31 Mr Scnk stated in oral evidence, the following reasons against the UBS Loan and its novat on:

0: Can we move on then to the Oil Search shares themselves? And I take it you are
quite critical of the original decision for KPHL to hold the Oil Search shares because in
your view. that is not KPHL's mandate to hold investments in private companies, is that
fair?

A: From the start we were critical. yes. certainly that is a fair statement and it is
consistent with my former chairmen that have presented to this commission.

Q: And you were likewise critical of that and were looking for every opportunity to get out
of the Oil Search share transaction as well?

A: That is correct.

Q: And that is really because as you point out in paragraph 27, the main function as you
see it at KPHL is to participate in its relation and development of projects. not to hold
shares for investment. Is that fair?

A: That is our explicit mandate in the Act and that is to participate in exploration, development, production, processing, transportation. marketing of oil and gas and NEC, That is our mandate as a company.

Q: And I take it that your biggest and the Board's biggest concern with the Oil Search shares was not necessarily that there was an asset on your books but rather the liabilities and expenses that came with that.

A: That is correct.

Q: You see in paragraph 29, you refer to the financial burden and that the annual operating plan and balance sheet had to take into account the debt and the loan and interest and I imagine other expenses in relation to the Oil Search shares?

A: Yes. We were very concerned about the continuity of paying the loan at — if you look at the numbers that I have presented 70 something million per year and our revenue was around 200 and something and, you know, you have got — we have our own plans and also government also wants dividends as well so depending on where the oil price is things can get a bit very tight.

Q: Certainly. And the only, I suppose, there were two benefits of owning the Oil Search shares. One was theoretically the value of them sits on your books as an asset, that is right, is it not?

A: Yes, but it was a nightmare to the accountants and auditors because it was floating up and down.

Q: I understand, but I am just Vying to understand and in accounting sense, the Oil

Search shares from time to time had a value and that would sit on the assets column of your balance sheet, would it not?

A: Yes, but the liabilities - - -

Q: Of course, of course.

A: Also net it up.

Q: This is then balanced out by the liabilities on the other side of the transaction and the net effect may well be negative.

A: Correct.

Q: All right. But the other benefit you had was receiving dividends?

A: Yes, but very minimal compared to what we were paying.[30]

2.32 Mr Sonk subsequently confirmed in his written evidence[31] that, in regards to his oral evidence above concerning paragraph 29 of his statement of 10 August 2021, the cost to KPHL annually in pre-paid interest totalled USD 106.2 million over 4 years. Mr Sonk said that this interest cost was offset, in part, by dividends of USD 15 million paid from the Oil Search shares. The interest had to be paid upfront in 2014 and again in 2016 as part of the refinancing. His reference in the transcript quoted above to a '70 something million figure'[32] was to the cost of entering into the collar loan in 2016. Mr Sonk said that the prospect of KPHL ever converting the collar to actual shares (at an anticipated cost of more than USD 1 billion) was near impossible due to fluctuations of oil and LNG prices, KPHL's limited cash flow and the need to provide dividends to the State.

2.33 Mr Sonk explained that the pre-paid interest component of the collar loan plus the costs of the transactions were borne by KPHL out of its proceeds from the PNG LNG Project, which was its only significant source of revenue at the time. KPHL was also required to pay significant

dividends to the State so that KPHL had very little finance available to it to invest in other projects whilst it was subject to the collar loan.

2.34 Mr Sonk also noted in his statement of 10 August 2021 that the burden of the Oil Search shareholding had the potential to limit KPHL's ability to take advantage of other opportunities d:o fail within its founding objectives which were coming cn stream.'=6 By way cf example. in his supplementary statement of 22 February 2022, Mr Sonk said:

Leading up to and around the time of terminating the collar loan in 2017. KPHL was engaged in negotiations with Total regarding the development of the Papua LNG Project, which would require KPHL to make significant cash investments. KPHL would not be able to make an investment in the Papua LNG project if it continued to hold the Oil Search shares under the collar loan given the refinancing (or direct acquisition) costs that would have been required in early 2018. Although the development of Papua LNG Project had been deferred for various commercial reasons, selling the Oil Search shares and unwinding the Collar Loan before it matured in 2018 was a good decision. After getting rid of the UBS Collar loan KPHL was able to make a significant investment (about US$51 Million) in a 58 megawatt power generation project in 2018 (in a 50-50 partnership with another party).34

2.35 KPHL also seems to have understood that the State anted to maintain a significant stake in Oil Search, albeit less than a 10% blocking stake.

2.36 In oral evidence, Mr Sonk was questioned about why KPHL entered into a new collar loan when the Bridge Loan was repaid:

O. ,„ You gave evidence earlier that under the novation transaction when Kumul Petroleum took over the bridge loan and the bridge loan liabilities were extinguished at that time but you rewrapped into the collar loan. What was the commercial basis for that?

A: I have to look at the advice we sought but I think the price was high at that time and

when we decided to roll over like I was making reference to – when the prices are higher than the call. you have to pay. So that is why we rewrapped it because the State wanted 149 million shares and 10..1 per cent shareholding. So to make up for that we had to do that to maintain the percentage shares and the 10.1 percentage shareholding in Oil Search. 35

2.37 The Commission notes that at the time of the ncvaticn. the State's shareholding in Oil Search had in fact been below 10% for some while, thereby negating that aspect of the strategic reasons for holding the shares.

2.38 Mr Kramer was the Chairman cf NPCP Krotcn between January 2013 and March 2017. He was also the Chairman of KPHL between 4 March 2014 and 30 March 2017 and of NPCP Investments (subsequently Kumul Investments) between 15 December 2014 and 30 March 2017.36

2.39 In his written evidence to the Commission. Mr Kramer stated in relation to the State's purchase of Oil Search shares in 2014 that:

was completely taken by surprise when I found out about the State's decision to purchase a new shareholding in [Oil Search]. I did not understand why the State decided that it was necessary to buy [Oil Search] shares and why it made this decision in such a short timeframe. I recall thinking that entering into a borrowing arrangement to purchase shares was going to cost the State a significant amount more money (AU$1,239

In my view (and ultimately that of the NPCP Kroton board), that purchase and associated borrowing was entirely unnecessary and provided no benefit whatsoever for NPCP Kroton nor the country. I was critical of the deal because the State lumbered the fledgling national oil company for which I was the Chair with the

burden of this senseless transaction.37

2.40 In relation to the novation of the UBS Loan, Mr Kramer recalled that the State could not keep up with the repayments under the Bridge Loan because of what he regarded as punitive interest rates.38 Mr Kramer clarified in his oral evidence that his knowledge of this was anecdotal but that it was common knowledge. It was more than gossip and based on information provided to the Board of KPHL that the Bridge Loan was structured to provide a strong incentive to meet its repayment program.39

2.41 Returning to his written statement, Mr Kramer then stated:

43. I recall that the (KPHL] board did not want to get involved but we knew that we had to assist the State. Otherwise the State would have been financial (sic] exposed under the terms of the bridge and collar loan arrangements with UBS that funded the purchase of the (Oil Search] shares.

44. I recall that KPHL, through its subsidiary Kumul Investments, assumed the State's obligations under the collar loan arrangement in or around December 2014.

45. I recall after this was completed, the KPHL board spent a lot of time managing the collar loan arrangement. The company spent a lot of money obtaining professional support to assist the board on how to manage its obligations and explore ways in which it could exit the arrangement altogether.

46. Between 2014 and 2017, it was a standing agenda item for the KPHL board to discuss:

(a) the amounts owing under the collar loan arrangement;

(b) the exposure under the arrangement; and

(c) potential exit strategies from the arrangement, having regard to the [Oil Search] share price at that time.

47. I recall that the board's focus was to ensure that KPHL was in the best position to exit the collar loan arrangement and divest itself of the [Oil Search] shares.40

2.42 In his oral evidence, Mr Kramer was asked about the above paragraphs:

Q: Mr Kramer, the way I read your paragraphs 45 and 46, it seems as though from the moment that KPHL obtained the obligation, are you already looking for ways to exit the arrangement, is that a fair characterization?

A: That is correct, yes.

Q: So, the management that you are talking about is not management to keep the shares, you were just looking for the first available opportunity to exit the arrangement?

A: By and large that is correct, yes.'"

2.43 Mr Rogen Wato, the Chef Legal Officer of KPHL and its Company Secretary between 4 March 2014 and 11 August 2017, also provided evidence to the Commission on this topic. He recalled that:

51. Following the novation of the Collar Loan arrangement. I recall the Board obtaining an update at every meeting on the performance of the Collar Loan and the Oil Search shares, and requiring Management to find ways to discharge the loans and retain the Oil Search shares.

62. However. from mid-July 2014 onwards, [the] world oil price slumped from the usual average of USS90/b in the previous 7-8 years, to as low as USS26/b in February 2016, and remained at an average USS60/b over the next 3 years. That made it difficult for KPHL to plan to discharge the UBS loans (which were predicated on the assumption that the oil price would remain at the USS90/b average) and at the same time support the Government's growing budgetary needs during a difficult

revenue period.

64. Once the loans were refinanced, I recall that the KPHL Board considered that the oil price would not rebound to the old average of USS90/b days and that against the difficulty that KPHL were having to accumulate savings or obtain better financing, the Board began to view the loans more as a liability than an asset. The Board then began to watch the market with a view to divesting the Oil Search shares and thereby discharge the loans. This monitoring was undertaken through the office of the Executive Manager of Finance. which office was initially held by Mr McDougall. then Mr Bradley Mitchell and Mr Robert Acevski, with external consultants covering during periods of vacancy.42

Kumul Petroleum Holdings Limited Authorisation Act 2015

2.44 NPCP had originally been a subsidiary of IPBC. In September 2015, this structure was changed as a result of the KPHL Act.

2.45 By section 5 of the KPHL Act, the shares of NPCP (and its subsidiaries) were transferred to the Kumul Petroleum Trustee (Kumul Trustee) and NPCP's name was changed to KPHL.

2.46 The Prime Minister of the day is the trustee of the Kumul Petroleum Share Trust (Trust). The property of the Trust is broadly defined but includes the entire share capital of KPHL and all rights and benefits attached to it, including dividends and other property.43 The beneficiary of the Trust is the State.

2.47 The KPHL Act limits the authority of the Board of KPHL. Section 13 of the KPHL Act requires KPHL to prepare an Annual Plan" which must then be approved by the Kumul Trustee and the NEC. Section 13 also prohibits the Board of KPHL from effecting transactions that total more than PGK 10 million in any accounting period unless they are in accordance with the Annual Plan. The Kumui Trustee has the power to increase this amount to PGK 25 million in any accounting period but that power has apparently never been exercised.45

2.48 To effect a transaction above the PGK 10 million threshold, the Board of KPHL must refer the matter to the Kumul Trustee (that is, the Prime Minister). The Kumul Trustee then refers it to the

NEC for approval. As Mr Sonk put it in his statement, the 'effect of Section 13 of the Act is therefore that any significant decision must involve the Prime Minister. Without the involvement of Trustee (PM), no major decisions of [KPHL] can be made.'46

2.49 Clauses 7 and 8 of the Trust Deed of Kumul Petroleum Holdings Limited (Trust Deed) provide for limitations on the liability of the Kumul Trustee and indemnities for any such liability. Importantly, the limitations and indemnities expressly do not apply in the event of 'fraud, breach of trust, gross negligence or wilful default of the Trustee including as a result of breach of fiduciary obligation.'47

2.50 Despite the provisions of the KPHL Act, Mr O'Neill's oral evidence was that he did not consider that his consent was required for KPHL to sell the Oil Search shares and that he simply had to be kept appraised of the dealings by the Board. Mr O'Neill gave the following evidence:

Q: So, if we can go to paragraph 138 [of Mr Sonk's statement of 13 November 2020]. So. now we are going forward in time Mr O'Neill to the sale of the shares in 2017. And this is Mr Sonk's statement. He is coming on Monday and he says there, recommended to the board that Sir Moi Avei, KCHL's then chairman and I should discuss the maturing of the collar loan with the Prime Minister, in particular the risk and strategy. I recall after this meeting Sir Moi and I had a meeting with the Prime Minister and then we each had separate discussions with the Prime Minister to discuss the maturing of the Collar Loan. I do not recall the dates of these meetings but they were regularly conducted to ensure the Prime Minister as trustee was fully appraised of developments in relation to the maturation of the loan.' So, firstly do you agree that in 2017 you had regular meetings with either Mr Sonk or Sir Moi Avei about the possible sale of the Oil Search shares?

A: As trustee of course they gave me briefings on the issues relating to Kumul Petroleum
so I am sure that those meetings eventuated as far as I can recall.
Q: I see, all right. And then [Mr Sonic] says this at paragraph 140, in order to sell the
shares held by Kumul Investments, Kumul Petroleum Holdings Limited had to obtain the
approval of the Prime Minister now the sole shareholder and trustee of the company
under the new corporate structure. Now, that is right, is it not that at that time in your
official capacity, not personally, you were the sole shareholder and trustee of the
company?
A: Trustee on behalf of the State, yes.
Q. Yes, indeed. And then if we go to 141 where he says, 'When the global oil price came
down to below $30 a barrel in July 2017, I contacted the Prime Minister to organize a
meeting to discuss the sale of the shares. I decided this was a good time to sell the
shares because the low oil price would minimize the loss that KCHL corporate group
would suffer under the terms of the Collar Loan Agreement.' And then he says at 1.42
(sic: 142], do not recall but prior to 19 September 2017 I had a meeting with the Prime
Minister to discuss the possible sale of the Oil Search shares.' Do you recall that meeting
or meetings?
A: I am of course sure that those meetings when [sic: and] briefings took place; as you
can see the board made that decision to dispose the shares. No one predicted that the
oil prices will collapse down to less than US$30 and I understand from the briefings that
in order for us to participate in any distribution of excess from LNG Project, pricing would
have been above US$35 on oil prices to continue to hold the shares. So, when they
briefed me and it is the board's decision to dispose them, they are the owners of the –
yes I am the trustee of the holding company so I did get some of those briefings.
Q: All right, so you agreed with their decision to sell the shares?

A: Pardon?

Q: You agreed with [KPHL's] decision to sell the shares?

A: This is a decision for the board it has nothing to do with me and the board advised me
that that is the right course of action to take in order to protect Kumul Petroleum Holdings.

Q: All right, just scroll up a bit. When you say had nothing to do with you, you have
already agreed with me that paragraph 140 is correct that they had to obtain your
approval in your trustee capacity so to that extent it has nothing to do with you, is it not?

A: Approval in the sense that they were going to meet and make that decision. I had no
issues with that.

Q: Are you concerned in some way to agree with my question that you consented? You
did consent. did you not. there is no secret about that.

A: I did not consent. I had no right to approve the sale it is the decision of the board.
They just organized the meeting to advise me that they were making the sale.

Q: I see, all right.

A: As they are required to brief me as a trustee.48

2.51 Mr O'Neill later gave similar evidence. The answer came after he had given evidence about the
benefits to the State in holding shares in Oil Search. In his view, this arose not from dividends
from the shares but the wider role that he considered Oil Search played in Papua New Guinea as
a strategic and development partner
0: But then of course while you were the prime minister and with your approval the /Oil
Search] shares were sold in 2017, were they not?

A: That decision is entirely up to the Kumul Petroleum and its Board to make the
decision on when to sell the shares. I am equally surprised that they sold the shares

when the market prices were very low, I do not see the rationale of that. I know that the shares were much higher price from the purchase price we got few months after we bought at 58.20 and then even after it was sold the prices five to seven months after that the prices were well over S8.50. So the timing of the selling of the shares surprised me a hit. 4G

2.52 Mr O'Neill's evidence does not conform to the scheme of the legislation, and in any event it is rejected in iiew of the contrary evidence cited above.

2.53 In the circumstances faced by KPHL. under s. 13(1)(b) of the KPHL Act, 'the expenditure or acquisition or disposal of assets is presented by Kumul Petroleum Holdings to the Kumul Petroleum Trustee and subsequently presented by the Kumul Petroleum Trustee to the National Executive Council and approved by the National Executive Council'. Nothing in the KPHL Act or the Trust Deed absolved Mr O'Neill from the normal duties that apply to trustees. including the duty to act in the best interests of the beneficiary, here the State, and not to prefer his own or any other interests to that of the State. Mr O'Neill was required to put his mind to the request made by KPHL and from his evidence, it is clear that he did not do this as a trustee should. However, the evidence from Mr Sonk is that Mr O'Neill did indeed consider KPHL's request and refused it until the timing was right for his own purposes as discussed ;n more detail below.

3. The NEC approves KPHL dealing with the collar loans including selling the Oil Search shares

3.1 As referred to above, KPHL required Mr O'Neill's approval as Kumul Trustee to sell the Oil Search shares. Mr Sonk said that he had discussed the sale with Mr

O'Neill over a lengthy period of time.

Mr Sonk's written evidence was that:

(a) at the time of the 2016 refinancing of the collar loans, Mr Sonk and Mr O'Neill had several discussions in which Mr O'Neill had agreed that KPHL should un't/ind the collar loans if it was unable to refinance the loans with a cheaper and more traditional style of loan

(b) from those discussions, Mr Sonk was also aware that Mr O'Neill ',vented the State to get out of the Oil Search shareholding because the collar loans were expensive for KPHL to maintain in comparison to the minimal returns on dividends and Mr O'Neill wanted KPHL to invest in the Papua LNG project51

(c) whilst there was no disagreement between Mr Sonk and Mr O'Neill about whether the shares should be sold, Mr O'Neill (in Mr Sonk's estimation) saw a difficulty in managing this politically. This was not a concern of KPHL but because of Mr O'Neill's dual roles as Prime Minister and Kumul Trustee and the scale of the transaction, KPHL had to wait for Mr O'Neill to give his approval to sell the shares52

(d) KPHL was therefore seemingly waiting for the politics, share price and other factors to align before the shares could be sold. Mr Sonk noted that whilst the timing had to be right for KPHL, the primary consideration of Mr O'Neill, as Mr Sonk understood it, was a politically acceptable narrative53

3.2 On 8 October 2015, Mr O'Neill as Kumul Trustee submitted NEC Policy Submission No, 238/2015 to the NEC. The submission sought approval for KPHL to deal with the equity derivative financing transaction between NPCP Investments and UBS, including by terminating the transaction and disposing of the associated Oil Search shares.54 Part of the basis for the submission was that the 'volatility in gas prices Thad] presented an opportunity for managing the spread in the Collar loan to the advantage of Kumul Petroleum`:=5

3.3 The submission also noted that KPHL had discussed with UBS a range of other options, including the potential for a roll-over, extension, amalgamation or repayment of the collar loans. Any alteration of the collar loans would be regarded by UBS as requiring NEC approval. To accommodate this, KPHL had agreed the wording of an approval that met UBS' requirements so that the approval would be in place to allow the Board of KPHL

to manage the collar loans to the company's best advantage. It is therefore clear from the submission that as at its date, KPHL was already in discussions with UBS about the collar loans. Mr Sonk confirmed in his oral evidence that UBS' lawyers, Ashurst, had in fact drafted the terms of the decision that the NEC was being asked to make.56

3.4 By a letter dated 10 October 2015, Mr O'Neill had exercised his powers as Kumul Trustee to appoint Dr Jacob Weiss, an economist, as economic and financial adviser to himself as Kumul Trustee. The letter of appointment stated that Dr Weiss was to be invited to all KPHL Board meetings and have the right to express his views and advice to the Board on economic and financial matters.57 Dr Weiss had died before the Commission took evidence and left no testamentary evidence as to this role.

3,5 On 27 October 2015, the NEC issued NEC Decision No. 308/2015 based on NEC Policy Submission No. 238/2015. This authorised KPHL to deal with the collar loan, including

terminating the loan and disposing of the associated Oil Search shares.58 Whilst KPHL was. by NEC Decision No. 308/2015, authorised to deal with the collar loans as it pleased. any such course required the approval of the Kumul Trustee, which. for the time being, was not forthcoming.

3.6 On 20 February 2016, NEC Policy Submission No. 19/2016 was issued to seek a correction of NEC Decision No. 308/2015. The Submission reported that KPHL and Kumul Investments had agreed on the terms for a refinancing of the collar loans with UBS. However, UBS and its lawyers had taken the view that the wording and grammar of NEC Decision No. 308/2015 did not provide sufficient authority for those companies to execute the refinancing

3.7 On 22 February 2016, by NEC Decision No. 45/2016, the NEC approved the amendment to NEC Decision No. 308/2015.60 This was the same day as the collar Ican was refinanced as discussed below.

Refinancing of the UBS collar loans in February 2016

3.8 The March 2014 and December 2014 collar loans were due to expire between 7 March 2016 and. 24 June 2016, and 11 July 2016 and 13 July 2016, respectively.61

3.9 While Mr Sank could not recall the details, he said that KPHL engaged PwC in February of 20:6 and KPMG at separate times to assist KPHL. Although he could not recall the specific details of those engagements. PwC and KPMG advised on the structure of the deal. share pricing and the reasonableness of the proposed transactions and the accounting treatment of the novation.

3.10 Mr Kelly was also engaged to provide written advice on the novation. Mr Kelly provided an advice to the Board of KPHL dated 17 January 2016 entitled 'Proposed extension of the existing collar loan with UBS'.63 Mr Kelly's view, in summary, was that the terms of the collar loan offered to KPHL by UBS and Morgan Stanley were on commercial terms ordinarily available to an arms-length borrower in the market conditions of the time and that the indicated pricing also conformed to market conditions.84

3.11 Throughout 2016, the Board of KPHL maintained its view that the collar loans should be exited as soon as possible. For example. at a Board meeting on 28 January 2016 it was resolved. 'that the Managing Director should return to the Shareholder to seek endorsement for KPHL to unwind and not replace the existing equity collar on the basis that it is not commercially viable:65

3.12 It is evident that Mr O'Neill refused this request because in February 2016, the March and December 2014 collar loans were refinanced again with the new collar loan provided by UBS, but with J.P. Morgan providing some of the loan funds to UBS. 66

3.13 The reason KPHL obtained a split collar loan from UBS and J.P. Morgan was to create competition for the lending and thereby obtain more competitive rates.67 Mr Sonk also explained

that KPHL also thought that by splitting the loan into two •,vith dIffering maturity dates. it would be easier to refinance the loans in the future as it would reduce the amount that would need to be refinanced at each maturity.68

3.14 It is unclear why KPHL elected to refinance the UBS Loan rather than allow it to mature Brattle 4 assessed that if KPHL had allowed the UBS Loan to mature, the loss that the State suffered as a result of the entire transaction, which Brattle assessed at AUD 336.3 million, would have been reduced by between AUD 74.4 and AUD 75.2 million, giving a smaller total loss to the State of

AUD 261.2 to AUD 261.9 million.69 It is therefore clear that KPHL lost significantly more money by deciding to refinance. The principal components of this difference are discussed further below

3.15 In his oral evidence, Mr Sonk suggested that KPHL did not have the money to be able to pay out the transaction:

A: Basically, what I am saying is that the whole transaction, the collar transaction was – I do not know how to describe it - it is like you know the parcel of shares - - -

Q: Yes.

A: We do not actually own it but we are asking UBS to keep it and we are basically saying, when you pay the bridge cut so that the collar, we will pay out when we have money. In the meantime, we will roll it over every year or every two years so we pay you this interest. And because of oil price and it can be conditions not being right we never had the money. We could not produce the money to actually pay the entire shares out and we would physically own the shares. It was kept by them on the promise that we will pay you.70

3.16 However, Mr Sonk's understanding is incorrect in that it would not have been necessary for KPHL to find the funds to pay out the collar loans in their maturity periods. The purpose of the option structure of the collar loans was to ensure that such payments were unnecessary. This was an important protection for both the State/KPHL and UBS.

