Volume IA

Royal Commission of Inquiry into processes and procedures followed by the Government of Papua New Guinea into obtaining the off-shore loan from the Union Bank of Switzerland and related transactions

31 March 2022

Chief Sir Salamo Injia Kt GCL
Chief Commissioner and Chairman of Inquiry

The Honourable Margaret White AO
Commissioner

VOLUME 1A

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INQUIRY

INTO PROCESSES AND PROCEDURES

FOLLOWED BY THE GOVERNMENT OF PAPUA NEW GUINEA

INTO OBTAINING THE OFF-SHORE LOAN

FROM THE UNION BANK OF SWITZERLAND

AND RELATED TRANSACTIONS

31 March 2022

The Honourable James Marape, MP

C/- National Parliament

PO Parliament House

WAIGANI, National Capital District 131

Papua New Guinea

Dear Prime Minister,

Final Report of the Royal Commission of Inquiry into processes and procedures followed by the

Government of Papua New Guinea in obtaining the off-shore loan from the Union Bank of

Switzerland and related transactions

In accordance with the Terms of Reference made under the Commissions of Inquiry Act 1951 on 30 August

2019 as extended by the Amended Terms of Reference

dated 12 October 2021, we have inquired into and

prepared a report on the processes and procedures followed by the Government of Papua New Guinea in

obtaining the off-shore loan from the Union Bank of Switzerland and related transactions.

We now present to you our Final Report in respect of that inquiry.

Yours sincerely,

Chief Sir Salamo Injia Kt GCL The Honourable Margaret White AO

Chief Commissioner and Chairman Commissioner

Dated: 31 March 2022
Dated: 31 March 2022

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Commissions of Inquiry Act (Chapter 31)

EXTENSION OF THE COMMISSION OF INQUIRY INTO THE OFF-SHORE LOAN OBTAINED BY THE
GOVERNMENT OF PAPUA NEW GUINEA FROM THE UNION BANK OF SWITZERLAND IN 2014 AND
RELATED TRANSACTIONS

I, JAMES MARAPE, Prime Minister, by virtue of the powers conferred by Section 2, 4, 4A of the Commissions of Inquiry Act (Chapter 31) and all other powers me enabling, hereby:

I. Extend by six months commencing from October 2021 the term or period of the investigation by the Commission of Inquiry into the offshore loan obtained by the Government of Papua New Guinea from the Union Bank of Switzerland in 2014 and the related transactions, and

2. Extend the Amended Terms of Reference to be investigated during the period of extension.

• –,

Dated this 12th day of October, 2021.

J. MARAPE,
Prime Minister.

-1

ROYAL COMMISSION OF INQUIRY INTO PROCESS AND PROCEDURES FOLLOWED
BY THE GOVERNMENT OF PAPUA NEW GUINEA IN OBTAINING THE OFF-SHORE LOAN
FROM THE UNION BANK OF SWITZERLAND AND RELATED TRANSACTIONS

To: Chief Commissioner and Chairman, Retired Chief Justice of Papua New Guinea Chief Sir Salamo lnjia, Kt GCL; and; Commissioner Hon Margaret White AO

AMENDED STATEMENT OF CASE

A. INTRODUCTION

The decision of the Government of Papua New Guinea made in 2014 to obtain an off-shore loan from the Union Bank of Switzerland (UBS) has become controversial following the tabling of the Ombudsman Commission Investigation Report in Parliament in May 2019. The Prime Minister upon assuming office undertook to convene a Commission of Inquiry to establish facts surrounding the whole transaction, including all persons and entities involved in the deal and whether or not the deal followed proper and legal processes and procedures.

In order to appreciate the public concerns on improprieties in regard to the whole deal it is necessary and important that the Commission of Inquiry commences inquiry with the cause which brought about the need for the Government of the day to seek funding from an off-shore facility. This necessitates the Inquiry to commence its investigation with the States participation in the PNG LNG Project, including the purchase of shares and the disposal of same.

B. OBJECTIVE

The objective of the Commission of Inquiry is to inquire into and establish facts surrounding:

1. The decision by the Government to obtain the loan funding of US$1.3 billion;

2. The decision to seek off-shore loan and the decision to select Union Bank of Switzerland as the preferred financier;

3. Individuals and entities who were instrumental in the negotiation (the middlemen involved) for and on behalf of the State, how were they engaged and how much were paid as fees for their services as brokers and negotiators;

4. Whether breaches of mandatory Constitutional requirements have occurred and the conduct on the part of Leaders and persons involved in the deal.

The ultimate objective of the Commission of Inquiry is to establish whether there were breaches of PNG laws and Constitutional requirements in the process of negotiation and approval of the UBS Loan, and also establish whether PNG as a country had suffered as a result of this off-shore deal, and whether the persons involved in the deal can be held accountable for their conduct.

AMENDED TERMS OF REFERENCE

Know you that I, Hon. James Marape, MP, Prime Minister of Papua.New Guinea, reposing confidence in your integrity and ability to do so, by the virtue of the powers conferred by Section 2 of the Commission of Inquiry Act 1951 (Chapter 31) and all powers me enabling, hereby direct the Commissioners and the Commission to inquire into the following matters:

The Commission shall. so far as reasonably possible, inquire into, make findings and report on the following matters:-

OROGEN MINERALS MERGER WITH OIL SEARCH LIMITED

(a) What was the reasoning behind the decision by the Morauta Government to approve the sale of ()rotten Minerals to Oil Search Limited.

(b) Were alternative structures / transactions considered? If so, why were these rejected?

(c) What was the impact of the Orogen Minerals merger with Oil Search.

(a') How the merger impacted the relationship with Oil Search and successive Governments of Papua New Guinea.

PNG LNG PROJECT

(e) How the State financed its equity participation in the PNG LNG Project.

(f) Whether due and proper legal and administrative processes were followed to obtain the loan to finance the State's equity participation in 2009, including but not limited to:—

(i) How was the process commenced?

(ii) How was IPIC selected?

(iii) What process was utilized?

(iv) What were the terms of the Loan from IPIC?

(g) Who were the legal and financial advisors engaged in the IPIC Exchangeable Bond transaction?

(h) Were legal and administrative processes followed to engage any legal and financial advisors?

What was the rationale for allowing payment to be made by an election of either cash, or the mortgaged Oil Search Shares or a combination of both.

What was the rationale for allowing the mortgaged Oil Search shares to be used in payment of the loan.

(k) Whether IPIC had the sole election as to method of payment in satisfaction of the State Loan from IPIC, and if so what was the rationale for giving IPIC the right of sole election to either accept cash, the

mortgaged Oil Search shares or a combination of both.

When and what decision did IPIC make on the repayment of the loan?

UBS LOAN

(I) Why and when did the State commence the procedures to obtain a loan regarding the debt to IPIC and/or purchase Oil Search shares.

(in) Whether legal and administrative processes were followed regarding the loan from UBS, including but 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?

What processes have been utilized in the past to obtain loans?

Amended Statement of Case—continued

PURCHASE OIL SEARCH SHARES

(n) The rationale as to why the State determined to buy share in Oil Search in 2014.

(o) When the decision was made to purchase Oil Search shares.

(p) The rationale as to why the State determined to utilize the UBS Loan to purchase Oil Search shares.

(q) Whether legal and administrative processes were followed to buy Oil Search shares in 2014.

(r) What role did Papua New Guinean and international legal and financial advisors play in relation to the

UBS Loan?

(s) Which individuals or organisations benefitted from the UBS Loan or related transactions.

(t) What would the State's (and its government owned enterprises) financial positions have been had the UBS

Loan to purchase Oil Search shares and the purchase of Oil Search shares not been entered into?

ELK/ANTELOPE PRL-15 TRANSACTION

(u) The history of the Elk/Antelope PDL and PRL.

(v) The approvals process for PRL-15.

(w) The scale and quality of the PRL-15 resource.

(x) Which entities have held interests in Elk/Antelope PRL-15 since its inception.

(y) Which individuals or organisations benefitted from the 2014 sale of PAC LNG Group of companies to Oil

Search Limited and related transactions.

(z) What opportunities did the State have to acquire an interest Elk/Antelope PRL-15 other than indirectly

through a shareholding in Oil Search? Were there alternative means of Oil Search financing the PRL-15

transaction, other than obtaining funds from the Independent State?

SALE OF OIL SEARCH SHARES

(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. These Amended Terms of Reference may be added to, varied and amended from time to time.

3. The Commission shall use its best efforts to conclude its inquiry and report as soon as possible but no later

than the date appearing at the end of these Amended Terms of Reference, and shall make a full and

faithful report on and recommendations concerning the aforesaid matters, and transmit the same to the

Prime Minister after concluding its inquiry.

4. The provisions of the Commission of Inquiry Act 1951 (Chapter 31) shall be applicable for the purposes

of this inquiry.

5. The Commission may hold public and private hearings, in such manner and in such locations, as may be

necessary and convenient.

6. All organs of state, institutions and stakeholders are required to cooperate fully with the Commission.

Amended Statement of Case—continued

Sale of Oil Search Shares

AND I FURTHER direct that the inquiry be held in the National Capital District, or at such other places in Papua New Guinea or elsewhere as to you may appear necessary and expedient.

AND I FURTHER direct that the inquiry shall be held in public, but I approve that you may permit to he given in private, any evidence that in the course of your inquiry you, in your absolute discretion, consider needs to be given in private in accordance with Section 2(5) of the Commission of Inquiry Act, 1951 (Chapter 31).

AND I FURTHER direct that you shall continue with the inquiry without delay and proceed therein with all dispatch and render to me your final report by 31 March 2022.

Dated this 12th day of October, 2021

Hon J. MARAPE, MP,

Prime Minister.

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Port Moresby-751.

Glossary

Amended Terms of Reference	Amended Terms of Reference dated 12 October 2021
AUD	Australian Dollar
BPNG	Bank of Papua New Guinea
Brattle	The Brattle Group
Brattle 1	Brattle Report dated 14 July 2021
Braille 2	Supplementary Brattle Report dated 6 August 2021
Braille 3	Third Brattle Report dated 17 August 2021
Brattle 4	Brattle Report dated 10 February 2022
Brattle 5	Supplementary Brattle Report dated 21 February 2022
Bridge Loan	Bridge loan facility of AUD$335,000,000 provided by UBS to the Independent State in March 2014

COI Act	Commissions of Inquiry Act 1951
Collar Loan	Collar loan facility provided by UBS to the Independent State in March 2014
Commission	Commission of Inquiry
Constitution	Constitution of the Independent State of Papua New Guinea
CSTB	Central Supply and Tenders Board
Exchangeable Bond Transaction	Five-year AUD$1.681 billion mandatory exchangeable bond issued by IPBC to IPIC on or around 5 March 2009
GBT	General Business Trust
GDP	Gross Domestic Product of the Independent State of Papua New Guinea
GloCo	PNG Liquefied Natural Gas Global Company LDC
Goldman Sachs	Goldman Sachs JBWere
Hon	Honourable
ICAC	Independent Commission Against Corruption
IPBC	Independent Public Business Corporation
IPIC	International Petroleum Investment Company
KCHL	Kumul Consolidated Holdings Limited
KPHL	PNG Company no. 1-100145, named: • Telemu. No. 90 Limited from 16 December 2013 to 4 March 2014 • NPCP Holdings Limited from 4 March 2014 to 25 September 2015 • Kumul Petroleum Holdings Limited from 25 September 2015 to present
Kumul Investments	Kumul Petroleum (Investments) Limited
LNG	Liquefied Natural Gas
MP	Member of the National Parliament
MRDC	Mineral Resources Development Company Ltd
NEC	National Executive Council
NPCP	PNG Company no. 1-100145, named:

Amended Terms of Reference	Amended Terms of Reference dated 12 October 2021
NPCP Kroton	• NPCP Holdings Limited from 4 March 2014 to 25 September 2015, now KPHL PNG Company no. 1-63957, named: • Kroton No. 2 Limited from 20 June 2008 to 23 September 2010 • National Petroleum Company of PNG (Kroton) Limited from 24 September 2010 to 25 September 2015 • Kumul Petroleum (PNG LNG) Limited from 25 September 2015 to 28 January 2016 • Kumul Petroleum (Kroton) Limited from 28 January 2016 to present
NPCP Investments	NPCP Investments Limited
NRFA	Norton Rose Fulbright Australia
Oil and Gas Act	Oil and Gas Act 1998
Oil Search	Oil Search Limited
Ombudsman	Ombudsman Commission of Papua New Guinea
Ombudsman Report	Final Report of the Ombudsman Commission of Papua New Guinea dated December 2018
Orogen	Orogen Minerals Limited
Petromin	Petromin PNG Holdings Ltd
PDL	Petroleum Development Licence
PGK	Papua New Guinean Kina
PNG LNG Gas Agreement	PNG LNG Gas Agreement dated 22 May 2008 between the Independent State of Papua New Guinea and Licencees of each of PDL 1, PRL 12, PRL 2, PRL 11, PDL 2, PDL 4, PDL 5 and PDL 6
PNG LNG Project	An integrated system of gas production, processing, liquefication and storage facilities across the State established by subsidiaries of ExxonMobil, Oil Search, Santos, Merlin Petroleum Company, AGL and LX Holdings Incorporated and other State-owned companies under an unincorporated joint venture, and operated by Esso Highlands Limited on behalf of the PNG LNG participants
Pty	Proprietary
PPL	Petroleum Prospecting Licence
PRL	Petroleum Resource Licence

PwC	PriceWaterhouseCoopers
SoE	State-owned enterprise
State	The Independent State of Papua New Guinea
SWF	Sovereign Wealth Fund
Terms of Reference	Commission of Inquiry Terms of Reference published in the National Gazette on 30 August 2019 (as amended on 12 October 2021 by the Amended Terms of Reference)
Treasury	Department of Treasury
UBS	Union Bank of Switzerland Aktiengesellschaft (Australia Branch)
UBS Loan	General reference to the transactions by which UBS funded the acquisition by the Independent State of 149,390,000 Oil Search shares at $8.20 per share
USD	US dollar

List of Key Persons

Witness	Role
Mr Gerea Aopi CBE	Director of Oil Search at the time of the IPIC Exchangeable Bond Transaction and at the time of the UBS Loan Transaction Chairman, IPBC, at the time of the IPIC Exchangeable Bond Transaction
Mr Loi Bakani CMG	Governor, Bank of Papua New Guinea at the time of the IPIC Exchangeable Bond Transaction and at the time of the UBS Loan Transaction
Mr Peter Botten AC CBE	Chief Executive Officer of Oil Search at the time of the IPIC Exchangeable Bond Transaction and at the time of the UBS Loan Transaction
Mr Vittorio Casamento	Senior Associate, Norton Rose Fulbright Australia. Adviser in relation to the UBS Loan Transaction.

Mr Paddy Jilek	UBS, a key contact for the UBS Loan Transaction
The Honourable Kerenga Kua MP	Attorney General at the time of the UBS Loan Transaction
Mr Wasantha Kumarasiri OBE	Managing Director, IPBC, at the time of the UBS Loan Transaction
Mr Anthony Latimer	Partner, Norton Rose Fulbright Australia. Adviser in relation to the UBS Loan Transaction
The Honourable James Marape MP	Minister for Finance at the time of the UBS Loan Transaction Prime Minister at the time of the Commission
The late Mr Ben Micah	Minister for Public Enterprises and State Investments at the time of the UBS Loan Transaction
Mr Steven Moe	Senior Associate, Norton Rose Fulbright Australia. Adviser in relation to the UBS Loan Transaction
Mr Lars Mortensen	Adviser to Mr Vele at the time of the UBS Loan Transaction
The Honourable Peter O'Neill CMG MP	Member of Cabinet at the time of the IPIC Exchangeable Bond Transaction Prime Minister at the time of the UBS Loan Transaction and at the time of the sale of the Oil Search shares
The Honourable Don Polye MP	Treasurer until the UBS Loan Transaction
The Honourable Patrick Pruaitch MP	Treasurer at the time of the IPIC Exchangeable Bond Transaction, and re-appointed as Treasurer around the time of the UBS Loan Transaction, after the decommissioning of the Honourable Don Polye MP
Mr Daniel Rolpagarea	Solicitor at the time of the UBS Loan Transaction
Mr Arthur Somare	Minister for Finance at the time of the IPIC Exchangeable Bond Transaction
The late Right Honourable Grand Chief Sir Michael Somare GCL GCMG CH CF SSI MP	Prime Minister at the time of the IPIC Exchangeable Bond Transaction
Mr Wapu Sonk	Chief Executive Officer of KPHL at the time of the UBS Loan Transaction and at the

time of the sale of the Oil Search shares

List of Key Persons

Witness	Role
Mr Mitchell Turner	UBS. a key contact for the UBS Loan Transaction
Mr Dairi Vele	Director, Gas Production Coordination Office Secretary of the Department of Treasury at the time of the UBS Loan Transaction and at the time of the sale of the Oil Search shares
Dr Clement Waine	Secretary of the Department of Public Enterprises and State Investments at the time of the UBS Loan Transaction

PART A

Executive Summary

11 This Commission of Inquiry was established under the Commissions of Inquiry Act 1951 by Instrument dated 30 August 2019 and, as amended in October 2021, it required a report to be delivered to the Prime Minister, the Honourable James Marape MP, by 31 March 2022. This is that Report.

1.2 This Executive Summary gives an overview of the Commission's work, and of some key conclusions and recommendations. It must be read with the Report as a whole, noting that individual chapters contain a comprehensive analysis of the often complex issues and evidence they each cover. Each generally concludes with relevant findings and recommendations. The Commission's key conclusions and recommendations follow this summary.

1.3 The rationale for this Commission is explicitly stated in the establishing Instrument as follows:

> The decision of the Government of Papua New Guinea made in 2014 to obtain an off-shore loan from the Union Bank of Switzerland (UBS) has become controversial following the tabling of the Ombudsman Commission Investigation Report in Parliament in May 2019. The Prime Minister upon assuming office undertook to convene a Commission of Inquiry to establish facts surrounding the whole transaction, including all persons and entities involved in the deal and whether or not the deal followed proper and legal process and procedures.
>
> In order to appreciate the public concerns on improprieties in regard to the whole deal it is necessary and important that the Commission of Inquiry commences inquiry with the cause which brought about the need for the Government of the day to seek funding from an off-shore loan facility. This necessitates the Inquiry to commence its investigation with the States participation in the PNG LNG Project, including the purchase of shares and the disposal of the same.

1.4 The Ombudsman Commission Report is titled:

> An Investigation Into The Alleged Improper Borrowing Of [An] AuS1 .239 Billion Loan

From The Union Bank Of Switzerland ... (Australia Branch) To Purchase 149,390,244 Shares] in Oil Search Limited .„

1.5 This is a reference to what this Report calls the UBS Loan. It is one of the key financial transactions examined by the Commission, the other being the Exchangeable Bond Transaction that IPBC entered into with IPIC in 2008.

1.6 The Ombudsman Commission Report made serious findings of illegality and failure to follow proper procedures; but its jurisdiction was limited to investigating complaints concerning actions of governmental bodies and agencies, and the actions of 'Leaders' as defined in the Leadership Code. Unlike this Commission, the Ombudsman Commission could not investigate private citizens or entities, even those who had been paid to advise or perform other services for the State, such as lawyers NRFA and UBS itself.

1.7 It might have been expected that such well-paid former advisers would unstintingly assist the Commission, even though they are located overseas and beyond the reach of the Commission's

compulsory powers, but they have not. This surprising and disappointing behaviour has certainly limited what the Commission could achieve, and along with other findings of this Report, merits their exclusion from work for the State and its entities for some time to come.

1.8 Although the public concern generated by the Ombudsman Commission Report clearly led to this Commission, this Commission is not a review of the Ombudsman Commission's work, nor can this Commission decide legal controversies as a court can.

1.9 Nonetheless, despite the well-known difficulties caused by the COVID-19 pandemic, the Commission has been able to examine thoroughly a great many witnesses, entirely in live-streamed hearings which were held in public, and much

documentary evidence, and to answer
the Terms of Reference by the due date. The Commission acknowledges with gratitude the work
of all those who made this significant achievement possible.

1 10 Papua New Guinea is blessed with abundant natural resources, which were largely unexploited
before independence was attained in 1975. The need for wise and sustainable exploitation of
natural resources focused the minds of the founders of the newly independent State and was
reflected in the terms of the Constitution which, for example, declares in National Goal 4 that
'natural resources and the environment are to be conserved and used for the collective benefit of
all and be replenished for the benefit of future generations'. Equally, evidence to this Commission
from founders such as Sir Julius Chan and the late Grand Chief Sir Michael Somare emphasised
that governments should be wary of becoming involved in private business investments and,
when doing so, must carefully manage risks in order to avoid losses: overall, the Commission
concludes that risks were well managed in the case of the Exchangeable Bond Transaction but
were not in the case of the disastrous UBS Loan.

1 11 Among the most valuable and internationally marketable resource located in this country is
liquefied natural gas (LNG). Perhaps the most significant current resources project for many
years is the PNG LNG Project. Since its first LNG export in 2014, the PNG LNG Project has
exported approximately 7 million tonnes of LNG per year. It is a vast and complex project which
has been necessarily undertaken with the involvement of multinational companies and overseas
finance. To illustrate the scale of the PNG LNG Project: on 8 December 2009 the Final
Investment Decision for the PNG LNG Project was made, and this immediately resulted in the
commencement of comprehensive construction activities in the construction and commissioning
period from 2010 to 2014 costing more than USD 19 billion (approximately PGK 67 billion))

1.12 There are direct economic benefits to the country from such projects, especially employment and
investment in infrastructure. And, like anyone else, the State can become a shareholder in the
companies holding the licences or undertaking the work, receiving such dividends as those
companies may choose to declare. But the State also has uniquely valuable 'back-in' rights under

ss. 184 and 185 of the Oil and Gas Act which allowed it to pay to become an equity participant in the PNG LNG Project.

1.13 In 2009 the State decided to exercise those back-in rights, acquiring 19.4%. In return for acquiring 'back-in' rights then worth between USD 3-5 billion (approximately PGK 10.6-17.7 billion), the State needed to pay USD 300 million (approximately PGK 1.06 billion) upfront, and then USD 1 billion (approximately PGK 3.5 billion) between 2009 and 2014 in order to share in the future profits of the PNG LNG Project. The State did not have those funds, so it needed to raise them. At the time, it was the largest fundraising that the State had ever attempted. This significant need for finance directly led to the Exchangeable Bond Transaction.

1.14 In 2014. Oil Search was Papua New Guinea's largest company and an important partner with the State in many projects. The State had first acquired 196 million shares in Oil Search when it had merged in 2002 with Orogen Minerals, a company in which the State then held a bare majority of the shares. The merger gave Oil Search access to cash it did not otherwise have. The Oil Search shares the State then acquired gave the State between 17.65% (in 2004) and 13.17% (by 2013) of the issued share capital of Oil Search. Although Oil Search usually paid modest dividends, the shares tended to appreciate in value.

1.15 The Global Financial Crisis which began in 2007 was still being felt in Papua New Guinea in 2008/9 and it greatly affected the State's capacity to raise funds. At this time the late Sir Michael Somare was Prime Minister and Mr Peter O'Neill was in the NEC (Cabinet). The State decided to use a significant asset, namely its ownership, through IPBC, of the 196 million Oil Search shares to raise the funds needed for it to participate in the PNG LNG Project. The State (through IPBC)

decided to raise AUD 1.681 billion (approximately PGK 4.46 billion) by issuing 5-year Exchangeable Bonds to IPIC, an Abu Dhabi sovereign wealth fund. Under that transaction, IPIC would receive 5% per annum interest for the duration of the Exchangeable Bonds. On maturity, the Exchangeable Bonds would be exchanged for the shares that IPBC held in Oil Search. The reference price for the exchange was AUD 8.55 per share. If (as was the case in 2014) the share price was below the reference price, IPBC would have to make a top-up payment to IPIC. If the share price was greater, IPIC would only receive shares up to the value of the bonds.

1 16 The Report closely considers the Exchangeable Bond Transaction: its terms and rationale, the processes leading to its adoption and the work done by advisers. The Commission, assisted by detailed expert reports from The Brattle Group, concludes that the lack of controversy historically attaching to the Exchangeable Bond Transaction is justified. While it involved some risks (which largely turned out not to be realised), it served a valuable purpose for the State by enabling it to acquire at an attractive price the back-in rights and share in the profits of the largest resource project in the country. Further (and in contrast with the UBS Loan) it:

(a) was on the whole the best available option
(b) was quite carefully and methodically examined by Government and its advisers before the NEC decided to proceed with it
(c) was fairly priced
(d) achieved its stated purpose

1 17 From 2011-2019 the Prime Minister was Mr O'Neill. The Exchangeable Bonds were to mature in March 2014 and, unless IPIC otherwise agreed, the result would be that:

(a) IPBC had used the funds borrowed to share in the future profits of the PNG LNG project, for the ultimate benefit of the State and the people
(b) IPIC would take ownership of the Oil Search shares, through the exchange provisions of the Exchangeable Bonds, leaving IPBC and the State with no Oil Search shares
(c) IPBC would, according to a formula based on the market value of the shares, most likely make a relatively modest payment to IPIC thereby bringing the Exchangeable Bond Transaction to an end (the amount actually paid was about AUD 74 million (approximately PGK 196 million), and, critically

(d) IPBC would not have any further monies to pay, and the significant amounts they were due to receive as early as 2014 from the PNG LNG Project could be put into the legislated

but not yet operational Sovereign Wealth Fund for the benefit of the country and its economy

1.18 The first three matters came to pass. The fourth - the road not taken - did not, fundamentally because of the decision by Mr O'Neill, principally aided by then Secretary for the Department of Treasury, Mr Dairi Vele, to persuade the NEC to enter into the disastrous UBS Loan arrangement.

1.19 These matters are at the core of the Commission's work. As its establishing Instrument stated:

> The ultimate objective of the Commission of Inquiry is to establish whether there were breaches of Papua New Guinea laws and Constitutional requirements in the process of negotiation and approval of the UBS Loan, and also establish whether Papua New Guinea as a country had suffered as a result of this off-shore deal, and whether the persons involved in the deal can be held accountable for their conduct.