3.17 On 22 February 2016, the March and December 2014 collar loans were unwound and replaced with the new collar loan provided by UBS, but, as mentioned, with J.P. Morgan providing some of the loan funds to UBS.71

3.18 A new feature of the February 2016 collar loan was that KPHL had the right to terminate the loan and receive a pro-rata refund of the pre-paid interest on the loan.72 Additionally, KPHL negotiated a reduction in the interest rate on the collar loan from 4.95% to 3%.73 However, there were also inclusions in the new loan that did not favour KPHL. These included changes to the way in which dividends would be treated. Under the February 2016 collar loan UBS made no payments in lieu of dividends on the large majority of the shares.74

Sale of the Oil Search shares in September 2017

3.19 In about February 2016, the global oil price dropped to approximately USD 26 per barrel.75

3.20 Following the refinancing of the UBS Loan in February 2016, KPHL was of the view that the global oil price would not rise back to its former price of (the Commission was told, USD 90 per barrel). The KPHL Board therefore considered that the UBS Loan continued to be a liability and looked to divest the Oil Search shares.76

3.21 According to Mr Sonk's written evidence, KPHL received advice about the sale of the shareholding from a number of sources:

(a) From January 2015, it had received advice from Mr Kelly

(b) From about March 2017 to the sale of the shares in September 2017, KPHL's primary adviser was Mr Robert Acevski, KPHL's CFO

(c) Mr Sonk had regular contact with Mr Paddy Jilek and Mr Mitchell Turner of UBS and sought advice from them including in relation to 'when the right time to sell would be'77

(d) A presentation in July 2017 from UBS and J.P. Morgan about closing cut the collar loans, is discussed in more detail below73

3.22 Mr Kramer also gave evidence about the steps that KPHL took to monitor the transaction with a view to exiting:

Q: What were the factors that were under consideration during this period of managing the obligations as you put it with a view to [exiting)? What were the things that you were keeping an eye on in order to decide when the arrangement could be exited?

A: Well. first the collar loan structure was a complex but at all times while I was chairman of the board our focus was to ensure the best time we could exit the transaction at the minimum cost to the company. That was a function of how the shares were being traded with the nature of the collar structured as quite complex. Shares that were the subject of the transaction were constantly being bought and sold so it was an extremely complex structure. We were trying to understand with professional assistance as to how best we could exit that transaction and minimize our exposure.

Q: So. the only reason that the shares were not sold whilst you were still the chairman is because you felt it was not the right time yet to do that?

A: No. it was fundamentally driven by professional advice as to whether it was a good time to dispose of or exit the transaction or otherwise. We were constantly relying on professional advice as to how best to exit without increasing the exposure that we were already exposed.

Q: Whilst you were the chair up until March 2017, you did not receive professional advice that now was the right time to sell, is that how I understand it?

A: That is correct, yes.7';'

3.23 Mr Kramer's last answer quoted above may not be the full reason why KPHL did not sell the

shares before March 2017. It also needed the consent of Mr O'Neill as Kumul Trustee.

3.24 The minutes of the Board meeting held on 25 May 2017 record that:

> The Board suggested that Management need to investigate what estimates of dividends Treasury used in the 2017 budget so the Company can better manage Treasury's expectations. Robert fAcevskil said that he had received a letter from the State asking if KPHL was still able to provide K300m in dividends. The Company has responded saying that only K150m was provided for in the approved AOP, however it is clear that there is a shortfall in the Treasury revenue estimate which may return to haunt KPHL.
>
> MD noted that the Board should consider its position in regards to the collar loan. as a very large expenditure will be due in the beginning of 2018 to maintain it. Depending on the price of the Oil Search shares (which are expected to increase) then exiting the collar could become expensive with the crossover at a share price of A$7.35. and it could be beneficial to act before then.
>
> The Board requested that Management provide the exact financial position of the collar at every Board meeting from now on so they can accurately understand the Company's liability and he in a position to talk to the new government about the possible release of the collar.8°

3.25 Mr Sonk was subsequently asked to explain how it was said that 'exiting the collar could become expensive'.81 His written evidence was that, based on the advice that had been provided to KPHL at the time, the Board understood that KPHL would be financially worse off if the Oil Search share price went above AUD 7.35. He said those advices were provided in various discussions had with advisers and presentations made by J.P. Morgan and/or UBS. Mr Sonk referred to an example of one such presentation as the one made by UBS and J.P. Morgan on

17 July 2017 referred to below.82

3.26 As mentioned above, KPHL required. in effect, Mr O'Neill's approval as Kumul Trustee to sell the Oil Search shares.

3.27 Mr Sonk could not recall exactly when Mr O'Neill as Kumul Trustee gave permission to KPHL to sell the Oil Search shares.83 Mr Sonk further explained in oral evidence:

Q. Well, the obvious question then, Mr Sonk, is if you already had approval - final approval from the NEC at the end of October 2015 to finally exit this transaction, why did it take until 2017 for you to actually exit the transaction?

A: There were two in this transaction - there is two trigger points that we looked at. One was where is the share price and in relation to the put of $7.38. If it came below $7.38, we would exit without paying any more money; that was our target and also the political sensitivity around this decision because the same trustee made the decision to go in and the same trustee has made the decision to come out. So we were sensitive to something like that so we would be sensitive about making such a decision.

Q. ... So, let us just clarify this. The NEC decision that we were looking at was dated October 2015 so is your evidence that from somewhere even a little bit before October 2015, you had discussions with Prime Minister O'Neill that he wanted to get out of the Oil Search shareholding?

A: He was prepared to get out hence these decisions, yes.

Q: And that is only what 18 months after the transaction was entered into in the first place?

A: Correct.

Q: And why - so you have told us that one of the things that you were keeping an eye on was the share price but also you referred to the politics of it. Now, can I take you to paragraph 37. You say that what you understood from the discussions you had with

Prime Minister O'Neill was that the issue was not disagreement about whether KPHL should dispose of the Oil Search shares but the difficulty the then Prime Minister saw in managing this politically. What did he say to you about the politics of this decision to sell Oil Search shares?

A: It is just 2016 - he did not say, I am just - politics is around the comer in 2017. He did not say that but I am just saying that we saw it as him thinking about the consequences of 2017 politics when making these decisions in 2016.

Q: You had regular discussions with the Prime Minister about this topic?

A: Not about his politics and how to manage these things [bug about the shares, yes.

Q: And that continued from the latter half of 2015 all the way to September 2017 when the shares were finally sold, is that right?
A: Correct

0: And you see paragraph 38, you say KPHL had to wait for Prime Minister O'Neil/ to give his approval to sell the Oil Search shares. without that approval KPHL could simply not sell I take it? So, again despite having the authorization to deal with the shares. however you please. since October 2015 and the NEC decision. you say that you still needed Peter O'Neill's approval to sell the shares?

A: Yes. And also I do not think a lot of people. even the politicians and even the trustee maybe did not understand that the right time to sell was when the share price was at the put or below so vie would not pay anything else and come out. That would look like we

are selling at a loss and hard to message that was one of the difficulties.

0: And the issue of the share prices is something that you regularly kept the Prime Minister informed about?

A: Correct, Weil. discussions around that and where it is at.

0: You say in paragraph 29 that the timing had to be right for KPHL and I will just stop there. that is the share price. So in your mind the timing was timing in relation to share price. is that right?

A: Correct.

0: And you said the primary concern for Prime Minister O'Neill was a politically accepted narrative. And what narrative is that?

A: Narrative and explaining exactly why we are getting out and putting a positive spin when the share prices are below 58.20 that was announced in 2014 that we are getting into.84

3.28 However, Mr Sonk latter stated that he did not recall any actual conversations with Mr O'Neill about his need to manage the issue politically and that the only reasons Mr O'Neill gave for his position were that the collar loans were expensive in comparison to the returns on dividends and Mr O'Neill ?ranted KPHL to invest in the Papua LNG project

3.29 Mr Sonk did not provide any documents recording his discussions with Mr O'Neill about selling the Oil Search shares The Commission considers that It would have been good governance for the substance of the discussions and decisions reached to be recorded in writing.

3.30 In further written evidence provided dated 22 February 2022, Mr Sonk said that the February 2016 refinancing arose as a consequence of the fact that the collar loan was imminently expiring and KPHL did not have the funds available to it to directly acquire the underlying Oil Search shares. Mr Sonk says he recalls an informal discussion with Mr O'Neill with respect to the expiry of the collar loans and Mr O'Neill said words to the effect of 'roll it for now', which Mr Sonk understood to mean to renew the icans

3.31 Mr Sonk also said that the ultimate approval for KPHL to

take action over the collar loan was made by the NEC, rather than the Kumul Trustee Mr Sonk said that the usual process for obtaining NEC direction cn KPHL's significant business decisions was for him or the Chairman of the KPHL Board to discuss the business issues with Mr O'Neill as Kumul Trustee. He said that he

would then do the same with the KPHL Board to obtain its recommendation. Mr O'Neill in his capacity as Kumul Trustee would then take the recommendation to the NEC.87

3.32 When Mr O'Neil! was asked whether his primary consideration about when to sell the shares was a politically acceptable narrative, he answered: That is not quite true. A politically acceptable [sic] does not determine share prices. It will depend entirely on shares of value reflected on the stock market for Oil Search and that is for the Board to consider. '88

3.33 Mr O'Neill did not apply to cross-examine Mr Sonic on these (or any other; issues. Further, whilst Mr O'Neill gave further oral evidence to the Commission on 7 February 2022, he did not seek to tender any further evidence that might have responded to Mr Sonk.

3.34 On 17 July 2017, UBS and J.P. Morgan gave a presentation to KPHL in Port Moresby regarding the Oil Search shares.89 Mr Sonk attended the presentation. He recalled that Mr Acevski, KPHL's CFO and Mr Jilek were also at the meeting, amongst others.

3.35 The presentation included some PowerPoint slides headed 'Kumul Petroleum Follow up materials July 2017.9° There was only a single slide that contained substantive information about the shares. It was headed 'Kumul's effective share price in Oil Search is bound between $7.38 and $8.50'. The slide demonstrates that, if the loan was held until maturity, Kumul Investments would

not receive less than the strike price on the put options or the excess above the strike price on the call options, expressed by reference to the average strike price of each. It contained graphic and tabular information to demonstrate what Kumul Investments might receive on a sale of the shares by reference to a range of sale prices referenced against the average strike prices of the options.
There was also a text box explaining the same and referring to the difference between the market price of the shares and the strike price of the options as being the 'intrinsic value' in the shares.
This could be positive, neutral or negative depending upon the price at which shares were sold. A copy of the slide is reproduced below.

Kumul's effective share price in Oil Search is bound between :;37.38 and $8,50

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3 36 The slide inciuded a footnote reference to 'intrinsic value' ,,vh!ch stated: 'The market value of the derivative position prior to expiry is the sum of the time value and the intrinsic value. The market value may be lower than the intrinsic value (and potentially negative). At expiry the market value of the position will equal the intrinsic value'.91

3.37 In his statement of 10 August 2021, Mr Sonk said that the presentation explained the following, amongst other things:

(a) there was Intnnsic value in the Oil Search shares relative to KPHL's derivative position which was equal to the difference between the Oil Search share price and KPHL's

derivative position

(b) if the market price of the Oil Search shares was low. there was positive intrinsic value to

KPH! aris.lg from the collar loans (and vice versa)

(c) the lower the share price, the higher the intrinsic value

(d) positive intrinsc value was an assessment of what would occur on the sale of the shares.

not of the entire UBS Loan from its inception: 'positive 'intrinsic value' cannot turn a loss

transaction into a profit transaction''2

3.38 Mr Sonk also gave evidence to the Commission that Mr Jilek informed him that UBS would trade

the Oil Search shares to ensure that the price of the Oil Search shares remained

within the collar.

Mr Jilek said this to Mr Sonk but it was not put in writing. Mr Sonk cianfied in subsequent written

evidence that his understanding was that Mr Jilek meant that UBS were seeking to buy and seli

Oil Search shares to maintain the share value within the put and call strike prices in the collar structure.93

3.39 The Commission observes that UBS had no contractual obligation to trade the shares in a manner such that the Oil Search share price remained within the collar. Not least because of UBS' limited co-operation with the Commission, the Commission is unaware of whether UBS did in fact do so, or how it would have intended to achieve this and what shares it would have used for that purpose. Mr Jilek may have been referring to UBS' hedging strategy.

3.40 But if UBS did in fact seek to trade so that the share price remained between the collars, its attempt to do so was largely unsuccessful. For most of the

period in which the State and then
Kumul Investments held the Oil Search shares, the share price was below the average strike price
of the collar loan put options and therefore also below the price at which the State acquired the
shares.

3.41 On 1 August 2017, Mr O'Neill was re-elected as the Prime Minister. This development seems to
have cleared the way for the sale of the Oil Search shares. However, when it was put to Mr
O'Neill that he waited until he won the election to approve the sale of the Oil Search shares, he
replied: That is not quite true; t70' and that he could not recall the Oil Search shares being a
'significant political issue at the time:94 The Commission observes that if that were the case, Mr
O'Neill may have had a keen interest in ensuring that it stayed that way during the election period.

3.42 KPHL obtained advice from Mr Kelly on 10 August 2017 that:
(a) an Oil Search closing price of AUD 6.48 was 'in the money'95
(b) KPHL could 'request Early Termination of both Collar Loans' and 'the Back Collar
Confirmation Agreement ... requires that all parties agree to each tranche termination date.
In practice, this means that the banks need to be allowed to complete their Delta hedging
programme underlying each Collar Loan in an orderly market. ... the banks are obliged to
notify [KPHL] of the settlement amount within [one] business day of the agreed Termination
dates'96
(c) KPHL would 'receive back from UBS and JPM the pro rata amounts of pre-paid interest
relating to the unexpired period of the two Collar Loans'97
(d) the 'approximate amount of interest to be repaid fat a share price of AUD 6.48] is
AS20,878,656' and 'the approximate net proceeds to KPHL of an early termination given
today would be approximately A$155 million'8

3.43 KPHL's Board met on the following day, 11 August 2017. Mr Sonk's evidence was that at that
point, KPHL had spent USD 299.4 million (including dividends received) on the bridge and collar
loans and that if KPHL sought to refinance the loans in order to maintain the shareholding, this
would have required additional financing of an estimated AUD 71 million in early 2018 and
another AUD 71 million in 2020.99

3.44 The minutes of the 11 August 2017 Board meeting record that:

The MD presented to the Board an update on the Oil Search shares and associated Collar Loans.

It was reported that the collars would mature on 23 February 2018 and it was a requirement that KPHL must make an election between cash and physical settlement at least 10 days prior to the earliest expiration date of each collar group.

Management recommended that the Managing Director and the Chairman discuss this matter with the Trustee on the risk and strategy.lc
°

3.45 In his statement of 10 August 2021. Mr Sonk said that in or about August or September 2017. he was told by his Chairman, Sir Moi Avei, who had met with Mr O'Neill, that KPHL could now sell the Oil Search shares. Sir Moi said that Mr O'Neill would manage the politics of the situation and defend the decision.101

3.46 Sir Moi Avei provided a statement to the Commission dated 5 November 2020. The statement does not mention the meeting with Mr O'Neill or the instruction to Mr Sonk but states that at the 11 August 2017 KPHL Board meeting, Mr Sonk recommended that he and Sir Mo should speak to Mr O'Neill as the Kumul Trustee about the risks and strategy KPHL should consider in advance of the maturity date.102

3.47 When Sir Moi Avei gave oral evidence to The Commission, he denied that he had met Mr O'Neill to discuss the sale of the Oil Search shares.'03

3.48 On 19 September 2017, KPHL held a special Board meeting. The minutes record that

In the current investment climate with declining oil/gas prices, diminishing returns on investment, and better competitive investments [sic] options in new project coming on stream in the next few years, it is no longer tenable to maintain a shareholding position in [Oil Search] as well as the Collar loan facility denominating those shares.

There are various unwind and restructure options and costs and benefits of each option available in the market including early termination and unwind.

5. RESOLUTION

After noting the discussions and considering the recommendations by Management. the Board unanimously resolved, amongst others. to:

(a) authorise a physical unwind of the collar structure resulting in an early termination of the collar and KPHL having no further exposure to the Oil Search shares and

(b) authorise the board of KPIL to effect resolution (a):

(c) direct management to take all necessary steps including obtaining all authorisations and satisfying all legal requirements to implement the above resolution.'`-'4

3 49 Mr Wato recalled that:

On 19 September 2019 [sic: 2017], the KPHL Board decided to seek the Prime Minister's consent to the sale of the Oil Search shares, but defer seeking and obtaining the National Executive Counsel's [sic] approval until after first selling the shares. Then subsequently seek the approval and ratification of the National Executive Council. This was necessary to manage share price sensitivities in the market because any leakage of news that KPHL is about to sell the [Oil Search] shares would affect the [Oil Search] share price and have a negative impact on the margin due to KPHL from the sale or might even result in a total loss. I understood that the Prime Minister's consent to this approach was received prior to the Board's decision to sell the shares in this way.“.

3.50 Mr Sonk said the following in his statement to the Commission dated 13 November 2020:

(a) Before 19 September 2017, he :net with Mr O'Neill to discuss the possible sale of the Oil Search shares136

(b) On 19 September 2017, KPHL had a Special Board Meeting at which multiple options to

reduce or cease the shareholding in Oil Search were canvassed.107 The Board resolved to authorise a physical unwind of the collar structure to allow the KPHL group to terminate the collar and for KPHL to have 'no further exposure to the ISharesr,G.

(c) Between 19 September and 21 September 2017. Mr Sonk met with Mr O'Neill as the Kumul Trustee regarding the Board's decision to terminate the collar loans and sell the shares.1:5 No written approval of the sale was issued by Mr O'Neill

(d) KPHL announced its decision to sell the shares after the close of trading on 21 September 2017110

(e) KHPL sold the shares held by Kumul Investments on 22 September 2017111 or 26 September 2017112

3.51 Mr Sonk gave oral evidence to the Commission confirming that:

(a) He met Prime Minister O'Neill on 19 September 2017 to seek his consent to the sale of the Oil Search shares and unwinding the collar loans. He had some PowerPoint slides which he showed to Mr O'Neill that, in Mr Sonk's view, demonstrated that it was the right time to sell the shares. Mr Sonk cannot now locate those slides113

(b) He had a second meeting with Mr O'Neill discussing the sale of the shares.114 From paragraph 148 of Mr Sonk's statement of 13 November 2020,115 it would seem likely that this meeting took place on about 21 September 2017

3.52 In his statement of 10 August 2021, Mr Sonk said that:

From in person discussions I understood that the then Prime Minister Peter O'Neill considered that he would be able to 'sell' a narrative that the sale of the shares at that time was in fact 'made money' (sic] because:

(a) The sale was at above market price, being the difference between the market price of AUD$6.70 and the average strike price of the put options at AUD$7.38 creating what is described as a residual profitlis this the difference between cash and 'value 'l

(b) The sale generated AUD $35 million to KPHL comprising:

(i) the 'residual profit, and

refund of the pre-paid interest 116

3.53 Mr O'Neil's intended narrative was inaccurate.

3.54 Mr Sonk noted that the fact that KPHL was taking advantage of the strike price of the put options being higher than the market price for the shares did not in truth represent money being made given that the shares had originally been acquired at AUD 8.20.

3.55 Similarly, the AUD 35 million was a refund of money previously paid by the State so it also was not 'making money in the way that Mr O'Neill was suggesting. It was unplanned revenue as far as KPHL was concerned and was passed on to the State as a special dividend.117

3.56 On 12 October 2017, there was a meeting of the NEC. At the meeting, by NEC Decision NG29/2017, the NEC resolved to approve a Revised 2017 Annual Operating Plan for KPHL dated

19 September 2017 and thereby to authorise and ratify the sale of the Oil Search shares and the early release of the collar loans 11

The financial outcome from the sale of the Oil Search shares

3.57 The financial outcome of the sale of the Oil Search shares needs to be considered from the perspectives of KPHL and the State, respectively.

3.58 Mr Sonk wrote a letter to the Commission dated 14 July 2021 setting out KPHL's assessment of the financial outcome of the transaction.119

3.59 Viewing the sale of the shares from KPHL's perspective, AUD 1,137.66 million was realised. From that AUD 1,102.57 million was used to repay the collar loan. KPHL received net cash of AUD 35.09 million which comprised a refund of prepaid interest of AUD 25.6 million and a residual profit on the sale of AUD 9.49 million.120

3.60 In his statement of 10 August 2021, Mr Sonk stated that he viewed the sale of the shares and the closing out of the transaction as a good decision from KPHL's perspective. This was because

KPHL was losing money with no real gain; it had other investment opportunities which would yield higher returns and the transaction would realise the AUD 35 million. Mr Sonk noted that whether the transaction as a whole could be viewed as a success for the State was a different question.121

3.61 In his .eater of 14 July 2021 Mr Sonk also recoonised that the sale of the shares represented the final stage of KPHL's involvement with the Oil Search shares and the monies generated by the sale need to be considered in the context of its involvement in the initial purchase of the shares in March 2014, the novation in December 2014 and the refinancing in February 2016, thus:

a) KPHL's involvement in the initial purchase of the shares by the State was only to enter into the Payment Direction Deed. Its costs were limited to professional advisers which Mr Sonk believed to be about AUD 500,000122

(b) The novation in December 2014 required KPHL to obtain the finance to buy out the Bridge Loan. It did this through the letters of credit and a new collar loan. Mr Sork. assessed KPHL's direct net costs of the novation as being the AUD 270.99 million from the letters of credit plus professional costs of about AUD 1.5 million 123

(c) With the refinancing in February 2016, Mr Sonk assessed the net cost of the transaction to KPHL at AUD 97.35 million and a further AUD 1 million for professional advice124

3.62 Putting all of the above figures together. Mr Sonk assessed the total loss to KPHL from its involvement in the transaction at AUD 362.85 million.125

3.63 KPHL did receive dividends from Oil Search. Mr Sonk's evidence was that the dividends were relatively insignificant in comparison to the figures above. The KPHL 2017 Operating Plan forecast dividends of AUD 200,000 for that year.126

3.64 The Commission observes that in part, this would have been because the terms of the collar loans required dividends to be shared on agreed terms between KPHL and UBS.

Brattie's observations

3.65 Brattle comprehensively reviewed the transactions discussed above. Their analysis and conclusions are summarised below.

The novation and December 2014 collar loan

3.66 Through the novation, KPHL took the place of the State in the March 2014 transactions. It therefore became the borrower under the Bridge Loan and Collar Loan. KPHL repaid the Bridge Loan and entered into a new collar loan using as collateral the 12 million shares that had secured the Bridge Loan.

3.67 The December 2014 collar loan had different terms to the March 2014 Collar Loan. Brattle described the differences between the March 2014 and December 2014 collar loans as follows:

(a) the average of the put strike prices in the new collar loan was AUD 7.02 rather than AUD 7.38

(b) the average of the call strike prices was different

(c) the share price on the relevant date in December 2014 was AUD 7.80 rather than the AUD 8.20 in March of that year127

3.68 The principal amount of the new collar loan was again equal to the number of shares which secured the loan multiplied by the put strike prices. The interest was once again pre-paid, meaning UBS was again not exposed to the State's/KPHL's credit risk.128

3.69 Brattle assessed that the December 2014 transaction was not fairly priced - that is to say there was overcharging - and that it transferred AUD 7.1 million of value from KPHL to UBS. KPHL realised AUD 77.8 million from the transaction which it used to repay pant of the Bridge Loan. Had the transaction been fairly priced, KPHL would have realised an additional AUD 7.1 million, and thus KPHL would have needed to use AUD 263 million (rather than AUD 270 million) from its Letter of Credit to repay the balance of the Bridge Loan.129

The February 2016 transactions

3.70 It would have cost KPHL nothing to allow the March 2014 and December 2014 collar loans to expire in accordance with their terms. This is because of the put options in the Collar Loan. The strike prices of the put options would always have been sufficient to repay the UBS Loan so that KPHL had no risk of defaulting if the Oil Search share price fell below the put option strike prices. As Brattle noted:

> If the loans had been allowed to mature according to their terms, KPHL would from that point forward have had no further exposure to the Oil Search share price, KPHL would not have needed to make any further payments to UBS, and KPHL would have received up to AUD 390 million between 9 March 2016 and 13 July 2016 as the collars expired.
> The actual amount received would have been zero if the Oil Search share price was AUD 6.24 or less on all of the expiry dates of the options making up the collar component of the loans, but would have been a positive amount if the share price was above AUD 6.54 on any of the expiry dates. The maximum amount would have been AUD 390 million if the share price was AUD 11.64 (or more) on all of the expiry dates_13°

3.71 Brattle also concluded that. taking the Oil Search share price used by UBS on that day of AUD 6.75, there was value for KPHL in the loans that were being unwound:

> KPHL's rights under the collar loan agreements were valuable because of the possibility that UBS would be obliged to make a payment to KPHL as the collars matured. In order to realise this value, the Government could have looked for a third-party to take on KPHL's rights under the loan agreements. That third party would have been willing to pay to take on these rights, because KPHL had no further obligation to pay UBS and had

the right to receive payment from UBS if the Oil Search share price was above any of the put strike prices on any of the final exchange dates. In other words, the loans had a market value. Equivalently. UBS should have been willing to pay this amount to KPHL to terminate the loans.,31

3.72 Brattle concluded that. on 22 February 2016. the value of the March 2014 Collar Loan was AUD 119.3 million and the value of the December 2014 collar loan was AUD 8.7 million. t32

3 73 Instead of allowing the two collar loans to mature or seeking to extract their value by selling them to a third party or negotiating with UBS to terminate them, KPHL and the Kumul Trustee decided to replace the two loans with a new, single collar loan with a longer term. The structure of the new collar loan was similar to the previous collar loans but with a lower interest rate and a further important difference: KPHL had the right to terminate the loan at any time.133

3.74 The Commission notes that:

(a) the inclusion of this termination right is consistent with KPHL's desire to terminate the loans and dispose of the Oil Search shares

(b) the fact that KPHL did not allow the loans to mature and expire according to their terms is consistent with the suggestion that Mr O'Neill did not want the Oil Search shares to be sold until there was an acceptable political narrative

3.75 According to Brattle, the February 2016 refinancing was not fairly priced and favoured UBS. Whilst the interest rate in the February 2016 loan was reduced, it was still above a fair rate and KPHL received less than fair value when unwinding the March 2014 and December 2014 collar loans. Brattle estimated in their third report that a fair payment to unwind the March 2014 Collar Loan and December 2014 collar loan would have been AUD 127.9 million paid from UBS to KPHL as the rights that KPHL was releasing had value. A fair payment to refinance with the February 2016 Collar Loan would have been AUD 191.0 million paid to UBS. Therefore. a fair net r.s.aym,ent would have been AUD 63.0 million from KPHL to UBS. KPHL in fact paid UBS AUD 101.8 rrtHor Thus, in aggregate, these transactions transferred AUD 38.8 million cf value from KPHL to UBS

3.76 Brattie 4 assessed that if KPHL had allowed the loans to mature rather than refinance. the loss that the State (including KPHL) suffered as a result of the entire transaction, which Brattle assessed at A'JD 336.3 million, would have been reduced by between AUD 74,4 and AUD 75.2 million, giving a reduced total loss to the State of AUD 261.2 to AUD 261.9 million for the State. It is therefore clear that KPHL lost money by deciding to refinance. The principal components of this difference are that:

(a) KPHL would have avoided paying UBS to unwind the March 2014 and December 2014 collar loans and, later, the February 2016 collar loan

(b) KPHL would have received different amounts in dividends. The dividend policy under the March 2014 and December 2014 collar loans was more generous to KPHL than the policy under the February 2016 collar loan

(c) KPHL would have received payments from UBS as the March 2014 and December 2014 collar !cans matured and the Oil Search shares were disposed of between March and July 2016

3.77 Brattle also considered the question of how allowing the March 2014 and December 2014 collar loans to mature would ha /e affected the flow of dividends to KPHL. Brattle noted that while the

March 2014 Collar Loan and December 2014 collar loan required UBS to make a payment to KPHL in lieu of dividends on the Delta Quantity of shares, the February 2016 Collar Loan required no such payment. As a result, had KPHL allowed those loans to mature according to their terms, it would have received a greater payment from UBS in relation to the FY 2015 final dividend because it would have received a payment in lieu of the Delta Quantity of shares because the March 2014 Collar Loan and December 2014 Collar Loan were more favourable to KPHL in

relation to dividends than the February 2016 Collar Loan.

3.78 In order to calculate how much extra KPHL would have received, Brattle needed to make an assumption about the magnitude of the Delta Quantity, a pre-agreed fixed amount per share on some of the shares. Brattle assumed that the Delta Quantity in March 2016 would have been the same as the actual Delta Quantity at that time under the February 2016 Collar Loan. On this basis, KPHL would have received AUD 2.9 million more than it actually received. If the Delta Quantity in March 2016 had beer the same as the Delta Quantity was in August 2015 under the March 2014 Collar Loan and December 2014 collar loan, the State would have received AUD 3.7 million more than it actually received. The calculations underlying these amounts are shown in Table 3 of Brattle 4.135

3.79 In addition to reduced losses, KPHL would have been freed of the loans and the shares, an objective that it wanted to achieve so that it could undertake other projects that fell more clearly within its mandate (in its view, holding Oil Search shares did not).

The September 2017 transaction

3.80 In September 2017, KPHL took advantage of its early termination rights to sell the Oil Search shares and close out the February 2016 collar loan.

3.81 Brattle considered whether there was a financial benefit to KPHL in exercising the early termination right. The inclusion of the termination right meant that the loan documents also needed to specify the amount to be paid to KPHL on early termination. Brattle reported that there were two elements to the amount to be repaid:

(a) A partial refund of prepaid interest. The refund was only partial because it was calculated using an interest rate of 2.05% instead of the rate at which prepaid interest had in fact been paid of 3%

(b) A payment called the 'Optional Early Termination Amount'. This was to be determined by UBS in its discretion and was said to be 'subject to such factors as (UBS] deems relevant including, without limitation, the prevailing market circumstances and the price per Share which (UBS] would have achieved in terminating or liquidating its applicable Hedge Positions in connection with the Optional Early Termination, as determined by [LIES) in

good faith and a commercially reasonable manner.'136

3.82 The Optional Early Termination Amount was therefore an indeterminate amount which could have been zero. It depended in part on the outcome of UBS' hedging strategy which might, of course, have been negatively disrupted by the request for early termination.

3.83 Brattle estimated the market value of the February 2016 collar loan at its termination in September 2017. In Brattle's view, the loan was worth some AUD 17.6 million more than KPHL received from UBS for its termination. In other words, the termination transferred AUD 17.6 million of value from KPHL to UBS. This suggests that the value of UBS' hedge positions was significantly less than the value of the collar component of the loan. It follows from this that as

KPHL did not receive the market value of the loan when it terminated it early, there was no .nanciai advantage to it. in terms of the can itself. in seeking early termination.1.17

3.84 The Commission notes that there may have been other financial advantages Obtained by KPHL as a result of the early termination of the collar loan such as the ability for KPHL to invest in other projects with better returns but the Commission has not received any evidence that KPHL did in fact make such investments.

3.85 Had KPHL decided to allow the loan to mature according to its terms, Brattle noted that it would not have had to pay any further sums to UBS but it would have remained exposed to movements in Oil Search's share price.138 The Commission also observes that KPHL would not have been able to free up its capital for other prcjects offering better returns. if this was indeed a relevant and real consideration.

Dividends

3.86 As the StateiKPHL's shares in Oil Search were pledged as security for the collar loans, the loan agreements needed to address the question of what should happen to the dividends paid on the Oil Search shares during the period of the loan.

3 87 This is a complex issue with collar loans because the bank making the loan will want to hedge its exposure to the put options in the collar. Generally, it will do this by short selling borrowed stock in the same company, in this case, Oil Search. The lenders of that stock miss out on the dividends that they would have received on the shares which they have lent to the bank and the bank has then sold. Those dividends will be received by whoever has purchased those shares. The lender of the stock therefore requires the bank to compensate it for the lost dividends. Thus, a bank making a collar loan will face a cost – paying the short seller for the dividends. The bank then seeks to recover the compensatory sum from its borrower, here the State; KPHL. It is part of the price to b.e paid for the loan.

3.88 The treatment of the dividends as between UBS and the State/KPHL therefore needed to take account of UBS' likely obligations to the lenders of the stock to be short sold. This required a prediction of future dividend flows and an allocation of the risk that the dividend policy of the company in question, here Oil Search, could change.

3.89 Brattle analysed the treatment of dividends in the collar loans. Brattle concluded that:

(a) in the case of the March and December 2014 collar loans. the State or KPHL received from UBS a pre-agreed fixed amount per share on some e the shares (called the 'Delta Quantity') and the actual dividends on the rest of the shares

(b) in the case of the February 2016 collar loan, the pre-agreed amount to be paid in relation to the Delta Quantity was zero'="2

3.90 In Brattle's view, the structure of this arrangement was not in itself unfair (in the sense that it would not transfer value between the parties) if the pre-agreed fixed amount to be paid in relation to the Delta Quantity was equal to the expected dividend payments on those shares '4'2

3.91 This was essentially the case for the March 2014 and

December 2014 collar loans but not the February 2016 collar(cans

3.92 With the March 2014 Collar Loan, UBS received AUD 40 million of dividends whilst the State/KPHL only received AUD 19 million This may have been the result of a change in dividend policy announced by Oil Search in October 2014 which may not have been anticipated when the

loan was agreed but worked to the benefit of UBS. It was a risk of the transaction, a windfall and does not of itself indicate that the March 2014 dividend agreement was unfair at the time that it was made.141

3.93 In contrast, the agreement in the February 2016 collar loan that the pre-agreed fixed payment on the Delta Quantity would be zero could not reasonably be seen as a proper estimate of future dividend flows or. those shares. In Brettle's view, this represented a transfer of value from KPHL to UBS. By considering a dividend forecast for Oil Search issued at about the time that this loan was made, Brattle estimated that by agreeing to a pre-agreed payment of zero, KPHL transferred about AUD 20.2 million of value to UBS.142

3.94 In addition, had the dividend agreement of the February 2016 collar loan been the same as the prior loans (i.e. a reasonable expectation of future dividends, rather than zero), the market value of the loan when it was unwound in September 2017 would itself have been increased. This is because the dividend expectations for Oil Search in February 2016 were higher than they were in September 2017 so that the dividend rights under the loan would have been more attractive than could have been obtained in the market at that time. Brattle estimated that this would have increased the market value of the loan and hence its fair unwind amount by AUD 7.8 million.143

3.95 The dividend arrangements of the February 2016 loan therefore transferred a total of AUD 28.3

million from KPHL to UBS.144

UBS fees

3.96 Brattle 3 further considered the estimate of the fees paid by the State to UBS in relation to the UBS Loan. Brattle estimated that the fees amounted to AUD 28.4 million or about 2.3% of the value of the loans. This comprised an advisory fee of 1.35% together with additional fees for establishing and extending the Bridge Loan and a small amount of recharged expenses. Brattle regarded fees of that level as being high and consider that 1.35% rather than 2.3% would have been fair.145

3.97 Brattle noted that UBS did not charge a transaction fee on the post-March 2014 transactions but that had UBS done so at 1.35%, or about AUD 13 million, this would not have been sufficient to offset the difference between the price charged by UBS for those transactions and fair value.146

Financial Outcome

3.98 Brattle 3 considered the overall financial impact of the UBS Loan transactions.

3.99 From information provided by UBS, Brattle calculated that the State whether through itself or KPHL incurred costs of AUD 336.3 million to hold Oil Search shares between March 2014 and September 2017.147

3.100 This is made up as follows, with numbers in brackets showing payments to the State:148

Item	AUD Mil
Bridge Loan Interest payments	22.0
Dividends	(23.2)
Bridge Loan extension fee	5.0
Funds from Letter of Credit	270.3
Front Collar Additional Consideration Amount	97.4
Unwind payment from February 2016 Collar Loan	(35.1)
Total	336.3

3.101 This amount includes the net impact on the State of purchasing the shares (at AUD 8.20) and the ultimate sale of the shares at a price of AUD 6.70. It also includes fees paid to UBS, and to other advisers via UBS. It does not include fees paid directly to other advisers, for example the AUD 4 million that Mr Sonk has said KPHL directly paid to external advisers. It also does not include the cost to the State or KPHL of the Letter of Credit used to refinance the Bridge Loan which is not known.[149]

3.102 Brattle also considered what it would have cost the State to hold the Oil Search shares if the transactions with UBS had been fairly priced. In their opinion, the State actually paid a net AUD 80.9 million to UBS, but if the transactions had been fairly priced the State would have received AUD 94.0 million from UBS. Thus, the transactions in aggregate transferred AUD 174.8 million of value from the State to UBS None of these figures includes fees paid to UBS or others.15°

3.103 Brattle prepared a table showing this, set out below. A number in brackets indicates a payment to the State.[151]

Transaction	Total paid by State AUD Mil	Fair Value AUD Mil	Transfer to UBS AUD Mil
Bridge Loan	24.6	18.4	6.2
March 2014 Collar Loan	106.3	29.5	76.9
December 2014 Collar Loan	9.1	2.0	7.1
February 2016 transactions	101.8	63.0	38.8
Unwind of February 2016 Collar Loan	136.7	054.3)	17.6
Dividends	(24.2)	(52.6)	28.3
Total	80.9	(94.0)	174.8

3.104 This enables the loss of AUD 336.3 million to be shown in a different way as fcilows:'52

Item	AUD Mil
Purchase Oil Search shares at AUD 8.20	1,225
Fair value of the UBS transactions	

(94.0)	Value transferred to UBS
174.8	UBS Bridge Loan fee
11.7	UBS advisory fees
16.5	Other fees
3.1	Sell Oil Search shares at AUD 6.70
(1.000.9)	Total
336.3	

3 105 Brattle's calculation of loss is broadly similar to Mr Sonk's calculation of loss of AUD 362 million. The calculations can be reconciled Brattle did not take into account the AUD 4 million of professional fees that Mr Sonk says KPHL paid. Mr Sonk did not account for the return cf AUD 25 million of prepaid interest and omitted interest paid on the Bridge Loan and the Bridge Loan extension fee. Some of these omissions may have been because Mr Sonk was considering the losses from KPHL's perspective alone rather than the total position cf the State and KPHL

3.106 In Brattle 4, Brattle considered the letter of 14 July 2021 and compared Mr Scnk's analysis with the analysis in their earlier reports and identified the sources of difference between Mr Sonk's AUD 362.8' and Brattle's AUD 336 3 million. As a result. Brattle were able to include in their

estimate of the total loss to the State AUD 4 million of fees paid by KPHL that was not previously included in their analysis which had only included payments made to or via UBS.154 On the basis of their further analysis, Brettle considered it would be reasonable to update their estimate of the total costs of the UBS transactions to the State from AUD 336.3

million to AUD 340.3 million.155

4. The Commission's comments on the 2014–2017 dealings in the Oil Search shares

NEC Decision 308/2015

4.1 NEC Decision 308/2015 made on 27 October 2015 was based on a Policy Submission 238/2015 dated 8 October 2015.156 Policy Submission 238/2015 sought complete freedom for KPHL to deal with the Oil Search shares and the related loans subject to complying with the restrictions imposed by the KPHL Act. The Policy Submission was signed by Mr O'Neill and included a recommendation by him that the NEC should agree to it and a statement that he approved and endorsed the submission. It can therefore be concluded that from at least the date of that submission, Mr O'Neill was willing to permit the sale of the Oil Search shares, even though the State had only acquired them in March 2014 and despite his strongly expressed views then of the importance of the State maintaining a significant shareholding in Oil Search.

4.2 At no time did the board of KPHL consider a shareholding in Oil Search a strategic necessity for the State.

4.3 Given the absence of any credible basis for the asserted strategic interest in purchasing new Oil Search shares, an available interpretation of Mr O'Neill's apparent change of view about the need for the State to hold shares in Oil Search is that the purchase of the shares was primarily made to provide Oil Search with the funds to purchase the PAC LNG Companies and, thereby, its interest in PRL 15. Once that objective had been achieved, there was no further reason to hold the shares if other factors militated against this. The disastrous losses followed.

4.4 Equally, it is notable that the size of the shareholding acquired by the State in Oil Search was greater than necessary to finance the purchase of the PAC LNG Companies and appears to have been aimed to obtaining a stake of more than 10% in order to prevent a takeover of Oil Search, however Oil Search itself noted that the State always had special powers to achieve that in the national interest, and in fact there was rarely if ever more than 10% held. This also undermines the credibility of the strategic interest assertion.

The advice provided by Mr Kelly on 10 August 2017

4.5 The Commission understands the phrase 'in the money' to mean that at the time that the comment was made, the Oil Search share price was below the strike price of the put options in the collar loans so that KPHL would receive value through the exercise of the options. The value came from the shares being attributed with a higher price under the options than they were then worth in the market and being taken into account at that price in the repayment of the collar loan.

4.6 The termination of the collar loan and disposal of the Oil Search shares could be viewed from two perspectives: the transaction on its own and the transaction in the context of the entire Oil Search/UBS transaction between 2014 and 2017. The former generated value of approximately AUD 136.7 million to the State although only AUD 35.1 million of that was received as a monetary payment rather than an offset against the collar loan. However, the overall transaction caused losses of over AUD 340 million.157

4.7 It is apparent from Mr Scrk's eilderce that KPHL and its advisers consdered the question of selling the Oil Search shares from KPHL's perspective alone rather than as a transaction of the State. That is not surprising given the KumuliKEHL structure and the position held by Mr Sonk. This is clear from their use of the term 'in the money as applying to the situation when the Oil Search share price was beiciA; the strike price cf the put options. This ivas In the money in the sense that it would result in KPHL receiving more value for the Oil Search shares than it could obtain if it had sold the shares in the market.

4.8 Mr Sonk's evidence was that the KPHL Board at the time was not concerned with the context of the 0:1 Search shares in terms cf the overall loss to the State it holding the shares for three years

and selling them at the particular time when they were sold They were primarily concerned with
ensuring they adhered to their fiduciary duties to act in the test interests of the organisation
Mr Sonk was of the view that it was the Prime Minister and the Government's duty to act in the
best interest of the people of Papua New Guinea.159

4.9 This is not to say that KPHL was not aware of the broader context of the sale of the Oil Search
shares. In his statement of 10 August 2021, Mr Sonk appreciated that whilst Kumul Investments
*Paulo receive from UBS if the shares were sold for less than the strike prices of the put
options, and so taking advantage of the options being in the money, if the shares were sold for
less than they were bought, the overall transaction would result in a loss. As the average strike
price of the put options was AUD 7.38 and the shares had originally been bought at AUD 8.20.
this was indeed the case.'lli

4.10 Further, the exposure to the Oil Search share price included the upside available to KPHL under
the collar loan below the strike prices of the call options which averaged at AUD 8.50. In his
evidence to the Carnrnis.sic.:n. Mr Sank appears to have regarded any sale of the shares above the
strike prices of the put options as being financially disadvantageous to KPHL.161 In fact, this
would not be the case until the share price exceeded the strike price under the call options at
which point the amount of the excess would represent value transferred to UBS. There was
therefore room for KPHL to delay selling the Oil Search shares if it thought the share price might
rise although, against this, any delay would reduce the amount of prepaid interest to be refunded.
Mr Sonk was subsequently asked about this view. In further written evidence, his response was
to refer to his earlier statements and that the Board of KPHL relied on the advice of Mr Keily and
Mr Jilek and Mr Turner Mr Sank said the complexity of the collar loans generally meant there
were various incentives and disincentives for selling at various share prices. Mr Sonk said that,
on his understanding of the advice the Board was given, it was not as simple as realising a linear
benefit to price increase.162

4.11 If KPHL and the State were treated as one and the financial outcome of the transaction was
considered from inception in March 2014 tc termination in September 2017. the sale cf the shares

forfeited approximately AUD 17.6 million of value to the State. KPHL could have:

... attempted to realise this additional AUD 17.6 million of value either by negotiating with UBS (to terminate the February 2016 Collar Loan outside its terms. as it did with the other collar loans), or by attempting to find a third party to take on the loan, It could also have continued to hold the loan. Had the Government decided to continue to hold the loan, KPHL would have continued to he exposed to the Oil Search share price, although it would not have had to make further payments to UBS.163

4.12 In the Commission's view, it was legitimate for KPHL to regard the sale solely from its perspective. It was a separate legal entity and was not required to take account of the State's

preceding involvement in the transaction. Any wider duty to the people of Papua New Guinea in evaluating the right time to sell resided in the Kumul Trustee whose legislated role and purpose was to act in the best the interests of the State. KPHL had the consent of Mr O'Neill as Kumul Trustee to the sale and the sale was later ratified by the NEC. To that extent, it might be said that the State too was content to allow the transaction to be seen solely from KPHL's perspective.

Should the sale of the shares have been delayed?

4.13 It was put to Mr Sonk by counsel for Mr Vele and the Treasury that the loss that arose from the transaction was as a result of the timing of the sale and not because of anything inherent in the UBS Loan or the purchase of the Oil Search shares. It was mentioned that the price of the shares rose to AUD 9.19 in September 2018. The relevant exchange was as follows:

Q: .,. Now, I put it to you that that means that if the share price was 9.19 in September 2008 [sic:2018], that would mean that the State would have got 9.19 for each share that it sold in 2018.

A: We did not own the shares. If we owned it and paid for it, yes, you are right. But the
protection – the risk on the upside was with UBS so we would have paid more to get out
or even pay for those shares, crystallize it at that time.

Q: I put it to you that the loss that was occasioned was not because of anything inherent
in the UBS loan or indeed the purchase but the time of selling these shares; that is what
occasioned the loss.

A: Incorrect. Because the loss we are talking about is in pre-paid interest and paying out
the collar which came from the initial transaction.
Q: The initial transaction was to purchase Oil Search shares at AUD 8.20. If those
shares were sold at 9.19, clearly there would have been a profit per share of 149 million
shares, there would have been a profit.
A: I have to repeat myself, if we paid for that – in the initial transaction we paid for it and
the shares rose up to 9.19, yes, that statement would be correct_ 1s'

4 14 Mr Sonk's answers are not easy to understand. In particular, it was not a sufficient answer for him
to say that KPHL did not own the shares. The shares were pledged against the collar loan and
UBS held the title to them but KPHL had the right to close out the loan or allow it to run to
maturity.

4 15 It should also be noted that some of the tranches of the collar loan would already have reached
the expiry of their option periods before September 2018. The expiries commenced in March
2018. It is therefore not the case that all of the shares could have been held back to take
advantage of the price reached at that time, regardless of whether it is reasonable to consider that
KPHL should have foreseen the increase.165
UBS` hedging of the collar loan risk

4.16 It is normal for financial institutions to adopt strategies to hedge against financial risks.

4.17 The collar loans exposed UBS and later, J.P. Morgan to Oil Search share price risk. The risk
arose from the movement of the Oil Search share price in comparison to the strike prices of the
put options. KPHL could satisfy its obligations to UBS under the loan by transferring the shares to
UBS, even if the value of the shares was below the loan

principal outstanding (i.e., if the share
price was below the average of the put strike prices). The risk was real as ultimately, when Kumul

Investments terminated the loan, it did so when the Oil Search share price –.vas below the strike prices of the put options. From the banks' perspective, this downside risk was offset by their right to require the State to sell the shares to UBS at a fixed pnce 'the cat option strike prices; even if the market price of shares was then higher. In addition UBS charged the State premiums for the collars.

4.18 The banks' financial outcome from the transaction was uncertain and depended cn how the Oil Search share price would evolve during the terms of the loans. It would therefore be expected that UBS and J.P. Morgan would hedge against the risk of the collar loan.

4.19 UBS provided an unsigned statement with no identified individual as author to the Commission on 4 August 2021. Amongst other things, the statement asserted that:

a) UBS established a hedge position in Oil Search shares on the day of the Oil Search announcement on 27 February 2014, to mitigate some of its risk from the Oil Search share price166

to execute its initial hedge, it sold approximately AUD 700 million of Oil Search shares to 'eligible investors' at AUD 8.20 per share167

(c) its hedging as completed as a means to manage risk it said 'is common for collar loans of this type (known as 'delta hedging7168

(d) its intention was to regularly adjust its hedge position throughout the life of the first collar loan with 'the objective of UBS maintaining (as much as possible) a neutral risk exposure to the share price169

4.20 A subsequent statement from UBS on 9 August 2021 confirmed 'UBS was aware that JP Morgan implemented an intia/ delta hedge v.–hen the Refinanced Co jar Loan was executed because JP

Morgan implemented 'ts 'day one delta hedge as part of the transfer of 01! Search shares from 085 to JP Morgan'.''''

4.21 Section IX of Brattle 1 details UBS' trading behaviour in respect of Oil Search shares between 2014 and 2017. In summary, UBS borrowed a new total of 91 million Oil Search shares between 24 February 2014 and 6 March 2014. Over that same period. it sold between 82 million and 165 nriilion Oil Search shares,'"

4.22 UBS first disclosed a substantial shareholding in Oil Search on 3 March 2014. Its substantial shareholding ceased on 26 September 2017.