1.20 The period between mid-2013 and the entering into the UBS Loan in March 2014 can be seen as a series of stages, at each one of which serious errors were made.

1.21 The first stage covered the unsuccessful attempts by the State or State entities to persuade IPIC to give up its contractual rights to retain the Oil Search shares which were the subject of the Exchangeable Bonds. While there were some limited signs that IPIC was prepared to do so, in the end it relied upon its rights to keep the shares. Although it was always clear the Exchangeable Bonds gave those rights to IPIC, and Mr O'Neill

was in the Somare Cabinet which approved the Exchangeable Bond Transaction, in his evidence before the Commission he unhelpfully persisted with the notion that Papua New Guinea was well positioned to persuade IPIC to give up its rights. It never was. The NEC, the IPIC Exchangeable Bond Review Committee it established, IPBC and the Department of Public Enterprises and State Investments had their time wasted on what was likely to be a futile exercise.

1.22 The second stage was the growing realisation that the Oil Search shares formerly held were going to be lost and that. if even an approximately equivalent quantity was again to be held by the State, they would need to be newly acquired. From later in 2013 it became clear to Mr Vele, who was leading the State's search for a financial adviser in relation to refinancing the Exchangeable Bonds that an opportunity might exist to persuade Oil Search to issue new shares in itself to the State because Oil Search was seeking a significant amount of finance to buy into a valuable gas resource known as Elk-Antelope or PRL 15, and Oil Search might find it attractive to raise funds in a single transaction with the State.

1.23 The third stage was the formal but unsurprising advice from IPIC that it was keeping the Oil Search shares, which led to a series of urgent meetings between Oil Search executives, Prime Minister O'Neill and Mr Vele, which in turn led to the agreement with Oil Search. This created a need for the State to urgently obtain finance, although the urgency was because of Oil Search's timetable.

1.24 The fourth stage was a hurried and inadequate process over a period of 15 days whereby the State's financial adviser and arranger, UBS, and many lawyers, including from NRFA and PLG, put together a complex series of documents and largely drafted the NEC paperwork. Mr O'Neill and Mr Vele drove the process to the exclusion of others with key interests. Remarkably, even the Treasurer was excluded from drafting or commenting on a vital submission which recommended very large expenditure on behalf of the State. Nonetheless the UBS Loan was approved by the NEC and documentation executed.

1.25 The final stage of the UBS Loan was that, to avoid breaching the State's debt ratios, the Collar Loan (one of two parts of the UBS Loan) was novated to the SoE eventually known as Kumul Petroleum Holdings Limited (KPHL). In view of the controversy which resulted when the UBS Loan was announced, parliamentary disapproval of the UBS Loan could well have occurred. Importantly, KPHL never wanted either the Oil Search shares or the significant financing debts that came with the UBS Loan. But from 2015 the choice was not theirs alone, as the KPHL Trustee was the Prime Minister of the day and approval of the NEC was needed for many of its decisions. So the KPHL Board extended the loan in 2016 and, with its Trustee Mr O'Neill's permission, sold the shares at a significant loss in 2017. The Managing Director of KPHL, Mr Wapu Sonk, with some justification, felt the Trustee's permission was deferred for purely political reasons which, if established, would be a clear breach of duty by a trustee.

1.26 In the end, the State's entirely unnecessary UBS Loan to buy Oil Search shares resulted in:

(al the loss of those same shares

(b) significant financial losses to the State of in excess of AUD 340 million (approximately PGK 902 million)

lost opportunities, including to establish the Sovereign Wealth Fund as intended and endow it properly

(d) diversion of the significant revenues expected from the PNG LNG Project once the exports of LNG began in 2014

1.27 As the Report concludes in relation to the UBS Loan:

(a) Unlike the Exchangeable Bond Transaction which was justified by the purchase of significant and financially beneficial rights in the PNG LNG Project, the UBS Loan had no satisfactory justification or rationale. It made no economic sense for the State to pay large sums to multiple advisers as well as high interest

payments on a loan to purchase shares in a publicly listed company. If the State wanted to be involved in further oil and gas exploration projects, waiting instead for the back-in rights to PRL 15 was a more prudent course. The Commission rejects Mr O'Neill's stated 'strategic interest' justification for obtaining new Oil Search shares in 2014. On analysis, it amounts, at its highest, to no more than the habit of such ownership over the preceding dozen years, and access to modest dividends in common with any other shareholder. If there were other reasons they have not been revealed to the Commission. The State had powers to block takeovers on national interest grounds if that became a concern. Further, any interest in share ownership was short lived: the UBS Loan was swiftly novated to KPHL, which never wanted the UBS Loan obligations and wished to sell the shares at the earliest opportunity

(b) The failure to follow proper processes, coupled with the speed with which complex documentation was produced had the disastrous consequence that no-one within the public service – including the Secretary for Treasury. Mr Vele – understood the overcharging of the State by UBS, and the risks inherent in the UBS Loans, and no adviser retained by or on behalf of the State identified these matters, either in themselves or as risks to be further investigated

(c) In addition to its sizeable disclosed fee of AUD 28.4 million (approximately PGK 75.4 million), UBS also benefited from the refinancing of the Collar Loan in December 2014 and February 2016 as well as from the ultimate sale of the shares in September 2017. Its total over-charging amounts to AUD 175 million (approximately PGK 464 million), which should be repaid, with interest. The Commission considers UBS' failure to provide

witnesses deeply disappointing, as is its final submission which suggested as
inappropriate Brattle's use of the widely recognised Black-Scholes financial model but
without stating what is appropriate or what model it used to price the UBS Loan in 2014.
The Commission considers its assertion to be a defensive strategy not a serious
submission. It is not accepted

(d) The State's lawyers, including NRFA, failed to advise the State of UBS' at least potential
conflicts of interest and how to manage them. Like UBS, NRFA declined to provide
witnesses to the Commission. NRFA did not provide any submissions, and their delayed
and incomplete production of documents, owned not by them but by their former clients,
was inexcusable

(e) Mr Vele was responsible for the settling of the NEC policy submission recommending the
UBS Loan. The submission's inadequacies included its failure to set out any downside to
the proposal and the false statement that the Treasurer agreed with the submission's
contents when, to Mr Vele's knowledge, he had never seen it prior to the eve of the NEC
meeting, and according to Mr Vele himself, then indicated his disagreement with the
submission by refusing to sign it

(f) Mr O'Neill knew the submission was lengthy and complex and needed to be explained to
the NEC and yet he provided the NEC with no advance notice of it nor any real
opportunity to debate it during a meeting that lasted less than an hour, notwithstanding the
Treasurer's outburst against the proposal in the NEC (he being later sacked from that
role). The NEC is a valuable democratic method of analysing and discussing difficult
matters but Mr O'Neill ensured it could not operate effectively in relation to the UBS Loan.
Proper processes in the NEC and Government generally, like keeping adequate records,
may appear unimportant or uninteresting, but what happened in relation to the UBS Loan
demonstrates why such matters (like the NEC, parliamentary scrutiny and anti-corruption
measures) are vital in a democracy. Their absence can cost a nation dearly, as was the
case with the UBS Loan

1.28 In answer to the question 'Who was responsible and what remedies should be sought against
them', detailed findings are set out elsewhere in the Report,

but fundamentally:
(a) Mr O'Neill should be prosecuted for giving false evidence to the Commission and referred to the Independent Commission Against Corruption (ICAC)
(b) Mr O'Neill is centrally responsible for the UBS Loan, Mr Vele was indispensable in assisting him in that endeavour. Each should be referred to the Leadership Tribunal
(c) UBS is solely responsible for overcharging and any misleading or deceptive conduct. They should be asked to repay the amounts overcharged and both Papua New Guinea and Australian authorities should consider whether civil or criminal sanctions should be sought. UBS should be banned from doing work for the State and any SoEs for 10 years
(d) NRFA's obstruction of the Commission should be the subject of disciplinary investigation in Australia. Their failure to give proper advice to the State should be further examined and the firm should be banned from doing work for the State and any SoEs for five years
(e) The following current or former UBS or NRFA personnel should be banned from doing work for the State and any SoEs, in their own capacity or as employed by an entity for five years:
(i) Patrick 'Paddy' Jilek

(ii) Mitchell Turner

(iii) Anthony Latimer

(iv) Steven Moe

(v) Vittorio Casamento

1.29 The Commission makes a number of recommendations to ensure the UBS Loan is not repeated. It also recommends the long promised establishment of the Sovereign Wealth Fund be delayed no longer. Its establishment and endowment is not only vital for the welfare of the State and its people but will be important evidence for foreign

investors, along with the new ICAC and the ongoing role of the Ombudsman Commission, that sovereign risk from corruption and failure to follow mandated government processes is now being properly addressed. .

1.30 During the course of its work, the Commission received information about matters of concern which it pursued as far as its powers allowed. The Commission proposes to provide that information to appropriate authorities with greater investigative powers for them to consider and pursue if they think fit.

1.31 The Commission's work is now done. It is a matter for the Government, the Parliament and ultimately the people to decide whether to act on the Report's findings and its nation-building recommendations.

Note- all references in this document to the PGK equivalent are approximate, using the exchange rate as at 28 March 2022.
Exchange Rates UK website, accessed on 28 March 2022 httcs://www.exchamerates_oro.uk/currencv/exchanle-rate-calculatorhtml.

PART B

Summary of Chapters,

Conclusions and

Recommendations

1 1 As noted above, the task of this Commission of Inquiry is to inquire into and establish the facts surrounding certain transactions involving the State and SoEs. They are:

(a) the merger of Orogen Minerals and Oil Search in 2002

(b) the financing of the State's equity participation in the PNG LNG Project known as the IPIC Exchangeable Bond Transaction in 2008

(c) the purchase of a 10.1% equity interest in Oil Search through the issue of new shares funded through an AUD 1.681 billion loan (approximately PGK 4.46 billion)' from UBS' Australian Branch in 2014

(d) the acquisition of an interest in the Elk–Antelope PRL 15 field by Oil Search funded by the placement of new shares with the State

(e) the sale of those Oil Search shares in 2017 by KPHL to whom the State had novated the shares in 2014

1.2 The ultimate objective of the Commission is to establish:

(a) whether there were breaches of PNG laws and constitutional requirements in the negotiation and approval of the UBS Loan

(b) whether PNG as a country had suffered as a result of the deal

(c) whether the persons involved can be held accountable

1.3 In respect of each of the transaction there are questions posed which the Commission attempts to answer.

1.4 The composition of the Report and the sequence of its chapters reflects the chronological nature of the Terms of Reference and the links between the

transactions under investigation. This Part sets out:

(a) a brief overview of the subject matter of each chapter

(b) the conclusions reached where conclusions are required

(c) the relation of those conclusions to relevant Terms of Reference

Chapter 1 Work of the Commission

1.5 Chapter 1 gives a snapshot of the establishment of the Commission, its processes, staffing and budget and how it went about its task. It discusses the challenges of being unable to compel the attendance to give evidence of many individuals who had been closely involved in the transactions the subject of the Terms of Reference who were located outside the territorial jurisdiction of the State. It also notes the very great difficulties which government departments,

agencies of government and other public institutions had in accessing, in a timely manner, or at all, many of the documents sought under summons by the Commission.

1.6 Both difficulties have led the Commission to make the recommendations set out below to resolve the first challenge and to develop improved record-keeping practices.

1.7 The Commission recommends that the COI Act be amended to provide for:

(a) the facilitation of concurrent commissions of inquiry in a foreign country and the recognition of information obtained thereby, modelled generally on the provisions in the Australian Royal Commissions Act 1902

(b) the power of a commission of inquiry to take evidence in a foreign country, administer an oath or affirmation consistently with the laws of that country, and use any evidence so received

(c) the power to administer an affirmation or declaration be inserted into s. 7

1.8 The Commission recommends that Papua New Guinea investigate the advantages of becoming a member of the Hague Evidence Convention.

1.9 The Commission recommends that:

(a) training be given to all senior public sector employees with respect to the obligation to prepare an inventory of records held by the department for which they are responsible as required by s. 25 of the Archives Act

(b) training be given to all public sector employees with respect to record retention and management including but not limited to:

(i) protocols for document and file retention and management when installing new computers systems

establishing generic email addresses for all established public sector positions

(c) in public service management handbooks emphasise the obligation to record adequately in written form the proceedings of meetings and, if recorded on an electronic device, on an official device

(d) ensure that the National Library and Archives Office is resourced adequately to carry out its functions in s. 6 of the Archives Act and in particular, s. 6(g), (p) and (q

(e) amend the CO/ Act to provide for the custody and preservation of the records of commissions including:

(I) where they should be deposited

(ii) who may have access

(iii) whether law enforcement and regulatory bodies may take custody of any part of the records of a commission and on what conditions

1.10 The Commission recommends that a review be undertaken of the staffing and training needs of the Audit Office with a view to funding the Office adequately to carry out its statutory functions.

1.11 The Commission also makes recommendations in respect of some of the key persons involved in the UBS Loan who declined to participate, or participate fully in the Commission, thus:

(a) by reason of its conduct as established in this Commission and its insufficient participation in this Commission, UBS, whether acting on its own behalf or employed in any capacity, not be retained or engaged by the State or any SoEs for a period of ten years

(b) by reason of its failure to participate in the Commission. NRFA. whether acting on its own behalf or employed in any capacity, not be retained or engaged by the State or any SoEs for a period of five years

(c) by reason of their failure to participate in the Commission, the following individuals not be retained by the State or any SoEs for a period of five years:

(i) Patrick 'Paddy' Jilek

(ii) Mitchell Turner

(iii) Anthony Latimer

(iv) Steven Moe

(v) Vittorio Casamento

(d) by reason of its conduct as to the delayed or inadequate provision of information to this Commission, despite the direction of its former clients being the State or its SoEs. that NRFA be the subject of a referral by the State and any relevant State entities as former clients to the Legal Services Commission of New South Wales, Australia

Chapter 2 Historical Context

1.12 At the outset of its investigations, it was apparent to the Commission that to answer the questions posed in the Terms of Reference comprehensively, required a consideration of the foundations of the State and the approach taken then to the use of the rich and abundant resources of the country for the future. An understanding of some of the transactions examined by the Commission could only be gained in the context of this background.

1 13 Giving effect to the Commission's sense that the foundational history of the country was pivotal to its investigations, this chapter discusses the thinking of the designers of the framework for an independent Papua New Guinea, the kind of country they concluded the people wanted, and how that might be realised. Although the Final Report of the Constitutional Planning Committee (1974) is an excellent resource, the Commission was privileged to hear from many of those who were involved in the design of the Constitution and their vision for the country and the political economy under which the people could flourish.

Chapter 3 Legislative provisions about the State's fiscal arrangements

1.14 This chapter identifies and gives an overview of the laws relating to the State's fiscal arrangements which are relevant to considering the legal and administrative processes which were followed in the transactions the subject of the Terms of Reference.

Chapter 4 Legislative provisions about natural resource usage in Papua New Guinea

1.15 A constant theme throughout the inquiry is the explanation and management of the State's oil and gas resources. In this chapter the relevant provisions of key legislative arrangements are set out. They are considered in the context of events and decisions taken in the chapters following.

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Chapter 5 Constitutional and Legislative Safeguards

1 16 Various processes were in place from independence to give the people confidence that they were being governed in a proper and effective way and with integrity. Other initiatives to the same end were added later. An important additional purpose was to assure foreign investors and financial

institutions that sovereign risk in Papua New Guinea was acceptable. This chapter outlines many of the constitutional and other legislative safeguards operating in the country at the time of the Exchangeable Bond Transaction and the UBS Loan.

1.17 The Commission recommends that the Leadership Code and related laws concerning the jurisdiction of the Ombudsman Commission and Leadership Tribunals be amended to ensure that a person (a Leader) who was subject to these jurisdictions continues to be subject to them so that they can be investigated and subject to sanction for actions done as Leaders even if they have ceased to hold such positions.

1.18 This is because:
(a) such a person should not be able to escape investigation and sanction by resignation
(b) if they did hold such a position they could hold it again
(c) of the importance of punishment but also both specific deterrence against future wrongdoing by the individual and general deterrence against anyone else tempted to so transgress

Chapter 6 Exploration and Development of Oil and Gas Resources

1.19 The Commission has as a unifying theme the exploitation of the oil and gas reserves of the State. It underpins the transactions the subject of the Terms of Reference. To provide some context and background this chapter gives an overview of the history of petroleum exploration within the State.

Chapter 7 Orogen Minerals / Oil Search Merger

1.20 The transaction the subject of this part of the Terms of Reference was added to the Commission's Terms of Reference in October 2021. This was largely because it was, by then, clear that this began the formal relationship between the State and Oil Search. This relationship, which hitherto had been close through long investment by Oil Search in the country, was cemented by the State being a significant shareholder. It was advanced by former Prime Minister O'Neill as the reason for the purchase of the new Oil Search shares in 2014 by the UBS Loan after its shareholding from this merger was lost to IPIC.

1.21 Through the Orogen Minerals / Oil Search merger, the State and its people lost control of its company that held investments in the mining and petroleum sector, being a profitable and well-performing company. Oil Search and the State (directly or

through SoEs) grew ever closer in their dealings, and the large shareholding by the State / SoEs in Oil Search came to be regarded by some at least as the normal course of events.

1.22 While it was not unreasonable for Oil Search, the biggest company in the State, to have a close relationship with the State in the ordinary course of its business, that relationship became complicated with the Exchangeable Bond Transaction due to the State's large shareholding in Oil Search, as the State had a direct interest in Oil Search's success.

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Chapter 8 The participation of the State in the PNG LNG Project

1.23 This chapter is divided into three parts. It examines the origin of the agreement by eight exploration licence holders to commercialise the gas in their particular licence areas and the take up by the State of its back-in rights under the Oil and Gas Act to participate, for a price, in the project. The PNG LNG Project, as it became known, was, and remains, the largest project of its kind in Papua New Guinea from which huge revenues were expected by the people. A critical examination of how the State funded its equity participation in the project in 2008 was an important addition to the inquiry into the USB Loan.

1.24 The chapter traces the introduction of the State to IPIC, an Abu Dhabi sovereign wealth fund, by Oil Search in 2008, which became the lender of the funds needed to participate in the PNG LNG Project. The security was principally the Oil Search shares, which the State had acquired after Orogen Minerals merged with Oil Search in 2002, in the form of Exchangeable Bonds. It was the

intention of the Government of Prime Minister Sir Michael Somare, of which Mr O'Neill was a member, that at the expiry of the agreement in 2014 the shares would be forfeited for the more fiscally advantageous benefits of the PNG LNG Project.

1.25 There is consideration of whether the Exchangeable Bond Transaction was the best the State could have done at the time.

1.26 The Commission concludes that the decision to enter into the Exchangeable Bond Transaction was a well-considered decision in the global financial circumstances then prevailing which was designed, over the long term, to generate greater revenues for Papua New Guinea than the shareholding in Oil Search, and to meet the ambitions of the Constitution in providing the State with an equity interest in its most significant resource project. The State took a calculated risk that the Oil Search share price would rise over time to eliminate or reduce any shortfall that it might have to pay to IPIC at maturity, but the prevailing view at the time was that the share price would rise, not least as a result of Oil Search's involvement in the PNG LNG Project. It did. Alternative ways of raising the funds were put to the State but rejected.

1.27 A criticism that might be made is the level of confusion about the State's financing of its equity interest in the PNG LNG Project and the apparent disagreement and competition between IPBC, the Treasury and Petromin. The Commission finds that the failure of the State to make an early, clear and final decision about the State's nominee was a major factor in creating a measure of dysfunction, duplication and inefficiency, leading, in particular, to additional but unnecessary significant expenditure on advisers. While the dysfunction created inefficiencies, it may nonetheless have provided a degree of market-testing beyond what IPBC itself was considering. It also provided an incentive to all of the agencies involved to seek to obtain the best deals available. The Commission recognises that IPBC never saw itself as having a role in the financing and had no mandate to look for funding. It was Oil Search which approached IPBC with the suggestion to use its holding in Oil Search shares to raise the funds through the Exchangeable Bonds.

1.28 It is clear from the PwC report that ultimately the key reasons why acceptable alternatives were

not found was the desire of the State, in accordance with its policies, to maintain its full equity stake in the PNG LNG Project and the decision to secure the funding at an earlier stage than needed for the reasons mentioned above. These were matters for the judgement of the Government at the time. They were not irrational. Whilst there can be different views about the decisions made, they do not by themselves give rise to a concern that would fall within the Commission's Terms of Reference.

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1.29 The Commission does not accept the criticism made in relation to currency risk or the investment of the funds until the time that they were needed. Both issues were identified and addressed.

Chapter 9 Attempt to redeem the Exchangeable Bonds

1.30 As the term of the five-year Exchangeable Bonds was approaching in 2014, from early 2012 there were signs that the Government, or some of its members and their advisers, contrary to the intention of the Somare Government in 2008 when it entered into the transaction with IPIC, began to explore ways of redeeming the bonds and financing the redemption. This chapter follows the often-tortuous attempts to find the funds, including identifying UBS as a possible financier, and to persuade IPIC to permit the State to redeem the bonds and thus retain the shares in Oil Search. This was ultimately unsuccessful, but not before much energy and many resources had been spent in the attempt.

1.31 From early 2012 until early 2014 considerations as to refinancing the Exchangeable Bonds continued. There was limited interaction, if any, between the various persons and entities looking at options regarding financing of the exchangeable bonds. To the contrary, there appeared to be competition between the various persons and institutions involved in considering financial proposals.

1.32 It is clear that the NEC mandated orderly process of evaluating and selecting a suitable entity to finance the then proposed redemption of the Exchangeable Bonds foundered, not least because Mr Vele sidelined the IPIC Exchangeable Bond Review Committee which he was meant to chair, instead conducting his own inquiries and reporting directly to Prime Minister O'Neill. Mr Vele soon favoured UBS which meant they were in pole position when the redemption failed to provide finance for the acquisition of new Oil Search shares in March 2014.

1.33 Further, the integrity of the processes as to the refinancing of the Exchangeable Bonds was compromised by those communicating on behalf of various financial institutions: certainly. Dr Waine considered, with some justification, that UBS should be disqualified from consideration because of this, and also behaviour he regarded as threatening.

Chapter 10 Elk-Antelope Gas Fields – PRL 15

1.34 Circumstances surrounding the sale of the PAC LNG companies and their interest in what is known as the Elk-Antelope gas field (PRL 15) to Oil Search financed by issuing new shares to the State were added to the Terms of Reference in October 2021. The close link between Oil Search's desire to own an interest in PRL 15 and the State's desire to have an interest in Oil Search is an essential part of the narrative of the UBS Loan. This involved the Commission inquiring into the often internecine web of ownership interests in PRL 15. over time, understanding the scale and quality of the resource, how those interests were priced, and whether the State might have fared better had it saved its borrowing capacity for a direct equity in PRL 15. This chapter discusses those issues.

1.35 The Commission concludes that:

(a) PRL 15 appears likely to be a viable resource

(b) the amount that Oil Search paid to participate in PRL 15 was comparable to Total's. It was not uncommercial but likely reflected the strong negotiating position of the PAC LNG companies

(c) the project is proceeding

(d) whilst the State lost an indirect interest in PRL 15 when it disposed of the Oil Shares, the State can, and it appears that it will, exercise its back-in rights when the time comes

Chapter 11 The decision to purchase the Oil Search shares in 2014

1.36 After IPIC issued the Mandatory Exchange Notice to the State electing to retain the Oil Search shares and seeking a monetary 'top-up' from the State under the terms of the agreement, the State, primarily through Prime Minister O'Neill and Secretary to the Treasury, Dairi Vele, sought to maintain a shareholding in Oil Search. This had not been contemplated under various NEC decisions regarding the attempt to refinance the Exchangeable Bonds through 2012 and 2013. This chapter examines the various strands of decision making and the involvement of many individuals; who, with the notable exceptions of Mr O'Neill and Mr Vele, were outside Government. Thus, Oil Search and UBS together worked to achieve an outcome desired by them and at least Mr O'Neill and Mr Vele. That hurried outcome was the purchase of newly issues shares – about 10% of the issued share capital – which would allow Oil Search to fund the purchase of the PAC LNG companies and thus an interest in PRL 15.

1.37 The evidence available to the Commission indicates that the dominant driver of the State's purchase for Oil Search shares was to assist in ensuring that the PAC LNG companies were bought out of PRL 15 and to facilitate Oil Search taking over their interests in the resource. A decision (albeit unofficial) to issue a new placement of Oil Search shares had been made before February 2014, and before the Mandatory Exchange Notice was issued on 14 February 2014.

1.38 By August 2013, parties acting on behalf of the State, including Mr Vele, were considering an acquisition of new Oil Search shares and Mr Vele then preferred this option over the refinancing of the Exchangeable Bonds.

1.39 The decision to purchase the Oil Search shares was made

on either 23 February 2014 or
27 February 2014, before the NEC meeting on 6 March 2104.

1.40 The evidence available to the Commission indicates that the State determined to utilise the UBS
Loan as follows:
(a) from 16 August 2013, parties acting on behalf of the State, including Mr Vele, Mr Latimer
and potentially Mr O'Neill, considered UBS to be the favoured financier for refinancing the
Exchangeable Bonds
(b) the State did not engage in a tender process to evaluate proposals from prospective
financiers in relation to the purchase of 149.39 million shares in Oil Search
(c) UBS' conduct throughout the tender process for refinancing the Exchangeable Bonds whilst
not an overriding consideration by parties acting on behalf of the State may have featured
in the decision-making process
(d) the State determined to use the UBS Loan, where UBS, following the issuance of the
Mandatory Exchange Notice, encouraged and facilitated parties acting on behalf of the
State to engage with Oil Search regarding an on-market purchase of shares

Chapter 12 Chronology of the UBS Loan

1.41 To understand how the State came to enter into the UBS Loan agreement in March 2014 an
appreciation of the chronology, sometimes unfolding hour by hour, is essential. Significantly, this
shows that the impending deal was kept secret from those Ministers whose portfolios were vitally
engaged by this transaction such as Treasury and the Department of Public Enterprises and State

Investments, who held the State's business assets, as well as the SoE with its legislated
independence mandate and to whom the shares were to be novated within 6 months, and
bypassed all governmental checks on financial policy and expenditure. This analysis reveals that

many outside government managed the deal, and, as the Commission has found, not to the benefit of the State.