4.23 The Commission is not aware of any of J.P. Morgan hedging strategy.

4.24 Hedging strategies obviously have varying degrees of success in minimising risk. In this case, it appears that the hedging strategy did not fully neutralise UBS's exposure to the Oil Search share price. This conclusion is derived from the payment of the Optional Early Termination Amount explained above. As already noted, the amount of the payment depended on the outcome of UBS' hedging strategy. Brattle noted that the payment that UBS made to KPHL for the Optional Early Termination Amount was less than Brattle's estimate of the market value of the loan at the time. This suggests that the value of UBS' hedge positions was significantly less than the value of the collar component of the loan. If the hedging had been perfect, the value of the hedge position would have ve been equal to the value of the collar component of the loan.

4.25 In summary, the Commission considers that the hedging adopted

by UBS and J.P. Morgan was a matter for those institutions and not a concern of the State or KPHL. UBS and J.P. Morgan took the risk of how such strategies would unfold.

4.26 Despite the statutory significance and importance of the Kumul Trustee's decision to approve the sale of the shares in Oil Search, KPHL adopted a casual approach in being content to seek and accept Mr O'Neill's approval orally, which suggests a measure of informality, rather than doing so formally in writing, and in failing to keep proper records of discussions and decisions.

5. Conclusions in relation to the Terms of Reference

The rationale as to why the State sold the Oil Search shares in 2016

5.1 KPHL disposed of the shares in September 2017, not 2016,

5.2 It did so because, in its view:

(a) the Oil Search shares were not generating significant revenue
(b) it was not KPHL's role to hold shares solely for investment purposes. Indeed it had never wished to do so but had been directed to do so by Mr O'Neil! and the NEC
(c) the burden of the collar loan was preventing KPHL from investing in other resource development projects that did fall within its objects
(d) at the time that it sold the shares, it would receive value under the put options and a refund of prepaid interest
(e) Mr O'Neill as Kumul Trustee and the NEC had agreed to the sale

5.3 Brettle's evidence was that there were other courses that KPHL could have adopted which would have reduced the losses suffered by the State/KPHL.

5.4 Of course, the fact and circumstances of the sale undermines both the objective and subjective credibility of the strategic interest argument put by Mr O'Neil to justify the UBS Loan in the first place.

Whether legal and administrative processes were followed in the sale of the Oil Search shares

5.5 In the Commission's view, KPHL did comply with legal and administrative processes in selling the shares. It complied with the requirements of s. 13 of the KPHL Act.

5.6 Further, KPHL planned for the sale for some time in advance of it. Most notably, it secured a right

to terminate the collar loan during the February 2016 refinancing. It also took advice in relation to the sale, monitoring the share price for some while before it decided to sell them. The advice came not just from UBS but also from its own adviser, Mr Kelly.

5.7 Brattle called into question the decisions made by KPHL in relation to the loans and the disposal of the shares. Some of these decisions appear to have been made by Mr O'Neill's refusal to allow the disposal of the shares. These decisions increased the State's losses.

5.8 On the other hand, the Commission finds that Mr O'Neill did not act in accordance with his duties as the Kumul Trustee.

5.9 It was Mr Sortk's evidence that the sale was delayed by the need for Mr O'Neill to have an acceptable political narrative to explain the sale. KPHL needed, or at least, felt the need to have

Mr O'Neill's consent to sell the shares. In the Commission's view, Mr Scnk's evidence should be accepted. Mr O'Neill had a conflict of interest in considering the sale of the shares in the context and for the benefit of his own political fortunes.

5.10 In addition, Mr O'Neill's evidence was that he regarded the question of the sale of the shares as a matter for the Board of KPHL and that he was surprised that the Board decided to sell the shares when the market price was 'very low'. In the Commission's view, such thinking disregarded the purpose and requirements of the KPHL Act and his own duties as Kumul Trustee. The KPHL Act while stipulating that the Kumul companies are not the State nonetheless ensures that the State through the Kumul Trustee and the NEC keeps

broad control of their operations through the Annual Plan and any expenditure or acquisition or disposal of assets outside the Plan exceeding PGK 10 million.

5.11 More fundamentally, where Mr O'Neil's evidence diverges from the contemporaneous documents or Mr Sonk's evidence the Commission prefers the latter.

Losses incurred in the UBS deal

5.12 The total cost of the UBS deal to the country is about $AUD 336 million, calculated as follows:

Item	AUD million
tsriage Loan interest payments	-z-Lu
Dividends	(23.2)
March 2014 Bridge Loan extension fee	± 5.0
Funds from Letter of Credit	270.3
Front Collar Additional Consideration Amount	97.4
Unwind payment from February 2016 Collar Loan	(35.1;
KPHL fees	4
Total	340.3

Overcharging by UBS (compared to fair value)

5.13 The total amount UBS overcharged is $AUD174.8 million. calculated as follows.

Transaction	Total paid by State AUD million	Fair Value AUD million	Transfer to UBS AUD million
Budge Loan	24.6	18.4	6.2
March 2014 Collar Loan	106.3	29.5	76.9
December 2014 Collar Loan	9.1	2.0	7.1
February 2016 transactions	101.8	63.0	38.8

	Unwind of February 2016 Collar	136.7
(154.3)	17.6	
	Loan	
	Dividends	(24.2)
(52.6)	28.3	
	Total	80.9
(94.0)	174.8	

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2 'PNG to restructure all oil, gas and mining interests' published by ABC News on 8 April 2013, accessed 25 March https://www.abc.net.au/news/2013-04-08/pno-to-restructure-all-oil-aas-and-minino-interests/4616690.

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'Email, E. Asigau to W. Tecn-Isu, Re. Follow up letters, 4 March 2014, Exhibit N.1, W17.0099,0007.0406.

Email, E. Asigau to V:. Tom-isu, Re Follow up letters, 4 March 2014, Exhibit N.1, WIT,0099.0007.0406.

° NEC Policy Submission No. 67i2014 dated 6 March 2014, Exhibit ES, WIT.0051.0003.0008.

" NEC Decision No. 79/2014; 6 March 2014, Exhibit N.3, l/VIT.0099 0007.1162.
 National Petroleum Company Papua New Guinea, Extract of Minutes of Meeting, 9 March 2014, Exhibit 163 WIT.0026.0001.0924 at page 0925, [5].

72 Subscription Agreement. 10 March 2014, Exhibit V, WIT. 0015.0001.1382.
" NEC Decision No. 186/2014, 12 June 2014, Exhibit FF, WIT. 0036.0001.0306.

14 NEC Decision No. 264/2014, 2 September 2014, Exhibit FF, WIT. 0836.0001.0321.
"Statement of Rogen Wato dated 8 November 2020, [58], Exhibit 65, WIT.0038.0002.0002,
"Affidavit of Erastus Kamburi dated 27 July 2021, pages 6.14, Exhibit AM, WIT.0056,0004.0372.
 Answer to summons, Wapu Sonk, Exhibit 421, WIT.0O36.0010.0278.
1° Affidavit of Erastus Kamburi dated 27 July 2021, [47), Exhibit AM, Annexure T, WIT.0056.0004.0372.
" Affidavit of Erastus Kamburi dated 27 Jury- 2021, (49)-(51), Exhibit AAA, WIT.0056.0004.0372.
" Affidavit of Erastus Kamburi dated 27 July 2021, [52], Exhibit AAA, WIT.0056.0004.0372.
 Global Novation and Amendment Deed, 17 December 2014, Exhibit 165, W1T.0021.0005.0020; see also Statement of Frank Kramer dated 5 November 2020. [44], Exhibit CCC, WIT.0037.0003.0002.
 Letter from NPCP Holdings Limited to Australia and New Zealand Banking Group Limited, 17 December 2014, Exhibit 166, WIT. 0124.0004.0803;
Security Trustee Notice, 17 December 2014, Exhibit 167, WIT. 0124.0004.0928.
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'4 Notice of cessation of substantial shareholding, 17 December 2014, Exhibit 1472. OSL.5018.0001.0763.
'if- -.Witness Statement cf Mr Wapu Sank dated 1C August 2021, [28], Exhibit NNN, WIT 0036.0006.0004.
'1] —Witness Statement of Mr Wapu Sonk dated 10 August 2021, [28)132], WIT.0036.0006.0004.
'7 Witness Statement of Mr Wapu Sonk dated 10 August 2021, [34], Exhibit NNN, WIT.0036.0006.0004.
24 Statement of Francs Kramer dated 5 November 2020,[321 Exhibit NNN, WIT.0037.0003.0002.
 Witness Statement of Mr Wapu Sank dated 10 August 2021, (281;30], Exhibit NNN, WIT.0036.0006.0004.
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31 Supplementary Witness Statement of Wapu Sank dated 22 February 2022 in response to the questions posed by Mr Hales email of the 11 February
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"Transcript, Wapu Sonk, 12 August 2021, pages 3104-3105.

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2022, 22 February 2022, Exhibit 449, WIT 0036.0015.0006 at page 0010.
3' Transcript, Wapu Sonk, 5 August 2021, page 2620.
ls Statement of Francis Kramer dated 5 November 2020, [9]110], Exhibit CCC, WIT.0037.0003.0002.
07 Statement of Francis Kramer dated 5 November 2020, [32]. Exhibit CCC, WIT.0037.0003.0002
" Statement of Francis Kramer dated 5 November 2020, (42], Exhibit CCC, WIT.0037.0003.0002

3° Transcript, Francis Kramer, 29 July 2021; page 2356.
40 Statement of Francis Kramer dated 5 November 2020, (4311471, Exhibit CCC, WIT.0037.0003.0002.
4' Transcript, Francis Kramer, 29 July 2021; page 2360,
" Statement of Rogen Wato dated 8 November 2020, [611462] and [64), Exhibit 65, WIT.0038.0002.0002.

43 Letter from Prime Minister the lion James Marape MP to the Commission, 12 August 2021, Exhibit CCCC, WIT.0007.0005.0002 at pages 0007-
0018.
" Kumul Petroleum Holdings Limited Authorisation Act 2015, s. 2.

45 Traniscopi. Wapu Sonk, 12 August 2021 pegs 3101

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ru Iranracept, Peter O'Neill, 9 August 2021, pages 2040-2041.

• Statomont of Wept' Sonk dated 'It) August 2021, [35] Exhibit NNN, WIT 0031: 0006 0002

51 Statement of Wapu Sonk dated 10 August 2021, (641, Exhibit NNW, WIT.0036.0006.0004.

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" Statement of Wapu Sank dated In August 2021, r35t. [391, Exhibii NNN, WIT.0036.0000.0004.

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56 Transcript, Wapu Sonk, 18 August 2021, page 3261.

57 Letter P. O'Neill to W. Sonk, Appointment of an economic and financial advisor, 14 October 2015, Exhibit 416, WIT. 0036.0006.0063.

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59 NEC PCTIICy SOMISAi011 1612018 E%110.11i 16$, WIT 0007 0004 0772

8° NEC Decision No. 45/2016, Exhibit 169, WIT. 0007.0004.0770.

81 Brattle Report 3, 18 August 2021, [69], Exhibit PPP, WIT.0132.0003.0002.

62 Supplementary Witness Statement of Wapu Sonk dated 22 February 2022 in response to the questions posed by Mr Hales email of the 11 February
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63 Answer to summons, Wapu Sonk. Exhibit 421, WIT. 0036.0010.0278 at pages 0296-0297_

64 Answer to summons, Wapu Sonk, Exhibit 421, WIT. 0036.0010.0278 at page 0297.

• Kumul Petroleum Holdings Limited, Extract of Meeting Minutes. 28 January 2016, Exhibit 1108, WIT.0036,0012.0003 at page 0004.

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WIT 00313 0002 0002

W5))41 Soak 21 June 2021 page 1612
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" ' Brattle Report 4, 10 February 2022, [36], Exhibit 0000, WIT.0132.0004.0001.

'0 Transcript, Wapu Sonk, 19 July 2021, page 2068.

71 Front Collar Side Letter, 22 February 2016, Exhibit 91, ASH 002.014.5646.
• Eiraqle 'Riper! 3 1s Aewsi. 2021. Ell.11101I PPP WIT 0132 0001 0002

73 Transcript, Wapu Sonk, 5 August 2021, page 2609 ; Brattle 3, [78], Exhibit PPP, WIT 0132.0003 0002.
74 Brattle Report 3, 18 August 2021, [34], Exhibit PPP, WIT.0132.0003.0002.

75 Statement of Rogen Wato dated 8 November 2020, [62]. Exhibit 65, WIT.0038,0002.0002

'° 'Statement of Rogen Wmc November 2020 reel Exhibit 88. WIT 0038 0062 0002

" Statement of Wapu Sonk dated 10 August 2021, [46], Exhibit NNN, WIT.0036.0006 0004

78 Statement of Wars.; cuter 111 August 2021 1441481 Exhibit NNW, 451T 0036 0008 3004

76 Transcript, Francis Kramer, 29 July 2021, page 2361.

vu Extract of minutes of KPHL Board meeting, 25 May 2017, Exhibit 110, WIT.0038 0002.0089: Witness statement of Rogen Wato dated 8 No,einoet
2020, Annexure RW13, Exhibit 65, WIT.0038.0002.0002.

81 Extract of minutes of KPHL Board meeting, 25 May 2017, Exhibit 110, WIT 0038.0002.0089; Witness statement of Rogen Wato dated 8 November
2020, Annexure RW13, Exhibit 65, WIT.0038.0002.0002.

"r,tusp'ementary Witness 5,Ya'e-e. ;i::u Soo',

22::22 In response to the questions posed by Mr Hales email of the 'It February
22 22 csooysrl, 2022 4e,
s,

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65 Supplementary Witness Statement of Wapu Sonk dated 22 February 2022 in response to the questions -vs: email c' -e I I February
2022, 22 February 2022, Exhibit 449, WIT. 0036.0015.0006 at pages 0011-0012.

59 Supplementary Witness Statement of Wapu Sonk dated 22 February 2022 in response to the questions posed by Mr Hales email of the 11 February
2022, 22 February 2022, Exhibit 449, WIT.0036.0015.0006 at pages 0011-0012.

97 Supplementary Witness Statement of Wapu Sonk dated 22 February 2022 in response to the questions posed by Mr Hales email of the 11 February
2022, 22 February 2022, Exhibit 449, WIT.0036.0015.0006 at pages 0011-0012.
99 Transcript, Peter O'Neill, 7 February 2022, page 3783.
62 Statement of Wapu Sonk dated 10 August 2021, [59]-1621 Exhibit NNN, WIT.0036.0006.0004.
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32 Statement of Wapu Sonk dated 10 August 2021, [59]462], Exhibit NNN, WIT.0036.0006.0004.
93 Supplementary Witness Statement of Wapu Sonk dated 22 February 2022 in response to the questions posed by Mr Hales email of the 11

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'6 Attachment 4.1.3 - Tony Kelly, the steps and financial
implications for early unwind, 11 August 2017, Exhibit 61, WIT.
0036.0007.0445 at page 0446.
Attachment 4.1.3 - Tony Kelly, the steps and financial implications
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'7 Attachment 4.1.3 - Tony Kelly, the steps and financial
implications for early unwind, 11 August 2017, Exhibit 61, WIT.
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4 Attachment 4.1.3 - Tony Kelly, the steps and financial
implications for early unwind, 11 August 2017, Exhibit 61, WIT.
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99 Statement of Wapu Sonk dated 10 August 2021, [31], Exhibit NNN,
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172, WIT.0038.0002.0093 at page 0094.
79" Statement of Wapu Sonk dated 10 August 2021, [66], Exhibit NNN,
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1'2 Statement of Sir Moi Avei dated 5 November 2020, [20], Exhibit
DDD, WIT. 0074.0003.0002.
103 Transcript, Sir Moi Avei, 29 July 2021, page 2383.
104 Extract of minutes of KPHL Board meeting, 19 September 2017,
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105 Witness Statement of Rogen Wato dated 8 June 2021, Annexure
RW-17, Exhibit 67, W1T.0038.0004.0004.

'ax Statement of Wapu Sonk dated 13 November 2020; [142], Exhibit
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707 Statement of Wapu Soak dated 13 November 2020, [144], Exhibit
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Statement of Wapu Sonk. dated 13 November 2020, [146], Exhibit FF,
WIT.0036.0003.0002.
10' Statement of Vstapu Sank dated 13 November 2020, [148], Exhibit
FP, WIT.0036.0003.0002.
110 Statement of Wapu Sank dated 13 November 2020, [149], Exhibit
FP, WIT.0036.0003.0002.
111 Statement of Wapu Sank dated 13 November 2020, [125], Exhibit
FF, WIT.0036.0003.0002.

"'Statement of Wapu Sank dated 13 November 2020, [150], Exhibit FF.
WIT.0036.0003.0002.
113 Transcript, Wapu Sank, 21 June 2021, page 1613.

114 Transcript, Wapu Soak, 21 June 2021, page 1614.
"'Statement of Wapu Soak dated 13 November 2020, [148], Exhibit FP,
WIT.0036.0003.0002.
179 Statement of Wapu Sonk dated 10 August 2021, [70], Exhibit NNN,
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17 Statement of Wapu Sonk dated 10 August 2021, [71]-[73], Exhibit

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110 NEC Decision NG29/2017, 12 October 2017, Exhibit 174, WIT. 0038.0002.0099.
"'Letter from Wapu Sonk to the Commission, 14 July 2021, Exhibit WW, WIT.0036.0004.0002.
120 Letter from Wapu Sonk tc the Commission, 14 July 2021, Exhibit 104, WIT.0036.0004.0002 at page 0005.
121 Statement of Wapu Sank dated 10 August 2021, [79]-[80], Exhibit NNN, WIT,0036.0006.0004.
122 Letter from Wapu Soak to the Commission, 14 July 2021, Exhibit 104, WIT.0036.0004.0002 at page 0004.
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12° Letter from Wapu Sank to the Commission, 14 July 2021, Exhibit 104, WIT.0036.0004.0002 at page 0005.
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128 Brattie Report 3, 18 August 2021, [65], Exnlbit PPP, W11.0132. 0003.0002.

173 Brattle Report 3, 18 =,;g1;,:t 2CLI Exhibit PPP, WIT.0132.0003.0002
Brattle Report 3, 18 August 2021, [15], Exhibit PPP, WIT.0132.0003.0002
Brattle Report 3, 18 August 2021, [72], Exhibit PPP, WIT.0132.0003.0002.
e 18 August 2021, [75] and table 7, Exhibit PPP, WIT.0132.0003.0002.
133 Brattle Report 3, 18 August 2021, [77], Exhibit PPP, WIT.0132.0003.0002.
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PPP. WIT 0132 0003 0002
135 B".sttt 4 10 February 2022, [33], Exhibit 0000, W17.0132.0004.0001.
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'37 Brattle Report 3, 18 August 2021. [79]-[80], Exhibit PPP, WIT 0132 0003 0002
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139 Brattle Report 3, 18 August 2021, [88], Exhibit PPP, WIT.0132.0003.0002.

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'53 Letter from Wapu Sonk to the Commission, 14 July 2021, Exhibit 104, WIT.0036.0004.0002 at page 0005
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155 Era "n e 4 13 F 722. (55) Exhoint 0000 WIT 0132 0004 1,4;+C1
156 Bundle of Documents comprising 22 pages provided by Grace So-On, 18 August 2021, Exhibit SSS WIT 0015 7001 074 7 at pef.ies. 0747 ano 07:

157 Transcript, Wapu Sonk, 12 August 2021, pages 3120-3121; See also Brattle Report 4, 1,1 February 2022, Exhibit

0000, WIT 0132 0004 0001, in
which B rattle calculates the total losses to the State to be $340m.
158 Transcript, Wapu Sonk, 12 August 2021, page 3128.
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162 Supplementary Witness Statement of Wapu Sonk dated 22 February 2022 in response to the questions posed by Mr Hales email of the 11 February
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1°5 Brattle Report 3, 18 August 2021. [27)431], Exhibit PPP, WIT 0132 0003 0002
166 Statement by UBS AG, Australian Branch Wile,: 4 Aug,,st 2021 152!. Exhibit 6, UBS.000 i 0002 0007
167 State:y..47,i 14 OBS AG Aust,alian Branch dated 4 August 2021, [33], Exhibit 6, UBS.0001.0002.0007.

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CHAPTER 17

The State's Sovereign Wealth Fund

Summary

This chapter considers the genesis, nature and future of the State's SWF and makes related recommendations.

1. Relevance of this chapter to the Terms of Reference

1.1 This Chapter concerns item 1(t) of the Terms of Reference:

(t) What would the State's (and its government owned enterprises) financial positions have been had the UBS Loan to purchase the Oil Search shares and the purchase of the Oil Search shares not been entered into?

2. Background

2.1 SWFs typically:

(a) are a special purpose investment fund or arrangement created and o aned by a government for macro-economic purposes

(b) hold, manage or administer assets to achieve financial objectives and employ a set of investment strategies that include investing in foreign financial assetsl

(c) are established from receipts received from commodity exports, amongst other sources of revenue2

(d) are intended to be or become institutions of central importance in helping a country to improve the management of public finances, achieve macro-economic stability and support high-quality growth3

2.2 SWFs are adaptable and can be designed to achieve different purposes. As Brattle noted:

These commonly include.'

(a) smoothing out volatile revenues in order to insulate spending programs from fluctuations, such as those caused by volatile commodity prices; and

(b) investing surplus revenues for use later (including possibly much later, to facilitate intergenerational equity).

If a fund is mostly trying to smooth out volatile revenues, it is likely to invest mainly in low-risk, low-return assets such as bonds issued by governments with very strong credit ratings (such as the USA or Japan). Such investments generally hold their value from one year to the next but do not generate high returns over the long term. If a fund is mostly investing for the long term, it is more likely to invest in equities: although the value of equities is volatile, returns over the long term

tend to be much higher than returns from investing in bonds. Thus the investment mandate of a Sovereign Wealth Fund will depend on whether it is mostly trying to invest surplus revenues for the long term or is

mostly trying to smooth out volatile revenues to support current spending. The former will ha ye relatively low and relatively stable returns, while the latter will have higher returns that are more volatile.=

2.3 A set of principles known as the Santiago Principles were developed in 2008 by representatives of a number of SWFs. The Santiago Principles are described as Generally Accepted Principles and Practices (GAPP). The GAPP are designed to promote transparent and sound governance structures providing for adequate operational controls, risk minimisation and accountability. Different frameworks may be utilised to achieve these aims.5

2.4 The structure may be a pool of assets without a separate legal personality, such as, for example, Norway's Government Pension Fund and Timor-Leste's Petroleum Fund. The State's intended SWF, as set out in the Organic Law on Sovereign Wealth Fund,6 was also to have a pool of assets without a separate legal personality. It seems clear that there are a number of features which are desirable if not essential for the success of a fully operating SWF. for example:

(a) Where there is not to be a separate legal personality, there needs to be a clear distinction between the owner/governing body and the agency responsible for the operational Fri anagerrent of the SWF-

(b) The SWF owner role may be delegated to one of the central government's organisational snits. for example a ministry or a parliamentary committee Operational management might be delegated to an independent entity, such as a central bank as occurs in Norway and Timor-Leste, or an independent separate agency, as in

Alberta, Canada7

(c) As GAPP 8 emphasises, it is '[i]mportant to enhance confidence that the manager's decision with respect to investment be protected from undue and direct political it7terference'

(d) A robust governance structure is central to the success of any SWF. The GAPP provide for models of accountability through annual reports to the legislature or the public supported by dependent external review of financial statements audited in accordance with recognised in ternational standards8

(e) A code, guidelines or rules of professional and ethical standards are critical to ensuring a hii gh-Ievei of professionalism and integrity. as well as clear and observed rules for dealing with third party service providers9

2.5 The State was accepted as an implementing country of the Extractive Industries Transparency Initiative (EITI) in 2014 which 'implements the global standard to promote the open and accountable management of oi/ gas and mineral resources ' Its members comprise 55 span soring countries at different stages of imp:em. ent-ing the EITI Standard Of these. in 2019. nine COLA ntries had achieved satisfactory progress, 35, including the State achieved meaningful progress, and three countries have achieved inadequate progress. Other members include civil society representatives and companies in the extractive industry working with the countries in which they operate to develop a framework for transparency.

2.6 The latest published PNG EITI report (for 2019) observes:

5.4. PNG Sovereign Wealth Fund

The PNG Sovereign Wealth Fund (SWF) is intended to be an important mechanism for managing external shocks to the economy. to support the budget to fund priority areas

such as education, health and infrastructure, and to invest for the benefit of future generations. The Organic Law on the Sovereign Wealth Fund was passed by the Parliament in July 2015. The SWF is supposed to comprise two funds managed under the same governance framework: the Stabilisation Fund and the Savings Fund. Once operationalised, each fund will receive a proportion of mining and petroleum dividends paid by state owned enterprises. Based on current estimates by Treasury, 50% of mining and petroleum tax revenues will be channelled to the SWF Stabilisation Fund, while the other 50% will flow directly to the CRF to finance government operations. Until the SWF is operationalised, all mineral and petroleum dividends are directed to the National budget. The Savings Fund will also receive some of the proceeds of state-owned assets that the government agrees to sell. When revenue flows are large, the excess will be deposited into the Savings Fund. The SWF was originally slated to come into operation in 2016, However, at the time of writing, the Government has still not appointed the inaugural board, and the 2019 National Budget projects zero balances for both funds through to 2023.

3. Comparable SWFs

Timor-Leste

3.1 Amongst several possible comparators for the State is the Petroleum Fund of Timor-Leste, noting that this fund is, essentially, a savinas fund with the goal of saving the resource sourced wealth for future generations.1° The Petroleum Fund of Timor-Leste was established in 2005 to manage Timor-Leste's petroleum and other resources receipts for this purpose. The Government of Timor-Leste, through the Ministry of Finance, is responsible for the overall management of the Petroleum Fund on behalf of the people of Timor-Leste, with various reporting obligations to the Parliament. The operational management is carried out by the Central Bank of Timor-Leste which invests the Fund's capital according to guidelines established by the Ministry of Finance and mandates developed by the Investment Advisory Board. The Petroleum Fund law requires that all petroleum revenues are entirely transferred to the Fund and invested abroad in financial assets. The Fund's only outgoings are transfers back to the central government budget pursuant to

parliamentary approval.[11] In the Petroleum Fund of Timor-Leste quarterly report for 1 October to 31 December 2021,[12] the Central Bank reported the capital of the fund as USD 19.65 billion and achieving just short of its benchmark of 1.91% return. Gross cash in-flows into the fund from royalties and taxes were USD 467.1 million for the quarter. Out-flows for the quarter were USD 353.32 million, being transfers to the national budget of USD 350 million with USD 3.32 million for management costs. The profit for the quarter was USD 357.7 million.[13]

Ghana

3.2 In Ghana, the Bank of Ghana has responsibility for the operational management of the funds comprising the SWF.[14] The Petroleum Holding Fund is held off-shore at the Federal Reserve Bark of New York as the Bank of Ghana Petroleum Holding Fund Account. The Bank of Ghana reports[15] that the Ghana Stabilisation Fund and the Ghana Heritage Fund are collectively referred to as the Ghana Petroleum Funds, the purpose of which is to cushion the impact on or sustain public expenditure capacity during periods of unanticipated petroleum revenue shortfalls. The Ghana Stabilisation Fund is a fiscal stabilisation fund with a short investment horizon and the investments are highly liquid and conservative to be able to meet un-anticipated withdrawals. The

Ghana Heritage Fund is a savings fund to create wealth for future Ghanaian generations with a long inviestment horizon, the ability to take more risk and benefit from illiquidity premium.

3.3 The Ba Elk of Ghana is to report on the investment management through quarterly portfolio perforrniance reports and Financial Statements which are audited by the Bank's Internal Audit Departrrent and submitted to the Minister of Finance and the Investment Advisory Committee.

The Bank of Ghana also submits semi-annual reports to the Parliament of the Republic of Ghana, Investrnient Advisory Committee, in addition to publishing these on the Bank of Ghana website and in two national daily newspapers.16 The Ghana Heritage Fund currently has USD 644,787,189 in assets.17 A paper prepared by the South African Institute of International Affairs18 notes that the petroleum funds have largely been managed within the rules, but the Stabilisation Fund has been revised downwards multiple times to finance debt and expenditures. The report also notes low yields with regard to the Heritage Fund and the issue of the investment advisory committee not meeting regularly. The relatively smail size of oil revenues means the fund rules have not had a broad impact.

Chile

3.4 S'tJF the Economic and Social Stabilisation Fund (ESSF), is a Government-o',vned investment organisation which was established in March 2007. The ESSF was established with a contribution of USD 2.58 billion, the majority of which came from the dissolution of an earlier Copper Stabilisation Funcl.79

3.5 The ma nagement and regulation of the ESSF is tiered and set out below:

(a) Central Bank of Chile: manages the ESSF with a portion delegated to external fund managers whose performance it also monitors

b) The Financial Committee: Appointed by the Ministry of Finance to advise on the ESSF management and investment policies, and releases its own annual reports

(c) The Ministry of Finance: decides investment and management policy while the General Treasury, Chile's revenue service, is responsible for accounting and preparing audited reports on the ESSF

fd) The Comptroller Genera'performs and audit and reports to the Congress and the Government and

(e) Chilean Congress: passes legislation authorising funds to be paid into the ESSF and receives monthly, quarterly and annual reports from the Ministry of Finance20

3.6 The ES SF also has significant safeguards in place in the form of governance standards and regu lation.2"

3.7 The ESSF was established to stabilise revenues for the Government and overcome fiscal deficits when copper revenues declined, as copper is Chile's main export, or in periods of low growth. The ES SF operates to support fiscal expenditure stabilisation through a reduction of exposure to global business cycles. but also provides funding for public education, health and housing plans.

3.8 The Government of Chile makes deposits to the ESSF each year where there is a fiscal surplus. The positive balance is evaluated as being the difference between the fiscal surplus and deposits to another fund, the Pension Reserve Fund. Contributions to the Pension Reserve Fund are a minimum of 0.2% of the prior year's GDP.22

3.9 As the ESSF is a stabilisation fund its investment strategy is primarily aimed at maximising value to cover cyclical reductions in fiscal revenues while minimising risk. The ESSF's portfolio has a high level of liquidity and low credit risk / volatility and is accordingly aimed at the following asset classes:

(a) banking assets
(b) Treasury Bills
(c) sovereign bonds
(d) inflation-indexed sovereign bonds
(e) equities23

3.10 As at the end of January 2022, the ESSF had a market value of USD 6,414,660,000. Contributions to the ESSF since its creation totalled USD 25,765,710,000 and withdrawals from the fund totalled USD 24,245,060,000.24

4. Genesis of the State's SWF

4 1 On 10 January 2010, the State signed a Joint Understanding with Australia which principally focused on the assistance which Australia would give to the development of a PNG SWF for the

transparent management of the expected PNG LNG Project revenues.25 The State acknowledged that the Santiago Principles would provide a framework to reflect appropriate governance and accountability arrangements, as well as the conduct of investment practices on a prudent and sound basis.

4.2 In March 20'40, the NEC established a Joint Department of Treasury-Bank of Papua New Guinea Working Group (Working Group) to assess a structure for a SWF to manage the windfall revenues arising from the PNG LNG project.26 The Working Group consulted widely across government, with other domestic stakeholders, including IPBC and Petromin. relevant international stakeholders including the World Bank and Asian Development Bank, the IMF and governors of other SWFs.27

4.3 In its analysis, the Working Group examined past State experience in managing new resource sectors and commodity booms and concluded that the country had not successfully translated those revenues into improved socio-economic indicators to the extent that might have been expected.28

4.4 The Mineral Resources Stabilization Fund (MRSF) had been established in 1974.29 As the Working Group observed, its effectiveness was mixed – its funds were entirely invested onshore. there was a high opportunity cost through low domestic interest earned and limited scope for growth of the fund as well as weak governance arrangements and poor integration with the Budget and operation of fiscal policy. In 1999 the entire balance remaining in the fund was drawn down to retire a portion of the government's short-term debt. It was subsequently closed.

4.5 The other principal mechanism employed by the State to manage windfall revenues from high commodity prices reviewed by the Working Party were trust accounts. The trust accounts could be characterised as a form of domestic SWF. From 2005 to 2008 these trust funds were used to reduce debts and liabilities. According to the Working Group, up to and including the 2009

Budget a total of PGK 4.1 billion was appropriated to trust accounts for implementation of pnority progranrs.

4.6 A related matter was the Medium Term Fiscal Strategy (MTFS) which provided a framework to handle the volatile and uncertain revenue from commodity exports. Under the MTFS, 4% of GDP per ann um from resource revenue was regarded as normal revenue and could reliably be incorpo rated into the Budget, According to the Working Group, 3° in its first two years the MTFS was highly successful in managing fiscal policy and helping the State withstand the negative impact <A the global financial crisis and subsequent recession. In 2009 there was a substantial breach of the 4% spending rule. The Working Group stated:

> While a much greater amount than 4 per cent of GDP left Government trust funds, it is unclear whether these funds have been actually spent or transferred to other accounts.31

4.7 The Wowking Group observed that the problem was not the rules, but the failure to adhere to them

4.8 It then turned to the objectives of a SWF appropriate for the State's circumstances,'= which it concludl ed were

(a) macroeconomic stabilisation
r b) avoidance of Dutch disease33

(c) a sset management
(d) savings

4.9 To obtain those objectives the likely fund models were a stabilisation fund, a savings fund or a financing fund (which has features of each of the other types of funds). The Working Group concluded that an offshore financing fund with elements drain from sound international practice and experience was likely to be the best option,

4.10 The priricpai design elements would include:

(a) fully integrating the SWF with the budget and fiscal framework

(b) gcavernance, transparency. disclosure accountability and asset management rules based on international best practice including not pledging the SWF as collateral against any borrowings by government

(c) ensuring proper surveillance by parliament

(d) sufficiently flexible operational rules to enable the SWF to function within a wider fiscal framework and deal with unexpected shocks, but rigid enough to impose adequate discipline and control

4.1'1 The preliminary coneusions of the Working Group recommended

(a) a single offshore financing fund

(b) principal design elements to include:

(I) full integration with the budget and fiscal framework

(ii)) governance. transparency, disclosure. accountability and asset management rules to be based on international best practice

(e) drawdown rules to ensure prudent macroeconomic management and support government development objectives overseen by an independent board established to act in the best interests of the SWF with a clear mandate, adequate authority and competency to carry out its functions

(d) investment undertaken by an offshore investment manager investing only in offshore assets and restricted from purchasing government debt or lending directly domestically

4.12 A detailed submission was taken to the NEC in August 2010 sponsored by the then Minister for Treasury and Finance and Public Service, the Hon Peter O'Neill, and the then Minister for Public Enterprise, the Hon Arthur Somare, 'reflecting the

recommendations of the Working Group'.34 The structure was to consist of a consolidated pool of offshore funds with three coordinated and integrated funds with all expenditures to be through the budget process. They were a:

(a) Stabilisation Fund
(b) Future (Savings) Fund
(c) Infrastructure Fund

4.13 The governance arrangements were to be in accordance with the Santiago Principles (GAPP) with an independent competent board. A Secretaries Committee was established to oversee the detailed establishment of the SWF comprising, inter elle, the Treasury (Chair), Public Enterprises, National Planning, the Prime Minister and the NEC, and the Governor of the Bank of Papua New Guinea.

4.14 To explain what an SWF was and how its establishment would benefit the people of Papua New Guinea, the Department of Treasury issued explanatory statements and held workshops around the country in about mid-to-late May 2010.35 On the subject of better public funds management, the statement read:

> The creation of a Sovereign Wealth Fund will provide an opportunity for PNG to better manage public funds that it has done in the past. The Sovereign Wealth Fund will improve transparency and accountability around the use by the Government of the mining and petroleum revenues and dividends. The use of an independent Sovereign Wealth Fund board will ensure that assets in the Sovereign Wealth Fund are invested overseas without bias for the benefit cf the Fund.

4.15 On transparency and accountability of public funds the statement observed:

> Transparency in reporting and accounting of public funds has been a particularly sensitive issue in PNG. Loss of public funds and the lack of responsibility to account for those funds has left a great deal of public distrust for public finance management.

5. Relevant law

Constitutional Provision for SWF

5.1 The work of the Secretaries Committee and others led to the insertion of Sub-division AA The Sovereign Wealth Fund – into the Constitution which established a 'fund to be called Sovereign

Wealth Fund. Further provision was to be made by an Organic Law for setting up the SWF.36

5.2 The Orgenc Law on the Sovereign Wealth Fund 2012 was passed by Parliament in 2012. Under the Act, there was to be a guaranteed minimum annual payment into a Development Fund based on the expected average of PNG LNG Dividends.37

Organic Law on Sovereign Wealth Fund 2014

5.3 Due to a perceived procedural error in the Organic Law on the Sovereign Wealth Fund 2012 it did not become operative, and the Secretaries Committee then took the opportunity to address errors and restructure aspects of the SWF. The result was the repeal of the 2012 Act, replacing it with the Organic Law on the Sovereign Wealth Fund 2015 (SWF Act). It is important to note that the flow of PNG LNG Dividends into a Development Fund did not continue under the SWF Act albeit, as noted below, the SWF Act does require payment into one of its funds of between 25% and 65% of ail dividends due to the State from non-holding companies holding interests in mineral or petroleum projects.

5.4 The design of the SW(F in the SWF Act has changed from that originally envisaged. There are now only two funds, the Stabilisation Fund and the Savings Fund.3° The stated objects of the SWF are to support:

(a) macroeconomic stabilisation
(b) inter-generational equity
(c) asset management n relation to assets accrued from mineral and petroleum receipts

5.5 The legal ownership of the SWF is vested in the State. to be managed and invested for the benefit

of current and future generations of citizens. A board, appointed under the SWF Act, has legal custody of and management responsibility for the SWF (Board).4° Importantly, the Executive through the relevant Minister or its agents, may not give directions to the Board, the fund manager appointed under the SWF Act, the custodian, who overall holds the assets protectively, the secretariat, or any third party engaged by the Board, in relation to the operation of the Board, the investment strategy and management of the Board except as provided for by the SWF Act.'

5.6 Investments by the Board are only to be in foreign assets. may not be used as collateral for a loan or encumbered, and may not be used to support any guarantee.42

5.7 The stated purpose of the Stabilisation Fund is to manage the impact of fluctuations in mineral and petroleum receipts on the economy of the State, to promote and support macroeconomic stability, and to ensure that large foreign currency movements do not affect the competitiveness of the economy.43 The deposits into the Stabilisation Fund are, inter alia:

(a) 50% of all mining and petroleum taxes

(b) a lesser amount provided an increased amount is paid into the Savings Fund) of the proceeds of sale of the State's interests of any entity with an interest in a mining or petroleum asset, or any interest which the State holds in any entity holding an interest in mineral and petroleum assets

(c) permitted withdrawals from the Saving Fund

(d) 75% of all distributions from any of the State's holding entities, holding the State's interest, directly or indirectly, in mining or petroleum projects44

5.8 Withdrawals from the Stabilisation Fund are to be made through the budget and limited as to

amount by a complex formula designed to protect the real value of the Fund.45

5.9 The purpose of the Savings Fund is to provide a 'means of preserving the real value of extracted mineral and petroleum resources through long-term investment for the benefit of future generations of citizens of Papua New Guinea'.46 The deposits into the Savings Fund comprise the earnings on its investments and:

(a) any surplus of the Stabilisation Fund after its balance reaches USD 1 billion
(b) 40% (or greater if Parliament determines) of the proceeds of sale of any entity holding an interest in any mineral or petroleum asset for or on behalf of the Independent State, or the State's interest in any entity holding interests in mineral or petroleum projects
(c) 25% of all distributions from any of the State's holding companies, holding interest in mining or petroleum projects
(d) between 25% and 65% of all dividends due to the State from non-holding companies holding interests in mineral or petroleum projects
(e) proceeds of the sale of any ncn-mining or petroleum asset
(f) any other amount allocated under the budget4'

5.10 Withdrawals from the capital of the Savings Fund may not be made if the effect would be to diminish the Savings Fund to an amount less than the real value of the Fund and may not occur before the tenth anniversary of the effective commencement of the SWF."

5.11 The balance of the SWF Act provides in detail for the establishment of the Board, its duties and responsibilities, fund managers and the custodian, the secretariat and its finances and accountability. These provisions reflect the governance practices in the Santiago Principles (GAPP).

6. The Kumul companies – a 'shadow' SWF?

6.1 In 2016, the Government passed the Constitutional Amendment No. 44 (Papua New Guinea's ownership of Hydrocarbons and Minerals and the Commercialisation of Papua New Guinea's Business) Law 2016. This amended the Constitution to confirm the legal position under the Mining Act 1992 and Oil and Gas Act that 'hydrocarbons and minerals in their natural state are, and always have been, the property of Papua New Guinea.'

The amendments also make provision for an Organic Law to make further provisions in respect of the State's interests in relation to same.

6.2 The Government also passed the Organic Law on Papua New Guinea's ownership of Hydrocarbons and Minerals and the Commercialisation of Papua New Guinea's Business Law 2016. This Organic Law set out the structure for a group of companies created by Parliament in the previous year through which the Government would reorganise ownership of its interests in mining and petroleum projects in the State.

6.3 In 2015, a group of companies was created by Acts of Parliament" (Kumul Acts) as vehicles for commercial activities by the State with respect to oil and gas and mineral resources replacing previous companies which, generally, carried out the same functions. It is through those companies that the proceeds of and from participation in projects exploiting the natural resources

of the State are now channelled. At the same time, the indeperdert Public Business Corporetior, of Papua New Guinea Act 2002 was amended by the Independent Public Business Corporation of Papua New Guinea (Kumul Consolidated Holdings) (Amendment) Act 2015 (Amending Act) in a number of ways including changing the name of IPBC, which was the trustee of the GBT which held the Majority State Owned Enterprises on behalf of the State, to KCHL, and the name of the IPBC Act to the Kumul Consolidated Holdings Authorisation Act 2002.5°

6.4 NPCP Holdings Limited was renamed KPHL51 and Petromin Papua New Guinea Holdings Limited was renamed Kumul Minerals Holdings Limited (Kumul Minerals).52

6.5 Apart from a number of governance amendments relating to the qualifications and appointment of the chairman and directors of the former IPBC, the Amending Act

required dividends to be declared each financial year, to be 'paid directly into the Sovereign Wealth Fund, the amount to be equal to the amount of the available reserves of the corporation 'being the accumulated realized earnings from prior periods and the profits earned in the current year' less any amount required to be held to meet the requirements of the Annual Plan.53 The total value of any acquisition or asset disposal of any majority SoE in any financial year was not to exceed PGK 10 million unless expressly authorised by the NEC.54

6.6 Kumul Minerals Holdings Limited and KPHL, upon their respective Acts coming into force, became uncoupled from certain requirements of the IPBC (now KCHL) Act relating to the vesting of their respective assets in the GBT (the trust vehicle for the IPBC). Instead, their assets were and are vested in the trustee nominated in each of the Kumul Acts who is the person holding the office of Prime Minister from time-to-time.

6.7 Each of the Kumul Acts mirrors the other although the ownership and management of proceeds from the exploitation of the State's mineral resources has a much longer history than oil and gas receipts. KPHL was principally established to hold and develop petroleum interests and projects in the State and through one of its subsidiaries, NPCP Kroton, is an investor and participant in the PNG LNG project and free to pursue its objects independently. It is, however, subject to the direction of the trustee, who is the Prime Minister of the day. KPHL and Kumul Minerals prepare an Annual Plan to be approved by the NEC and all expenditure and the acquisition and disposal of assets must be within the parameters of the Annual Plan.

6.8 Both Kumul Minerals and KPHL are required to declare dividends which must be paid into the SWF in accordance with the SWF Act in respect of each Accounting Period equal to the amount of available reserves of Kumul Petroleum Holdings Kumul Minerals Holdings (being the accumulated realised earnings from prior periods and the profits earned in the current year) determined on a consolidated or group basis at the end of the Accounting Period less any amount required to be held by Kumul Petroleum Holdings and its subsidiaries to meet the requirements of the approved Annual Plan.

6.9 The Prime Minister, the Hon James Marape, gave evidence that

between May 2014 and August 2021 KPHL made PGK 1.6 billion of dividend distributions to the State.55 The Prime Minister provided a table identifying those payments made which is shown below.5', The Prime Minister did not provide a source for this document

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6.10 This evidence was supported by:

(a) Mr Sonk, who gave evidence that PGK 1.605 billion of dividend distributions had been paid by KPHL to the State and provided a breakdown year by year57

(b) audited financial statements of KPHL and its predecessor NPCP Holdings Limited provided by KPHL58

6.11 Mr Vele produced evidence to the Commission that a total of PGK 1.81 billion had been paid by KPHL to the State between 2014 and 2018. The evidence produced by Mr Vele was not supported by any other documentation. 59

6.12 Both the Prime Minister and Mr Sonk indicated that between 2014 and 2021, NPCP Kroton had received USD 1.644 billion as dividend revenue from the PNG LNG Project. From that amount

approximately USD 1.119 billion had been paid to the State.[60]

6.13 Although it may not be possible for the Commission to state with certainty the actual amounts paid, on any view they amount to a very large total sum.

7. Current status of the SWF

7.1 The establishment of the SWF in the State has not materialised.

7.2 This has caused the following commentary:

> It is deeply disappointing that a project – the receipts of the PNG LNG project and the SWF to receive those receipts – from which there were great expectations for the economic growth and stability of the country has seemingly withered away, achieving nothing.[61]

7.3 Witnesses before the Commission gave evidence as to why this was the case.

7.4 Mr Anthony Yauieb, co-chair of the Working Group, understood that the Secretaries Committee has not met for some years.62

7.5 In terms of the establishment of the SWF, Mr Yauieb noted that there are a number of consequential legislative amendments required before the fund can become operational.63

Mr Yauieb noted that 'there is currently a rewrite of the Income Tax Act 1959 that has been led by the Department of Treasury' .64 Mr Yauieb's evidence was that in the draft he has seen 'there is no provision that allows for the operation of the Sovereign Wealth Fund .65

7.6 Mr Yauieb's oral evidence was that one of the difficulties in making the SWF operational was that all mineral and petroleum resource flows were to be placed within the SWF in the first instance

'and I think that has hindered bas]... its progress wouid stymie the of resources to the goverorrent..==

7 7 Mr Yauieb said that the Kumul structures themselves cannot be considered SWFs as 'they do not have the mandate for fund management. that is to manage a fund and to grow with using an appropriate investment strategy'.67 Mr Yauieb also stated that the SWF is an offshore account and one of its specific purposes is to mitigate against what is called the 'Dutch disease impact' and that is for appreciation of the exchange rate that leads to the un-competitiveness of Papua New Gurea industries and potential loss of jobs and incomes for our peop/e'.68 Mr Yauieb's view was that the Kumul entities are clearly unable to perform the function of an SWF and their foundational legislation and corporate artic:es do not empower them to do Sc.