1.42 The entire process of the UBS Loan and the subsequent acquisition of the Oil Search shares took place over a 15-day period: from 25 February 2014 when UBS was formally engaged to 12 March 2014 when the transaction was completed.

1.43 The transaction was undertaken with a great deal of urgency, with serious adverse consequences for the State.

1.44 The short timeframe was ultimately a product of the fact that Oil Search needed the funds from the share placement by 12 March 2014 in order to meet its own deadlines from its transaction with the PAC LNG companies to acquire an interest in PRL 15. The urgency was entirely avoidable.

1.45 The Commission recommends that:

(a) the question of whether NRFA breached its duty of care to the State be referred to the Attorney-General for further investigation and advice

(b) the apparent failure of UBS to use any arrangements for managing its conflict of interest be referred to the appropriate authorities, including the Australian Securities and Investments Commission, for further investigation

Chapter 13 The Loan Agreements

1.46 By any measure, the volumes of documents constituting the UBS Loan were complex and opaque. To assist it appreciating the complexity and unravelling the import of the two agreements – the Bridge Loan and the Collar Loan – the Commission retained The Brattle Group. This chapter opens the UBS Loan to detailed scrutiny to reveal, with the assistance of Brattle's expertise, the wholly disadvantageous nature of the deal to the State and the corresponding benefits to UBS.

1.47 The Commission accepts Brattle's analysis of the UBS Loan and its calculations and concludes as follows.

1.48 The March 2014 Collar Loan was unfairly priced against the State. This was deliberate on the part of UBS.

1.49 It was beyond the abilities of borrowers to be able to fully understand the risks involved in the

option structure unless they have the assistance of a highly sophisticated financial adviser who can conduct their own modelling to test the fairness involved in the options structure proposed; as UBS would have, and as the Commission has done through the work of Brattle. In particular. this modelling is necessary in order to check that the pricing of the collar loan was fair.

1.50 The State did not have the ability to do this and was vulnerable to being overcharged as a result. In the Commission's view, it is clear that the State personnel, including Mr Vele and Mr O'Neill, did not appreciate this risk. Nor did the States principal advisers, Mr Mortensen and NRFA. And Mr Jilek of UBS made it clear to Mr Mortensen that the State should not get advice from another investment bank.

1.51 The State also considered that it was being advised on the terms of the loans by UBS. UBS disputes this but did not proffer a witness to explain its position, relying instead on its engagement letters. Those are not the end of the matter. As one of these included an advisory mandate in relation to the purchase of the Oil Search shares, which could easily be understood to include the financing for that purchase, it is understandable why the State considered that UBS, or at least Mr Jilek and Mr Turner, were on their side. Further, UBS did indeed provide advice on the loans to the State and took no steps to inform the State that they were not providing advice in relation to the UBS Loan.

1.52 The March 2014 Collar Loan was unfair in the following ways:

(a) It was not nil premium as UBS represented. The normal meaning of 'nil premium' in this context (and there was no suggestion it was not being used in its normal meaning by UBS)

means that nothing was payable to UBS for providing the collar option structure and that the value of the downside protection that the State received from all of the put options was equal to the value of the upside protection that UBS received from all of the call options. That is, nil premium in this context was a clear representation by UBS that it was not separately profiting from the pricing of the option structure over and above its declared fees and interest charges. As mentioned, the State had no ability to verify this. This matters because, far from being nil-premium, the premium or excessive profit that UBS made in this regard was substantial at about AUD 25 million (approximately PGK 66 million), but it never informed the State of this

(b) UBS charged an excessive interest rate. It was excessive in two respects:

(i) UBS knew that the State wanted an interest rate of less than 5%. This was so that the loan could be compared favourably to the IPIC Exchangeable Bond Transaction, where the interest rate on the bonds generated a yield for IPIC of 5.1%. However, the State appears not to have appreciated that because the entire two years' interest was paid at the outset of the loan, this had the effect of increasing the benefit of the interest to UBS through the accelerated receipt of the money rather than it being spread out over the two year period. The yield on the loan for UBS was in fact 5.34%. not the 4.95% that the State thought that it was paying

(ii) As UBS did not face a credit risk from the State from the Collar Loan and faced a market risk in relation to the Oil Search shares which they could minimise through hedging, the Collar Loan was close to risk-free for UBS

(iii) Brattle consider that the interest rate charged was unfairly high and that the State transferred about AUD 56 million (approximately PGK 149 million) in value to UBS as a result

1.53 Brattle also concluded that the interest rate on the Bridge Loan was excessive and resulted in an unwarranted additional AUD 62 million (approximately PGK 16.45 million) of interest being paid

by the State to UBS.

1.54 Finally, Brattle concluded that the fees paid to UBS for the Collar and Bridge Loans were unreasonably high. They amounted to some 2.3% of the sums lent. In Brattle's view, 1.35% would have been more reasonable. The difference between the two amounts is approximately AUD 11.9 million (approximately PGK 31.56 million). However, the fact UBS did not charge new

fees for the later transactions brings the overall fees on all of the transactions into the acceptable range.

Chapter 14 Approval of the UBS Loan

1.55 This chapter documents and analyses the passage of the UBS Loan through the necessary legislated and governmental administrative approvals which were pre-conditions to its completion. At each point the process was flawed, dictated as it was by a sense of urgency, confected as far as the State's needs were concerned, but required by Oil Search to settle its contract to purchase the PAC LNG companies.

1.56 The chapter covers the execution of the documents by the necessary parties on the State side, which, again, was characterised by urgency which gave no or little time for other advice on the desirability or otherwise of signing. It was a mark of the (wholly avoidable) urgency with which the UBS Loan documents were assembled that, in less than a working day, the State Solicitor was asked to advise on a large quantity of commercial documents – often still in draft form – that were to be placed before the NEC the next morning. Faced with this almost impossible task, the State Solicitor considered the documents and communicated his views to the NEC, despite the extraordinary haste. The State Solicitor or his nominee should have been involved in this process

from the beginning.

1.57 Finally, it deals with the way in which the procurement requirements of the State were bypassed by the legally wrongful issue of a certificate of inexpediency concerning the payment of fees to the external advisers – solicitors and accountants – to the State and State entities. After the certificate was withdrawn, the Secretary for the Treasury, Mr Vele, was advised that a quantum meruit was the appropriate process. There was no evidence, oral or documentary to indicate that this ever occurred, and a single line figure, as under the certificate, was paid by the State.

1.58 The NEC Policy Submission 67/2014 was exceptionally large in volume and complex in content, and, most unusually it had been largely drafted by persons other than public officials. The 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.

1.59 Mr Vele presented the policy submission to the NEC and took ultimate responsibility for its contents although large parts were drafted by external advisors. It was seriously deficient at least in so far as it:

(a) 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

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

(c) 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

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

(e) did not 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

1.60 There was no 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. 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.

1.61 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, on notice. 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 transaction of enormous complexity, based on a submission of which no other NEC member, including the Treasurer, had prior sight, and which did not fairly set out the arguments against as well as for the proposal.

1.62 The 2017 NEC handbook sets out processes designed to ensure model practice by the NEC. However, no handbook can 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 defined level, in order to make less likely the procedural failures in 2014 in the NEC.

1.63 The Commission recommends amendment of the legislation on overseas commercial loans by the Government: requiring prior parliamentary approval above a certain level will potentially

alleviate the procedural failures on 2014 in the NEC.

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

1.65 The Commission also finds that Ashurst and Pacific Legal Group should have appreciated that the certificate of inexpediency could not lawfully be issued and advised their clients accordingly.

1.66 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 merit basis.

Chapter 15 The lawfulness of the UBS Loan

1.67 The Terms of Reference require the Commission to consider the lawfulness of the UBS Loan. The particular focus in this chapter is on the constitutional framework for the State to enter into loans for governmental purposes. This entails a consideration of s. 209 of the Constitution, particularly s. 209 (1), the Loans (Overseas Borrowings) No 2 Act and allied legislation dealing with financial management.

1.68 The key question is whether, where s. 209 (1) provides that the raising of loans is subject to the authorisation and control by the Parliament, that authorisation must be prior to entry into the loan. The section further provides that the borrowing must be regulated by an Act of Parliament. If prior parliamentary authorisation for the particular loan is not required, the further question is whether the Loans (Overseas Borrowings) No 2 Act is such an Act. The State Solicitor 's advice to the

proponents of the UBS Loan was that prior parliamentary approval was required. He nonetheless signed off on the deal concluding that the approval could be retrospective.

1.69 The Commission heard from many eminent lawyers of their views about the meaning of this section of the Constitution. Since only the Supreme Court can make binding interpretive decisions about constitutional instruments, the Commission is of the opinion that a such a vital question ought to be resolved by a reference to the Court under s 19 of the Constitution, not least because State practice since independence has favoured the view that prior approval is not necessary.

1.70 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?

1.71 The Commission recommends that:

(a) 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
(b) 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
Chapter 16 The Oil Search shares held from 2014 until sold in 2017

1.72 The Oil Search shares purchased by the State in March 2014 were, within 6 months, novated to KPHL, an independent entity owned by the State which held the State's petroleum and mineral assets. The purpose was to avoid the loan being on the State's 'books' so that it would not fall foul of the debt to GDP ratio prescribed by statute. From inception, KPHL did not want the shares, and more particularly, the large debt which accompanied them. In 2015 the National Executive Council authorised KPHL to sell the Oil Search shares. This chapter follows the unfolding of the divestment over the ensuing years.

1.73 Because the Prime Minister of the day, Mr O'Neill. was the sole trustee of the KPHL assets, KPHL needed him to take the sale to the NEC for approval under its authorising Act. The Commission discerned that the time was right when it suited the political narrative of the Prime Minister. The evidence suggested to the Commission that KPHL did not have a clear understanding of the collar loans and thus the best time for it to exit the deal. The Commission was assisted by Brattle in analysing the refinancing of the loans with UBS after novation, in understanding the missed

opportunity by KPHL to let the loans expire according to their terms, and used Brattle's work to validated the conclusion to which KPHL had come about the losses sustained.

1.74 KPHL disposed of the shares in September 2017, not 2016 as the Terms of Reference suggest.

The Commission finds that 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'Neill 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 intrinsic value under the put options and a refund of prepaid interest

(e) it misunderstood the option structure in the collar loan and placed too much emphasis on intrinsic value in the options as opposed to the real value of the shares in the market

(f) Prime Minister O'Neill as Trustee and the NEC had agreed to the sale

1 75 Brattle's expert evidence, which the Commission accepts, is that if KPHL had simply allowed the collar loans to expire according to their terms, this would have reduced the losses suffered by the State/KPHL. The fact and circumstances of the sale undermine both the objective and subjective credibility of the strategic interest argument put by Mr O'Neill to justify the UBS Loan.

1.76 In the Commission's view, KPHL complied with legal and administrative processes in selling the shares, albeit that it would have been financially better to allow the collar loan to expire.

Chapter 17 The State's Sovereign Wealth Fund

1.77 It had been anticipated in 2008 that the receipts from the PNG LNG Project would be such that a sovereign wealth fund ought to be established to assist in economic planning and for the benefit of future generations of citizens to share in the exploitation of finite resources. Much was expected. This chapter investigates the genesis, nature and future of the State's Sovereign Wealth Fund which was established by an amendment to the Constitution and secured by an Organic Law. The source of its revenue stream is provided for in the Kumul Authorisation Acts but no funds have ever been allocated to it because the machinery of the fund has not been established. The Commission heard evidence from experts, Professor Sir Tim Besley of the London School of Economics and Mr David Murray AO, foundation chair of Australia's Future Fund, about the way forward for the State.

1.78 The Commission concludes that the failure to establish the Sovereign Wealth Fund 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.

1.79 The Commission recommends that the Government:

(a) immediately move to expedite the implementation of those parts of the SWF Organic Law 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

Chapter 18 The Facilitators and the Intermediaries

1.80 Between 2012 and 2014 various individuals were authorised by the NEC and the Department of Public Enterprises and State Investments 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.

1.81 The Terms of Reference require identification of the roles and remuneration of these persons and this chapter does so.

Summary answers to the Terms of Reference

The Commission's answers, in summary to each term of reference as follows:

Terms of Reference		Answer
Orogen Minerals Merger with Oil Search Limited		
(a)	What was the reasoning behind the decision by the Morauta Government to approve the sale of Orogen Minerals to Oil Search Limited	It was seen as the best way to move the "Gas-to-Queensland project" ahead and at the same time allow the State to participate in the PNG LNG Project's upside'.
(b)	Were alternative structures / transactions considered? If so, why were these rejected	Yes. Chapter 7 sets out why the alternatives were rejected.
(c)	What was the impact of the Orogen Minerals merger with Oil Search	The most notable impact of the merger was that Oil Search and the State (directly or through SoEs) grew ever closer in their dealings, and the large shareholding by the State/SoEs in Oil Search came to be regarded by some at least as the normal course of events.
(d)	How the merger impacted the relationship with Oil Search and successive Governments of Papua New Guinea	The merger led to a close relationship between the State and Oil Search. That relationship became complicated with the State's large shareholding in Cil Search as it had a direct interest in its success.

PART B > Executive Summary

Terms of Reference		Answer
	Conversely, Oil Search was deeply interested in the State's plans for its shareholding.	
PNG LNG Project		
(e)	How the State financed its equity participation in the The Exchangeable Bond Transaction.	
	PNG LNG Project	
(f)	Whether due and proper legal and administrative processes were followed to obtain the loan to finance the State's equity participation in 2009, including but not limited to:	Yes Chapter 8 sets out the detail of the processes followed.
	(I) How was the process commenced	
	(ii) How was IPIC selected	
	(iii) What process was utilised	
	(iv) What were the terms of the Loan from IPIC?	
(g)	Who were the legal and financial advisors engaged in the IPIC exchangeable bond transaction	IPBC received legal advice from Freehills and financial advice from Goldman Sachs.
(h)	Were legal and administrative processes followed to engage in any legal and financial advisors	Yes. Chapter 8 sets out the detail of the processes followed.
( )	What was the rationale for allowing payment to be made by an election of either cash, or the permit payment to be made by an election of cash or shares or a combination of the two. The principal way in which the Exchangeable Bonds were to be redeemed was by being exchanged for IPBC's shares in Oil Search up to the reference price of AUD 3.55 with a cash payment required if	The Exchangeable Bond Transaction did not mortgaged Oil Search shares or a combination cf both

the share price was lower than that price.

The rationale behind PBC's agreement to IPIC's

rights of early redemption appears to be an

acceptance that !PBC would never have the funds

to be able to redeem the Exchangeable Bonds in

cash.

(j) What was the rationale for allowing the mortgaged Oil Search shares to be used in payment of the Loan

It was considered to be the best way of leveraging !PBC's most significant asset, namely the Oil Search shares.

(k) Whether IPIC has the sole election as to method of payment in satisfaction of the State Loan from IPIC, as to the manner in which the Exchangeable Bonds would be dealt with on maturity. They were to be exchanged for Oil Search shares using a reference price with IPBC being obliged to make up any shortfall between the actual price of the shares at that date and the reference price.

See above. IPIC did not have a right of election and if so what was the rationale for giving IPIC the right of sole election to either accept cash, the mortgaged Oil Search shares or a combination of both

Terms of Reference	Answer
UBS Loan	
(I) Why and when did the State commence the procedures to obtain a loan regarding the debt to IPIC and to investigate options for refinancing the	The State first decided to initiate discussion with

IPIC and/or purchase Oil Search shares Exchangeable Bonds on 14 March 2012.

It was thought important to the State to remain a shareholder of Oil Search.

(m)	Whether legal and administrative processes were followed regarding the loan from UBS including but not limited to:	No. Chapter 9 sets out the detail of the processes followed in respect of consideration of refinancing
(I)	how was the process commenced	the Exchangeable Bonds.
(ii)	how was UBS selected	UBS was selected as the financier for the
(iii)	what process was utilised	purchase of new Oil Search shares by Mr Vele
(iv)	what were the terms of the loan	and Mr O'Neill as it had been chosen as the preferred financier for refinancing the Exchangeable Bonds.
	What processes have been utilised in the past to obtain loans	No process was utilised.

The UBS Loan comprised two loans: the Collar Loan and the Bridge Loan. Chapter 13 and the Brattle reports set out the detail of each loan.

Chapter 14 sets out the detail of processes that have historically been used to obtain loans.

(n)	The rationale as to why the State determined to buy shares in Oil Search in 2014	The stated rationale was the so-called 'strategic interest' in owning Oil Search shares but the Commission does not accept that.

The balance of the evidence suggests that a significant driver of the States purchase of new Oil

Search shares in 2014 was to assist in ensuring that the PAC LNG companies were bought out of PRL 15 and that Oil Search could take over their interests in the resource.

(o) When the decision was made to purchase Oil Search shares — The decision to purchase the Oil Search shares was made on either 23 February 2014 or 27 February 2014 before the NEC meeting on 6 March.

(p) The rationale as tc why the State determined to utilise the UBS Loan to purchase Oil Search shares — The State determined to use the UBS Loan to acquire the Oil Search shares because UBS, following the issuance of the Mandatory Exchange Notice by IPIC, encouraged parties acting on behalf of the State to engage with Oil Search regarding an on-market purchase of shares.

(q) Whether legal and administrative processes were followed to buy Oil Search shares in 2014 — No. Chapter 14 sets out the detail of the processes followed.

Terms of Reference		Answer
(r)	What role did Papua New Guinean and international legal and financial advisors play in relation to the UBS Loan	UBS was the State's sole financial advisor and sole lead arranger in relation to management of

the State's investment in Oil Search and

associated matters flowing from the Exchangeable

Bonds, and exclusive arranger of the UBS Loan.

NRFA advised the State on the UBS Loan

(excluding matters of Papua New Guinean law).

Pacific Legal Group (PLG) advised the State on

matters of Papua New Guinean law relevant to the

UBS Loan.

Pertusio Capital acted as advisor to Mr Vele, then

Secretary for Treasury.

Mr Jimmy Maladina was a consultant lawyer to

PLG.

KPMG advised the State on the collar loan.

(s) Which individuals or organisations benefitted from Oil Search, UBS, the State's advisers as set out above, Ashurst (legal advisors to UBS on the UBS

Loan paid for by the State).

(t) What would the State's (and its government owned enterprises) financial positions have been had the UBS loan to purchase Oil search shares and the purchase of Oil Search had not been entered into

There would have been an amount of AUD 340 million (approximately PGK 902 million).

Elk / Antelope PRL 15 Transaction

(u) The history of the Elk/Antelope PDL and PRL

Chapter 10 sets out the history of Elk-Antelope

and PRL 15.

(v) The approvals process for PRL-15

Chapter 10 sets out the approval process for PRL

15.

(w) The scale and quantity of the PRL 15 resource

PRL 15 appears likely to be a viable resource.

Chapter 10 and the report of Dr Hornbrook sets

out details of the scale and quantity of the PRL 15

resource.

	(x)	Which entities have interests in Elk-Antelope PRL-15 since its inception	Chapter 10 sets out the history of ownership of Elk-Antelope and PRL 15.
	(y)	Which individuals or organisations benefitted from the 2014 sale of PAC LNG Group of companies to Oil Search Limited and related transactions	The beneficial owners of shares in the PAC LNG companies. Chapter 10 identifies the individuals and organisations and the quantum. Oil Search also benefited.
	(z)	What opportunities did the State have to acquire an interest in Elk/Antelope PRL-15 other than through a shareholding in Oil Search? Were there	The State can acquire an interest in PRL 15 indirectly through its back-in rights.

Terms of Reference			Answer
		alternative means of Oil Search financing the PRL-15 transaction, other than obtaining funds from the Independent State?	Yes. Oil Search had alternative means of financing the PRL 15 transaction, other than obtaining funds from the State and was already considering them when the State expressed an interest in purchasing shares.
Sale Of Oil Search Shares			
(aa)		The rationale as to why the State/Kumul Petroleum Holdings Limited sold the Oil Search shares in 2017	KPHL sold the Oil Search shares because: a) they were not generating significant revenue (b) it was not KPHL's role to hold shares solely for investment purposes. (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 Trustee and the NEC had agreed to the sale	
(bb)	Whether legal and administrative processes were followed in the sale of the Oil Search shares?	Yes. Chapter 16 sets out the details of the processes followed.

' Note: all references in this document to the PGK equivalent are approximate, using the exchange rate as at 28 March 2022. Exchange Rates UK website, accessed on 28 March 2022 httrs://www exchangerates.org.uk/currencv/exchame-rate calculator.htm1.

CHAPTER 1

Work of the Commission

1, Introduction

1.1 This Chapter provides an overview of the work of the Commission, its establishment, how hearings were conducted, the powers of the Commission and rules made by the Commission, including in respect of the adducing of evidence and examination of witnesses.

2. Establishment of the Commission

The Ombudsman Commission Report

2.1 The forerunner to the Commission was the Ombudsman Commission's investigation and the Ombudsman Commission Report.

2.2 The Ombudsman Commission's investigation commenced in March 2014, following the NEC's approval for the State to enter into the UBS Loan for AUD 1.39 billion (approximately PGK 3.11 billion)1 to purchase approximately 149 million newly issued shares in Oil Search, a long-established oil and gas exploration company then listed on both the Papua New Guinean and Australian Stock Exchanges.

2.3 The Ombudsman Commission's investigation was slowed by various applications to the Supreme Court to resolve challenges to its jurisdiction by interested persons.

2.4 On 17 May 2019, the Ombudsman Commission Report dated December 2018 was tendered in the National Parliament.2

2.5 As a response to this document, the Hon James Marape MP,

following his election as Prime Minister on 30 May 2019, established the Royal Commission of Inquiry into processes and procedures followed by the Government of Papua New Guinea into obtaining the off-shore loan from the Union Bank of Switzerland and related transactions. It is noted that in his evidence to the Commission, Mr O'Neill supported the work of the Commission and its importance.

Establishment of the Commission

2.6 The Commission was established under the Commissions of Inquiry Act 1951 (C01 Act). Section 2(1) of the CO/ Act authorises the Prime Minister to establish by instrument a Commission to 'inquire into any matter in which an inquiry would, in the opinion of [that] .. Minister, be for the public welfare'. That instrument must specify the subject of the inquiry and be accompanied by a statement of the case on which the inquiry was ordered.3

2.7 A copy of the instrument made under the CO! Act dated 30 August 2019, as amended on 12 October 2021 is available in Volume 1.

2.8 Under the COI Act, one or more Commissioners can be appointed,4 and if more than one, a Chairman must be designated.5

2.9 The following appointments were made:

(a) Chairman: Chief Sir Salamo Injia Kt, GCL. former Chief Justice of Papua New Guinea

(b) Commissioner the Hon John Gilmour QC, former Judge of the Federal Court of Australia, who passed away on 6 February 2021

(c) Commissioner the Hon Margaret White AO, former Judge of Appeal of the Supreme Court of Queensland, appointed on 3 February 2021

Secretary and assistants

2.10 Mr Mathew Yuangu, seconded from the Department of Prime Minister and National Executive Council, was appointed as Secretary under s. 4 of the COI Act.

2.11 The Commission was also assisted by a number of seconded officials and administrative
personnel, including:
(a) Ms Imelda Ande, Assistant Documentation Officer
(b) Mr Roland Bala, Assistant ICT Officer
(c) Ms Theresa Dihm, Administrative Assistant to the Secretary
(d) Mr Tau lndau, Quality Controller
(e) Mr Ben Kaiah, ICT Officer for the Commission
(f) Mr Thomas Katubai, Accounts Manager
(g) Mrs Gina N'Draliu, Transcript Manager
(h) Mrs Joyfuil Kila, Assistant Accounts Officer
Mr Samuel, Documentation Manager (Marshall) and Associate to the Commissioners
0) Ms Betty Simeon, Recording Officer
(k) Mrs Elmi Taman. Personal Assistant to the Chairman
Mr Tyson Yapac, In-house Legal Officer of the Commission and Associate to the
Commissioners

2.12 The Chairman appointed Mr Yapao. an experienced lawyer as Legal Officer to the Department
and later Associate to the Commissioners.

Counsel Assisting

2.13 On 30 August 2019, Mr Sam Koim was appointed as Counsel Assisting the Commission under
s. 4(1) of the COI Act. Mr Koim did not take up the appointment.

2.14 Subsequently Mr Matthew Howard SC and Mr Alexander Mossop of Counsel were appointed as
Counsel Assisting. Due to early delays in the Commission, including the COVID-19 pandemic,
Mr Howard SC was unable to continue and resigned his appointment.

2.15 Ms Patricia Cahill SC and Mr Cheyne Beetham of Counsel were then appointed as Counsel
Assisting, with Mr Mossop continuing under his original appointment. None of that Counsel team
were admitted in Papua New Guinea.

2.16 On 21 July 2020, applications for admission were filed on behalf of Counsel Assisting. The
admission applications were opposed by the Papua New Guinea Law Society and ultimately
discontinued in early 2022.

217 Due to delays in admission, Ms Cahill SC and Messrs Mossop and Beetham resigned their
appointments.

2.18 The Prime Minister appointed new Counsel Assisting, all of whom were admitted and had current practising certificates in Papua New Guinea, namely:

(a) Dr James Renwick CSC SC, Barrister-at-Law, on 3 February 2021

(b) Dr Dominic Katter, Barrister-at-Law, on 3 February 2021

(c) Mr Levente Jurth, Barrister-at-Law, on 11 January 2021

Technical and Professional Experts

2.19 Under s. 4A(2) of the CO/ Act, the Minister may appoint 'persons with the appropriate technical or professional expertise to assist the Commission'. The Commission was conscious of the need to ensure that there were no conflicts in respect of dealings with persons or entities in the State. In around July 2020, MinterEllison was appointed as the International Solicitors and Technical Experts Assisting the Commission under ss. 4A(2) and 18 of the COI Act. As the International Solicitors and Technical Experts were not admitted in Papua New Guinea, they did not provide legal advice or opinions concerning the law of Papua New Guinea, consistent with the requirements of the Lawyers Act 1986.