7.8 Governor Loi Bakani told the Commission that SWF progress has foundered because there are no funds available to establish a Board: '...under the law it says that [the Board] have to be paid by the Sovereign Wealth Fund. And the setting up of the Sovereign Wealth Fund has not taken place so the board would he unpaid after being appointed '= ° The Joint Understanding betweer Australia and the State negotiated in 2010 and supported by the NEC allocated funding and personnel to develop a SWF for the anticipated revenue streams from not only the PNG LNG Project but mineral resources generally. Furthermore, material seen by the Commission indicates that international organs and bodies were assisting the State to achieve this desired goal.
Mr Marape explained that there had been no budget for the establishment of the fund, identifying specifically funds locked into the UBS Loan: '... so revenue that was meant to support our country including saving for the future in sovereign wealth fund was not there for us to move into that path' .7°

7.9 Others suggested that there are no funds because the PNG LNG gas recovery has not lived up to its original expectations. Mr Marape's view was that he could see no serious will to establish the SWF because the country has no surplus revenue.71

7.10 Mr Arthur Somare gave evidence about the failure of the State to have an operating SWF observing that the reasons are only known to the successors to the NA-led government' .72

7.1 1 Further, as to why no money has been put into the SWF from the export cargo receipts, tAr Somare said: '/ think the question is better reserved for the former Prime Minister and the current Prime Minister and also to Mr Wept; Sonk as the person who is the beneficiary of those revenues that come to them".73

7.12 In his view: 'the biggest issue for the country at the moment is the revenue management system that we heie from Kumul Petroleum Holding

7.13 Mr Wapu Sank, the managing director of KPHL, told the Commission that no funds were paid into the SWF. He explained that KPHL paid dividends to the State which decided what to dc with the funds.76

7.14 Mr Sonk noted. 'there is various streams of revenue to the State for a project like PNG LNG Project .. Royalties. dividend levies paid through the government. equity revenue which Kumul Petroleum is managing is just one part of that revenue stream that goes into the State ... we cannot project these numbers as if it is the revenue from the project. There are other sources that goes to Treasury, IRC and other place MRDC'

7 15 The Hon Peter O'Neill explained that the reason for the failure to have an operational SWF was that there were no funds available from the PNG LNG Project. This, he said, was because any revenue from the PNG LNG Project went to repay loans for the PNG LNG Project, pay for the expenses of operating the Project and was distributed to the shareholders or project partners after each shipment.77 Mr O'Neill's evidence was that there would be excess funds available from about 2024:

> am aware that there will be excess funds after the project finance has been fully repaid and that from my understanding was after 10 years of the project been in operation and once that is completed, there will be excess funds for the state to put in the Sovereign Wealth Fund then it is necessary to do so.78

7,16 On his second appearance before the Commission, Mr O'Neill recollected that the proceeds did not go into the SWF 'because we thought that Kumul Petroleum did not have enough funds, excess funds to pay into the Sovereign Wealth Fund.'79

7.17 In terms of the perceived tension between KPHL and the SWF, Mr O'Neill agreed that there needs to be a bit more work done on making sure that distribution formulas are clearly defined in the legislation because 'right now, KPHL is receiving all the funds and to some extent, it is at their discretion to distribute whether to declare dividend or whether to invest in Sovereign Wealth Funcf.8°

7.18 In his final appearance before the Commission, Mr O'Neill confirmed his support for an active SWF stating:

> I support the establishment of a Sovereign Wealth Fund because we need to preserve some of the wealth that is being generated by the development of the resources in the country.81

7.19 Mr Vele in his evidence before the Commission noted that a balance needed to be maintained in terms of the flow of funds from the Kumul Companies. Mr Vele said that from his experience as the inaugural chief executive officer of KPHL, he understood the need for the Kumul Companies to retain funds to participate effectively in industry.82

7.20 Mr Vele also expressed concern that a SWF might act as a 'cash trap'. Rather, he advocated for

those funds to be used to support the Government's development agenda, through an 'operational fund which allows us to invest in the roads, schools, bridges and hospitals for today .83

7.21 In his final appearance, Mr Marape told the Commission that it is his Government's policy to make the SWF operational when possible.84 Mr Marape noted however that administrative requirements for the establishment of the Trust and the appointment of the SWF Board had not yet been attended to. A priority for the State was ensuring that it 'set up a solid structure for the Sovereign Wealth Funcf.85 Importantly it was also noted that 'we want to set it up so that the process is rigid and fixed and it is not open for discretion of the trustee or discretions of the board, or discretions of those who are currently engaged in this sort of key institutions of the State who will be handling millions and millions of Kina that belong to the people of which we are Trustee.'86

7.22 Mr Marape affirmed that it has been his Government's policy to quarantine '7 per cent of all revenues from state-owned enterprises, including all Kumul companies to be funnelled through a sovereign wealth fund facility. That is to give commitment to a fact that we have not set up yet a

sovereign wealth fund .87 Mr Marape confirmed that this was a decision formally approved by the NEC.88

7..23 hie identified an issue that had potentially slowed the availability of funds for the establishment of the SWF,

The possible reason why we have not ventured strongly into that space. with the hand over of the UBS transactions and lack of Kumul's clarity on what has taken place in as far as the trust dividend distributions are concerned, we just want to have a clear view on

Kumul's own standing as well as there is ... the 4.27 per cent that was used for the UBS
transaction is really equity that is meant to he passed on to the Provincial Governments
and the landowners as per the ... umbrella benefits and agreements that define the way
we distribute dividends since 2009...
The equity parcel is supposed to be passed back to all landowners and the five Provincial
Governments from the PAIGLNG. So, Kumul at the moment is in transition to detach that
4.27 per cent and Kumul is of the view that they might not be financially strong as yet
looking into that transfer of the 4.27 per cent. That transfer would come exactly after the
effects of the UBS transaction. So. with those hanging over Kumul. Kumul's 2021 annual
appointing plan did not factor. in my view, the Sovereign Wealth Fund's establishment but
to summarise my answer to your question I have got around it in a very long way. To
summarise this the intention of government still stands on Sovereign Wealth Fund. I
would he assuming that 7 per cent would still be in the books of Kumul and once we set
up the full Sovereign Wealth Fund structure. the 7 per cent from 2021. 7 per cent from
2022 all will be put into that Sovereign Wealth Fund structure.89

8. Returns the State could have achieved from a SWF

8.1 As part of its analysis of the losses to the State incurred by entering into the UBS Loan, Brattle
was tasked tc cons der what returns might have been earned by the State if the funcs spent cn
the UBS Loan had ■nstead been invested in the SWF

8.2 Brattle qualified their analysis by noting:
Since the Government did not in fact setup the Sovereign Wealth Fund as planned, we
do not know what investments it would have made and therefore we do not know what
returns it would have made. However, we know that the intention was for the fund to hold
its investments offshore. and to follow established principles for such funds (the 'Santiago
Principles.). We therefore think it reasonable to use the returns from other Sovereign
Wealth Funds as a benchmark.

CHAPTER 17 >
State's Sovereign iftrodith Fund

8.3
Brattle used three SWFs as benchmarks in their analysis, Chile and Timor Leste, because they
featured in materials published by the State when announcing its plan to create the SWF, and
Norway, because it is one of the best known and largest SWFs.G1 Using publicly available data,
Brattle was able to graph the returns of the various funds over the years 2014-2021

20%
An n ual Return
Timor Leste
i
Chile
2014
2015
2016
2P17
2018
2019
2020
2021
Year

8.4
Brattle commented that the returns earned by any Papua New Guinea SWF would depend on the
SWF purpose and associated investment strategy and risk tolerance, as outlined above.92 The
SWF Act had centred around the importance of both a stabilisation and savings fund.

8.5 Brattle concluded that had the amount spent on the UBS Loan, AUD 336,300,000, been instead
paid into a SWF the State could have earned 'between 2 and 9% per annum, depending on the
objectives of the fund and hence its investment policy.'s3

9.

Expert evidence

9.1 The Commission received expert evidence from Professor Sir Tim Besley CBE FBA and Mr David Murray AO on governance matters broadly in relation to the State. Professor Besley is a Professor at the London School of Economics with recognised expertise in economic policy formulation. Mr Murray has had a significant career in the Australian banking industry culminating in 13 years as the CEO of Commonwealth Bank of Australia and later appointed the inaugural Chair of the Australian Sovereign Wealth Fund (named the Future Fund). Mr Murray has also served as Chair of the International Forum of Sovereign Wealth Funds and played a role in drafting the 'Santiago Principles'.

9.2 Professor Besley and Mr Murray agreed that the SWF did present an opportunity for the State, but raised some potential challenges to be considered.

9.3 When the Organic Law on the Sovereign Wealth Fund was initially introduced in 2012 and 2014, it was customary for countries in the position of the State for money to flow into a stabilisation fund

which would smooth the budget due to the fluctuating nature of commodity prices. Residual money would then flow from the stabilisation fund into a savings fund. However. Mr Murray noted that a significant amount of time had passed since then, and that the economic position of the State had changed.94

9.4 Mr Murray identified a number of complicating factors present in the States economy including:

(a) Government debt. as a proportion of GDP has continued to rise significantly, worsened by the onset of COVID-1 9

(to) the State's sovereign credit rating has fallen to B-, implying a very high interest rate premium

(C) a real bond rate of 6%95

9.5 Mr Mu Tray cautioned that these factors necessitated that the Government first prioritise fiscal
consot idation, repayment of debt and restating fiscal policy.96

9.6 Both Professor Besley and Mr Murray observed that the position of the State's institutional
framevvork on the corruption index needed to be addressed to ensure international credibility.

9.7 Profes sor Besley also noted that to improve overall economic conditions it would be key for the
State to prioritise the development of a strong private sector to develop the economy across the
board but that this could not be achieved in the absence of effective management of public
resources. Merely creating a SWF would not change perceptions of the State's levels of
corruption or solve the States broader economic issues:97 Professor Besley also noted:

./ think the thing that you have to ask if you are going to establish a Sovereign Wealth
Fund is would the best return on assets in the wider sense be achieved by the kind of
investments shown in SWF would create compared to just finding ways of improving the
fiscal position by using the same resource

9_8 As a precursor to making the SWF operational in the State, Mr Murray suggested the appointment
of a panel of experts under the auspices of the IMF, World Bank or Asian Development Bank to
review the formula under which funds would flow from the State's budget to the SWF's
stabilisation fund or savings fund. This panel could be charged with recommending:

(a) how funds flow from the budget into normal budgetary expenditure
(b) defining how SoEs should operate in terms of returns. dividend payments. new investments and indebtedness
(c) how funds would flow into the stabilisation and/or savings funds''=

10. Consideration and Recommendations

1. The Commission concludes that the failure to establish the SWF in 2015 or since represents a significant lost opportunity for the country. However the Commission also notes the stated intention of both Mr Marape and Mr O'Neill to do so at an early opportunity.

2. The Commission recommends that the Government:

(a) immediately move to expedite the implementation of those parts of the SWF Act which have not been implemented

(b) move to appoint appropriately qualified and experienced persons of good reputation and professional independence as members of the SWF Board of Trustees

(c) seek assistance from multilateral partners including the International Forum of Sovereign Wealth Funds, the World Bank and/or the Asian Development Bank in attending to such matters as:

(i) how SWF funds flow from the budget into normal budgetary expenditure

(ii) defining how SoEs should operate in terms of returns, dividend payments, new investments and indebtedness

(iii) how all SWF funds would flow into the stabilisation and/or savings funds

(d) report annually to Parliament on progress

International Working Group, Sovereign Wealth Funds Generally Accepted Principles and Practices – Santiago Principles' October 2008, Appendix 1, page 27. The International Working Group was established in Washington D.C. in 2008 under the auspices of the International Monetary Fund to identify best practices for SWF. The following year the Kuwait Declaration established the International Forum of Sovereign Wealth Funds as the successor to the Working Group.

'International Working Group, Sovereign Wealth Funds Generally Accepted Principles and Practices – Santiago Principles' October 2008, Appendix 1, page 3.

International Working Group, 'Sovereign Wealth Funds Generally Accepted Principles and Practices – Santiago Principles' October 2008, Appendix 1, page 3.

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Proposed Establishment of a Sovereign Wealth Fund for the Future Management of LNG and Other Mineral and Petroleum Revenues — Policy Submission No / 2010, 31 August 2010, Exhibit BB, WIT.

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be withdrawn.

Kumul Minerals Holdings Authorisation Act 2015, Kumul Petroleum Holdings Authorisation Act 2015 and Oil and Gas (.4,r0,i,l.,:!; Act 2015

9' independent Public Business Corporation of Papua New Guinea (Kurnui Consolidated Holdings) (Amendment) Act 20/5, se. 4, 5 and 6.
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CHAPTER 18

The facilitators and the intermediaries

Summary

This chapter provides information about individuals and entities who acted for and on behalf of the State between 2012 and 2014 in the negotiation and refinancing of the 1PIC Exchangeable Bonds and the subsequent negotiation of the UBS Loan, including the role they played, how they were engaged and the fees paid to them.

1. Relevance of this chapter to the Terms of Reference

1.1 The third objective identified in the Terms of Reference requires the Commission to inquire into and establish facts surrounding:

> individual and entities who were instrumental in the negotiation ... for and on behalf of the State, how they were engaged and how much [they] were paid as fees for their services as brokers and negotiators.

.2 Between 2012 and 2014 various individuals were authorised by the NEC and the Department of Public Enterprises and State Investment to negotiate the refinancing of the Exchangeable Bonds. There were also other individuals and entities who were instrumental in that negotiation and the subsequent negotiation of the UBS Loan who were not, on the evidence before the Commission, properly authorised.

1.3 During this period the Government and the SoEs of the State engaged various Papua New Guinea based and international legal and financial advisers in relation to the refinancing of the Exchangeable Bonds and the UBS Loan. These advisers and the roles that they played are

outlined below.

2. Payments to advisers

2.1 The following payments were made to advisers:

Adviser Role / Term of
Engagement Amount
NRFA Advising the State in
relation to the UBS AUD 600,0002
Loan between 21
February - 12 March
2014'
UBS Sole financial
adviser and lead arranger for AUD 28.4 million,5 comprising:
the State in relation
to: • AUD 16.5 million, being
1. management of the
State's investment UBS advisory fee
in Oil Search;
(1.35% of AUD1,225
2. associated matters
'flowing' form the million)
issuance of the
2009 IPIC • AUD 6.7 million, being
Exchangeable
Bonds in respect of the Bridge Loan
State's
shareholding.3 establishment fee

Adviser Role / Term of Engagement
Amount
Exclusive arranger of the
UBS Loan!' • AUD 5 million, being

Bridge Loan extension

fee

• AUG 0.1 million. being

UBS expenses charged

to the State
Ashurst Legal representatives for
UBS AUD 612.500"
Pacific Legal Group (PLG) Engaged by fIRFA to provide
advice on PGK 600,000
Papua New Guinea law
between 21
February - 12 March 2014
Mr Jimmy Maiadina Consultant with PLG
PGK 1 million
Pacific Capital Company used by Pertusio
Capital PGK 128,000c,
Partners for payment
Rertusio Capital Partners Engaged by Mr Vele to
advise on the PGK 1.122 rrillionlo
refinancing of the
Exchangeable Bonds
and the UBS Loan
BSP Capital Engaged by the IPBC to
advise the internal Between PGK 675,000" and
committee or proposals to
refinance the PGK 900,00012
Exchangeable Bonds
FRA Blackstone Engaged by Mr Micah to
provide SGO 25,00C''
independent analysis of
proposals to
refinance the Exchangeable
Bonds
Back-well Lombard Capital Mr Micah requested BLC, to
provide advice PGK
/ National! Capital Limited on what the Exchangeable
Bonds required
cf IPBC" and appointed BLC
as non-
exclusive Lead Manager and
Arranger for
refinancing the
Exchangeable Bonds'=

3. Financial advisers

3.. 1 As previously outlined in this Report, between 2012 and 2014 there were a number of competing processes seeking to secure finance for the refinancing of the Exchangeable Bonds and to secure a new shareholding in Oil Search In its attempts to achieve these goals the State engaged a number of financial advisers whose roles are outlined below.

4. Backwell Lombard Capital / National Capital Limited

4.1 Backwell Lombard Capital is an independent corporate advice and investment services firm providing financial services to wholesale and sophisticated clients.17 Backwell Lombard Capital is incorporated in Australia and at all relevant times held an Australian Financial Services Licence.18

4.2 National Capital Limited was incorporated and registered with the Investment Promotion Authority (IPA) as a foreign owned enterprise.''' Between 2009 and 2010 NCL held a Funds Management Licence issued by the BPNG.

4.3 During the relevant period, the relevant person in those entities was Mr Benjamin O'Dwyer. Mr O'Dwyer holds qualifications in finance and is an accredited derivatives trader.2' Mr O'Dwyer

also has experience working with companies in Papua New Guinea in the finance and superannuation industries.22

4.4 Mr O'Dwyer is based in Brisbane, Australia. Accordingly, the Commission could not compel Mr O'Dwyer to appear or give evidence. Despite this, Mr O'Dwyer:

(a) provided a significant number of unique documents not previously disclosed by other witnesses
(b) a signed Witness Statement
(c) appeared before the Commission to give evidence and
(d) made himself available for cross examination.

4.5 The late Mr Ben Micah, the then Minister for Public

Enterprises and State Investment, requested
Backwell Lombard Capital to provide advice on what the Exchangeable Bonds required of IPBC.23
On 16 October 2012, Backwell Lombard Capital provided advice to Mr Micah about the
Exchangeable Bonds.24

4.6 On 26 February 2013, Backwell Lombard Capital provided a letter to Mr Micah (and a further copy
to Dr Waine) which set out Backwell Lombard Capital's proposal for the funding of the
Exchangeable Bonds financing.25

4.7 On 31 May 2013, Mr Micah wrote to Backwell Lombard Capital confirming it as Lead Manager
and Arranger in consultation with his advisers on a non-exclusive basis.26 Mr Micah was asked
about this arrangement:

Q: Yes. So, you are instructing Backwell Lombard Capital, this is its full name, to
arrange finance but then you also say that that firm is going to be arranging that finance
on a nonexclusive basis, to use your words. I will just take you down to point 4. You see
that? Point 4 says; 'No direct payment or invoice will be submitted by your firm to the
State for any part of this engagement agreement. The State understands and accepts
these proceeds, fees and costs will be paid by the funder.'

So, is what you are saying that Backwell Lombard will receive any payment from
whatever financial institution provides the potential finance?

A: They will raise the funds to finance the State's requirements and then get their fees
paid by whoever is funding it as some form of a success fee or something like that.27

4.8 From May to October 2013 Backwell Lombard Capital engaged with various financiers, including
UBS, National Australia Bank, Commonwealth Bank of Australia and Citi, to obtain proposals for
refinancing the Exchangeable Bonds on terms acceptable to the State.

5. Pertusio Capital

5.1 Pertusio Capital is a company incorporated in the State.28 Pertusio Capital was incorporated on

1 July 2009, with Mr Lars Mortensen as the then sole Director and Shareholder.29 Mr Mortensen gave evidence that Pertusio Capital was formed as an investment advisory business and investment holding company '.30

5.2 In March 2010, Nathan Chang became a Director of Pertusio Capital, and on 16 November 201i became a snarehoider.1

5.3 Evide rice before the Commission indicates that Mr Vele, following work on the establishment of Krotori No. 2 Limited which later became Kumul Petroleum Holdings Limited (the State's holding comp: any for its oartcicating interest in the PNG LNG Project),32 left the public service to join Pertusio Capital with the goal of building 'a strong investment advisory business'.33 IPA records indicate that betiiiveen 16 November 2011 and 31 March 2012 Mr Vele i.•as aisc a Director and shareholder of Pertusio Capital.34

5.4 Mr Mortensen gave evidence that ownership changes at Pacific Capital, which Mr Mortensen facilitated through his friendship with Mr Malcolm Giheno,35 'resulted in a shift in operating model from time-to-time [and) Pertusio acted as a sub-contractor to Pacific Capital on assignments'.36

5.5 Regarding the engagement of Pertusio Capital to provide advice to the State, Mr Mortensen said that:

Work being undertaken by Pacific Capital There was discussions about the terms of the engagement. There were some communications around it but it really was only

towards the tail end of the transaction that ultimately happened that the terms were finalized. So, you could say I did not have an engagement for the work done during the course of 2013: engagement letters, executed letters.37

5.6 Mr Vele's evidence was that his involvement with PertL;s4 Capital ceased when he re-entered the public service, as the Director of the GPCO.

5.7 Ernails provided to the Commission by NRFA indicate that Mr Vele, despite having left Pertusio Capital, continued to use the dairi.velepertusiocapital.com.pq email address in August 2013 in correspondence with Mr Latimer, NRFA and Mr Mortensen.38

5.8 In his appearance before the Commission, Mr Mortensen was shown a number of emails provided by NR FA which were addressed to Mr Vele using his Pertusio Capital email address Mr Mortensen stated:

Q: So why did Mr Vele continue. It seems. to use the Pertusio email address two years after the date of his resignation and director and shareholder of Pertusio?

A: I do not know that he does. My read of that is that Mr Latimer has sought to send that email to Mr Ale and essentially all addresses that he has on him, including a treasury email address and the gmail address. That would be my interpretation of that. It is Mr Latimer trying to reach Mr Vele on the email address that he has.. 3=

5.9 Mr Mortensen emailed Mr Vele using dairi.velepertusiocapital.com.po on 28 August 2013 4° Mr (Mortensen did not include any other email address for Mr Vele in that email.

5.10 Mr Vele said that he may have been using the Pertusio Capital email address in that period:

Q: I will just go to another document please which is NRF. 001.001.3794. This is an email from Anthony Latimer of Norton Rose Fulbright to you in your capacity as the head of the project co-ordination office and to others back in August 2013. So we are now looking at a different period of time .. Just by the way, when we look at that at the top,

why was it when you were at the Gas Project Coordination Office that you were receiving information and forwarding information using your Pertusio email?

A: I am not sure again when I left– what was it – August 2013? Yes, I am not sure why that is the case. The Gas Project Coordination Office was a – it was not an official office. It was a – I guess it did not have a stronger legal standing as a department. It was an office created under the Prime Minister's Department. I do not know why I am using that one. That may be the email on record on Anthony's or Mr Latimer's email in which case I assume he has typed in DA and this is the first email that has popped up. I think my Gas office email was gpco.gov.pg at that time so I am not sure why Anthony used this one.

Q: I take it from that you were still using your Pertusio email?

A: Well, I received this particular email from Anthony. I cannot remember if I was using that to communicate with anyone outside. I still up until very 20 recently had access to my Treasury emails as well even though I left that office in December.'"

6. Lars Mortensen

6.1 Mr Mortensen is based in Australia and is not a compellable witness. At the request of the Commission he appeared on multiple occasions before the Commission to give evidence. Due to physical records being located in the State, Mr Mortensen was unable to produce many contemporaneous documents, but did prepare a formal statement for the Commission.

6.2 Mr Mortensen had been resident and working in Papua New Guinea for many periods from January 2000 to March 2020.42

6.3 From late 2007 to December 2009 when the PNG LNG Project achieved its final investment decision, Mr Mortensen provided commercial and financial advice to the State (primarily the

Ministerial Gas Committee) through Pacific Capital (then a merchant bank):43

(a) as part of its negotiations with the PNG LNG Project joint venture"

(b) in respect of activities that were completed during the front-end engineering and design stag e45

6.4 Mr Mortensen, in his statement to the Commission, expressed a view that his involvement with the PNG LNG Project gave him a reasonable understanding of its associated commercial and financial structures, including some limited understanding of the Exchangeable Bonds.46

6.5 Mr Mortensen stated he first became involved in the refinancing of the Exchangeable Bonds when:

> In August 2013, the Acting Secretary for the Department of Treasury, Mr Dairi Vele, as a member of the recently formed IPIC Bond Committee, requested that I accompany him to meetings in Sydney with several international investment banks to discuss proposals to act as advisors and arrangers to the State in its endeavours to retain a significant shareholding in Oil Search.47

6.6 Evidence provided to the Commission indicates that Mr Mortensen's role in the transaction includ (e&

(a) contributing to the preparation of the confidentiality agreement to be completed by prospective financiers'.

tb) provision of technical context background and advice tc Mr Vele in relation to his

interactions with the Exchangeable Bond Committee49
(c) preparing for and attending conference with Mr Vele, Mr Latimer and prospective financiers
in Sydney, Australia between 13 and 16 August 20135°
(0) receiving and considering proposals from prospective financiers in conjunction with Mr Vele
and NRFA51
(e) reviewing the draft UBS engagement letter=:,
(f) providing informal advice to Mr Vele regarding the Oil Search stock price—71
(g) attending a meeting with Mr Vele and Mr Botten of Oil Search wherein the possibility of the
State participating in any upcoming private placement by Oil Search was discussed'-`
(h) participating in planning as to how the State will approach the UBS Loan including
negotiation of the term sheet55
(i) considering, reviewing and negotiating56 of draft transaction documents including":'
Brndge Facility Agreement

(ii) Security Trust Deed

(iii) Specific Security Deed

(iv) Participant Sponsorship Agreement

(v) Payment Direction Deed

(vi) Subscription Agreement

(vii) Board Resolutions58

(Ai liaising with various representatives of NRFA59
(k) liaising with KPMG in respect of its review of the financial modelling done by UBS6°

6.7 In evidence before the Commission Mr Mortensen indicated that he received his instructions from
Mr Veld. Mr Mortensen had no discussions directly with the Prime Minister 5'

6.8 Mr Mortensen ..,/as based in Sydney at the time of the UBS Loan.

7. Nathan Chang

7.1 Mr Chang is based in Australia and is not a compellable witness. At the request of the
Commi ssion, Mr Chang appeared on multiple occasions before the Commission to give evidence.