APEC Haus

2.20 In June 2020, with the support of the Prime Minister, the Commission sought the assistance of the National Events Co-ordination Office and the Department of Prime Minister and National Executive Council to conduct its proceedings at APEC Haus between September 2020 and March 2022.

Conduct of the Inquiry – COVID-19

2.21 The Commission and all those assisting it have sought to expeditiously complete their tasks. Commissioner White and Counsel Assisting, Mr Jurth, travelled to Port Moresby for an extended period for taking evidence in 2021 and Mr Jurth again did so in 2022.

2.22 The work of the Commission has been significantly impacted by the world-wide COVID-19 pandemic. Travel to and within Papua New Guinea became very difficult. The pandemic forced courts and tribunals around the world to consider remote participation in hearings, especially by video link, and this expedient was necessarily adopted by the Commission.

2.23 All hearings of the Commission were held in public and live-streamed on the Commission's Facebook page. Importantly, this enabled large numbers of people of Papua New Guinea – including those in remote locations – to watch the proceedings and follow the work of the Commission.

2.24 The Chairman of Commissioners sat to take evidence in the Commission's premises at APEC Haus in Port Moresby. On those occasions where it was not possible, or practical, for Commissioner White to sit at APEC Haus, the Commissioner was able to sit to hear evidence remotely via video. Technology also enabled many witnesses who otherwise would have had great difficulty in attending Port Moresby whether in the country or outside to give their evidence and to be represented remotely.

2.25 The innovation in having virtual hearings allowed the Commission to proceed relatively smoothly given the restrictions on travel brought about by the COVID 19 pandemic.

Summary of sittings

2.26 The Commission:

(a) sat for hearings on 126 days
(b) received and analysed over 19,000 documents
(c) tendered exhibits comprising over 10,000 documents

(d) received oral testimony from over 60 witnesses

2.27 The first phase of sittings commenced in September 2019 by issuing summonses to produce documents and conduct preliminary discussions with some key witnesses about the assistance they could give to the Commission.

2.28 The second phase of the Commission began in February 2021 with the appointment of Commissioner White, to replace the late Commissioner Gilmour, and the appointment of Counsel Assisting, each of whom had experience practising law in Papua New Guinea, as noted above.

2.29 The opening of the second phase began on 30 March 2021 with a hearing setting out the anticipated scope of the work of the Commission.

2.30 On 12 October 2021, the Prime Minister authorised and declared a new reporting date of 31 March 2022 and extended Terms of Reference to be investigated during the period of extension.

Terms of Reference

2.31 The instrument establishing the Commission contains its Terms of Reference and begins:

> The decision of the Government of Papua New Guinea made in 2014 to obtain an off-shore loan from the Union Bank of Switzerland (UBS) has become controversial following the tabling of the Ombudsman Commission Investigation Report in Parliament in May 2019. The Prime Minister upon assuming office undertook to convene a Commission of Inquiry to establish facts surrounding the whole transaction, including all persons and entities involved in the deal and whether or not the deal followed proper and legal process and procedures.
>
> In order to appreciate the public concerns on improprieties in regard to the whole deal it is necessary and important that the Commission of Inquiry commences inquiry with the cause which brought about the need for the Government of the day to seek funding from an off-shore loan facility. This necessitates the Inquiry to commence its investigation with the States participation in the PNG LNG Project, including the purchase of shares and the disposal of the same.

2.32 The Terms of Reference may be grouped under the following headings and are addressed throughout the report:

(a) Orogen Minerals merger with Oil Search (in 2002)

(b) PNG LNG Project (the largest ever such project in Papua New Guinea, which is ongoing)

(c) UBS Loan (of AUD 1.39 billion, approximately PGK 3.11 billion,6 to the State in 2014)

(d) Purchase cf Oil Search shares (by the State in 2014)

(e) Elk-Antelope % PRL 15 Transaction (by Oii Search n 2014)

(f) Sale of Oil Search shares (by an SoE in 2017)

g) Related matters

CHAPTER 1 > Work of the Commission

3. Role of the Commission

Overview of the role of the Commission

3.1 In contrast to the Ombudsman Commission, the Commission has the power to investigate the conduct of private persons and entities in relation to the Terms of Reference. In particular, the Commission is directed to investigate into and establish the facts relating to a number of significant financial transactions to the State, their lawfulness and propriety, the nature of the conduct of those involved and the effect on the State and the people of Papua New Guinea.

3.2 The Commission is charged with making recommendations arising out of its investigations. Those are collected together in the Executive Summary and are developed in the following chapters.

3.3 The Commission is an inquiry, not a court of law. It cannot and does not seek to make determinations of the legal rights and obligations of any persons or entities either within Papua New Guinea or elsewhere, nor may it make binding determinations on legal issues including relating to Constitutional matters and does not purport to do so.

3.4 The Commission is not reviewing the Ombudsman Commission Report which was the catalyst for the establishment of the Commission, nor does it challenge its findings. The Commission is

mindful of the prohibition in the Constitution that the proceedings of the Ombudsman Commission may not be subject to review except in certain limited circumstances by the Supreme or National Courts.

3.5 The Commission does inquire into and make findings of fact as directed by the Terms of Reference and offers non-judicial comment on legal matters throughout the Report, some of which touch on the broad subject matter of the Ombudsman Commission Report but without encroaching on its Constitutional role and purpose.

Limitations of the Commission

3.6 The Commission's investigative powers are limited in several key ways, for instance:

(a) the Commission cannot seek the assistance, nor resources, of counterparts in other jurisdictions – there is no comity of commissions of inquiry of the kind enjoyed by courts or law enforcement agencies

(b) the Commission cannot issue or obtain a court-ordered warrant to enter and search premises or seize documents or other records (for example. computer hard drives) or to use an interception device; the Commission also cannot make arrests

(c) the Commission has no ready access to data matching services with other authorities or bodies

3.7 Rather, it is the function of the Commission to inquire into any matter of public welfare,7 assemble the facts using the powers available to it and report on its proceedings and the results of its inquiry3 – that is, to answer its Terms of Reference for tabling in Parliament.9

3.8 It is then the function of other relevant investigative and law enforcement agencies in Papua New Guinea to investigate and prosecute conduct within their respective jurisdictions utilising the wider powers referred to above, for example, the Ombudsman Commission and Public Prosecutor (in respect of breaches of the Leadership Code), Public Prosecutor and the police (in respect of breaches of the Criminal Code or prosecutions of other offences) or ICAC (in respect of prosecution of corrupt conduct, including official corruption).

CHAPTER 1 > Work of the Commission

3.9 During the course of its work, the Commission received information about matters of concern which it pursued as far as its powers allowed. Some of that information included matters that may suggest criminal conduct, but which are beyond the powers of the Commission. The Commission proposes to provide that information to appropriate authorities with greater investigative powers and jurisdiction to prosecute for them to consider and pursue if they think fit.

Summonses to produce and appear

3.10 Under the authority of the CO/ Act a person may be summonsed to attend the Commission to give evidence and/or produce described documents or classes of documents under the control or custody of the person.1°

3.11 It is an offence:

(a) for a person served with a summons to fail to appear before the Commission or produce documents as required

(b) for a person appearing before the Commission as a witness to refuse to be sworn, make an affirmation or answer questions relevant to the Inquiry12

(c) for a person appearing as a witness before the Commission to give false evidence under oath

3.12 Over the course of the Commission, a significant number of witnesses were summonsed and gave evidence, including the current Prime Minister the Hon James Marape, former Prime Minister the Hon Peter O'Neill and various senior Ministers and Government officials. These witnesses were examined on oath in accordance with the CO/ Act.14 A comprehensive list of sitting dates and witnesses called is included in Volume 2 of the Report.

3.13 The compulsion of witnesses for documents and information is balanced by at least the following:

(a) the fact that, unlike a court or tribunal, the Commission's conclusions, findings and recommendations are not legally binding: they do not, for example establish

contraventions of any law

(b) as noted above, they do not attempt to alter or impact the findings of the Ombudsman Commission

(c) there is a use immunity provision in the CO/ Act as follows:

> A statement or disclosure made by a witness in answer to a question put to him by a Commission or by a Commissioner is not (except in proceedings for an offence against this Act) admissible in evidence against him in any civil or criminal proceedings.15

3.14 In addition to witnesses who were requested or summonsed by the Commission, any person who demonstrated a genuine interest in the subject matter of the inquiry was permitted to appear before the Commission.

Compulsion of persons outside the State

3.15 A significant limit on the Commission's jurisdiction is that its powers of compulsion only apply to those persons present in the State. The powers of the Commission do not have extra-territorial application and cannot compel oral evidence or the production of documents from witnesses outside the State.

3.16 A number of persons voluntarily prepared statements or produced documents and made themselves available to give oral evidence to the Commission even though they were under no obligation to do so as they were beyond Papua New Guinea's jurisdiction. The Commission is

grateful to them acknowledging that this entailed considerable inconvenience particularly as some returned on several occasions to give evidence at the Commission's request.

3.17 The proceedings were livestreamed into the hearing room at APEC Haus, but the witnesses were physically outside the country. In each State in Australia legislation precluded the administering of an oath or affirmation unless authorised by the

designated authority. The Commission thanks the Attorneys-General of Queensland and Western Australia and the then Chief Justice of New South Wales for facilitating the taking of evidence in their respective jurisdictions.

3.18 There is merit in the COl Act making provision for the taking of evidence outside the country for use in an inquiry established under the Act.

3.19 There were witnesses outside Papua New Guinea's jurisdiction who were not sworn or affirmed. They were, for the most part, experts who assisted the Commission in its work. The Commission is grateful to Professor Sir Tim Besley CBE FBA of the London School of Economics and Mr David Murray AO former chair of the International Forum of Sovereign Wealth Funds and first chair of Australia's Future Fund for their generous assistance. Brattle, Dr Toby Brown, Dr George Oldfield and Dr Alberto Vargas, provided the Commission with assistance in understanding the financing of the UBS Loan. They were generous in making themselves available on a number of occasions to give evidence, which, for Dr Oldfield and Dr Vargas in the United States of America was not within usual business hours.

3.20 There were, however, a significant number of persons closely associated with the subject matter of the Terms of Reference, who, despite requests refused to make themselves available to give evidence, asserting through their lawyers that they could not be compelled and would not assist voluntarily. This was even though they would not need to travel outside their own offices which, mostly, were in Australia.

3.21 These were persons intimately involved in the UBS Loan either as partners/employees of UBS or as partners/employees of Norton Rose Fulbright Australia (NRFA). They were entities which earned substantial fees from the UBS Loan from the State. The Commission has had the benefit of some documents produced by UBS and documents and emails produced by NRFA, which in the latter's case were in a disorganised form so that much work has been required for these to be pieced together. But the Commission's work would have been much facilitated by their full cooperation and provision of witnesses. They thus cannot complain if adverse inferences are drawn which they may have been able to dispel, and recommendations made, which reflect this.

3.22 Most inquiries will be entirely domestic in their subject-matter and reach but some, like this Commission, extend internationally and that gives rise to the difficulties mentioned. This can be remedied. Australia has amended its Royal Commissions Act 1902 to provide for concurrent commissions of inquiry with a foreign country. Broadly, where a person who is commissioned to make inquiry into matters specified in Australia and is also authorised to inquire into matters substantially the same or significantly related to them, by another country, any information received in that other country may be used in the Australian inquiry. The laws of the foreign country will apply when making inquiry there, and witnesses may be compelled to appear and give evidence.

3.23 Had Papua New Guinea had similar legislation and had Australian authorities been of the view that the conduct of significant commercial Australian entities in respect of a transaction, much of it negotiated in Australia, and the governing law of which was the law of New South Wales, was of interest, the present Commissioners may well have been appointed to investigate in Australia. The reluctant witnesses would then have been compellable.

CHAPTER 1 > Work of the Commission

Recommendations

1. The Commission recommends that:

(a) by reason of its conduct as established in this Commission and its insufficient participation in this Commission, UBS, whether acting on its own behalf or employed in any capacity, not be retained or engaged by the State or any SoEs for a period of ten years

(b) by reason of its failure to participate in the Commission, NRFA, whether acting on its own behalf or employed in any capacity, not be

retained or engaged by the
State or any SoEs for a period of five years

(c) by reason of their failure to participate in the Commission, the following
individuals not be retained by the State or any SoEs for a period of five years:

(i) Patrick 'Paddy' Jilek

(ii) Mitchell Turner

(iii) Anthony Latimer

(iv) Steven Moe

(v) Vittorio Casamento

(d) by reasons of its conduct as to the delayed or inadequate provision of
information to this Commission, despite the direction of its former clients being
the State or its SoEs, that NRFA be the subject of a referral by the State and any
relevant State entities as former clients to the Legal Services Commission of New
South Wales, Australia

Procedural Rules made by the Commission

3.24 Paragraph 5 of the Terms of Reference provides:

> The Commission may make such rules, not inconsistent with the terms of the instrument
> of its appointment, for the conduct of proceedings before it, for the times and places of its
> meetings and for adjournment, as it thinks proper.

3.25 The Commission issued a number of practice notes setting out the practices and procedures of
the Commission, and published press statements from time to time to advise potentially affected
individuals and entities of key dates, including the date for submission of applications for
examination of a witness and lodgement of written submissions. All press statements and
documents concerning practices and procedures have been made available on the Commission's
website.

3.26 The practices and procedures established by the Commission are clear and comprehensive and
gave persons every opportunity to contact the Commission without delay to:

(a) discuss any information that person holds relevant to the Terms of Reference
(b) make an application to adduce evidence or conduct a further examination of a witness
(c) seek to tender additional evidence
(d) otherwise engage with the Commission and its Terms of Reference

3.27 Importantly, the published rules provided the framework to ensure witnesses were afforded procedural fairness while the Commission conducted its work.

Procedural matters including adducing evidence

3.28 Practice Note No. 3 of 2021 made on 11 May 2021 (PN 3) makes provision for any person with a bona fide interest in the matter or has been granted leave to attend the Commission to notify the Commission:
(a) that they wish to have evidence placed before the Commission, following which Counsel Assisting will then decide whether to call the witness16
(b) that they wish to tender a document to the Commission, following which Counsel Assisting will decide whether to seek to tender the document17

3.29 Further, PN 3 outlines the procedure to be followed if Counsel Assisting has declined a person's request to call a witness or tender a document,18 including rules allowing the person concerned to make an application for leave to call the witness or tender the document, to be determined by the Commission.19 Counsel Assisting and the Commissioners made careful assessments of proposed evidence put to the Commission, in terms of relevance to the Terms of Reference, admissibility and weight to be afforded to it.

3.30 PN 3 makes provision for a person to raise a procedural matter with the Commission with as much advance notice as possible, including any objection to or restrictions on the production or use of documents.2°

3.31 In accordance with PN 3, tendered statements were made

available on a confidential basis on a
secure website to persons with leave to appear before the Commission.

Examination of witnesses

3.32 PN 3 allows any interested person (including a witness by counsel or personally) to seek leave to
examine another witness or conduct a further examination of a witness following examination by
Counsel Assisting.21 Practice Note No. 4 of 2021 made on 15 July 2021 (PN 4) supplements
PN 3 (and the procedures under paragraphs 19 and 20) by detailing the procedure for a witness
by counsel or personally to seek leave to cross-examine another witness.

Observations regarding Rules and witnesses

3.33 The rules established by the Commission gave interested persons and witnesses every
opportunity to:
(a) produce documents to the Commission and seek to tender that evidence in a timely
manner and well before the closing of evidence hearings
(b) make applications to cross examine witnesses to make observations on or refute
evidence given to the Commission

3.34 Overall, the Commission would have welcomed more responsive engagement from all parties
involved in the interests of efficiency and fairness, The Commission generally accommodated
requests for extensions and offered assistance to witnesses and legal representatives in
accordance with the rules of the Commission and to the extent practicable.

3.35 Potentially affected individuals and entities were invited to lodge written submissions in response
to final oral submissions of Counsel Assisting by 28 February 2022 (each a Response). In its
Press Statement 2 of 2022 published 11 February 2022, the Commission reminded potentially
affected individuals of the procedures contained in PN 4. The Commission received Responses
from some potentially affected individuals and entities. In some cases (summarised below), the

Responses received by the Commission were plainly inconsistent with the rules outlined in the practice notes and disregarded the procedural fairness that those rules were designed to afford.

Mr O'Neill

3.36 The hearing on 7 February 2022 was the third occasion on which Mr O'Neill appeared to give oral evidence. Mr O'Neill had produced one piece of documentary evidence to the Commission, namely a Statutory Declaration dated 3 June 2021. During his appearance on 7 February 2022, Mr O'Neill stated that he did not wish to make any changes to that previous evidence.22 Apparently contradicting that statement, Mr O'Neill produced to the Commission a Response which the Commission considers to be largely an assertion of new matters. In the interests of procedural fairness, and in circumstances where Mr O'Neill has not complied with the established rules and procedures, the Commission cannot accept untested assertions into evidence. Mr O'Neill did not present any such evidence during his oral evidence when he would have been capable of doing so, nor did Mr O'Neill seek to apply to cross examine any witnesses to whom he could have put such matters.

Oil Search

3.37 Together with its Response, Oil Search sought to produce additional documents to the Commission which had not previously been provided. Oil Search had active participation in the Inquiry. The Commission cannot accept such further documents into evidence for reasons of procedural fairness, in circumstances were such documents should, and could, have been produced to the Commission during the initial phases of the Inquiry. Oil Search did not seek leave under the practice notes to cross examine any witnesses in respect of the matters raised in its Response and has not formally sought to tender any additional documents. That being the case, the further documents have not been admitted into evidence.

UBS

3.38 UBS chose not to participate in the Inquiry. save for provision of documentary material and unsigned submissions made by persons unknown. Nevertheless, UBS has produced a Response which purports to challenge certain submissions made by Counsel

Assisting and the model relied upon by Brattle, which provided expert evidence to the Commission. This assertion cannot be given any weight in circumstances where UBS had every opportunity to put evidence before the Commission in accordance with the practice notes but elected not to do so, and where it has not applied to tender evidence. nor to cross examine any witness.

Mr Vele

3.39 At the hearing on 18 February 2022, Mr Vele sought to have admitted into evidence an unsigned Report of FTI Consulting Services which was annexed to Mr Vele's affidavit of 17 February 2022 and marked DV1. The Commission ruled that the annexed Report not be admitted into evidence. Notwithstanding that ruling, the Response provided by Mr Vele, purports to introduce into evidence before the Commission a large part of that Report that was ruled inadmissible. For the same reasons as the ruling made on 18 February 2022, those assertions cannot be afforded any weight.

Backwell Lombard Capital

3.40 Although it is noted that Mr O'Dwyer of Backweil Lombard Capital's purpose is to assist the Commission, many submissions advanced in its Response are not supported by evidence before the Commission. The Commission was not asked to make any findings that are critical of Mr O'Dwyer or Backwell Lombard Capital by Counsel Assisting and does not do so.

CHAPTER 1 > Work of the Commission

Oath and affirmation

3.41 There is a minor matter which ought to be rectified if the COI Act is to undergo amendment.

3.42 The Act does not, on its face, authorise a commissioner to examine a witness by administering an affirmation. Section 7 merely states that a commissioner may administer an oath to a person

appearing as a witness. Nonetheless, s. 10 pronounces it an offence to be sworn or refuse to make an affirmation. Finally, the Oaths, Affirmations and Statutory Declarations Act 1962 provides that a person who objects to taking an oath is permitted to give evidence by affirmation or declaration. It is likely that that Act establishes the right to affirm in a commission of inquiry, but any doubt should be removed.

Recommendations

1. The Commission recommends that the COI Act be amended to provide for:

(a) the facilitation of concurrent commissions of inquiry in a foreign country and the recognition of information obtained thereby, modelled generally on the provisions in the Australian Royal Commissions Act 1902

(b) the power of a commission of inquiry to take evidence in a foreign country, administer an oath or affirmation consistently with the laws of that country, and use any evidence so received

(c) the power to administer an affirmation or declaration be inserted into s. 7

Taking Evidence Abroad in Civil and Commercial Matters

3.43 Although not within the experience of this Commission nor within the ambit of the COI Act the Commission hoped that it might be thought opportune to mention the facilitation for taking evidence in legal matters which was established by the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, which is better known as the Hague Evidence Convention. The Convention, which entered into force in 1972, established a procedure whereby each contracting state designates a central authority (often a Ministry of Foreign Affairs) to receive and review Letters of Request for taking evidence in that country. If the letter complies with the requirements of the Convention, it is passed to the authority competent to execute it – a court. Usually the request nominates an individual (often a senior lawyer unconnected to the proceedings) or a body (a local law society) who will nominate an individual who will take the

evidence.

3.44 The Convention applies only to assistance in judicial proceedings and thus, even had Papua New Guinea been a participating member of the Convention, the Commission would have not been able to utilise its provisions for taking evidence abroad. Currently there are 63 member countries of the Convention including a number with whom Papua New Guinea has regular dealings including the People's Republic of China (1997), Singapore (1978) and Australia (1997).

3.45 Article 39 permits countries who were not members of the Hague Conference on Private International Law, where the Convention was drafted in 1970. to become members. Among those countries are Barbados, Kuwait, Columbia, and Seychelles. The Depository is the Ministry of Foreign Affairs of The Netherlands.

Recommendations

1. It is recommended that Papua New Guinea investigate the advantages of becoming a member of the Hague Evidence Convention.

Record Keeping

3.46 The difficulties government agencies experienced in complying with Commission summonses to produce documents was largely due to poor record keeping practices and, in some cases, the failure to take any or any comprehensive minutes of meetings. Arrangements made on a handshake with no record at all by government officials from the Prime Minister and other Ministers down were frequent. This included arrangements to carry out work for the State without recording the terms of the agreement and the fees involved. A retainer was sometimes raised but

often quite some time after the event.

3.47 Good record keeping is at the heart of good government decision making. In effect, records preserve the corporate memory of the State for its people and facilitate probity and integrity in public sector decisions and management.

3.48 The Commission formed the view that many public officials who appeared before it had little understanding of how vital record keeping is for the effective operation of government and the services it provides.

3.49 The National Library and Archives Act 1993 (Archives Act) establishes the National Archives and Public Records Service23 which has, amongst its functions, the promotion of better management of public records in government instrumentalities. This is to be done by providing advice and assistance in a way that will facilitate those records being part of the country's information resource.24 The Service is also tasked with training, and assisting with training, in the management and preservation of public records.25

3.50 The Commission saw no evidence that public officials, who might have been expected to know (such as Mr Vele) were genuinely aware of, or acted upon, the obligation in s. 25 of the Archives Act to prepare and submit an inventory every five years of all public records held by the instrumentality and a further inventory specifying any of those records which the administrative head considered not worth retaining.

3.51 Such an inventory would have been of considerable assistance to the Commission. This was particularly the case because the Terms of Reference covered matters which had their origin in the late 1990s.

3.52 Another problem encountered by Departments in answering the Commission's summonses to produce documents related to the transition to new computer systems without any or any adequate provision for the transition of previous electronic files to the new system.

3.53 It may seem a minor matter, but the failure in some instances to have generic email addresses for established positions in the public sector, meant that when an employee left, tracing that person's official email records became virtually impossible.

3.54 As discussed elsewhere in this Report, the paucity of records relating tc the NEC (which were made available to the Commission) meant that there was no contemporaneous record of discussions and even who, outside the Ministers shown on the Attendance Sheet, was present when key decisions were made. In the result, witnesses had to rely on very imperfect memories about events which had occurred almost a decade or more ago.

3.55 The CO/ Act does not make provision for the custody of commission records after the expiration of a commission. The records of this Commission will be a resource for many years and ought be available for study and research. The website maintained by the Commission may, in due course, pass to a permanent governmental body to manage but only the Report proper may be retained. This is the experience in other jurisdictions.

3.56 Another issue relates to the use which may be made of Commission documents. Some inquiries receive evidence which would interest law enforcement or regulatory bodies, as the evidence given to this Commission may. The Commission is of the view that this is an important omission in the COI Act and ought to be reviewed for amendment. The Australian Royal Commissions Act 1902 has been amended substantially to include detailed provisions about the records of commissions which may offer some useful suggestions.

Recommendations

1. The Commission recommends that:

(a) training be given to all senior public sector employees with respect to the obligation to prepare an inventory of records held by the department for which they are responsible as required by s. 25 of the Archives Act

(b) training be given to all public sector employees

with respect to record retention
and management including but not limited to:

(I) protocols for document and file retention and management when
installing new computers systems

(ii) establishing generic email addresses for all established public sector
positions

(c) in public service management handbooks emphasise the obligation to record
adequately in written form the proceedings of meetings and, if recorded on an
electronic device, on an official device

(d) ensure that the National Library and Archives Office is resourced adequately to
carry out its functions in s. 6 of the Archives Act and in particular, s. 6(g), (p) and
(q)

(e) amend the COI Act to provide for the custody and preservation of the records of
commissions including:

(i) where they should be deposited

(ii) who may have access

(iii) whether law enforcement and regulatory bodies may take custody of any
part of the records of a commission and on what conditions

Scrutiny

3.57 A robust system of independent scrutiny of government spending is essential if the people of
Papua New Guinea are to have confidence in the organs of government.

3.58 The Commission was told that the Audit Office, established under the Audit Act 1989 has a delay back to 2012 for some of its audits. It would have been of significant assistance to the Commission to have an independent audit of some of the entities which came within its investigations.

3.59 Holding government and public institutions accountable becomes a very difficult exercise if the Audit Office has inadequate resources to do so in a thorough and timely way. One obvious result of delay, apart from the loss of recollection where reliance is not solely on documents, is that some, perhaps many involved from those bodies being audited will have left government employment and no longer be subject to the jurisdiction of disciplinary bodies.

Recommendation

1. The Commission recommends that a review be undertaken of the staffing and training needs of the Audit Office with a view to funding the Office adequately to carry out its statutory functions.

Exchange Rates UK website, accessed on 27 March 2022, htte:// www.excharoerates.oro.uk/AUD-PGK-01 01 2014-exchanoe-rate-histor,:htn3l.

2 AN INVESTIGATION INTO THE ALLEGED IMPROPER BORROWING OF [AN] AU$1 239 BILLION LOAN FROM THE UNION BANK OF SWITZERLAND, AKTIENGESELLSCHAFT (AUSTRALIA BRANCH) TO PURCHASE 149,390,244 SHARE'S] IN OIL SEARCH LIMITED AND [THE] IMPROPER TENDER ... AND PROCUREMENT OF CONSULTANTS IN RELATION TO THE BORROWING.

Commissions of Inquiry Act 1951, s. 2(2).

° Commissions of Inquiry Act 1951, s. 2(1).

5 Commissions of Inquiry Act 1951, s. 2(3)(b).

Exchange Rates UK website, accessed on 27 March 2022. ht 2s:// www.exchanaerates.oro.uk/ALID-PGK-01 01 2014-exchange-rate-historv.htmi.

Commissions of Inquiry Act 1951, s. 2.

'Commissions o4 Inquiry Act 1951, s. 15.

Commissions of Inquiry Act 1951, s. 17.

10 Commissions Of Inquiry Act 1951, s. 6(1).

11 Commissions of Inquiry Act 1951, s. 9(1).

12 Commissions of Inquiry Act 1951, s. 10(a)–(c).

Commissions of Inquiry Act 1951, s. 11.

14 Commissions of Inquiry Act 1951, s. 7.

Commiss'ons of Inquiry, Act 1957, s. 13.

16 Practice Note No. 3, Rule 33.

" Practice Note No 3, Rule 34.

Practice Note No. 3, Rule 35.

Practice Note No 3, Rule 36.

2' Practice Note No. 3, Rule 51.
23 Practice Note No. 3, Rules 19, 44 – 48.

22 Transcript, Peter O'Neill, 7 February 2022, page 2749.
23 National Library and Archives Act 1993, s. 3(b).

24 National Library and Archives Act 1993, s. 6(g).
25 National Library and Archives Act 1993, s. 6 (p) and (q).

CHAPTER 2

Historical Context

1. Relevance of this chapter to the Terms of Reference'

1.1 The Commission's hearings began with an historical examination of the adoption and terms of the Constitution, particularly as to the commercial exploitation of natural resources, the potential role of the State in this regard and Parliamentary control of borrowing by the executive government. History provides essential context to the Commission's work.

1.2 The Commission has considered the constitutional scheme relating to the proper role of government in the free market/capitalist economy operating in the State. The Commission sought and received evidence from some of the key founders of the State, current and former Ministers, as well as experts.' Their evidence focused on key 'political-economy' questions relevant to the Terms of Reference.

1.3 That evidence concerned the role of the government in private business as an investor as it was understood at, and applied since, Independence, under successive governments.

2. Evidence and information

2.1 Key founders who gave evidence included the late Grand Chief Sir Michael Somare,3 Chief Sir Julius Chan,' Chief Dr John Momis5 and Sir Charles Lepani.6

2.2 Other witnesses from whom the Commission sought to secure evidence had either passed-away during the hearing and evidence gathering process,' or were too frail or otherwise unavailable.8

2.3 Additional information and official publications considered by the Commission included the Final Report of the Constitutional Planning Committee (1974) (CPC Final Report),9 which was referred to and relied upon by key witnesses. A review of the CPC Final Report was also relevant to the interpretation of the Constitution, as it led to the inclusion of the National Goals and Directive Principles in the Preamble to the Constitution.lc

3. Colonial history, self-government and independence

3.1 Papua New Guinea's progression towards self-government and Independence took place over a short period of time. In 1949, Papua New Guinea was placed

under Australian administration as
a Trust Territory of the United Nations.

3.2 The International Bank for Reconstruction and Development Report, 'The Economic Development
of the Territory of Papua New Guinea', in 1964, was relevant to the approach to the economic
development of Papua New Guinea. As the monograph by R. J. May, State and Society in Papua
New Guinea: The First Twenty-Five Years (2004) observes:

> The so-called World Bank report of 1964 (IBRD 1965) became a major focus for debate
> about Papua New Guinea's economic future. In essence, it supported a development

> strategy based on maximising the growth of areas of greatest export agricultural potential,
> through the provision of infrastructure, credit and extension, and the encouragement of
> foreign private capital. It also urged investment in human capital, and advised that the
> level of government services (which largely reflected Australian standards) be geared to
> local conditions. Little was said about either mining or the possibility of industrialisation.
> (pp. 304-305)

Although the World Bank report provided a more comprehensive review than had been
previously attempted, its recommendations suggested no real substantive change of
direction in existing policy. Following the appointment of an Economic Adviser (Bill
McCasker) to the administration in Port Moresby, in 1967- 1968 two major economic
policy papers were produced which; in effect, sought to provide a basis for implementing
the administration's economic development strategy in broad conformity with the World
Bank report. These documents provoked a lively debate, particularly amongst academics
in Port Moresby and Canberra, progressives within the Reserve Bank of Australia's

Papua New Guinea Department, and Papua New Guinea's emerging nationalist elite.
(p. 305)

3.3 May also identifies the earlier 1973 Faber Report (also for the International Bank for Reconstruction and Development), which alternatively recommended 'a progressive reduction in dependence on aid and, ultimately, foreign capital'." The Faber report which 'resonated the predominant nationalist economic discourse of Papua New Guinea in the early 1970s'12 was endorsed by the Somare government and 'provided the basis for a new economic plan; Strategies for Nationhood published by the Central Planning Office in 1974'.13

3.4 In 1972, Papua New Guinea was granted self-government, which led to Independence in 1975.

3.5 In answer to the notion that Independence came too soon, or that it was 'rushed' by Papua New Guinea's and Australia's leaders, Sir Michael Somare said:14

> When my political colleagues and I led this Nation to independence, this happened over a relatively short period of time in contrast to independence movements in many other countries. In the mid to late 1960s, many leaders in Australia, our former colonial rulers, were convinced Papua New Guinea was not ready for independence, that it would take a generation or more before this could be contemplated.
>
> However, when the Honourable Gough Whitlam became Australia's Labour Prime Minister in 1972, things happened rather quickly along with many sweeping policy changes implemented by Australia's first Labour Government in 23 years. Almost overnight it seemed the carpet was laid for PNG's Independence; I welcomed this development even though many Papua New Guinean leaders also believed our country was not ready. For me it was never all right for us to remain second-class citizens in our own land ...

3.6 There were advantages and disadvantages of attaining Independence in 1975. The disadvantages included the size of the then economy, having regard to the need for much new infrastructure. An advantage of Independence was that almost all of Papua New Guinea's natural resources, including oil and gas, were unexploited and remained

intact for the new country and its people to control and develop. This was a significant advantage compared with other former colonies, whose natural resources had often been extensively developed or even depleted before independence by foreign corporations that were given access by colonial governments.15

3.7 The single large exception at the time of Independence was the Bougainville Copper Mine, established by Bougainville Copper Ltd, a subsidiary of the Australian company, Conzinc Rio Tinto of Australia. The Bougainville Copper Mine commenced mining operations in or about 1969 and a new agreement was signed with the new Government after Independence.16 It was well after Independence that other major resource discoveries were made of minerals, oil and gas.17

3.8 Much early thinking among Papua New Guineans on the democratic system of government that they desired and the ownership and development of natural resources and distribution of benefits from the development of those natural resources is set out in the CPC Final Report.

3.9 The Constitutional Planning Committee consulted widely with the people of Papua New Guinea on the draft Constitution. During its consultation, the people were asked: 'What kind of society do we want?'18 The discussions led to the development of the 'Eight Improvement Aims'. which set out policy requirements for the development direction Papua New Guinea would take,19 and which the House of Assembly adopted by unanimous decision. These events led to the promulgation of the National Goals and Directive Principles, which are found in the preamble to the Constitution.

3.10 The CPC Final Report summarised the 'Eight Improvement Aims' as follows:2°

> rapid increase in the proportion of the economy under the control of Papua New

Guinean individuals and groups, and in the proportion of personal and property income that goes to Papua New Guinea

more equal distribution of economic benefits, including movement toward equalization of income among people and toward equalization of services among different areas of the country

a more self-reliant economy, less dependent for its needs on imported goods and services and better able to meet the needs of its people through local production

government control and involvement in those sectors of the economy where control is necessary to achieve the desired kind of development

3.11 The CPC Final Report recorded that, of the small economy that existed, 'two thirds of the developed section of Papua New Guinea's economy is controlled by Australian companies and individuals';21 that 'we accept foreign investment but 'only if it is in accordance with strict controls, and that it does not over-tax our capacity to cope with its direct and indirect effects'; and that it is 'essential that we are highly selective as to the type of enterprise we allow into this country – not only should we carefully consider whether the industry which a foreign company proposes to establish is in accordance with our national objectives, but we should thoroughly investigate the history of the company's activities in other countries'.22

3.12 The CPC Final Report referred to the experiences of other colonies with the positive and negative impacts of multinational corporations and counselled against any 'influence of excessive foreign investment that would compromise the country's national sovereignty and integrity.23 The CPC Final Report argued for self-reliance in terms of ownership or greater participation of Papua New Guineans in the development of their natural resources.24

3.13 The CPC Final Report said:

> We believe that people of Papua New Guinea, both of today and tomorrow, should be continually aware that in striving to improve their human lot they should not make the mistake of blindly destroying their rich natural environment; land, river seas, fish, animal and birds. Use of these resources should be weighed

carefully against the real cost to

the country in terms of the damage which will be caused to the whole way of life of the people living in the vicinity of a particular project; the destruction of land and rivers and wildlife in the course of the operations of, for instance, a large mining or timber enterprise, the need for the integral development of man which also concerns spiritual, psychological, cultural and social development.25

We should develop a sense of respect for all our natural resources and the environment.

We should not be afraid to use those resources to contribute to our development but should be sure not to overuse them to the extent they are rapidly exhausted, especially at this stage of our history when it is foreign interests who gain by far the most benefit from the exploitation of our natural resources. Our needs should be weighed against the needs of our children, their children and the generations which follow them.26

We recommend that the equity of the Government and of citizens should be maximized in the case of all large-scale enterprises for the exploitation of natural resources; that this equity should normally be as great as possible and should constitute at least a majority shareholding. This proposed provision is in line with the resolution passed by the House of Assembly in November 1972 in relation to mining enterprises. We believe it should extend to all enterprises for the exploitation of natural resources, as similar considerations apply to these other industries.27

Progressive transfer of control to Papua New Guinea

In the interest of achieving greater control of our economy, we recommend that provision be made in investment agreements for control of foreign enterprises to be progressively transferred to Papua New Guinean hands. There are various devices by means of which this can be done, and we believe this should be a high priority in Papua New Guinea's

foreign investment policy*.28

4. Political and economic system: participatory democracy

4.1 During the CPC's public consultation phase, there was no discussion about different political systems23 and different economic systems that accompanied those different political systems3° - -91 As Dr Momis made clear: the CPC 'did not give them options', they 'asked them questions' and 'by listening to them', 'we discerned what we thought the people wanted and came out with the type of government that would involve them .. land] to have checks and balances'.31

4.2 The general philosophy was that policies of government would not be motivated by political ideologies common in other societies, but by pragmatic policies 'driven by our Melanesian culture and by regional issues and aspirations'.32 In conclusion, the CPC Final Report recommended a Parliamentary system that would allow for 'participatory democrac y.33

4.3 Dr Momis recalled that the CPC saw the need to balance:

> very strong parliamentary committees to make sure that non-ministerial members of Parliament would also keep a 'check' on the government, make their contribution and at the same time you have got to allow the government, that is the National Executive Council, to take initiatives, knowing that they are being watched and they would not just do things without taking into account the importance of the benefits to the nation.34

4.4 Ultimately, the preferred and familiar model was the British Westminster style of parliamentary democracy with a capitalist economic system. This system would provide for a 'participatory democracy in which every citizen would be able to participate.35

CHAPTER 2 > Historical Context

4.5 There was considerable debate at the time about the need

for a Head of State and whether that role was needed at all or whether all such functions could be performed by Cabinet, or by the Prime Minister and Speaker of Parliament. Finally, in 1975, the government proposed and the Constituent Assembly agreed that the Queen be Head of State, represented by a Governor-General elected by Parliament. Under the Constitution the Governor-General 'shall act only with, and in accordance with, the advice of the National Executive Council' and, although responsible for appointing a Prime Minister, it is Parliament that makes the nomination for that position.36

5. Fundamental constitutional principles underpinning 'Constitutional Democracy'

5.1 The Constitution reflects much of the early thinking and desire of the Papua New Guinean people for a Constitutional democracy, under the guidance of some fundamental Constitutional principles mentioned by those who gave evidence.

5.2 Among the basic principles were the notions that:

(a) government power belonged to the people

(b) the people retained and controlled the use of that power through their duly elected representatives in Parliament

(c) all government acts, be they legislative, executive or judicial, be subject to the supreme law of the land – the Constitution

6. Supremacy of the Constitution

6.1 The Constitution is declared to be the supreme law of the land to which all other statutes including the Organic Laws37 are subject.38

6.2 The provisions of the Constitution and the Organic Laws are 'self-executing to the fullest extent that their respective natures and subject matters permit'. 39

6.3 All government acts (whether legislative, executive or judicial) that are inconsistent with the Constitution and the Organic Laws are, to the extent of the inconsistency, invalid and ineffective.40

7. National goals and directive principles

7 1 The Constitution's preamble contains the National Goals and Directive Principles National Goals), which albeit non-justiciable, should drive government policy and decisions.41 They are important guidelines for the Government to follow in formulating policies, enacting them into law and implementing them.42

7.2 National Goal 3 is relevant to ownership and development of natural resources:

> 3. National sovereignty and self-reliance.
>
> We declare our third goal to be for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant.
>
> WE ACCORDINGLY CALL FOR—
>
> (1) our leaders to be committed to these National Goals and Directive Principles.
> to ensure that their freedom to make decisions is not restricted by obligations to

> or relationship with others, and to make all of their decisions in the national interest; and
>
> (2) all governmental bodies to base their planning for political, economic and social development on these Goals and Principles; and
>
> (3) internal interdependence and solidarity among citizens, and between provinces, to be actively promoted; and
>
> (4) citizens and governmental bodies to have control of the bulk of economic enterprise and production; and
>
> (5) strict control of foreign investment capital and wise assessment of foreign ideas and values so that these will be subordinate to the goal of national sovereignty

and self-reliance, and in particular for the entry of foreign capital to be geared
to internal social and economic policies and to the integrity of the Nation and
the People; and

(6) the State to take effective measures to control and actively participate in the
national economy, and in particular to control major enterprises engaged in the
exploitation of natural resources; and

(7) economic development to take place primarily by the use of skills and
resources available in the country either from citizens or the State and not in
dependence on imported skills and resources; and

(8) the constant recognition of our sovereignty, which must not be undermined by
dependence on foreign assistance of any sort, and in particular for no
investment, military or foreign-aid agreement or understanding to be entered
into that imperils our self-reliance and self-respect, or our commitment to these
National Goals and Directive Principles, or that may lead to substantial
dependence upon or influence by any country, investor, lender or donor.

7.3 Dr Momis in his evidence referred to National Goal 3 in the following terms:43
They state quite clearly that leaders and government bodies are to ensure that –

(1) decisions are to be made in the national interest;

(4) citizens and governmental bodies to have control of the bulk of economic
enterprise and production; and

(5) strict control of foreign investment capital and wise assessment of foreign ideas
and values so that these will be subordinate to the goal of national sovereignty
and self-reliance. and in particular for the entry of foreign capital to be geared
to internal social and economic policies and to the integrity of the Nation and
the People; and
(6) the State to take effective measures to control and

actively participate in the
national economy, and in particular to control major enterprises engaged in the
exploitation of natural resources; and

(7) economic development to take place primarily by the use of skills and
resources available in the country either from citizens or the State and not in
dependence on imported skills and resources; and
(8) the constant recognition of our sovereignly, which must not be undermined by
dependence on foreign assistance of any sort, and in particular for not
investment, military or foreign-aid agreement or understanding to be entered
into that imperils our self-reliance and self-respect, or our commitment to these
National Goals and Directive Principles, or that may lead to substantial
dependence upon or influence by any country, investor, lender or donor ...

7 4 Sir John Kaputin in his statement in relation to National Goal 3 said that:
Our people's elected representatives have a responsibility to ensure that all aspects of
national finance, including loans are –
subject to authority and control by the Parliament and shall be regulated by an Act
of Parliament (Constitution, s209(1)); and

loans, in particular, must be
subject to recommendation of the Head of State acting with, an in accordance
with, the advice of the National Executive Council (s 210).44

7.5 National Goal 4 is relevant to natural resources and the environment of Papua New Guinea:
4. Natural resources and environment.

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all and be replenished for the benefit of future generations.
WE ACCORDINGLY CALL FOR—
(1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and
(2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and
(3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

7.6 Dr Momis further stated in his evidence that:
the fourth National Goal and Directive Principles apply to natural resources and environment, as their heading makes clear. These provisions make clear - in a manner unusual, and perhaps unique to a national constitution - that the protection and management of natural resources are matters of the greatest importance.45
Relations between Papua Guineans and our country's rich and diverse land and natural resources are themselves rich diverse, and in many cases, multifaceted. Papua New Guinean communities value the sheer beauty and rich diversity of their surrounds, including. food, materials used for clothing, bodily decoration, trade and exchange, and other communal purposes. Cultural and spiritual aspects are important, but so, too, are food, clothing and active engagement in hunting. fishing, gardening, trade and exchange

within and between communities, as well as observing and engaging with diverse aspects of the natural environment. Land is, obviously, of economic

importance to Papua New
Guineans primarily for growing food and more recently for sales and trade.46

Papua New Guineans are very closely related to natural resources, environment. In fact,
their relationship has an eschatological dimension to it, in other words, both spiritually
important and of course materially economically also important so it has a double base.
People of Papua New Guinea are very close to their resources. So in fact even without -
the fact that foreigners have taken over and exploited our resources to our detriment in
the long run, only makes the people more angry and more determined to ensure that they
take ownership or they play a very effective role in the ownership of resources and the
control of the method of exploitation of the resource. In other words, people do not want
to be just mere sharers in the benefits, they also want to participate in the process of
development, exploitation of resources and to ensure that their resources are not
detrimentally affected in the way that will be exhausted and in the final analysis be not in
the best interest of the population.

7 7 The preamble to the Constitution also emphasises the importance of basic social obligations:
All persons in our country have the following basic obligations to themselves and their
descendants, to each other and to the Nation,
(a) respect and to act in the spirit of this Constitution; and

(d) to protect Papua New Guinea and to safeguard the national wealth, resources and
environment in the interests not only of the present generation but also of future
generations.'

and additionally, declares that:

' all citizens have an obligation to themselves and their descendants, to each other and
to the Nation to use profits from economic activities in the advancement of our country
and our people, and that the law may impose a similar obligation on non-citizens carrying
on economic activities in or from our country.

8. Leadership Code, quality leadership and basic rights and

fundamental
freedoms

8.1 The Constitution contains a Leadership Code that prescribes minimum duties of good leadership
that are enforceable by the Ombudsman Commission.47

8.2 In the Constitution there is an express declaration of basic rights and freedoms, as a measure of
protecting the people's rights and freedoms, and also by way of limitation on government.48

8.3 Significantly, s. 32(1) of the Constitution states:
32. Right to freedom
(1) Freedom based on law consists in the least amount of restriction on the
activities of individuals that is consistent with the maintenance and
development of Papua New Guinea and of society in accordance with the
Constitution and, in particular, with the National Goals and Directive Principles
and the Basic Social Obligations.

8.4 The Constitution provides that the Supreme Court shall, on application by an authority referred to
in s. 19(3), give its opinion on the validity of a law or proposed law that restricts or removes the
protected rights and freedoms of the people.49

8.5 A law may be declared not to be reasonably justifiable, if the 'law or act' is not 'reasonably
justifiable in a democratic society having regard to the rights and dignity of mankind'.6c

9. The people – source of power and government power

9.1 The principle that the people reign supreme over government is 'embedded' in the provisions of
the Constitution that define the government and its powers, functions and responsibilities. It is
declared that 'all power belongs to the people acting through their duly elected representatives'61
and that 'power, authority and jurisdiction of the People' is vested in the National Government and

'shall be exercised by the National Government' for and on their behalf.52

9.2 Witnesses emphasised the need for government to make 'sound' decisions that benefited the people,53 and to ensure the benefits from the economic growth of the country, through natural resource projects, reached the people,54 and for government to abide by the Constitution in making decisions about the economic development of its natural resources.55

10. Separation of powers between three arms of government

10.1 Government power is vested in the traditional three 'arms' of government, the Legislature (Parliament which makes the laws),5'3 the Executive (which administers the law)57 and the Judiciary (which declares, interprets and enforces the law).58 The Constitution states that whilst the three 'arms' of government must remain separate, they must work together for a proper and effective functioning of government.59

10.2 Some witnesses expressed concerns about:

(a) ensuring the effectiveness, efficiency and transparency in the systems and processes of the three 'arms of government60
(b) the significant influence the Executive had over Parliament, particularly in relation to its approach to achieving a favourable decision
the failure by the Executive to consult Parliament to obtain its approval on important decisions
(d) the seeking of retrospective approval from Parliament of decisions already made by members of the Executive61

11. Parliamentary supremacy in law-making

11.1 Subject only to the Constitution, the Parliament as an elected legislature has 'unlimited powers of law-making'.62

11.2 Parliament may make any 'laws, having effect within and outside the country, for the peace order and good government of Papua New Guinea'.63

11.3 Sir Michael said that 'the essential role of government is to lay down, and administer, good laws that benefit a wide array of people in our society'.64

CHAPTER 2 > Historical Context

12. The Executive and Executive's responsibility to Parliament

12.1 Parliament elects the Prime Minister from amongst its members and the Prime Minister appoints the other ministers.

12.2 All ministers, including the Prime Minister, collectively comprise the National Executive Council (NEC), which is jointly responsible to Parliament. Section 141 of the Constitution states that:

> Subdivision B. — The Ministry.
>
> 141. Nature of the Ministry: collective responsibility.
>
> The Ministry is a Parliamentary Executive, and therefore—
>
> (a) no person who is not a member of the Parliament is eligible to be appointed to be a Minister, and, except as is expressly provided in this Constitution to the contrary, a Minister who ceases to be a member of the Parliament ceases to hold office as a Minister: and
>
> (b) it 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; and
>
> (c) it is liable to be dismissed from office, either collectively or individually, in accordance with this Subdivision' [underlining added].

12.3 The Executive must maintain the 'confidence' of the Parliament. If it were to lose that 'confidence', Parliament, which appoints the Executive, may remove it from office.tt

12.4 Sir Michael Somare expressed concern, with hindsight, that a counter-productive political culture had emerged and that the demands of different political parties within governing coalitions had led

to a favouring of regional and local interests over the need for stable national policies for a steadily growing democracy.66

12.5 A further concern expressed by Dr Lawrence Sause was that the Executive had become dominant over Parliament and limited Parliament's ability to enforce its oversight of powers on the Executive.67

12.6 The Commission does not need to make any particular findings or reach conclusions in relation to these debates. However, the Commission has taken into consideration these concerns about perceived departures from the foundational model of government for the country and its people when formulating recommendations for policy change, which are addressed in subsequent chapters of this Report.

13. Parliamentary control over government finances including loans to fund the budget

13.1 Parliament controls the raising of revenue and expenditure of government's finances. The government's finances are derived from various sources including tax, loans, foreign aid, revenue from State investments in State-owned enterprises and revenue from joint venture businesses with multinational corporations involved in resource development projects. Tax revenue and loans feature prominently in the Constitution. Section 209(1) of the Constitution, states:

209. Parliamentary responsibility

(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 authorisation and control by the Parliament, and shall be regulated by an Act of the

Parliament.

13.2 Section 209 of the Constitution gives the power to Government to obtain a loan but approval is required by Parliament,68 while s. 2 of the Loans (Overseas Borrowings) (No. 2) Act 1976 further regulates the general borrowing powers of the Government from or through overseas financial institutions.

13.3 The Commission has heard much evidence about the role and purpose of s. 209(1) of the Constitution in respect of the financial transaction entered into by the State mentioned in the Terms of Reference. Section 209 of the Constitution and the surrounding provisions as well as the Loans (Overseas Borrowings) (No. 2) Act 1976 are further considered later in this Report.

14. Government's role in business in a capitalist economy

14.1 The proper role of government in a capitalist system was discussed by a number of witnesses.

14.2 Witnesses spoke of four main functions, namely:

(a) the traditional and essential role of government is to make good policies and laws that create an environment that is conducive for business growth, without direct government intervention, while the government focusses on provision of quality public services such as in education, health and law and order69

(b) government raises tax revenue from private businesses to fund public goods and services70

(c) government regulates business in order to achieve proper exploitation of labour and natural resources and to promote equitable distribution of economic benefits71

(d) government invests in public and private business enterprises72

14.3 There were no alternative contentions as to the first, second and third functions. The fourth attracted different views from the witnesses.

14.4 In respect of the fourth function:

(a) Sir Michael Somare stated that the development guide-posts for medium and long term

development planning are set out in government policy documents such as Vision 2050.

In his time as Prime Minister, the government invested heavily in state-owned enterprises (SoEs) which were managed by the Independent Public Business Corporation (1PBC).

These SoEs included PNG Power Ltd, Air Niugini Ltd and PNG Ports Ltd. IPBC also managed the State's investment in private business ventures such as the State's 17.6% stake in Oil Search and 19.4% stake in the PNG LNG Project.73

(b) Chief Sir Julius Chan said that 'ordinarily government should stay out of business because it involves a lot of risks'.74 However, he said that the notion that government ought to be involved in business is a good idea, as long as the government mitigates risks. He said:

> The role of the Papua New Guinea government in business
>
> 24. It is very hard to make a judgment on the role that the government ought to play in business, because it depends on the circumstances of the time.