Due to his physical records being located in the Independent State, Mr Chang was unable to produce contemporaneous documents, but did prepare a formal statement for the Commission.

7.2 Mr Chang gave evidence that while working in 2010 and 2011 on the establishment of Kroton No. 2 Limited he became familiar with the PNG LNG Project's commercial structure and the financing structures including the Exchangeable Bonds.62

7.3 Mr Chang gave evidence that during 2012 and 2013 he was working from and based in Australia:

During my absence from Papua New Guinea in 2013, I was generally aware of but had limited involvement in work performed by my colleague Mr Lars Mortensen in assisting the Department of Treasury (Treasury) with its participation in the effort by the State to investigate options associate with the possible redemption of the 1PIC Exchangeable Bonds issued to the International Petroleum [Investment Companyj.63

7 4 Mr Chang returned to Papua New Guinea in early 2014. Mr Chang described his role between February and March 2014 as 'assistance with transaction management in Port Moresby in support of the Treasury and under instructions from Acting Secretary for Treasury, Mr Dairi Vele',64 Mr Chang did not disagree with the characterisation of his role as ' .. a conduit for emails and documents',66

7.5 Contemporaneous email correspondence indicates that Mr Chang's involvement extended to the following:

(a) co-ordinating the provision of briefing materials to the IPBC and NPCP Boards66

(b) receiving draft transaction documents from NRFA for

comment67

(c) co-ordinating the State team through the completion of Ashurst's conditions precedent checklist68

(d) obtaining State approvals and sign-offs of transaction documents. including preparing documents for issuing to the State Solicitor for legal clearance69

(e) requesting that NRFA draft certain documents7°

(f) attending the Governor General's signing of the Participant Sponsorship Agreement on behalf of the State7'

(g) advising on amendments being made to certain transaction documents, including amendments to the execution block on the Subscription Agreement and Confirmation Side Letter72

(h) corresponding with KPMG on behalf of NRFA in relation to its review of the financial modelling done by UBS73

8. Pacific Capital Limited

8.1 Pacific Capital Limited (Pacific Capital) is a limited liability company based in Papua New Guinea. It commenced operations in early 1996 as a merchant bank licensed by the Bank of Papua New Guinea as a non-bank financial institution.74

8.2 In 201 0, Mr Mortensen, the former CEO of Pacific Capital, sought to acquire the company through Pertusio Capital. Mr Mortensen did not acquire the company and later believed a third party, with no previous connection to Pacific Capital, would be better placed in a takeover bid. Accordingly, Mr Mortensen asked Mr Malcolm Giheno to acquire Pacific

Capital, while Mr Mortensen and
Mr Chang would build the Pacific Capital branc.-1

8.3 Mr Gil-tenc gave evaence that he agreed to Mr Mortensen's proposal as it would require minimal
involvement from him.76

8.4 In 201 2, Geefin Limited, an entity controlled by Mr Gihenc. became the majority shareholder of
Pacific Capital.77 Mr Mortensen and Mr Chang managed the transaction for Mr Giheno.78

8.5 Following the acquisition Mr Giheno and Mr Mortensen agreed that Pertusio Capital would
operate under Pacific Capital. Mr Mortensen characterised this relationship as that of a
sub-contractor.79 There were bank statements produced to the Commission identifying the
payrnsnts from Pacific Capita! to Pertusio. Capital.

8.6 Mr Gil-ieno gave evidence that his involvement with the company was minimal, but that he allovved
Pertus lo Capital to use the Pacific Capital brand and business.80

8.7 Mr Gif-ienc also gave evidence that he had never had access to the Pacific Capital bank accounts
or those of any associated companies.81 In his appearance before the Commission Mr Giheno
confirmed that the accounts of Pacific Capital were also being managed by Pertusio Capita1.82

8.8 In 201-4, Mr Vele issued a formal request for a certificate of inexpediency to the CSTB. In this
request Pacific Capital was identified as a financial and technical adviser to the State.83 There is
no evidence before the Commission that any contract was entered into between Pacific Capital
and the State in respect of the UBS Loan.

8.9 Mr Mortensen of Pertusio Capital indicated in evidence before the Commission that:

A.t that time it was Pacific Capital Limited which was providing the advice. However. at
tf-7at point Pertusio Capital Partners was effectively providing the resourcing for that work
tc) he undertaken.=`

9. Payments made to Pacific Capital

9.1 Pacific Capital submitted a claim of PGK 1.375 million to the Treasury for financial advisory
servioss in relation to the UBS Loan.85

9.2 Both Mir Mortensen and Mr Chang gave evidence that only PGK 1.25 million was paid to Pacific Capita 1.8`-

9.3 The Commission has not been able to substantiate these claims.

9.4 Mr Mortensen previously gave evidence when he appeared before the Commission that the amount paid to Pertusio Capital was the full amount received by Pacific Capital from the Department of Treasury 87 This does not appear to be the case.

9.5 Mr Chang, the Company Secretary of Pertusio Capital, provided the Commission with bank records for Pacific Capital which showed a total of PGK 1.122 million being paid by Pacific Capital to Pertusio Capital between April and September 2014.88

9.6 If Mr Mortensen and Mr Chang's evidence that Pacific Capital received PGK 1.25 million for its services in relation to the UBS Loan was to be accepted, this would indicate that Pacific Capital received PGK 128,00089 for no services provided to the State.

9.7 If Mr Mortensen and Mr Chang's evidence was not accepted, the amount received by Pacific Capital would be significantly higher at PGK 253,000.

9.8 Mr Mortensen outlined the method of calculation of Pertusio Capital's fees:

The identification of that amount was I guess you could say in an ongoing process of establishing the duration and the amount of work that would be required during the period. The general structure of it was a retainer

leading up to the end of 2013 with a continuation into 2014 with let us say, the expectation of increased workload during 2014 on account of the IPIC Exchangeable Bond timeline and therefore upkeep in the retainer with a success fee type component which was denominated with reference to the monthly retainer. So effectively several months' worth of additional retainer fee, a successful outcome was achieved.90

9.9 Mr Chang gave evidence before the Commission that neither he nor Mr Mortensen were aware of the amount paid to Pacific Capital. Mr Chang went further to say:

> we agreed to invoice them as part of our sub-contract. l do not know what they would have invoiced. So, I am assuming it is just the same.91

10. BSP Capital

10.1 BSP Capital is a wholly owned subsidiary of BSP Financial Group, the largest publicly listed bank in the South Pacific region. BSP Capital provides services in funds management and capital advisory.82

10.2 BSP Capital was engaged by Mr Igimu Momo, then IPBC Chief Policy Officer and Chairman of the IPBC Internal Review Committee. IPBC sought to engage BSP Capital to 'conduct a due diligence exercise to validate the financial status of the potential financiers ... and also to assist the IPBC Internal Review Committee to review the proposals and make recommendations to the Board of IPBC for approval.'93

10.3 During the relevant period, the relevant person at BSP Capital was Mr Ryszard 'Richard' Borysiewicz who held the position of General Manager until December 2017.84

10.4 Mr Borysiewicz is based in Sydney, Australia. Accordingly, the Commission could not compel Mr Borysiewicz to appear or give evidence. Despite this Mr Borysiewicz:

(a) provided documents not previously disclosed by other witnesses
(b) provided a signed witness statement
(c) appeared before the Commission to give evidence and

(d) made himself available for cross examination,

10.5 In providing advice to the IPBC Internal Review Committee, Mr Borysiewicz was assisted by Mr Gabriel Bosip, an analyst with BSP Capital. Mr Bosip passed away in =ate 2014.95

10.6 On 5 September 2013, Mr Momo sent an email to Mr Borysiewicz advising that IPBC was seeking to engage a financial advisor to assist the IPIC Exchangeable Bond refinancing.96

10.7 On 9 September 2013, Mr Borysewicz replied to Mr Momo's email detailing the BSP Capital offer. BSP Capital proposed:

(a) a monthly retainer of ?GK 75,000 per month for the 6 months from September 2013 to February 2014 and

(b) a completion fee of PGK 450,000 to be paid completion of the transacticn.

This ,,vas later accepted by IPBC

10.8 Mr Borysiewicz's involvement, and by extension that of BSP Capital. extended to:

(a) attending meetings of the IPIC Exchangeable Bond Revievi... Committee +.,IEBRCt"

(h) re vie the original Request for Proposal (RFP issued by the !EBRO to ANZIBarclays. UBS, Citi and Hermsley Capital and evaluating associated refinancing proposal99

(c) implementing a revised tender process10°

(d) engaging with representatives of the prospective financiers"

(e) considering and developing evaluation criteria for the prospective financiers102 and

f) preparing a final report for consideration by the IPBC

Internal Review Committee."

10.9 Mr Borysiewicz attended a further meeting of the IPBC Internal Review Committee to explain the results of the evaluation process. Mr Borysiewicz could not recall the exact results but noted that ANZ/Barclays was the preferred financier with Hermsley Capital being the least preferred.104 This decision was later endorsed by the IPBC Internal Review Committee.

10 . 10 In October 2013, having apparently reached a conclusion on the proposed financier, Mr Borysiewicz together with Mr Kumarasiri attended a meeting with representatives of IPIC in Abu Dhabi, to confirm that IPBC had secured a financial advisor and prospective financier and would be looking to progress with refinancing the IPIC Exchangeable Bonds." Mr Bcrysiewicz's recollection was that following that meeting, the IPIC representatives expressed a willingness for the IPIC Exchangeable Bonds to be refinanced.106

10.1 In November 2013. BSP Capital's final report was issued to the IEBRC.

11. FRA Blackstone Pte Ltd

11.1 FRA Blackstone Pte Ltd I FRA Blackstone) was an independent financial consultancy based in Singapore from August 2005 until its deregistration on or about 24 November 2015.1°7 At the relevant time FRA Blackstone was owned by Mr Andrew Doyle and Mr Daniel Stone.

1.2 On 22 October 2013, then Minister of Public Enterprises and State Investments Mr Micah and Dr Waine requested Mr O'Dwyer of Backwell Lombard Capital recommend an independent expert to advise on the refinancing proposals for the Exchangeable Bonds received by IPBC and the IPIC Exchangeable Bond Review Committee. FRA Blackstone, specifically Mr Doyie, was one of three recommendations made by Mr O'Dwyer due to its experience in derivative, bond and structured equity transactions.1°8

11.3 Following this recommendation, Dr Waine contacted Mr Doyle and requested he compile an independent evaluation of the IPIC Exchangeable Bond refinancing proposals.1c,"3

11.4 FRA Blackstone was officially engaged following a meeting between Mr Micah and Mr Doyle at the Crowne Plaza at the Changi Airport in Singapore. Mr Doyle in his appearance before the Commission noted:

> The meeting ... felt to me like an interview to see whether I was the right person to complete the work. Whether my credentials, my background was appropriate for getting a good report out. Something that was – that my underlying experience was appropriate and they referred my derivatives knowledge.1'3

11.5 Between 10 November 2013 and 18 November 2013, FRA Blackstone prepared a report analysing the various refinancing proposals. The report ranked the four proposals in order from best to worst:

(a) Citi
(b) UBS
(c) ANZ/Barclays
(d) Hermsley111

11.6 On 17 November 2013. Mr Doyle on behalf of FRA Blackstone, executed a Short Term Expert Advice and Fee Agreement. This document was not executed by Minister Micah or any representative of the Independent State.112

'1.7 On 18 November 2013, FRA Blackstone issued an invoice to the Department of Public Enterprises and State Investment in the amount of SGD 25,000 for the preparation and provision of the report.113

11,8 On 24 November 2013, Mr Doyle sent a letter enclosing the final report of FRA Blackstone by

email to Dr Waine, copying Minister Micah's gmail account.114

11.9 Mr Doyle gave evidence that following the provision of the report, FRA Blackstone:

(a) did not receive a confirmation of receipt from Dr Waine or Minister Micah

(b) did not subsequently meet with Dr Waine or Minister Micah

(c) did not have any further involvement in any aspect of the refinancing of the Exchangeable Bonds115

11.10 Mr Doyle gave evidence that the invoice was paid in full in August 2014,116

12. UBS

12 1 UBS AG is a Swiss multi-national Investment hark and financial services company founded and based in Switzerland.

12.2 The Australian branch of UBS "as engaged as both financial adviser and financier to the State on the UBS Loan.

12 3 UBS continues to operate out of Sydney, Australia and is not compellable by the Commission to provide evidence. UBS provided a level of co-operation with the Commission, producing some relevant documents, a statement and a Response.117

12.4 A summary of UBS' participation and involvement in the tender process to refinance the Exchangeable Bonds is set cut in the Report. UBS has provided its summary of the process in its statement ""

12.5 On 30 January 2014, UBS ..,vas appointed as the State's preferred adviser and financier for the proposed refinancing of the Exchangeable Bonds by way of a bridge facility and collar loan.1 '9

12.6 On 13 February 2014, IPIC issued the Mandatory Exchange Notice:II' By this Notice. PIC elected to retain the Oil Search shares secured under the IPIC Exchangeable Bonds. The opportunity to refinance the IPIC Exchangeable Bonds ended with the issuing of the Notice.

12.7 Following the issuance of the Mandatory Exchange Notice. individuals within the State took the decision to make an on-market purchase of a new placement of Oil Search shares. A further tender process for this new transaction was not undertaken.

12.8 On 25 February 2014, the State and UBS executed an advisory mandate letter. Under this letter UBS was appointed the State's sole financial adviser and sole lead arranger in relation to:

(a) the management cf the State's investment n Ci; Search

(b) associated matters flowing from the issuance of the 2009 IPIC Exchangeable Bonds in respect cf the States shareholding'2'

12.9 On 27 February 2014, the State and UBS executed a financing mandate letter. Under this letter UBS was appointed as the exclusive arranger of the financing facility to the State:22

12.10 UBS facilitated the acquisition by the State of a new 10 01% share :n Oil Search

12.11 UBS' fees for the March 2014 Bridge and Collar Loans amounted to AUD 28.4 million. This ccmprised:'2''

UBS fees for the March 2014 transactions	
UBS advisory fee (1.35% of AUD1,225 million)	16.5 million
2014 Bridge Loan establishment fee	6.7 million
2014 Bridge Loan extension fee	5 million
UBS expenses charged to the State	0.1 million
Total	28.4 million

13. Patrick 'Paddy' Jilek

13.1 Mr Jilek was a Managing Director at the Sydney office of UBS. Mr Jilek 'was the lead banker of the UBS team1124 and a key contact at UBS for the duration of the negotiation of the UBS Loan4, particularly during 2013 when UBS was negotiating with the State regarding its proposals to refinance the Exchangeable Bonds and during early 2014 when the terms of the UBS Loan were being negotiated.

13.2 Mr Mortensen when he appeared before the Commission gave evidence that while he was not aware of any formal division of responsibility within the UBS team, Mr Jilek acted as the financial adviser to the Independent State.[125]

13.3 Mr Jilek was specifically involved in the following:

(a) liaising with Mr Latimer (NRFA) regarding market intelligence that highlighted the importance of the Independent State acting quickly in relation to the IPIC loan[126]

(b) initial meetings with NRFA and Mr Vele, as well as negotiations with IPBC, leading to the formal engagement of UBS[127]

(c) liaising with Oil Search following the issuance of the IPIC mandatory exchange notice[128]

(d) advising Mr Vele in relation to the subscription of Oil Search shares, including advising on price[129]

(e) meeting with BPNG and Mr Vele to negotiate the terms of the refinancing arrangement13°

(f) liaising with Mr Vele, Mr Maladina, NRFA and Ashurst regarding the conditions precedent to, and the settlement process for, the purchase of Oil Search shares[131]

(g) assisting with the preparation of the draft press releases for the Independent State regarding the subscription of Oil Search shares,[132] including circulating material regarding the UBS financing package to Mr Vele and Mr Maladina to assist with briefings of the Prime Minister[133]

(h) liaising with Mr Vele, Ashurst and NRFA, and at times Pertusio Capital, regarding the

bridge security documents and UBS fees134 and
(i) meeting with Allen & Overy and NRFA regarding the unsuccessful 2013 Papua New Guinea sovereign bond135

13.4 Mr Jilek is no longer employed by UBS. Mr Jilek is based in Australia and is not a compellable witness. Mr Jilek did not appear before the Commission or provide a statement.

14. Mitchell Turner

14 1 Mitchell Turner was a Director at UBS. Mr Turner was described by Mr Mortensen as 'on the lead as a counterparty on the side of the Bridge Loan'. 136 Mr Turner appears to have been a key contact at UBS for the duration of the negotiation of the UBS Loan and seems to have had authority to provide instructions on behalf of UBS.

14.2 Specifically, Mr Turner was involved in the following:
(a) meeting with NRFA and Mr Vele, leading to the execution of a costs agreement137

(to) iaising .,vith Governor Bakani regarding the proposal by UBS to refinance the Exchangeable Bonds138
to) liaising with Mr Vele:
to provide a briefing paper for a meeting between Mr Vele and Peter Botten138

iii) to discuss aoVce received from Ashurst regarding a loan to purchase Oil Search shares148

:ii) regarding the terms on which the State was to engage UBS'

liaising with Mr Vele, NRFA and Pertusio Capital to

prepare draft press releases for the
State regarding the subscription of Oil Search shares142
(.e) preparing the UBS fees commitment letter143
(fi liaising with Mr Vele, Mr Maladina and Ashurst regarding the conditions precedent to, and
the settlement process for, the purchase of Oil Search shares144
(g) meeting with NRFA, Pertusio Capital, Ashurst and Mr Vele regarding Project Kumu1145
(h) circulating material regarding the UBS financing package to Mr Vele and Mr Maladira to
assist with briefings of the Prime Minister146
(i) liaising with NRFA and Ashurst, and at times Pertusio Capital. regarding the bridge security
documents147
(j) liaising with NRFA, Ashurst, Mr Vele and Pertusio Capital regarding a draft NEC
submission seeking the required approvals to proceed with the Oil Search subscription148
(k) liaising with NRFA and Ashurst regarding the draft drawdown notice and payment d:recticn
deed"

14.3 Mr Mortensen stated that
Mr Turner. who ran the bridge loan component of UBS, was anxious to pursue
agreement whereby UBS could be in a sense pre-appointed and a bond would be the
specifically nominated take-up for the bridge.150

`4.4 Mr Turner is a Managing Director with UBS. Mr Turner is based in Australia and is not a
compliable witness. Mr Turner did not appear before the Commission or provide a statement.

15. Guy Fowler

15.1 Mr Fowler was a Managing Director at the Sydney office of UBS. Mr Fowler s primary
involvement appears tc have been limited to correspondence with former Prime Minister Peter
O'Neill in March 2014. regarding the funding facilities for the State and requesting direct
intervntion to assist with resolving certain conditions precedent to the Oil Search subscription
agreernent.151 Mr Fowler also had a limited role liaising with Oil Search following the issuance of
the Mandatory Exchange Notice.182

15.2 Mr Fo\.•.vler is no longer employed by UBS. Mr 7- cliler is based in Sydney. Australia and is not a
compellable witness. Mr Fowler did not appear before the Commission or provide a statement.

16. KPMG

16.1 KPMG is a multinational network of professional firms providing audit, tax and advisory services.
KPMG was engaged by the Department of Treasury to advise on the terms of the collar financing
proposal provided by UBS for the Oil Search share placement. This engagement was facilitated
by Mr Mortensen of Pertusio Capital and Mr Latimer of NRFA: e'3

16.2 Mr Mortensen in his appearance before the Commission indicated that KPMG was engaged
because of:

> ... the need to have the financial modelling of the collar loans validate from the logic and
> accuracy plus also validating some of the work that had been done in relation to pay-off
> diagrams. Pay-off diagrams being what happens in the Oil Search share price become
> XYZ during the tenure. So, KPMG's involvement there was to provide that sign off or as
> to logic and accuracy of the modelling as well as some analysis of the consequences of
> various collars as well as various exposed outcomes. 154

16.3 This position was summarised: 'UBS built it and KPMG checked it'.155

16.4 On 4 March 2014, KPMG issued a formal engagement letter to Mr Vele. This was executed on
6 March 2014.156 Under the engagement letter KPMG's scope of work included:

(a) reviewing the terms of the Collar and associated bridge loan to provide a summary to the
Department of Treasury

(b) providing analysis of:

(i) any downside price protection embedded in the Collar

(ii) any potential value foregone embedded in the Collar under various agree scenarios

(iii) commercial and economic risks associated with the Collar

(iv) the effective cost of financing for the Department of Treasury implied through the Collar under various agreed scenarios

(v) the pricing mechanics of the Collar and comment on the comparison to 'fair market value' (taking into account notional size and market liquidity)

16.5 KPMG was required to complete the above scope of work between 28 February 2014,157 when they were notified they would be engaged, and 6 March 2014 when they provided their final advice.158 Internal KPMG correspondence indicates that, given the short time-frame, their advice was limited to a high level commentary of the UBS Loan. 156

16.6 The KPMG team comprised of:16°

(a) David Heathcote, Partner Debt Advisory
(b) Craig Davis, Partner Financial Risk
(c) Raj Bhat, Director Debt Advisory
(d) Jack Newall, Director Debt Advisory

f e) Michael Bonanno, Associate Director Debt Advisory
f) Brad Hollingsworth, Associate Director Financial Risk Management
(g) Martin Blake, Lead Partner KPMG NSW161

16.7 The State paid KPMG AUD 166,221.00 for the work completed. 162 These funds were paid out under the Bridge Facility Agreement – Drawdown Notice.163

16.8 No puid:io tender appears to have occurred as to this work. The Commission has not been providaad with evidence of the criteria on which KPMG was evaluated prior to their engagement. No evi Bence has been provided to the Commission that inquiries were made Nith any other financial advisory firm.

17. N RFae4

17.1 NRFA, was the key legal adviser for the State in relation to the refinancing of the Exchangeable Bonds: and the UBS Loan.

17.2 NRFA. was engaged under three retainers164 potentially relevant to the Terms of Reference

Retail ner	Client	Date
First 'Retainer	Board of !PBC and possibly the Minister for Public Enterprise (the Hon Ben tkilicah	5 December 2312
Seco aid Plainer	The Gas Projects Cc-ordination Office i the GPC.0';'"=	August 2013'
Thvd Retainer	State	' E Z.;14

17.3 No•ence has been provided tc the Commission about the amount paid to NRFA for its work on the First. Second and Third Retainer. The Bridge Facility Agreement - Drawdown Notice indicat es that AUD 600,000.00 was paid to NRFA from the total amount borrowed for the Bridge Facility, "^

17.4 No eviAdence has been provided to the Commission that a public tender process was utilised before the awarding of work to NRFA.