CHAPTER 2 > Historical Context

25. The government should take an interest in the profitable enterprises but normally the government should not take any risks whatsoever in business.

26. The notion that government ought to be involved with business is a good idea, as long as the government mitigate risks.

27. A positive example of government being involved in business can be seen in resource projects.

28. If an investor is prepared to provide an equity share to the government for free – and often I think they should because

they are harvesting and
benefiting from the resources belonging to the country – then the
government receives that equity share and investment without risk.
That is tremendous benefit to the country.

29. It is my belief that the government should not indebt itself in business.
Business is risky and government deals with public monies. It should
protect public money and not engage in the 'game' of business and
commerce.

30. In the 1970's and 1980's. when I held various ministerial portfolios such
as Finance, the government of the day and Cabinet took a very risk
adverse approach.

31. I concentrated on raising revenue through the physical capacity of the
government to do so from within its existing resources, rather than
speculating on potential future revenue.
32. I do not believe that a government should approach a private financier
to get private equity in resource projects.

33. As a government you have to know all you can before you allow an
investor in and you should have a protected cash flow of any business
who might want to come in.
34. Therefore it is up to government, through Cabinet, to have a proper
diligent conversation with any investor that come in on any project.
35. 1 tried as much as possible to fall in line with the law and when there
was opportunity I would be talking to some of my ministers and also to
the Prime Minister about that project, but really during my time in
parliament I have not come across any potential investment that the
government would have the capacity to take part in. We just didn't
have the money to play around.
36. As I emphasized earlier, ordinarily governments should stay out of
business.
37. However, I think that it is good for government

minsters or governments
to talk to a private entity and in my view government should do this all
the time.

CHAPTER 2 > Historical Context

38. Government must be fully informed, it must be certain and use everything in its power to secure the best investor for investment in a project so that consideration can be given to any proposals coming forward and they are as accurate as possible.

39. Sir Charles Lepani said government policy on government investments in private business occurred in different ways – on its own through SoEs and statutory corporations and in joint ventures with national or multi-national corporations. With regard to joint venture investments, the government took up 20% equity in both BCL and OK Tedi Mine Ltd.75 There were 37 national government-owned and provincial government-owned corporations in existence. As early as 1979, it was becoming increasingly obvious that there were emerging problems and risks associated with the State's participation in businesses and business investments. In 1979, a Committee of Inquiry chaired by then Minister for Finance Sir Julius Chan, warned the government against an 'unstructured approach to its investments in commercial activities.' Yet by 1984, almost a decade after Independence, the government was undertaking these corporate activities and undertaking these risks. He

said that of the 37 national and provincial government-owned businesses, only 12 were profitable and paid the government dividends. 76

14.5 Dr Osborne Sanida observed:77

Government involvement in commercial transactions and finance

22. ... Over the years, the Governments have made statements to promote the role of the private sector in economic growth but on the other hand they have been involved in setting the rules and regulations and involvement in business.

23. I think it is important to mention that there are now a number of state-owned enterprises (SOEs) in PNG. This is the involvement of the State in the economy, so over the years, the State has been involved in the economy through the different SOEs.

24. In addition to SOEs, the State also has shares in some of the large commercial projects/ventures such as the LNG Projects. There are new projects coming up that the State will potentially have a shareholding interest. For example, the Papua LNG Project and the Wafi-Golpu Gold Project.

25. To summarise, the Government has been involved in economic affairs in the terms of trying to affect what happens in the economy as well as been involved in economic or business activities through the SOEs and interest in the large projects.

26. The State, on the one hand, promotes the role of the private sector as the 'engine of growth' but on the other hand, also interferes in the economy by being involved in businesses in addition to running the public-sector affairs of the nation.

27. Ideally, the main focus of the State should be on ensuring that public affairs/Institutions are functioning effectively and efficiently to provide a

growth. However, there is a question as to whether or not the people are getting maximum benefit from all the economic and business activities. In my view, one of the reasons that governments get involved in business is the perceived view that the private sector is not doing enough for the people.

(a) Dr Lawrence Sause commented:78

15. The starting point for any consideration of the role of Government in commercial transactions and finance is to understand the limitations of the Government. Government is not the best entity to own businesses or participate directly in commercial transactions, but is well placed to get real value through indirect ownership.

16. The Government has, to my knowledge, rarely been successful in business ownership and that is because of the political management of Papua New Guinea and the influence that this has on business. This is true, regardless of which political party or figures may be in control at any given time in Papua New Guinea.

17. It is my view that Government should not directly be owning business and there are alternatives available. The Constitution of the Independent State of Papua New Guinea is a well-constructed document and gives the Government leverage to consider a range of options when approaching commercial transactions with non-

Government entities. The model favored by most governments to date, has been the create, own and manage model. Under this model the Government is in control from start to finish. This model has failed to generate benefits for the people of Papua New Guinea. The key failing of this model is the associated political influence that comes with roles responsible for management.

18. There are alternative models, for example the create, own and transfer model. An ideal situation occurs already in the corporate world, where there is a separation between the ownership (shareholders) and management (Board of Directors). The shareholders do not interfere in the work of management.

20. A responsible Government. with no stake in the private company, should not obtain a loan which obliges the Country to pay for it, with the intent and purpose to buy shares in a private company. This is a question fundamentally of public policy and ethics.

21. Politicians must give wider consideration to the broad principles under pinning Government decision making. One of those key considerations is that of the public good and public interest.

14.6 The Commission notes there is agreement amongst most witnesses that:

(a) under the capitalist free market economic system broadly operating in Papua New Guinea, the traditional position has been that the State avoids involvement in private businesses

(b) however, if the government considers it necessary to intervene in private business as an investor itself, it can do so, provided any risks inherent in private business investment are managed properly to avoid losses.79

14.7 Government investment in natural resource development projects through equity participation has historically occurred in direct or indirect ways in Papua New Guinea including the following:

(a) Government directly taking up equity in a joint-venture company with multinational companies such as in the Porgera Gold Mine and OK Tedi Mining Ltd

(b) Government taking over a joint-venture company after purchasing shares of another joint venture partner such as Ok Tedi Mining Ltd

(c) Government taking up shares in a multinational company that operates the project such as the Bougainville Copper Mine

(d) Government buying shares in a multinational corporation that is involved in a joint-venture with other multinational corporations to conduct a resource development project such as the proposed Papua LNG Project.

14.8 The witnesses broadly agreed that where business involves investment risks, government must be cautious in engaging in business ventures and undertaking those investments using public funds only after a thorough assessment of risk has been undertaken. The State obtaining loans to finance its equity or shares under any of the above models increases that risk, and extra prudence is to be exercised in those circumstances. Some witnesses expressed the view that the State should not be involved in the fourth function described above (government investment in public and private business enterprises) at all, because the risks are too high when investing in a purely private business enterprise involving multinational companies in which the State does not

hold any controlling interest.8°

14.9 The evidence referred to above thus sets the historical and, at a relatively high level, the philosophical context for the events being considered by this Commission, and informs the Commission's recommendations, which are addressed in subsequent chapters of this Report.

14.10 An issue especially in relation to the UBS Loan is the extent to which 'risks inherent in private business investment (were] managed properly to avoid losses'. al

I See Commission Chairman's opening statement, delivered on 30th March 2021.

2 Witnesses included the late Grand Chief Sir Michael Somare (Papua New Guinea's first Prime Minister and Chairman of the Constitutional Planning Committee); Chief Sir Julius Chan (Papua New Guinea's first Deputy Prime Minister and Minister for Finance and former Prime Minister); Chief Dr John Momis (Deputy Chairman of the Constitutional Panning Committee, former State Minister and former President of the Autonomous Region of Bougainville); Sir Charles Lepani (Papua New Guinea's first Director of National Planning Office, first Managing Director of State-owned Orogen Minerals Ltd, former Ambassador); Dr Lawrence Sause (Head of Political Science Department, University of Papua New Guinea); Dr Clement Waine (former Secretary, Department of Public Enterprises); Dr Solomon Awili (Senior Lecturer in Banking & Finance, School of Business & Public Policy, University of Papua New Guinea); Dr Osborne Sanida (Acting Director, National Research Institute).

3 Sir Michael Somare prepared a written statement dated 15th February 2021, before passing away on 26 February 2021, which was tendered by Ns lawyer (John Kumura of Kumura Lawyers) and read into evidence by Sir Michael Somare's representative at hearing (Sir Amold Amet, former Chief Justice, Provincial Governor of Madang Province and former Attorney General), Exhibit B. WIT.0001.0002.0002.

3 Sir Julius Chan provided oral evidence at a hearing attended

by Zoom from Kavieng on 12 May 2021 and provided a statement dated 5 May 2021,
Exhibit H, WIT.0002.0004.0002.

5 Dr John Momis gave oral evidence at a hearing attended by Zoom from Buin Secondary School on 20 May 2021 and provided a statement dated 29
April 2021, Exhibit K.1, WIT.0088.0002.0001 and supplementary statement dated 20 May 2021, Exhibit K.2, WIT.0083.0004.0001.
Sir Charles Lepani gave oral evidence at a hearing attended by Zoom from Alotau on 13 April 2021 and provided a statement dated 15 April 2020.
Exhibit C, W17.0008.0003.0903.

7 The late Sir Mekere Morauta, Papua New Guinea's first Secretary for Finance, former Governor of the Central Bank, former Prime Minister and
former State Minister.

Amongst them, Sir Rabbie Namaliu, Papua New Guineas first Chairman of the Public Services Commissuin, former Prime Minister and former Minister of the State.
9 Constitution, s. 24 recognises the CPC Final Report as an aid to Constitutional interpretation.
'3 Reference by the Ombudsman Commission of Papua New Guinea [2010] PGSC 10.

44 Ronald J May. State arid Society in Papua New Guinea: The First Twenty-Five Years (Canberra, ANU Press, 2004), page 308.
43 Ronald J May, State and Society in Papua New Guinea: The First Twenty-Five Years (Canberra, ANU Press, 2004), page 308.
13 Ronald J May, State and Society in Papua New Guinea: The First Twenty-Five Years (Canberra, ANU Press, 2004), page 310.

14 Statement of Sir Michael Somare dated 15 February 2021, page 2, Exhibit B, WIT.0001.0002.0002.
45 CPC Final Report, Chapter 2, page 2/16-19, [130]-[153].

16 Statement of Sir Charles Lepani dated 15 April 2020 , page 5, Exhibit C, WIT.0008.0003.0003
47 For example, Ok Tedi Mine commenced production in 1984, Porgera Gold Mine commenced production in 1990, Ramu Nickte Project commenced
production in 2011, Kutubu Petroleum Project – oil was first discovered in 1986 and production commenced in 1992, PNG LNG Project – gas was
first discovered in 1987 and production commenced in 2014, and Papua LNG Project– discoveries were made in 2015 and the development is
under discussions between the developers and the Government, Misima Gold Mine exploration commenced in 1977 and production commenced in
1989, and Lihir Gold Project– production commenced in 1997.
88 CPC Final Report, Chapter 2, page 2/1–2, [7]

In Statement of Sir Charles Lepani dated 15 April 2020, page 3, Exhibit C, WIT.0008.0003.0003.
3) CPC Final Report, Chapter 2, page 2/1, [7]–[12].
21 CPC Final Report, Chapter 2, page 2/8, [64].
22 CPC Final Report, Chapter 2, page 2/9, [71] and [73].
23 CPC Final Report, Chapter 2, page2/10–2/11, [78]–[85].

24 CPC Final Report, Chapter 2, page 2/11 – 12, [87]–[96].
25 CPC Final Report, Chapter 2, page 2/12, [92].

• CPC Final Report, Chapter 2, page 2/12, [95].
27 CPC Final Report, Chapter 2, page 2/18–19, [149].

2' CPC Final Report, Chapter 2, page 2/19, [150].
29 Democracy, socialism or communism.
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30 Capitalism/free market economy or laissez faire; mixed economy; and command economy.
• Transcript, John Morris, 20 May 2021, page 173.
32 Statement of Sir Michael Somare dated 15 February 2021, page 5, Exhibit B, WIT. 0001.0002.0002.
33 CPC Final Report, Chapter 1, page 1/3, [16); Chapter 6, page 6/1, [1].
34 Transcript, John Momis, 20 May 2021, page 173.
35 National Goals and Directive Principles, Goal 2(9).

36 See also Donald Denoon, A Trial Separation: Australia and the Decolonisation of Paoca New Guinea (ANU Press 2012).
31 Which is a form of Constitutional Law (see Constitution, s. 12).
36 Constitution. s. 9.
ti

39 Constitution. s. 11(2).
• Cwistqution, s. 11(1).
41 Constitution, s. 25.
4` Statement of John Momis dated 29 April 2021,[31, Exhibit K.1.

INIT.0088.0002.0001.

43 Statement of John Moms dated 29 April 2021. pages 7–8, Exhibit K. 1, %IT:W48:0002.0001 : Transcript. John Morris, 20 May 2021. pages 164–165.
" Statement of Sir John Kapurfn dated 30 April 2021. pages 2–1C, WIT.0089.0002.0003.
4' Supplementary statement of John Momis dated 20 May 2021, page 2, Exhibit K.2, WIT.0088.0004 0001.
44 Supplementary statement of Dr Chief Momis dated 20 May 2021, page 2, Exhibit K.2, WIT.0088.0004.0001
4' Constitution, s. 27 and s. 32.
4'• Constitution, Preamble, ss. 32–56; CPC Final Report, Chapter 5, page 5/11, [1]–[5].
49 Constitution, s. 19.

5° Constitution, ss. 38 – 39.
Sr Constitution, Preamble.

62 Constitution, s. 99.
53 Transcript, Osborne Sanida, 29 April 2021, pages 314 –315.

54 Statement of Osborne Sanida dated 28 April 2021, [36]438], Exhibit E, WIT.0009.0002.0001; Statement of Sir Charles Lepani dated 15 April 2021,
page 6, Exhibit C, WIT.0008.0003.0003; Supplementary statement of John Momis dated 20 May 2021, page 2, Exhibit K.2, WIT. 0088.0004.0001;
Transcript, Sir Julius Chan, 12 May 2021, page 280.
• Supplementary statement of John Momis dated 20 May 2021, pages 1–2, Exhibit K.2, WIT.0088.0004.0301.
56 Constitution, s. 137.
57 Constitution, s. 138–139.
sn Constitution, s. 158.

59 Constitution, s. 99(3) and (4).
Transcript, Osborne Sanida, 29 April 2021 page 185.
Cl Transcript, Lawrence Sause, 13 May 2021, page 318 Statement

of Lawrence Sause dated 12 May 2021 [24], Exhibit J WIT. 0012.0006.0009*

Statement of Osborne Sanida dated 28 April 2021, [47]449], Exhibit E, WIT.0009.0002.0001.

Constitution, s. 99(2)(a).

w Constitution, s. 109(1).

04 Statement of Sir Michael Somare dated 15 February 2021, page 5, Exhibit B, WIT.0001.0002.0002

• Constitution, ss. 141–145; CPC Final Report Chapter 7, page 716, [41]445].

Cifi Statement of Sir Michael Somare dated 15 February 2021, pages 2–3, Exhibit B, WIT.0001.0002.0002.

• Statement of Lawrence Sause dated 12 May 2021, [23], Exhibit J, WIT.0012.0006.0009.

8° Statement of Osborne Sanida dated 28 April 2021, [31] and [42], Exhibit E, WIT.0009.0002.0001; Statement of John Momis dated 29 April 2021,

page 6, Exhibit K.1, WIT.0088.0002.0001.

• Statement of Sir Michael Somare dated 15 February 2021, page 5, Exhibit B, WIT.0001.0002.0002 Statement of Sir Charles Lepani dated 15 April

2020, page 2, Exhibit C, WIT.0008.0003.0003,

7° Statement of Sir Charles Lepani dated 15 April 2020, page 2, Exhibit C, WIT.0008.0003.0003; Statement of Osborne Sanida dated 28 April 2021

[28] and [31]–[32], Exhibit E, WIT.0009 0002.0001.

71 Statement of Sir Charles Lepani dated 15 April 2021, page 2, Exhibit C, WIT.0008.0003.0003.

'2 Statement of Sir Michael Somare dated 15 February 2021, pages 8–11, Exhibit B, WIT.0001.0002.0002; Transcript, John Morris, 29 April 2021,

page 164, Statement of Sir Charles Lepani dated 15 April 2021, page 2. Exhibit C, WIT.0008.0003.0003; Transcript Osborne Sanida. 29 April

2021, pages 182–183; Transcript, Lawrence Sause, 13 May 2021, pages 310–311.

Si Statement of Sir Michael Somare dated 15 February 2021, pages 8–11, Exhibit B, WIT.0001.0002.0002.

Statement of Sir Julius Chan dated 5 May 2021, [24]446], Exhibit H, WIT.0002.0004.0002; Transcript, Sir Julius Chan, 12 May 2021, pages 2£2–

285.

• Statement of Sir Charles Lepani dated 15 April 2020, page 5, Exhibit C, WT.0008.0003.0003; Transcript, Sir Charles Lepani, 13 April 2021. pages

115–119.

16 Statement of Sir Charles Lepani dated 15 April 2020, page 6, Exhibit C, WIT.0008.0003.0003.

" Statement of Osborne Sanida dated 28 April 2021, [21]4271, Exhibit E, WIT.0009.0002.0001.

15 Statement of Lawrence Sause dated 12 May 2021, [15]-[18] and [20)-[21], Exhibit J, WIT. 0012.0006.0009.
Statement of Clement Waine dated 19 April 2021, page 5, Exhibit F, WIT.0039.0005.0007.
8° For example, membership on the Board of Directors; see also Statement of Sir Charles Lepani dated 15 April 2020, page 7, Exhibit C.
WIT.0008.0003.0003.
Si Statement of Sir Julius Chan dated 5 May 2021, pages 3-5, Exhibit H, WT.0002.0004.0002; Transcript, Sir Julius Chan, 12 May 2021, pages 284-
288; Transcript. Osbourne Sanida. 29 April 2021, page 321.

CHAPTER 3

Legislative provisions

about the State's fiscal

arrangements

1. Relevance of this chapter to the Terms of Reference'

1.1 Terms of Reference (f) and (m) require the Commission to inquire into and make findings as to
whether legal and administrative processes were followed regarding the Exchangeable Bond
Transaction and the UBS Loan.

1.2 This chapter identifies and gives an overview of the laws relating to the State's fiscal
arrangements which are relevant in considering what legal and administrative processes were
required to be followed:
(a) in obtaining the IPIC Exchangeable Bonds to finance the

State's equity participation in the PNG LNG project in 2008
(b) to refinance the IPIC Exchangeable Bonds
(c) to obtain the loan from UBS in 2014 to purchase Oil Search shares
(d) to divest the shareholding in Oil Search in 2017

1.3 A more expansive discussion of these legal obligations and administrative processes is contained in the chapters dealing with the above transactions.

2. Background

2.1 It will be recalled that:
(a) On 23 November 2008. IPBC2 and IPIC entered into the Exchangeable Bond Transaction, by which IPBC issued A.UD 1.681 million of Exchangeable Bonds to IPIC to fund its equity participation in the PNG LNG Project
(b) On 5 March 2014, the Exchangeable Bonds 'matured' according to their terms and IPIC elected to retain the State's equity stake in Oil Search
(c) On 6 March 2014, UBS loaned AUD 1.239 billion (comprising two facilities: a AUD 335 million bridge loan facility and a AUD 904 million facility) to the State (through Petromin as nominee)3 in order to fund the State's acquisition of shares in Oil Search
(d) On 12 March 2014, the State (through Petromin) acquired 149,390,244 fully paid ordinary shares in Oil Search (amounting to a 9.8% interest) via a share placement at AUD 8.20 per share
(e) On 2 September 2014, the State transferred all of the shares to NPCP (now KPHL)
(f) On 26 September 2017. KPHL (via Kumul Petroleum (Investments) Limited) divested its shareholding in Oil Search4

3. Relevant legislation

3.1 In addition to provisions in the Constitution considered elsewhere in this report, the key provisions primarily relevant to the State's fiscal arrangements are contained in the following statutes:

(a) Independent Public Business Corporation of Papua New Guinea Act 2002, which provides for the establishment and management of IPBC to hold certain assets, including interests in business enterprises, as trustee, for the benefit of the State

(b) Loans (Overseas Borrowings) Act 1973 and Loans (Overseas Borrowings) (No. 2) Act 1976, which provide for the raising of loans overseas, and for related purposes

(c) Loans Securities Act 1960, which provides for the issue of stock, bonds, debentures and other securities by the State, and for the paying off, repurchasing, redeeming and converting of loans, and for related purposes

(d) Evidence Act 1975, which sets out certain laws relating to evidence and related matters

(e) Papua New Guinea Fiscal Responsibility Act 2006, which, among other things, provides a framework for fiscal management based on principles of sound fiscal management, and for transparent reporting of the national fiscal position against this framework

Public Finances (Management) Act 1995, which, among other things, provides for the management of public finances

(g) Petromin PNG Holdings Limited Authorization Act 2007, which establishes Petromin as a commercial enterprise, provides that Petromin is not an instrumentality of the State and its assets are not public assets, permits the State to nominate Petromin as its nominee to acquire certain assets, and to authorise the State to direct IPBC to transfer certain assets to Petromin, among other things

(h) Companies Act 1997, which sets out the key laws relating to companies Attorney-General Act 1989

4. Legal and administrative processes for issuance of the Exchangeable Bonds in 2008

4.1 The legal and administrative processes to be followed, before issuing the Exchangeable Bonds in 2008 are referred to below.

4.2 It is clear that, no later than 30 March 2008, IPBC was obliged

to submit an operating budget to
the Departmental Head of the Treasury, including:
(a) an estimate of IPBC's expenditure for the next financial year
(b) its proposed program (if any) for the next financial year, itemised separately in respect of
each of the Trusts, and identifying any expenditure to be charged against the assets of the
particular Trust, as approved by the Board after consultation with, and in such form as
reasonably required by, the Departmental Head of Treasurys

4.3 If provision had not been made by Parliament for the Exchangeable Bond Transaction at the
beginning of FY08-09, the NEC was authorised to expend funds appropriated out of the
consolidated revenue fund for the purpose of the Exchangeable Bonds, provided that amount did
not exceed one third of the budgeted expenditure during the FY07-08.6

4.4 IPBC was required to agree on timetables and policy guidelines with the Head of the Treasury:
Those guidelines required approval of the NEC8 and were required to be published in the National
Gazette.9

4.5 Approval by the NEC for the disposal of the shares, by way of the Exchangeable Bonds, was also
required in writing.10 The issuance of the Exchangeable Bonds required prior consent of the NEC
and that consent was required to be published in the National Gazette.11

4.6 The transaction documents for the Exchangeable Bonds were required to have been signed on
behalf of IPBC under seal, or by someone acting with the express or implied authority of IPBC. or
by a duly appointed attorney on their behalf. 12

4.7 The Exchangeable Bonds were required to have been issued to

IPIC by the Head of State13
(acting on advice)", on such terms as were necessary or convenient for the purpose of giving
effect to the terms of the loan agreement15 and executed on behalf of the Independent State by
the Minister or a person authorised by the Minister for the purpose.16

4.8 The Exchangeable Bonds were required to have been vested in IPBC by the Minister17 and notice
of the vesting published in the National Gazette.18

5. Legal and administrative processes regarding engagement of advisers

5.1 Where a matter coming before the NEC gives rise to legal issues, advice is to be provided by the
Attorney-General in the capacity as principal legal adviser to the NEC, to the exclusion of all other
lawyers, unless the Attorney-General has authorised the giving of advice by another person.'9

The expenditure of public moneys by one of the branches of government being the NEC,
Parliament or the Judiciary (as the case may be) is subject to authorisation and control of the
Parliament and regulated by an Act of the Parliament.28 If provision was not made by the
Parliament for the supply of services at the beginning of the FY13-14. the NEC may enter into the
agreement. but only if the amount did not exceed one-third of the budgeted expenditure during
FY12-13 (noting in the circumstances the Commission is considering, agreements for public
expenditure by the other two branches of government, Parliament and Judiciary, do not arise).21

5.3 Public moneys must not be committed or expended unless authorised by a warrant authority
within a financial year,22 which the Minister may authorise the Head of the Department
responsible for financial management to issue, for the purpose for which the money was
appropriated or charged.23

5.4 Before a State contract may be entered into, a certificate of Authority to Pre-commit relating to the
contract must be issued.

5.5 The Head of the Department responsible for financial management may issue a Certificate of
Authority to Pre-commit in relation to a contract exceeding PGK 100,000, where satisfied that
funds will be available to meet the proposed schedule of

payments for the purchase or supply.
which must specify:
(a) the purchase or supply to which it relates
(b) the maximum amount to which the Authority extends24

CHAPTER 3 > Legislative provisions about the State's fiscal arrangements

5.6 Tenders must have been publicly invited prior to entering into any contract for the supply of
services,25 unless:
(a) a Board26 certified that the inviting of tenders was impracticable or inexpedient
(b) (where the transaction involved an amount not exceeding PGK 500,000) the Minister
considered that there was a natural disaster or it was not expedient or proper to call public
tenders and, prior to the goods or services being provided, by certificate in writing which
both narrated these pre-conditions and waived the provisions of this section27

6. Legal and administrative processes operating in 2014

6.1 The expenditure of public moneys is subject to authorisation and control of the Parliament and
regulated by an Act of the Parliament.28

6.2 There are also general principles for fiscal management and implementation of budgets of the
State contained in the Papua New Guinea Fiscal Responsibility Act 2006, which include as one
principle that a Government will not raise the overall level of debt during its term.29

6.3 It is however a legal requirement under the Public Finances (Management) Act 1995, that public
money (other than those from the Trust Fund established by s. 15 of that Act) should not be
committed or expended, unless authorised by a warrant authority within a financial year,39 which
the Minister may authorise the Head of the Department responsible for financial management to

issue for the purpose for which the money was appropriated or charged.31 The Departmental
Head is responsible for ensuring that all expenditure is properly authorised and applied for the
purposes for which it is appropriated.32

6.4 Further, ss. 35 and 36 of the Public Finances (Management) Act 1995 provide as follows:

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.

6.5 The limit referred to in s. 36 (2) of the Public Finances (Management) Act in the Central Banking Act 2000 is PGK 100,000,000 (or such other adjusted amount as agreed by the Governor and National Executive Council 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).33

6.6 Under ss. 210 and 211 of the Constitution:

(a) The Parliament must not provide for the raising of loans or the expenditure of public moneys of the State, except on the recommendation of the Head of State, acting in accordance with the advice of the NEC34

(b) No money under the control of the State is to be expended except as provided for by the Constitution or under an Act of the Parliament35

6.7 If provision is not made by Parliament for a loan at the beginning of a financial year, the NEC could enter into a loan only if the amount of the loan did not exceed one-third of the budgeted expenditure during that financial year.36

6.8 The amount of any loan is required to be applied only in accordance with the terms of the loan agreement; be executed on behalf of the State by the Minister or a person authorised by the Minister.37 and laid before Parliament as soon as practicable following execution.38

6.9 Tenders are required to be publicly invited prior to entering into any agreement,39 unless:

(a) a Board's° certified that the inviting of tenders was impracticable or inexpedient or

(b) (where the transaction involved an amount not exceeding PGK 500,000) the Minister in his discretion considered that there was a natural disaster or it was not expedient or proper to call public tenders and, prior to the goods or services being provided, by certificate in writing narrated these circumstances and waived the provisions of this section41

6.10 Before a Board can approve such a certificate cf inexpediency to certify that the inviting of tenders was impracticable or inexpedient, it is to ensure that there is a valid approved Certificate of Authority to Pre-commit42 and one of the following situations exists:

(a) Natural Disaster
(b) Defence Emergency
(c) Health Emergency
(d) Situation of Civil Unrest43

6.11 The Head of the Department responsible for financial management can issue a certificate of Authority to Pre-commit in relation to a contract exceeding PGK 100,000, where they are satisfied that funds will be available to meet the proposed schedule of payments for the purchase. which is to specify:
(a) the purchase to which it relates
(b) the maximum amount to which the Authority extends44

6.12 A certificate of inexpediency cannot be issued retrospectively to cover a contract already executed:45

6.13 If a certificate of Authority to Pre-commit was not issued, any loan agreement would be null and void,46 and would not be enforceable against the State.47

6.14 Unless otherwise directed by the Minister," any loan moneys are required to be paid into the consolidated revenue fund."

7. Legal and administrative processes for the purchase of shares

7.1 If there is no provision in any law as to the person or authority empowered to execute a contract or agreement for a purchase of shares, a contract can only be executed:

(a) by the Head of State acting on advice

(b) by the Minister (where the total consideration does not

exceed PGK 5,000,000)

(c) by the Chairman of the Tenders Board which considers the tender (where the amount of
the consideration does not exceed an amount not exceeding PGK 5,000,000 specified by
the Minister)50

7.2 Before any agreement for a purchase of shares could be entered into, a Certificate of Authority to
Pre-commit would need to be issued as discussed above.

' See Commission Chairman's opening statement delivered on 30 March 2021.
2 IPBC was established under the Independent Public Business Corporation of Papua New Guinea Act 2002. The IPBC (Kumul Consolidated
Holdings) Amendment Act 2015 was certified on 12 August 2015 and came into effect on 2 September 2015, replacing IPBC with Kumul Consolidated
Holdings.
Petromin was established under the Petromin Holding PNG Limited Authorization Act 2007 for the purpose of enabling the Government of Papua
New Guinea to develop mining and petroleum tenements.
4 See Notice of Cessation of Substantial Shareholding [WIT. 0124.0002.0401].
5 Independent Public Business Corporation of Papua New Guinea Act 2002, s. 37.
Constitution, s. 212.
7 Independent Public Business Corporation of Papua New Guinea Act 2002, 5. 8.
8 Independent Public Business Corporation of Papua New Guinea Act 2002, s. 9.
9 Independent Public Business Corporation of Papua New Guinea Act 2002, s. 8.
w Independent Public Business Corporation of Papua New Guinea Act 2002, s. 9.
" Independent Public Business Corporation of Papua New Guinea Act 2002, s. 39.
'2 Independent Public Business Corporation of Papua New Guinea Act 2002, 5. 55.
" As defined in the Constitution, s. 82: 'Her Majesty the Queen, whose privileges, powers: functions, duties and responsibilities may be exercised and
performed through an appointed Governor-General'.
" Constitution, s. 210.
" Note that s. 1 of the Loans (Overseas Borrowings) Act 1973 defines 'loan agreement' as 'an agreement of a kind referred to in s. 2(1), whether

known as a loan agreement or a bond purchase agreement or otherwise'.
Loans (Overseas Borrowings) Act 1973, s. 3: Loans (Overseas Borrowings) (No. 2)1976, s. 3.
17 Defined in the Independent Public Business Corporation of Papua New Guinea Act 2002 as 'the Minister responsible for privatization matters or the Minister designated by the Prime Minister, and published in the National Gazette with respect to the allocation of Ministerial duties and responsibilities of Ministers under s 148 of the Constitution, to be the Minister responsible for matters concerning or dealing with the management or privatization of State-owned corporations, companies, entities or assets wholly or partially owned by the State'.
Independent Public Business Corporation of Papua New Guinea Act 2002, s. 31. See also (Vesting and Transfer) of the Independent Public Business Corporation of Papua New Guinea Act 2002, s. 50(1): All assets and liabilities held by the State which are notified in the National Gazette by the Minister under Section 31 ... are taken to have been vested in and transferred to the Corporation to be held as trustee of the General Business Trust or in such other capacity specified in such notification under this Act (as the case may be) on and from the commencement date or such later date as specified in the notice'.
'9 Attorney-General Act 1989. s. 8.
23 Constitution; Sections14, 22 of the Public Finances (Management) Act 1995, s. 209.

2' Constitution, s. 212; Public Finances (Management) Act 1995, s. 14.

22 Public Finances (Management) Act 1995, s. 31.
" Public Finances (Management) Act 1995, s. 29.
" Public Finances (Management) Act 1995. s. 476.

CHAPTER 3 > Legislative provisions about the State's fiscal arrangements

25 Public Finances (Management) Act 1995, s. 40.
26 Public Finances (Management) Act 1995, s. 2 states that a 'Board' means a Supply and Tenders Board established under section

39. 27 Public Finances (Management) Act 1995, s. 40.
. 27 Public Finances (Management) Act 1995, s. 40.
25 Constitution, s. 209: Public Finances (Management) Act 1995, ss. 14, 22.
" Papua New Guinea Fiscal Responsibility Act 2006, s. 4(c).
3° Public Finances (Management) Act 1995, s. 31.
31 Public Finances (Management) Act 1995, s. 29.
32 Public Finances (Management) Act 1995, s. 5.
33 Central Banking Act 2000, s. 55(4)(a).
34 Constitution, s. 210.
Constitution, s. 211.
3° Constitution, s. 212.
37 Loans (Overseas Borrowings) Act 1973, s. 2(3); Loans (Overseas Borrowings) (No. 2) 197,6 s. 2(7).
" Loans (Overseas Borrowings) Act 1973, s. 2(4); Loans (Overseas Borrowings) (No. 2)1976, s. 2(8).
22 Public Finances (Management) Act 1995, s. 40.
4° Public Finances (Management) 1995, s.2 states that a 'Board' means a Supply and Tenders Board established under s. 39.
41 Public Finances (Management) Act 1995, s. 40.
Financial Instruction 1A/05, s. 11.1.
43 Financial Instruction 1A/05, s. 11.2.
" Public Finances (Management) Act 1995, s. 47B.
45 Financial Instruction 1A/05, s. 11.1.
46 Public Finances (Management) Act 1995, s. 47C.
47 Public Finances (Management) Act 1995, s. 47D.
" Loans (Overseas Borrowings) (No 2) Act 1976,s. 2(11),
PublIc Finances (Management) Act 1995, s. 13.
5° Public Finances (Management) Act 1995, s. 47

CHAPTER 4

Legislative provisions about natural resource usage in Papua New Guinea

1. Relevance of this chapter to the Terms of Reference

1.1 This chapter sets out some details of the applicable legislative provisions concerning the State's natural resources – such as 'back-in' rights – and provides some history of the oil, gas and mining laws within the State.

1.2 The chapter is intended as background to matters raised throughout the Report, in particular in relation to Terms of Reference 1(e) and (u) - (z) and the licensing and approval process.

2. Legislation

Pre independence – Mining Legislation in Papua

2.1 The first legislative measure regulating the exploitation of natural resources in Papua was The Gold Fields Ordinance 1888 (Papua), which adopted Queensland legislation for the management of goldfields.' Subsequently, the Mining Ordinance 1899 (Papua) adopted the Mining Act 1898 (Old), a Queensland Act. Neither of those Ordinances vested minerals in the Crown.2

2.2 The Mining Ordinance 1899 (Papua) was amended by the Mining Ordinance 1907 (Papua). The Mining Ordinance 1907 (Papua) vested all minerals, gems and precious stones on or under what were described as 'native lands' in the Crown.3

2.3 The Mining Ordinance 1911 (Papua) made amendments to section 55 of the Mining Act 1898 Qfd), to insert a provision deeming mineral ois of Papua to be the property of the

Commonwealth of Australia, removing the rights of customary landowners. The Act also provided that the Mining Warden was to prevent any mining likely to cause substantial damage to land without the owner's consent.4

2.4 Section 191 of the Mining Ordinance 1928 (Papua), provided that: 'All gold, silver, copper, tin, antimony and metals of every description ... in or under all lands ... are and shall be deemed always to have been the property of the Administration.'5

2.5 The Mining Ordinance 1937 (Papua) (1937 Mining Ordinance) consolidated and amended the laws relating to mining and substantially followed the provisions of the Mining Act 1898 (Old). The 1937 Mining Ordinance set out provisions for the grant of gold and mineral mining leases and licences, the establishment of a Mining Wardens' Court, and health and safety in the mines.5 Section 167 provided that, in Papua: 'All minerals gems and precious stones on or under native lands shall after the passing of this Ordinance be the property of His Majesty.' The 1937 Mining Ordinance provided for:

(a) the appointment of a Director of Mines to administer the Act

procedures for the issue of miner's rights (which conferred the right to take possession of mines for mining purposes) and business licences (which conferred the right to occupy gold or mineral fields for residence or business purposes)

the Lieutenant Governor to issue gold mining and mineral mining leases to carry out mining, upon the payment of a yearly rent at the rate of one pound per acre for a gold mining lease, and ten shillings per acre for a mineral mining lease

special provisions relating to coal mining and mining on 'native lands'. Any person

intending to mine on land not alienated by the Crown and owned and occupied by 'natives'
was to deposit funds with the warden as security for any damage
the Warden was not to allow any operation which could do substantial damage to a 'native
village', unless consent was given by the 'natives'
the Wardens' Courts were to hear and determine disputes and claims in relation to any
mining tenement

Pre-independence – Petroleum Legislation in Papua

2.6 The Mineral Oil and Coal Ordinance 1923 (Papua) (1923 Ordinance) was the first petroleum
legislation enacted by the Papuan Legislative Council and regulated mining for mineral oil and
coal. The 1923 Ordinance repealed sections of the Mining Ordinance 1911 (Papua) and the
Mining Act 1898 (Old) that were inconsistent with the Act. The 1923 Ordinance:
(a) provided for the issue of licences to search for mineral oil or coal not exceeding 1000
square miles in area, for a period of 5 years, allowing preferential right to a mineral oil or
coal lease should payable mineral oil or coal be discovered'
(b) the issue of mineral oil or coal leases
(c) contained provisions providing for compensation to 'native owners and occupiers' of 'native
lands

2.7 The 1923 Ordinance was subsequently amended in 1929 and repealed by the Petroleum (Mining)
Ordinance 1934-1937 (Papua) (1934 Ordinance). which was to be incorporated and read with
the Mining Act 1898 (Old). The 1934 Ordinance was divided into three parts and provided for:
(a) procedures for the issue of permits, licences and leases
(b) the appointment of a Petroleum Advisory Board by the Lieutenant Governor to advise on
any question or matter relating to mining of petroleum or arising under the Ordinance
(c) for all petroleum and helium to be vested in the Crown
(d) for the Lieutenant Governor to carry on the business of, and do anything necessary to
search for petroleum
(e) for the Lieutenant Governor to issue permits, licences and leases. Only 'qualified persons'
(meaning British subjects – Australian citizens were then designated British subjects –, an
associate of a British subject or a company registered in the Territory with at least two-
thirds of the shares being held by British subjects) could apply for permits, licences and
leases

(f) for rent to be payable during the period of the licence and, until a lease was granted to a licensee, a licensee was to pay a royalty to the Lieutenant Governor

(g) leases were for a period of 21 years (and were renewable), the lessee was to pay rent and a royalty to the Warden, and to provide monthly statements to the Warden

CHAPTER 4 > Legislative provisions about natural resource usage in Papua New Guinea

2.8 The Petroleum (Prospecting and Mining Ordinances) 1938-1939 (Papua) (1938 Petroleum Ordinance) repealed previous legislation9and was to be incorporated and read as one with the 1937 Mining Ordinance.

2.9 The 1938 Petroleum Ordinance was divided into three parts, the third part dealing with permits, licences and leases, and was duplicated and enacted by the Legislative Council of Papua and New Guinea as two separate ordinances.10

2.10 The 1938 Petroleum Ordinance was in similar terms to the 1934 Ordinance and:

(a) provided for the establishment of an Oil Advisory Committee (in addition to the Petroleum Advisory Board) to advise on any scientific or technical questions arising from the ordinance or referred to by the Minister or Lieutenant Governor

(b) provided that all petroleum was deemed to be the property of the Crown: ' all petroleum and helium at or below the surface of any land in the Territory shall be, and shall be deemed at all times to have been, the property of His Majesty'11

(c) part III allowed the Lieutenant Governor to issue permits, licences and leases to 'qualified persons'12

(d) royalties were payable by lessees at a rate of ten percent of the gross value at the well-head of all crude oil, casinghead petroleum spirit and natural gas produced from the land comprised in his lease

(e) set out the procedure for the grant of licences and

compensation of private landholders for any damage

2.11 The 1938 Petroleum Ordinance was amended in 194713 and 1950. It was repealed and replaced by the Petroleum (Prospecting and Mining) Ordinance 1951 (1951 Ordinance) upon the amalgamation of the administration of the Territories of Papua and New Guinea.

Pre independence New Guinea

2.12 In New Guinea, there were a series of ordinances beginning with the Mining Ordinance 1922 up to the Mining Ordinance 1928–1947. The Mining Ordinance 1922 vested ownership of petroleum in the Colonial Government.14

2.13 The Petroleum (Prospecting and Mining) Ordinance 1938–1939 was to be incorporated and read with the Mining Ordinance 1928–1936 and was in similar terms to the Papua legislation, being amended in 1947.15

Amalgamation of the administration of Papua and New Guinea

2.14 Upon the amalgamation of the administration of the Territories of Papua and New Guinea in 1949, the separate petroleum ordinances were replaced by the 1951 Ordinance. The 1951 Ordinance was stated to be incorporated, and read as one, with the Mining Ordinance 1937–1950 of Papua and Mining Ordinance 1928–1947 of New Guinea.

2.15 The 1951 Ordinance again vested all petroleum in the Administration, thus: 'subject to this Ordinance, but notwithstanding anything contained in any other law of the Territory ... all petroleum and helium at or below the surface of any land in the Territory shall be, and shall be deemed at all times to have been, the property of the Administration'.16

2.16 The Administrator was entitled, with the consent of the Minister, to carry on mining operations. There were also provisions relating to the Oil Advisory Committee and a Petroleum Advisory Board. Division 1 set out provisions for the issue of permits, licences and leases.17

From Independence

2.17 Upon Independence in 1975, the 1951 Ordinance was repealed by the Laws Repeal Act 1975,
and immediately adopted as an Act of the Parliament of the newly independent State by the
Constitution, with the rights and property previously vested in the 'Administration' vested in the
State, and re-enacted as an Act of the National Parliament. The new Constitution declared
customary laws to be an integral part of the law of the land.

2.18 Subsequently, the Petroleum Act 1977 (Chapter 198) was enacted (Petroleum Act). The
Petroleum Act was described as an Act to enact comprehensive legislation governing the
exploration for and production of petroleum in Papua New Guinea, and in the off-shore area and
for related purposes. Under the Petroleum Act:
(a) petroleum was the property of the State, Islubject to this Act ... all petroleum and helium at
or below the surface of the land is and shall be deemed at all times to have been, the
property of the State'le
(b) there was a Petroleum Advisory Board consisting of a person appointed as Director by the
Minister and not more than four members appointed by the Minister's
(c) the issue of licences, prospecting licence and pipeline licences was provided for
(d) the rights of landowners or occupiers to continue to use and occupy the land generally was
protected2° and the payment of compensation to the landowners or the deprivation of the
use and enjoyment of the surface of the land or any part of it, or damage21
(e) the payment of a royalty to the State at a rate of AUD 1.25 of the well-head value of all
petroleum produced from the licence area was payable to the State

2.19 The Petroleum Act was amended in 1987.22
Mining Act 1977

2.20 The Mining Act 1977 (Chapter 195) (Mining Act 1977) was revised in 1980. The Mining Act 1977
provided that 'all gold and minerals in or on any land in the country are the property of the State',
provided for the establishment of a Mining Advisory Board and stated the power of the Minister to

grant gold mining leases and mineral leases.23

2.21 Both the Petroleum Act and the Mining Act 1977 set out elaborate schemes governing the acquisition of rights concerning the relevant resources by grant from the State including miners' rights, prospecting authorities and mining leases and regulating the exercise of such right.24

2.22 The current position in the legislation is that minerals in Papua New Guinea are the property of the State. Therefore, a permit, licence or lease granting rights to explore Papua New Guinea's natural resources is dependent on State approval.

2.23 Section 5(1) of the Mining Act 1992 provides that Tail! minerals existing on, in or below the surface of any land in Papua New Guinea, including any minerals contained in any water lying on any land in Papua New Guinea, are the property of the State'.25

2.24 Section 6 of the Mining Act 1992 provides that Islubject to this Act, all land in the State, including all water lying over that land, is available for exploration and mining and the grant of tenements over it '.26

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What does it mean that the State owns all the minerals and petroleum resources?

2.25 Prior to the enactment of the Mining Act 1992 and the Oil and Gas Act 1998, Illandowners were not directly involved in negotiations concerning major resource development; they were merely consulted and then their interests were presented in the negotiation process.'27 However, both the Acts ensured that the views of persons affected by project proposals are considered and thus help minimise disputes in relation to [mining or petroleum] projects'.28

2.26 It has been observed that:

> 'Landowners now negotiate how benefits from major projects will be distributed during a development forum process and the agreements reached lead to the state and landowners to the signing of specific agreements (Memorandum of Agreement (MOA)) confirming the terms of their benefit sharing arrangements and obligations to ensure delivery and continuation of the security of the project'.29

2.27 In 2016, the State sealed its claim to exclusive ownership of hydrocarbons and minerals in their natural state by enacting Constitutional Amendment No. 44 of 2016 and an Organic Law, both titled Papua New Guinea's Ownership of Hydrocarbons and Minerals and the Consolidation and Commercialisation of Papua New Guinea's Business 2014.

2.28 in the second reading debate of the laws which became the Constitution Amendment No. 44 of 2016, Mr O'Neill referred to the 'bad reputation of poor management and huge inefficiencies' of various State-owned entities that also hold shares in 'all manners of businesses' and the losses incurred by the State as a result.30 The purpose of the Constitution Amendment No. 44 was to:

(a) consolidate the State's business interests into a 'more organised and simpler regime' by ensuring that the right to hold the shares on behalf of the State is afforded to one company for mining developments and another company for petroleum developments31

(b) increase transparency by requiring companies to table an annual report to Parliament32

(c) strengthen and remove doubt about the State's ownership of resources previously 'based on mere legislation'33

(d) maximise the value of the State's investments34

2.29 The purpose of the related Organic Law was to 'provide further provisions about these decisions and interests' in resource industries, and further commercialise the State's interest in the hydrocarbon and minerals industry.35

3. Oil and Gas Act 1998

Overview

3.1 The Petroleum Act 1977 was repealed by the Oil and Gas Act 1998. The Oil and Gas Act 1998 is intended to be:15

> ... comprehensive legislation governing the exploration

for and production of petroleum
(including oil and gas) in Papua New Guinea, including the offshore area, and the grant to
traditional landowners and Provincial Governments and Local-level Governments of
benefits arising from projects for the production of petroleum (including oil and gas), and
the processing and transportation in Papua New Guinea of petroleum and petroleum
products.

3.2 The Oil and Gas Act 1998 provides for:
(a) State ownership and rights – The State owns all petroleum in the State and it may grant
licences allowing others to locate, explore and develop areas containing petroleum
(b) Licence types – The different licence types, which dictate the rights and obligations
between the State and licence holder
(c) Petroleum projects and State participation – Petroleum projects can be established and the
State has a right, upon payment, to participate in those projects (the State's 'back-in' rights)
(d) benefits arising from petroleum development to be granted to the landowners

Amendments

3.3 In 2020, the Honourable Kerenga Kua MP, the Minister for Petroleum, introduced proposed
amendments to the Oil and Gas Act 1998 to Parliament. Mr Kua stated the purpose of the
amendments was to alter key outdated sections of the Oil and Gas Act 1998' ... that inhibit or
frustrate the State's ability to secure the best deal possible from Papua New Guinea's
participation in Oil and Gas Projects'37. The Honourable James Marape MP, Prime Minister,
stated that the amendments ' ... will undo historical legacies which have made our country
become a very generous profit centre for those who have been doing business in our oil and gas
trade.'38

3.4 The Mining Amendment Bill 2020 and the Oil and Gas Amendment Bill 2020 were passed by
Parliament on 10 June 2020. The Bills amended the Mining Act 1992 and the Oil and Gas Act
1998 respectively.

4. State ownership and administration

4.1 Section 6 of the Oil and Gas Act 1998 provides that:
> Subject to this Act, but notwithstanding anything contained in any other law or in any
> grant, instrument of title or other document, all petroleum and helium at or below the
> surface of any land is, and shall be deemed at all times to have been, the property of the
> State.

4.2 The Oil and Gas Act 1998 is administered by the Minister for Petroleum and Energy and a
Director appointed by the Minister.39 The Minister may seek advice on matters relating to the
administration of the Oil and Gas Act from the Petroleum Advisory Board established under the
Oil and Gas Act. The Petroleum Advisory Board includes the Director and the secretaries of
departments responsible for national planning, treasury, and provincial and local government.40

4.3 For the purposes of delineating the boundaries of a licence, the earth's surface is taken to be
divided into blocks according to latitude and longitude.41 Generally, a person (individual or
corporate) may apply to the Director for a licence under the Oil and Gas Act which covers
block(s). The Minister may then grant a licence in relation to blocks of land so long as the
requirements of the Oil and Gas Act are satisfied.

5. Licence types

5.1 There are 5 types of licence which may granted under the Oil and Gas Act:
(a) petroleum prospecting licence (PPL)
(b) petroleum development licence (PDL)

(c) petroleum retention licence (PRL)
(d) pipeline licence (PL)
(e) petroleum processing facility licence (PPFL)

Petroleum prospecting licence

5.2 A person may make an application to the Director for the grant of a PPL in respect of any block or blocks.42 An application shall be accompanied by particulars of a proposal of work, expenditure, and the technical qualifications and financial resources available to the applicant.43

5.3 A PPL is usually only granted for a maximum of 60 blocks, but may be approved for up to 200 blocks in special circumstances." Once granted, the PPL holder has the exclusive right in the licence area to:45

(a) explore for petroleum
(b) carry out appraisal of a petroleum discovery
(c) carry on such operations and execute such works as are necessary for those purposes

5.4 If a PPL holder discovers petroleum in the licence area, the holder must notify the Director and give the Minister written particulars of the discovery.46 A block within a PPL that contains petroleum can be declared as 'a location' for the purposes of the Oil and Gas Act.47

Petroleum retention licence

5.5 A PPL holder who has 'a location' within their licence area may apply to the Director for the grant of a PRL for blocks that contain a gas field (or part thereof).48 An application shall be accompanied by particulars of a proposal of work, expenditure and the current and potential future commercial viability of the recovery of petroleum from the PRL area. 49

5.6 The Minister must consider a report from the Petroleum Advisory Board when deciding whether to grant a PRL. The Minister shall grant a PRL application if the Minister considers the recovery of petroleum from the proposed PRL area will be economically developed in a timely fashion.5°

5.7 Once a PRL is granted, the PRL holder has the right to:

(a) explore for petroleum in the petroleum retention licence area
(b) carry on field studies to obtain information to ensure timely economic development of the gas field in the petroleum retention licence area

(c) carry on such operations and execute such works in the petroleum retention licence area
as are necessary for or in connection with those purposes, including the construction and
operation of water lines
(d) if authorised by the Director, to complete wells, carry out drill stem tests or extended
production tests for appraisal of a petroleum pool (including the construction and the
operation of pipes and facilities to gather and transport petroleum to a point of testing or
treatment or disposal), and to recover and sell or otherwise dispose of all petroleum so
produced
Petroleum development licence

5.8 A PPL or PRL holder who has 'a location' within their licence area may apply to the Director for
the grant of a PDL for blocks that contain a petroleum poo1.51 An application shall be
accompanied by 'detailed proposals by the applicant for the construction, establishment and

operation of all facilities and services for and incidental to the recovery, processing, storage and
transportation of petroleum from the licence.'52 By amendments made by the Oil and Gas
(Amendment) Act 2020 (2020 Amendment Act), the Minister, in addition to the Director, may now
require the applicant to provide further information or proposals relating to s. 35(2). The
application under s. 53 can lapse if the information is not provided.53

5.9 The Minister must have considered the applicant's proposal, further submissions and information,
a report from the Petroleum Advisory Board (if any and), (if available) and a cost-benefit analysis
carried out and made available to the NEC by the National Economic and Fiscal Commission
under s. 117(8)(a)(v) of the Organic Law on Provincial Governments and Local-Level
Governments 1998. By the amendments made by the 2020 Amendment

Act, s. 57(2)(d)(v) the Minister must also consider additional matters including, whether the proposals for development will achieve maximum efficient recovery and prevention of resource waste by applying good oilfield practice and being otherwise in the best interests of the State.54 The Minister may refuse the application if not satisfied in respect of any of the matters in s. 57(2)(d)(v).