18. Anth iony Latimer

18.1 Mr Latimer as a key adviser to the State, from 2012 until 2014 inclusive.

18.2 In his appearance before the Commission, Mr Jimmy Maladina outlined Mr Latimer's history in the State:

. _ The family. we have known him for a longer period of time because his parents used tc3 run a plantation up in Goroka. Eastern Highlands Province early in the '50s and the

'6-0s. And my dad used to operate in Goroka and I was born in Goroka so that family connections were there. They used to run a Latimer Plantation in the Bena Bena region of Goroka. Eastern Highlands. So, that connection - I do know the family longer than tf-Jrat but professionally about 10 years from 2014.'1=

18.3 Mr Latimer was previously a Partner with Corrs Chambers Westgarth and had advised previously on a number of transactions in the State.17°

18.4 When asked by Counsel Assisting about the role played by Mr Latimer in the refinancing of the Exchangeable Bonds and the UBS Loan, former Prime Minister O'Neill answered:

> He would have been advising some of our departments and of course our SOE's but not directly to government.' 71

18.5 Mr Latimer's involvement extended to:

(a) liaising with Dr Clement Waine and advisers in relation to the State's strategy with regard to renegotiating the negative pledge and refinancing the IPIC Exchangeable Bonds172

(b) preparation of advice to Minister Micah and the IPBC Board regarding the Exchangeable Bonds and the proposed restructure of IPBC173

(c) facilitating meetings between representatives of the Abu Dhabi Government and a Ministerial delegation from the State174

(d) preparation of Ministerial briefing notes in advance of the proposed meeting with the Abu Dhabi Government175

(e) attempting to secure Oil Search directorships for State appointees178

(f) advising on the restructuring of IPBC (consolidation of petroleum and mining assets in separate entities) and the establishment of the sovereign wealth fund 177

(g) facilitating and attending meetings with prospective financial advisers regarding the Exchangeable Bonds178

(h) reviewing and considering proposals by prospective

financial advisers and advice in relation to the refinancing[179]

(i) advising on the UBS engagement letter[180]

(j) preparing draft NEC submissions regarding the appointment of UBS as financial adviser and NRFA as legal adviser in relation to the refinancing of the IPIC Exchangeable Bond[181]

(k) advising generally on the IPIC Exchangeable Bonds[182]

(I) accompanying representatives of the State including Governor Bakani, Mr Vele and Messrs Botten and Aopi of Oil Search on a trip to Abu Dhabi in February 2014 to meet with IPIC and discuss the Exchangeable Bonds[183]

(m) advising on required steps to be taken by the State following the issuance of the mandatory exchange notice [184]

(n) providing advice on a briefing paper prepared for Mr Vele by UBS [185] in advance of then Prime Minister O'Neill's meeting with Mr Botten, including:

(i) that UBS recommended the State appoint NRFA as its legal advisers

(ii) the State should obtain a term sheet from UBS to ensure terms of funding were clear

(iii) the State should not commit to a deal with Oil Search until funding was in place

(iv) the need to identify possible funding risks 'flowing' from other financing arrangements

querying whether the State be able to obtain the required approvals in the following week[186]

(0) advising the State on the draft term sheet187
corresponding Mr Vele noting the urgency cf the transaction13

(ci) engaging art organising, for payment of PLG and Mr Maiadina

(r) engaging KPMG to provide advice on the UBS financial modelling189

(s) co-ordinating meetings between Mr Mortensen, UBS and KPMG19°

(t) advising on draft transaction documents191

(u) together with PLG. Mr Maladina and Mr Chang co-ordinating steps required for the State to execute the agreements

18.6 Mr Latimer is no longer a Partner with NRFA. Mr Latimer is based in Australia and is not a cormpe-i,iiiiiabie 'witness. Given Mr Latimer's integral role between 2012-2014 the Commission made a num ber of requests for Mr Latimer to appear on a voluntary basis to give evidence. Mr Latimer confirrred receipt of those requests but declined to assist the Commission.

19. Vittorio Casamento

19.1 Mr Casamento was a Special Counsel at NRFA in 2013 and 2014. Mr Casamento was involved betwe...n February and March 2014 ti•ith the preparation of the Bridge and Collar Facility cicourrients. Mr Casamento appears to have acted as a liaison, particularly when the agreements were executed in March 2014.

19 2 Specifically, Mr Casamento was involved with the following:

(a) meeting and corresponding with Ashurst regarding the bridge and collar facility arrangement192

(b) reviewing draft transaction documents'-

(c) corresponding with Mr Vele both directly and through Mr Mortensen regarding the commercial implications of the Bridge Facility194

(d) corresponding v.vith Mr 'v'eie regarding the approvals requested by UBS from the State Sciicitc05

(e) corresponding with UBS, both directly and through their legal representatives Ashurst, regarding the drafting of the Collar Facility Term Sheet and the UBS mandate letters, including discussions about fees196

(f) corresponding with KPMG regarding the collar transaction documents197 and

(g) circulating finalised transaction documents for execution by the Governor-General and liaising with Ashurst ':BS. Mr Vele. Mr Chang of

Pertusio Capital Partners and
Mr Maladina of Pacific Legal Group to arrange execution'",=

19.3 Mr Casamento is now a Partner at NRFA, based in Sydney, Australia. Mr Casamento is not a compellable witness. Mr Casamento did not appear before the Commission or give evidence.

20. Steven Moe

20.1 Mr Steven Moe was a Senior Associate at NRFA in 2013 and 2014. Mr Moe played a facilitative role in preparing the Bridge and Collar Facility documents.

20.2 Mr Moe was primarily involved in the matter from early February 2014 to April 2014, as to the following:

(a) email correspondence between Mr Latimer and Dr Waine about the refinancing of the IPIC Bond in April 2013198

(b) preparing a draft confidentiality agreement for IPBC20° and a draft NEC submission on the establishment of a National Minerals Company Commercial Structure201

(c) facilitating meeting with Credit Suisse202 and ANZ203

(d) circulating draft NEC submissions regarding the appointment of UBS as financial adviser and NRFA as legal adviser in relation to the refinancing of the IPIC Exchangeable Bond2°4

(e) requesting opinions from Pacific Legal Group about advice provided by Ashurst regarding the proposed UBS loan, including seeking practical advice about the review and execution of the transaction documents205

(f) liaising with KPMG, Ashurst, UBS and Pacific Legal Group to finalise the NEC submission and transaction documents for the UBS loan208

(g) liaising with Pacific Legal Group to finalise the Substantial Shareholder Notice207

20.3 Mr Moe is no longer employed by NRFA. Mr Moe is based in New Zealand is not a compellable witness. Mr Moe did not appear before the Commission or give evidence.

21. Pacific Legal Group Lawyers

21.1 Pacific Legal Group Lawyers (PLG) is a law firm based in Port Moresby, Papua New Guinea.

21.2 On 26 February 2014, Mr Moe of NRFA sent an email to Mr Beattie, the Managing Partner of PLG and requested PLG provide an opinion, from a Papua New Guinea law perspective, on the proposed UBS Loan under the Loans (Overseas Borrowings) (No. 2) Act.208 The email from Mr Moe contained a thread of emails, including an advice offered by Mr Frecker of Ashurst. The understanding of Mr Beattie was that 'PLG was requested to review the advice from Ashurst and advise NRFA if the advice was in ordee.2°8

21.3 Mr Beattie with the assistance of Mr Asigau, another Partner with PLG, reviewed the advice.

21.4 On 27 February 2014, Mr Beattie responded to Mr Moe and confirmed the advice from Ashurst was in order.210

21.5 Messrs Beattie and Asigau identified two relationships that were key to PLG being engaged in the
matter. The first was:
... a long standing association with Anthony Latimer and NRF. PLG has acted as agents
for NRFA on various transactions and matters prior to and after the UBS loan
transaction.21'

21.6 The second was Mr Maladina, who was both a Consultant to and client of PLG:
PLG has also had an association with Jimmy MaIodine, who from time to time, has acted
as a source of referred matters for various clients and as a consultant on transactions in
which the firm was involved. Mr Maladina was at the time and is currently a client of
PLG.212

21.7 No formal retainer or letter of engagement has been provided to the Commission. Mr Beattie in
his sworn statement noted:
/ do not recall any formal retainer being signed with NRFA in respect of the transaction,
The instructions were issued and accepted on the basis of the existing association
between PLG and NRFA.2'3

21.8 Without a formai letter of engagement the scope of PLG is engagement is unclear. Mr Asigau
understood that PLG was engaged to act as NRF's 'PNG legal advisers on the transaction'.214
Mr Beattie. characterised the role played by PLG as 'town agents :n certain aspects of the
transaction 215

21.9 Mr Vele understood PLG to be 'local counsel' for NRFA. However, as NRFA did not have an
office in the Independent State. at that time: 'our dealings with them were both as external
counsel - foreign counsel and domestic counsel,211'

21.10 On 20 March 2014, despite being engaged by NRFA, PLG issued an invoice in the amount of
PGK 1.6 million to Mr Ves 217 The invoice old not set out specific hours worked by individual
lawyers, although it is unclear whether this //as required by the Department of Treasury prior to
making payment.

21.11 When examined on the reasoning behind the dec!sion to issue invoices to the State for payment
rather than NRFA, Mr Asigau observed:

'It would be a little hit impractical for the client to pay our fees to Norton Rose in Australia
and then for Norton Rose Australia to then send the money back to us. It would not make
much sense to do that based on the effect issues that we would have.'218

21.12 Of the PGK 1.6 million paid to PLG for its three weeks work PGK 1 million was paid directly to
Mr Maladina 21'

22. John Beattie

22.1 Mr Beattie was at the relevant time and remains the Managing Partner of PLG. Mr Beattie is
ordinarily resident in Papua New Guinea, however at the time of the Commission's hearings was
based in Queensland, Australia, and therefore was not a compellable witness. Despite this
Mr Beattie provided a sworn Affidavit and appeared before the Commission.

22,2 Mr Beattie appears to have been the primary point of contact with Mr Latimer and Mr Maladina,
holding discussions with both to discuss the nature of the transaction and the role that PLG was to
play in regard to same.22°

22.3 Mr Beattie's role in relation to the transaction included:

(a) in consultation with Mr Asigau, reviewing a legal opinion provided by Mr Frecker of Ashurst
in relation to the operation of the Loans (Overseas Borrowings) (No. 2) Act221

(b) between 1 and 6 March 2014, reviewing and providing commentary and advice from a
Papua New Guinean law perspective transaction documents including but not limited to:

(i) Bridge Facility Agreement

(ii) Security Trust Deed

(iii) Specific Security Deed

(iv) Participant Sponsorship Agreement

(v) Payment Direction Deed

(vi) Subscription Agreement

(vii) Board Resolutions222

(e) liaising with NRFA in relation to the conduct of the transaction223

(d) supervising work done on the matter by other PLG employees224

(e) advising on the potential nomination of Petromin as the State's Nominee225

(f) attendance at meetings with Mr Vele, Mr Mortensen, Mr Chang, Mr Maladina, Mr Latimer and Mr Jilek, at the PLG offices to discuss same226

23. Emmanuel Asigau

23.1 Mr Asigau was at the relevant time and remains a Partner of PLG. Mr Asigau is based in Papua New Guinea. Mr Asigau provided a sworn Affidavit and documents to the Commission in response to Summons.

23.2 Mr Asigau's statement records his involvement in the transaction as including:

(a) in consultation with Mr Beattie reviewing a legal opinion provided by Mr Frecker of Ashurst in relation to the operation of the Loans (Overseas Borrowings) (No. 2) Act227

(b) between 1 and 6 March 2014, reviewing and providing commentary and advice from a Papua New Guinea law perspective transaction documents including but not limited to:

(i) Bridge Facility Agreement

(ii) Security Trust Deed

(iii) Specific Security Deed

(iv) Participant Sponsorship Agreement

Payment Direction Deed

(vi) Subscription Agreement

(vii) Board Resolutions228

i(c) liaising generally with NRFA regarding same``'

d 1 attending meetings with Mr Vele, Mr Mortensen, Mr Chang, Mr Maladina, Mr Latimer and Mr Jilek, at the PLG offices to discuss same23°

(e) on 5 March 2014, delivering a letter dated 4 March 2014, enclosing copies of transaction documents to State Solicitor231

24. Jimmy Maladina

24.1 Mr Maladina was a consultant with PLG during the relevant period.232 In such capacity Mr Maladina, was billed by PLG for use of office space, employed his own staff and paid fcr his own overheads.233 Mr Maladina is based in Port Moresby. Mr Maladina provided a sworn affidavit and appeared before the Commission to give evidence.

24.2 Mr Maiad:nais in•otiiernent it the UBS Loan was further to a pre-existing professional relationship with Mr Latimer of NRFA. Mr Maladina described himself as Mr Latimer's 'point man' and 'his contact in Port Moresb31.234

In or around late [September)235 2013 Mr Latimer approached] me to see if we could work together if his firm North Rose Lawyers was successful in getting the mandate to work for the State of PNG on matters generally regarding the refinancing of the /P/C bonds from the Arabs.

During these discussions I recommended that his firm. North Rose Lawyers engage the legal services of PLG as the local firm to advice on PNG Laws. 236.

24.3 In his statement to the Commission, Mr Maladina described his role in the transaction:

As a consultant with PLG I attended meetings and reviewed documents on the UBS transaction in consultation with Norton Rose Lawyers before these advices were provided to the State of PNG.

... I verily believe that my role was purely providing legal advice in conjunction with PLG on the local laws and presenting the transaction documents before the State Solicitor for his advice and legal clearance.

This is the extent of the role / played as a consultant in the UBS transaction.237

24 4 Mr Beattie, appearing before the Commission described Mr Maladina s role ' as a consultant in a liaison type arrangement between the State agencies. UBS team, lawyers involved and other parties' .238

24.5 Contemporaneous records of correspondence provided by PLO and NRFA indicate that Mr Maladina's role included:

(a) reviewing and providing commentary on transaction documents to NRFA through Messrs Beattie and Asigau239
(b) providing approvals of draft transaction documents24°
(c) providing legal advice through Mr Beattie to Mr Casamento regarding the implications of removing the Hon Don Polye MP as Treasurer2'1
(d) providing internal PLG advice on general transaction requirements242
(e) coordination with Mr Vele and others in relation to the State's conditions precedent243
(f) briefing Prime Minister O'Neill on progress of the UBS Loan together with Mr Vele244

(g) correspondence with and delivery of documents to the State Solicitor for his legal clearance245

(h) correspondence with Ashurst and UBS regarding requirements for contract completion246

(i) together with Mr Chang attending to the logistics of the signing of various transaction documents by representatives of the Independent State247

(j) notifying Prime Minister O'Neill that payments under the UBS Loan would be made monthly, requesting use of Oil Search dividends for use as first payment248

24.6 Mr Beattie stated that Mr Maladina 'was not engaged as a lawyer for Pacific Legal Group in any sense'.24° While it might be the case that Mr Maladina was not formally employed as a lawyer he was involved in advice provided by PLG. Mr Maladina's own evidence indicates that prior to PLG issuing a legal opinion or correspondence relating to 'other practical issues as to matters on UBS transaction either John or Emmanuel always consults me before they move things or release them from the office, yes'.25°

24.7 Evidence before the Commission indicates that in April or May of 2014, upon payment of its PGK 1.6 million invoice, PLO paid PGK 1 million to Mr Maladina.

24.8 This payment has been described as being both a referral fee and a fee for services. Mr Maladina in his appearance before the Commission noted that the figure was arrived at following discussions with Messrs Latimer and Beattie. Mr Maladina estimates his fees were between PGK 900,000 and PGK 1.2 million: ' we agreed on a fixed figure, a ball park figure of a million kina and that is why I rendered that fee to Pacific Legal Group. I have no problems I believe I earned that money.'251

24,9 Mr Maladina gave evidence that his hourly rate in 2013/2014 was between PGK 1,000 and PGK 1,500 per hour.252 Mr Maladina stated that he no longer holds records of the time spent on the matter

CHAPTER 18 a The facilitators and the intermediaries

25. Ashurst

25.1 Ashurst is a multi-national law firm headquartered in London. Ashurst Australia and Ashurst Papua New Guinea: advised UBS during the negotiation of the UBS Loan in 2014. The Ashurst team comprised lawyers from Sydney, Melbourne and Port Moresby.

25.2 Ashurst was not engaged by the State. However, Mr Vele gave evidence before the Commission that it was customary for the State to pay for the financier's legal fees.

25.3 The Bridge Facility Agreement - Drawdown Notice indicates that AUD 812,500 was paid to Ashurst for work done on the matter.253

26. Richard Flynn

26.1 Mr Flynn was a Partner in the Ashurst, Port Moresby office. 1,1r Flynn was the lead lawyer for Ashurst in relation to the UBS Loan

262 Mr Flynn's rcAe was to liaise with NRFA. Pertusic Capital and Pacific Legal Group regarding:

(a) amendments to draft transaction documents::54
(b) appropriate Head of State authorisations25.5
(c) settlement instructions256
(d) the need for an Authority to Pre-Commit and the certificate of inexpediency257
(e) the release of the Allen & Overy sovereign bond offering memorandum258
(f) the instrument of appointment of then Prime Minister O'Neill as Treasurer259

26.3 Mr Flynn is currently the Managing Partner of the Port Moresby office of Ashurst Mr Flynn

produced documents to the Commission.

27. David Frecker

271 Mr Frcker was a Special Counsel in the Ashurst Sydney office. Mr Frecker has had a long history with the Government of the State from Independence onwards. Mr Maladina in his appearance before the Commission gave evidence that Mr Frecker had previously held a position in the office of State Solicitor and that he was viewed as a senior legal practitioner within the State.260

27.2 Mr Frcker's involvement with the transaction appears to have commenced in late February 2014. On 25 February 2014. Mr Frecker wrote to the UBS team providing his advice on the matter from a Papua New Guinea law perspective.2'" The advice noted the following.

(a) Under the Constitution, the State may only acquire property, raise loans. etc., in accordance with an Act of Parliament

(b) the relevant Act for raising loans overseas was the Loans (Overseas Borrowings) (No. 2) Act which permits borrowing subject to an overall limit of 125% of estimated internal revenue for the year

(c) a loan can be raised for the purpose of purchasing equity in companies

(d) while the ISDA component of the transaction did not immediate/ appear to be borrowing, if it could be portrayed as such it would fall within

the ambit of the Act

(e) further documents were required before an evaluation of negative pledge impacts could be made

(f) authorisations for the State to enter into the transaction, including required documents

(g) steps for execution of transaction documents

27.3 Mr Frecker was copied into correspondence between Ashurst, NRFA and Pacific Legal but does not appear to have taken an active role in the negotiation or review of any documents.

27.4 Mr Frecker is now a Ccnsultant with Ashurst based in Sydney, Australia. Mr Frecker is not a compellable witness but gave evidence as to matters relating to his historical involvement with the private loans having regard to the legislation.

NRFA's solicitors KWM confirmed that work was only done under the retainer executed on 6 March 2014.

7 Bridge Facility Agreement - Drawdown Notice, 12 March 2014, Exhibit 11.73, WIT. 0015.0002.1265 at page 1266.
3 Letter P.Jilek, M. Turner and B. Sharkey to D. Vele, Letter of Terms, 25 February 2014, Exhibit 11.73, WIT.0015.0001.1425.
Commitment letter-financial accommodation for the Independent State of Papua New Guinea, 27 February 2014, Exhibit 370, WIT 0015.0001.1063.
Brattle Report 3, 18 August 2021, [371444 Exhibit PPP, WIT. 0132.0003.0002.
Bridge Facility Agreement - Drawdown Notice 12 March 2014, Exhibit 11 73, WIT.0015.0002.1265 at page 1266
7 Pacific Legal Group Memorandum of Fees, 20 March 2014, Exhibit 36E, Ur 0014,0015.0056; Transcript, Emmanuel Asigau, 28 July 2021, page 2270
a Transcript, Emmanuel Asigau, 28 July 2021, page 2270.

a Letter N Chang to the Commission, 19 January 2022, Exhibit 466, WIT. 0095,0006.0006 at page 0007.
Letter N Chang to the Commission, 16 January 2022, Exhibit 466, WiT.0055.0006.0006 at page 0007.

1 BSP Capital invoice to Independent Public Business Corporation, 22 October 2013. Exhibit VVV, WIT.0142.0002.0150: BSP Capital invoice to
Independent Public Business Corporation, 4 November 2013, Exhibit VVV, WIT.0142.0002.0151; BSP Capital invoice to Independent Public Business
Corporation, 14 January 2014, Exhibit VVV, WIT.0142.0002.0152; BSP Capital invoice to Independent Public Business Corporation, 10 February
2014. Exhibit VVV, WIT.0142.0002.0153.

12 Affidavit of Ryszard Borysiewicz dated 15 December 2021, [62], Exhibit VVV, WIT.0142.0001.0001.

12 FRA Blackstone Pte Ltd invoice to Department of Public Enterprises and State Investment, 18 November 2013, Exhibit FFFF, W17,0154.0003.0166
at page 0167.

Letter T O'Dwyer to B. Micah, 16 October 2012, Exhibit PFPF, M70155 0001,1884 Letter B. O'Dwyer to B. Micah,17 December 2012. Exhibit
PPPP, WIT.0155.0001.0429; Mr O'Dwyehs evidence is that this meeting took place in November 2012: Statement of Benjamin Terrence O'Dwyer
dated 10 February 2022, [50], Exhibit PPPP, WIT. 0155.0009.0592.

15 Letter B. Micah to 8, O'Dwyer, RE: Refinancing IPIC Exchangeable Bond Proposal, 31 May 2013, Exhibit 1491, W17.0155.0001.1597,

1° Statement of Benjamin Terrence O'Dwyer dated 10 February 2022, (172(01, Exhibit PPPP, WIT.0155.0009.0592.

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'a Statement of Benjamin Terrence O'Dwyer dated 10 February 2022, [9], Exhibit PPPP, WIT.0155.0009.0592,

'a Statement of Benjamin Terrence O'Dwyer dated 10 February 2022, [9], Exhibit PPPP, WIT.0155,0009.0592.

21 Statement of Benjamin Terrence O'Dwyer dated 10 February 2022, (4), Exhibit PPPP, WIT 0155.0009.0592.

22 Statement of Benjamin Terrence O'Dwyer dated 10 February 2022, [9], Exhibit PPPP, WIT.0155.0009.0592.
23 Letter T. O'Dwyer to B. Micah, 16 October 2012, Exhibit PPPP, WIT.0155.0001.1884; Letter B O'Dwyer to B. Micah,17 December 2012, Exhibit
PPPP, WIT.0 155 00,01.0429; Mr O'Dwyer's evidence is that this meeting took place in November 2012: Statement of Benjamin Terrence O'Dwyer
dated 10 February 2022, [50], Exhibit PPPP, WIT.0155.0009.0592.

24 Letter T. O'Dwyer to B. Micah; 16 October 2012, Exhibit PPPP, WIT.0155,0001.1884; Statement of Benjamin Terrence O'Dwyer dated 10 February
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25 Email B. O'Dwyer- to C. Waine, Commercial-in-Confidence, 26 February 2013, Exhibit PPPP, WIT. 0155.0001.1620, Letter B. O'Dwyer to B Micah,
State Owned Enterp.rise Indicative Funding Proposal, 25 February 2013, Exhibit PPPP, WIT.0155,0001,1621.

26 Letter B. Micah to B. O'Dwyer, RE: Refinancing IPIC Exchangeable Bond Proposal, 31 May 2013, Exhibit 1491 WIT 0155.0001.1597, Statement oi
Benjamin Terrance (O'Dwyer dated 10 February 2022, [71], Exhibit PPPP, WIT. 0155.0009.0592.

27 Transcript Ben Micah, 11 February 2022, page 4030.

2" Statement of Nathan Chang dated 21 June 2021, [2], Exhibit HH WIT.0095.0004 0001.

2" Investment Promotion Authority website, accessed 28 March 2022: View Local Company (ma cmv.pot.

3° Statement of Lars. Rune Mortensen dated 21 June 2021, [9], Exhibit II, WIT,0100.0002,0001.

al Statement of Nathran Chang dated 21 June 2021, [2], Exhibit HH WIT.0095.0004.0001; Investment Promotion Authority weheite, accessed 26 Marhc
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[2792496:410] Your travel itinerary for Mr Dairi Vele/Dep 14-Aug-2013/Trip No SO/ZXB4AM, 14 August 2013, Exhibit 5, NRF. 001.001.3597; Email A.
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[2792496:398] PNG transaction - CS Credentials, 20 August 2013, Exhibit 5, NRF.001.001 3808; Email A. Latimer to D Vele and others, [2792496:398] PNG transaction - CS Credentials, 20 August 2013, Exhibit 5, NRF.001.001.3824; Email A. Latimer to D Vele, [2802286:35] IPIC Bond
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[2792496:429] SWF Overview, 3 September 2013, Exhibit 5, NRF. 001.001.4040; Email A. Latimer to D. Vele and L. Mortensen, FW: [2792496:431]
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Exhibit 5, NRF.001.004.2616; Email S. Moe to D. Vele and others, FW: Bible 6/6 (2802286)[NRF-APAC,FID1161564], 25 March 2014, Exhibit 5; NRF.001.004.2995.

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44 Statement of Lars 8t2oe Mortensen dated 21 June 2521 [4], Exhibit 1, 104 02'42 0001

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l" Email A. Latimer tc' D Vele and others, [2792496:366] IPIC agenda, 6 August 2013. Exhibit 5, NRF.001 001.2761; Email A Latimer to S. Moe, Re
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61 Email N. Cribb to D. Vele and others, RE: [2802286:15] For JP Morgan], 19 August 2013; Exhibit 5, NRF. 001.001.3768; Email A. Latimer to L.
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54 Statement of Lars Rune Mortensen dated 21 June 2021, [40], Exhibit Di, W070100.0002.0001..
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Royal Commission of Inquiry into processes and
procedures followed by the Government of Papua
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