5.10 The 2020 Amendment also added a provision requiring the Minister to take a view as to whether the grant of any application would likely to be of national significance.55 If the Minister is of the view that the grant of an application would likely be of national significance, the Minister must seek the advice of the Board on whether the applicant's proposals should reflect a minimum expected return to the State, and if so, the amount of the return, the appropriate methodology for its assessment or calculation, and the appropriate milestones for its achievement. The Minister is not bound by the advice of the Board, but must form his or her own view, and then serve an instrument on the applicant setting out the Minister's decision regarding any conditions to be imposed.56

5.11 The Minister also has the discretion to refuse the grant of an application. If they are intending to do so, they must provide reasons to the applicant who can then provide responses to the reasons. Within a reasonable time, the Minister may either grant or refuse the application.57 The power relating to PDL decisions may only be exercised by the Minister personally.58

5.12 The 2020 Amendment Act repealed provisions in the Oil and Gas Act allowing an applicant to refer the matter to arbitration should the Minister refuse to grant a PDL.59 An applicant has judicial review rights in the National Court: Order 16 of the National Court Rules.

5.13 Once granted. the PDL holder has the exclusive rights to:

(a) explore for petroleum in the licence area

(b) carry on operations for the recovery of petroleum in the licence area

(c) sell or otherwise dispose of the petroleum so recovered

(d) carry on such operations and execute such works in the licence area as are necessary for or in connection with the purposes specified above, including the construction and operation of flow lines or gathering lines and water lines

Pipeline licence

5.14 No person can construct or operate a pipeline, except under and in accordance with a pipeline licence.60 A person may apply to the Minister for the grant of a pipeline licence. The Minister is required to cause a notice of an application to be published in the National Gazette.61 An application shall be accompanied by a plan showing the pipeline route and pumping, tank and valve stations in connection with the pipeline.62 An application must also be accompanied by particulars of:63

(a) the proposed design and construction of the pipeline
(b) the proposed size and capacity of the pipeline
(c) the proposals of the applicant for work and expenditure in respect of the construction of the pipeline
(d) the technical qualifications of the applicant and his employees
(e) the technical advice available to the applicant
(f) the financial resources available to the applicant
(g) any agreement entered into, or proposed to be entered into, by the applicant for or in relation to the supply or conveyance of petroleum by means of the pipeline

5.15 Once granted, a PL holder is authorised to:64
(a) construct and operate a pipeline (including the pumping stations, tank stations and valve stations specified in the licence) of the design, construction, size and capacity specified in the licence, along the route specified in the licence
(b) carry on all operations, to execute all works and to do all other things that are necessary for or incidental to, the construction and operation of the pipeline

Petroleum processing facility licence

5.16 A person may apply to the Minister for the grant of a PPFL.65 An application must be accompanied by particulars of:66
(a) the names and addresses of the persons who will

construct, operate and own the
petroleum processing facility
(b) the proposed site for the petroleum processing facility and arrangements for the legal
occupation of the site
(c) the design of the petroleum processing facility
(d) the technical qualifications of the applicant and any contractors
(e) the financial capacity of the applicant to construct and operate the petroleum processing
facility
(f) environmental monitoring systems, waste disposal procedures and the results of
environmental studies
(g) the intended date for commencement of construction and estimated dates for
commissioning and full operation
(h) the intended output of petroleum or petroleum products

5.17 Once granted, a PPFL holder has exclusive rights to:67
(a) construct the petroleum processing facility at the site for which the petroleum processing
facility licence was granted
(b) conduct operations for petroleum processing through the petroleum processing facility
(c) carry on such operations and execute such works at the site of the petroleum processing
facility, other than a major modification, as are necessary and reasonable for or in
connection with the above purposes

6. 'Back-in' rights - Petroleum projects and State participation

6.1 Section 3 of the Oil and Gas Act defines a 'petroleum project' to mean:
... a project in Papua New Guinea for the production of petroleum, and includes, if they
are part of the same project or developed in conjunction with the petroleum production
development, the construction and operation pursuant to a licence of facilities for the

recovery, processing or transportation of petroleum.

6.2 A 'gas project' is, generally, a petroleum project with the purpose of extracting natural gas.68

6.3 The Minister may, on behalf of the State, execute an agreement with licence holders defining the extent of a petroleum project or gas project, and providing for matters relating to that petroleum project or gas project.69

6.4 Section '165 of the Oil and Gas Act provides that the State has the right (but not the obligation) to pay to acquire up to 22.5% in each petroleum project (a 'back-in' right). The State may do so directly or through a nominee. The State may exercise its tack-in' right at the time of granting the licence or licences by which the petroleum project is conducted.

6.5 The price the State must pay for a share in a petroleum project is generally a percentage (equal to the percentage of the project acquired by the State) of the unrecouped sunk costs attributable to the vendor's interest in the petroleum project.76 However, the State may agree in a petroleum agreement with the vendor the amount of consideration payable by the State when exercising its `back-in' rights.

7. Traditional land ownership

7 1 It is recognised that traditional landowners have an important relationship with their land. To confer direct financial benefits on traditional landowners, it is necessary to identify those landowners. Accordingly, it is a condition of every PDL that the PDL holder:71

> ... undertake social mapping studies and landowner identification studies in accordance with this section, to the extent that such studies have not been undertaken pursuant to a petroleum prospecting licence or petroleum retention licence out of which the petroleum development licence was granted.

7.2 While the Oil and Gas Act confers on PPL, PRL and PDL holders the right to enter into and occupy land in the licence area, that right is subject to paying compensation to 'the lawful owners and rightful occupiers of. any persons interested in' land, including customary land.72 This is coupled with a right of compulsory acquisition by the State.73 The compensation paid by the State is a debt due and payable by the PPL, PRL and/or PDL holders to

the State.
Equity and Royalty benefits

7.3 Significantly, when the State exercises its tack-in' right, it grants to the 'project area landowners
and the affected Local-level Governments of a petroleum project, if any, an equity benefit in that
petroleum project.'74 This equity benefit is a 2% participating interest in the petroleum project.76
The State also grants a royalty benefit to the project area landowners, the affected local-level
Governments and the affected Provincial Governments of a petroleum project.76 The royalty
benefit is a monthly amount of money equal to the royalty payable by a licence holder in the
previous month less any withholding tax payable to the State.77 The royalty is 2% of the
well-head value of all petroleum produced from the licence area. 78

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7.4 In addition to direct financial benefits, the Oil and Gas Act provides for a 'local purchase
obligation' on licence holders.79 This obligation requires licence holders (among other things) to
use and purchase goods and services supplied, produced or manufactured in the State provided
they can be acquired for the same price and terms as elsewhere.

7.5 The 2020 Amendment Act also included:

(a) amendments to provisions allowing the Minister to execute gas and petroleum agreements
and reduce the scope of the agreements,8° the purpose of which was stated as ensuring
that any such agreements do not prevail over the Oil and Gas Act81

(b) an amendment to s. 185 so that in any written agreement with a licensee, where the State

agrees that a discretion will be exercised in a certain way or that certain rights or consents
or authorisations will be exercised in a certain way, in all cases the discretion shall be
exercised and the rights or consents or authorisations granted, will be subject to
consideration by the Minister, in priority to any other matter, having regard to the factors in
s. 57(2)(d)(v)82

(c) that the new provisions, other than ss. 54(3) and 56 as amended, do not apply to PDL's
issued before the commencement of the 2020 Amendment Act83

7.6 The 2020 Amendment Act does not apply to the Papua LNG Project:84

Hank Nelson, Black, White 8 Gold: Goldmining in Papua New Guinea 1878 – 1930 (Australian National University Press, 2016), available online
<httr.s://t.ress-files anu.edueu/downloadskressn,347033k df/book.i. df> page 25.

R. S. O'Regan, 'The Ownership of Minerals and Petroleum in Papua New Guinea: A Comment' (1992) 8 Queensland University of Technology Law
Journal 141, accessed on 14 March 2022 <https://lr.law.gutedu.au/article/download/363/352/363-1-710-1-10-20120921.pdf>, page 143.

> Mining Ordinance 1907 (Papua), s. 1.

°Mako Kuwimb, 'An examination of Papua New Guinea's petroleum law and policy' (Master of Laws (Hons) thesis, Centre for National Resources Law
and Policy, University of Wollongong, 1997), accessed on 14 March 2022 <htite://ro.uow,edtt auicui/viewcontent.cli",article=35808context=theses>
and Ely Kinkin, 'Managing the Natural Resource Sector: A case study of the liquefied natural gas (LNG) project in Papua New Guinea' (Thesis, Victona
University of Wellington, 2020), accessed on 14 March 2022
<htlt ://researcharchive.vuw ac nzixmlui/bitstrearn/handle/10063/88(37/thesis access vdPseqoence=1>.

5 R. S. O'Regan, 'The Ownership of Minerals and Petroleum in

Papua New Guinea: A Comment' (1992) 8 Queensland University of Technology Law
Journal 141, accessed on 14 March 2022 hilt. s://1r.law. :ut edu.aufarticle/download/363/352/363-1-710-1-10-20120921P,If.

6 The following acts were repealed: Mining Act 1898 (Old), Mining Ordinance 1899 (Papua), Mining Ordinance of 1907 (Papua), Gold Mining
Encouragement Ordinance 1909 (Papua), Mining Ordinance 1911 (Papua), Mining Ordinance 1924 (Papua), Mining Ordinance 1931 (Papua), Mining
(Facilities for Development) Ordinance 1934 (Papua), Mining Ordinance 1934 (Papua), Mining Ordinance 1935 (Papua) and Mining Ordinance (No. 2)
1935 (Papua).

Mineral Oil and Coal Ordinance 1923 (Papua), a 5.

Mineral Oil and Coal Ordinance 1923 (Papua), s. 33.

'Petroleum (Mining) Ordinance 1934 (Papua), Petroleum (Mining) Ordinance 1935 (Papua) and the Petroleum (Mining) Ordinance 1937 (Papua).
Petroleum (Prospecting and Mining) Ordinance 1938 - 1939 (Territory of New Guinea).

"Petroleum (Prospecting and Mining Ordinances) 1938-1939 (Papua), s. 10.

12 Petroleum (Prospecting and Mining Ordinances) 1938-1939 (Papua), ss. 12, 13.

13 Petroleum (Papua) Ordinance 1947.

Mako Kuwimb, 'An examination of Papua New Guinea's petroleum law and policy (Master of Laws (Hons) thesis, Centre for National Resources Law
and Policy, University of Wollongong, 1997), accessed on 14 March 2022 <httrs://ro uow eduau/c.11/viewcontent.cui?article=35808context=theses>.

'5 The Petroleum (New Guinea) Ordinance 1947 amended the Petroleum (Prospecting and Mining) Ordinance 1938-1939, the amended act being the
Petroleum (Prospecting and Mining) Ordinance 1938-1947.

"Petroleum (Prospecting and Mining) Crdinance 1951, s. 7.

Petroleum (Prospecting and Mining) Ordinance 1951, s. 47

"Petroleum Act 1977, s. 5.

n" Petroleum Act 1977, s. 12.

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28 Petroleum Act 1977,s. 76
21 R. S. O'Regan, 'The Ownership of Minerals and Petroleum in Papua New Guinea: A Comment (1992) 8 Queensland University of Technology Law
Journal 141, accessed on 14 March 2022 <https-J/ Ir.law.qutedu.aufarticle/download/363/352J363-1-710-1-10-20120921. {x1f>.
22 Petroleum (Amendment) Act 1987 and Petroleum (Amendment No. 2) Act 1987.
23 Mining Act 1977 (Chapter 195) , s. 7.
24 R. S. O'Regan, 'The Ownership of Minerals and Petroleum in Papua New Guinea: A Comment' (1992) 8 Queensland University of Technology Lew
Journal 141, accessed on 14 March 2022: httos:/l1r.law.out edu.aularticle/download/363/352/363 1 710 1 10 20120921,adt
25 Mining Act 1992, s. 5(1).
26 Mining Act 1992, s. 6.
27 Hitelai Polume-Kiete, 'The Governance of Natural Resources: Issues Affecting Better Management of Revenues and Distribution of Benefits within
Papua New Guinea' (2014) International Journal of Rural Law and Policy.
26 Hitelai Polume-Kiele, 'The Governance of Natural Resources: Issues Affecting Better Management of Revenues and Distribution of Benefits within
Papua New Guinea' (2014) International Journal of Rural Law and Policy.
29 Ibid. As mentioned in the article, Ms Polume-Kiele says governance initiatives are required to ensure that there is equitable distribution of benefits
and to ensure that all citizens are empowered to participate in social and economic development, as enshrined in the Constitution various factors, for
example, lack of service delivery due to weak public capacity to implement expenditure plans, Including on key essential social services, such as
health, education and infrastructure, and transparency and accountability in the management and distribution of benefits are

being highlighted as
reasons for the short-fall in meeting landholders' expectations
39 Hansard, 4 June 2015 at pp. 17.
31 Hansard, 4 June 2015 at pp. 17, 18.
-1
32 Hansard, 4 June 2015 at pp 21.

33 Hansard, 4 June 2015 at pp. 22.
34 Hansard, 4 June 2015 at pp. 21.
35 Hansard, 4 June 2015 at pp. 18, 19.
36 Preamble to the Oil and Gas Act 1998
37 Hansard. 10 June 2020 at [16).
39 Hansard, 10 June 2020 at (18).
39 Oil and Gas Act 1998, s. 11.

40 Oil and Gas Act 1998, s. 13.
41 Oil and Gas Act 1998, s. 17.
42 Oil and Gas Act 1998, s. 21(1).
43 Oil and Gas Act 1998, s. 22(1)(d)

44 Oil and Gas Act 1998, s. 22(1)(d)
45 Oil and Gas Act 1998, s. 25.
44 Oil and Gas Act 1998, s. 32(1).
'7 Oil and Gas Act 1998, s. 34.
48 Oil and Gas Act 1998, s. 37.
011 and Gas Act 1998. s. 38.
"Oil and Gas Act 1998, ss. 39 and 40(2).
" Oil and Gas Act 1998, S. 53.
52 Oil and Gas Act 1998, s. 54(c).
53 Oil and Gas Act 1998, s. 54 as amended.
54 Oil and Gas Act 1998, s. 57(2) as amended.

" Oil and Gas Act 1998, s. 56(1) as amended.
56 Oil and Gas Act 1998, s. 56A, as inserted by the Oil and Gas (Amendment) Act 2020.

57 Oil and Gas Act 1998, s. 5613, as inserted by the Oil and Gas (Amendment) Act 2020.
f's Oil and Gas Act 1998, s. 56C, as Inserted by the Oil and Gas (Amendment) Act 2020.
's) Oil and Gas (Amendment) Act 2020, s. 4(b).
60 Oil and Gas Act 1998, s 70(1).

61 Oil and Gas Act 1998, s. 73(1).
62 Oil and Gas Act 1998, s 73(2)(d).
63 Oil and Gas Act 1998, s 73(2)(c).
" Oil and Gas Act 1998, s. 76.
66 Oil and Gas Act 1998, s 86.
66 Oil and Gas Act 1998, s. 87.
67 Oil and Gas Act 1998, s 90.
66 Oil and Gas Act 1998, s. 3 (definition of 'gas project).
Oil and Gas Act 1998, ss. 183 and 184.
10 0i/ and Gas Act 1998. s 165(3).
71 Oil and Gas Act 1998, s 47(3).
72 Of' and Gas Act 1998, s. 118
73 Oil and Gas Act 1998, s 120.
14 Oil and Gas Act 1998, s 167.
75 Oil and Gas Act 1998, s. 3 (definition of 'equity benefit).
78 Oil and Gas Act 1998, s 168.
n Oil and Gas Act 1998, s 3 (definition of 'royalty benefit).
78 Oil and Gas Act 1998, s 159.
7° Oil and Gas Act 1998, s. 129.
8° 0i/ and Gas Act 1998, s. 183, as amended.
81 Hansard, 10 June 2020 at [17).
82 Oil and Gas Act 1998, s. 185, as amended.
Oil and Gas Act 1998, s. 191, as amended.
84 Oil and Gas Act 1998, s. 195, as inserted by the Oil and Gas (Papua LNG Project) (Arne^dment) Act 2021.

CHAPTER 5

Constitutional and legislative safeguards

1. Relevance of this chapter to the Terms of Reference

1.1 This chapter outlines some details of the applicable constitutional and legislative safeguards in the State during the period of the Exchangeable Bond Transaction and UBS Loan.

1.2 These processes are designed to give the people of Papua New Guinea confidence that they are being governed in a proper and effective way, and with integrity. They also reassure domestic and foreign investors and financial institutions that sovereign risk in Papua New Guinea is at an acceptable level.

1.3 The chapter is intended as background to matters raised throughout the Report, particularly in relation to Terms of Reference 1(m) and (q).

2. Constitutional Safeguards

2.1 As noted in detail elsewhere in this Report, the expenditure of money of or under the control of the National Government for public expenditure is only permitted to the extent outlined in the Constitution or by cr under an Act of Parliament.1

2.2 The Constitution provides that the raising and expenditure of finance by the Government, including the imposition of taxation and the raising of loans, is subject to authorisation and control by the Parliament and shall be regulated by an Act of Parliament.2

2.3 An important element of the constitutionally enshrined role of Parliament in restraining the Executive is provided for in s. 209(3) of the Constitution, which provides:

> Before any Budget or appropriation is prepared for submissions to the Parliament, the National Executive Council shall consult with any appropriate Parliamentary Committee, but this subsection does not confer any right or impose any duty of consultation after the initial stages of the preparation of the Budget or appropriation

2.4 It also provides that each fiscal year, there must be a National Budget comprising of various elements including, amongst other things, estimates of finance to be raised and expenditures to be made.°

2.5 These matters are considered in detail later in the Report.

Parliamentary Committee System

2.6 'The Committees of the Papua New Guinea Parliament are established by the Constitution, by the Standing Orders of Parliament, or by legislation. '4

2.7 The Constitutional Planning Committee (CPC) recommended constitutional recognition of six permanent parliamentary committees,5 to be known as the:

(a) First Parliamentary Committee: responsible for constitutional matters, foreign relations, trade and investment, defence, police, public employment and the Ombudsman Commissions

(b) Second Parliamentary Committee: responsible for finance, industry and natural resources'

(C) Third Parliamentary Committee: responsible for social welfare (including health and education) and justices

(d) Public Accounts Committee: report to Parliament on the administration of Government funds9

(e) General Parliamentary Committee: responsible for drawing up

allocation of
responsibilities for subject areas to other Committees, resolve disputes, and review
allocation of responsibility for subject areas between committees and make
recommendations for changes to Parliament10
(f) Private Business Committee: responsible for the consideration of Private Business in
accordance with Parliamentary Standing Orders

2.8 The CPC also provided for such further Permanent Parliamentary Committees as may be
provided by law or the Parliamentary Standing Orders.11

2.9 The primary purposes of the CPC in recommending the establishment of these committees were:
(a) scrutiny of government activities
(b) scrutiny of new legislation
(c) maintenance of Parliamentary integrity
(d) to ensure accountability for public expenditure
(e) to inquire into matters on behalf of the Parliament as a whole12

2.10 The recommendation by the CPC was not fully adopted. Rather the Constitution provides for
Permanent Parliamentary Committees (PPC) (one being a Public Accounts Committee) and
allows for the establishment of others.13

2.11 There are currently eight Permanent Parliamentary Committees'
(a) Public Works
(b) Plans & Estimates
(c) Pensions & Retirement Benefits
(d) Foreign Affairs & Defence
(e) Emergency
Citizenship Matters
(g) Broadcasting of Parliamentary Proceedings
(h) Appointments

2.12 'The terms of the establishment, membership, jurisdiction, functions, powers and procedures of
the Permanent Parliamentary Committees are found in Organic Laws, Acts of the Parliament, and
Standing Orders.'15 Ministers are prohibited from being a member of the PPC. however the
Constitution is otherwise silent on how members are appointed to a PPC.

Powers of Permanent Parliamentary Committees

2.13 A PPC can sit at any time when Parliament is sitting 16 or such other time as it deems appropriate17 and may make deliberations in public unless the Committee otherwise determines.18

2.14 Matters can be referred to PPC's in three ways:
(a) by Parliament, either by motion or as provided for under the Standing Orders19
(b) by a Minister at any time29
(c) by the Committee, on its own initiative, within its jurisdiction and functions21

2.15 Upon receipt of a referral, a PPC must inquire into the subject matter of the referral and report the result of its inquiries to the Parliament:
(a) within seven sitting days in the case of a referral by Parliament under the Standing Orders
(b) as soon as practicable in the case of any other referral

2.16 A PPC may summons witnesses to require their attendance before it.23 It can also, by notice in writing, require the production of any book, paper or document relevant to a matter before it.24
PPCs also have the power to inspect any documents produced to it.25

2.17 A person is guilty of an offence that attracts a penalty of PGK 1000 or a term of imprisonment not exceeding one year26 if they:
(a) refuse or fail, without reasonable excuse, to appear or to continue in attendance in obedience to the summons27
(b) refuse to be sworn or make an affirmation28
(c) refuse to answer any relevant questions29
(d) refuse without lawful excuse to produce any book, paper or document39

Public Accounts Committee

2.18 The CPC described the objective of the then prospective Public Accounts Committee (PAC) being to ensure '... the executive is accountable in detail to the legislature for its administration of government funds',31 and stated the PAC should not be

'open to domination by members of the
National Executive Councif .32

2.19 The Constitution provides for the establishment of the PAC.33 The functions of the PAC are found
in the Constitution and the Public Finances (Management) Act 1995 (PFMA).34

2.20 The PAC has jurisdiction to perform certain functions;35 its primary function being to examine and
report to the Parliament on the 'public accounts' of Papua New Guinea and on the control of and
on transactions with or concerning the 'public moneys' and property of Papua New Guinea.36

2.21 For the purposes of the Constitution:
(a) 'public accounts of Papua New Guinea' include all accounts, books and records of, or in
the custody, possession or control of, the National Executive or of a public officer, relating
to public property or public moneys of Papua New Guinea
(b) 'public moneys of Papua New Guinea' includes moneys held in trust by the National
Executive or a public officer in his capacity as such, whether or not they are so held for
particular persons37

2,22 This function also extends to any accounts, finances and property that are subject to inspection
and audit by the Auditor-Generaf .38 The Auditor-General has the power to inspect and audit the
'accounts, finances and property of all arms, departments, agencies and instrumentalities of the
National Government; and all bodies set up by an Act of the Parliament, or by executive or
administrative act of the National executive, for government. '39

2.23 The PAC's functions are expanded by the PFMA. Section 86(1) states that the PAC's functions
are, among others:4°
(a) to examine the accounts of the receipts and expenditure of

the Public Account and each
statement and report of the Auditor-General
(b) in accordance with the PFMA examine and report on the accounts of a public body
(c) report to the Parliament on such issues contained in those accounts or reports the PAC
deems relevant
(d) report to the Parliament any suggested alterations
(e) inquire into any question in connection with the public accounts that is referred to it by the
Parliament, and to report to the Parliament on that question

2.24 Section 86(2) of the PFMA states that a 'member of the Parliament may move for the reference to
the Committee of any question in connection with the public accounts, for report to the
Parliament'!"

2.25 In 1995, the role of the PAC was expanded to include approving the estimated expenditure of the
Auditor-General.42

2.26 The Permanent Parliamentary Committees Act 1994 stipulates that the PAC may, on its own
initiative, commence an inquiry into matters of National importance within its jurisdiction and
functions' and subsequently report to the Parliament.43
Plans & Estimates Committee

2.27 The Plans & Estimates Committee (PEC), was established by Resolution of Parliament in 1979.
The PEC was established to consult the NEC on budgets and appropriations as required under
s. 209(3).

2.28 The Parliamentary Manual of Practice and Procedure sets out the role of the PEC in the context
of the National Budget:
The delivery of the Budget is one of the most important events in the parliamentary
calendar. It is delivered at 3.00pm in early November in the form of a speech to the
Appropriation Bill. Its progress through the Parliament varies from the practice for other
bills. For instance, its second reading immediately follows introduction and the first
reading. The bill itself is not referred to a sector committee. The 'Estimates', which are
the detailed plans contained in the Budget, are referred to the Plans and Estimates
Committee ... 44

2.29 Evidence provided to the Commission referred to the extent to

which the Constitutional
requirements in relation to the UBS Loan were complied with. This evidence includes:
(a) a reference to a potential refinancing of the IPIC Exchangeable Bonds being made in the
2014 National Budget Books45

(b) inclusion of interest payments that the State was required to pay under the UBS Loan
prior to 31 December 2014 in the 18 November 2014 Supplementary Budget46

2.30 No documentary evidence has been produced indicating compliance with s. 209(3).

2.31 The PEC receives a briefing from the Departments of Treasury and National Planning prior to the
delivery of the National Budget. This briefing allows the Committee Chairman to make a
statement to Parliament as a procedural requirement following the Opposition's Budget Reply
Speech. This briefing, and scrutiny does not extend to consideration of supplementary budgets,
appropriations or Government loans.

2.32 The PEC was unable to produce documents relating to any briefings by the NEC in relation to the
IPIC Exchangeable Bonds or UBS Loan as it was not consulted in relation to same.

Leadership Code

Why have a Leadership Code?

2.33 During the decade preceding the State's independence the topic of corruption of public officials
and how to appropriately deal with this problem became increasingly prominent in both developed
and developing countries:42 The CPC in proposing a code of conduct for the State's leaders noted
that a number of new Commonwealth countries had also recently implemented similar measures
In particular, the CPC drew attention to the following:

(a) in 1967, Tanzania introduced a leadership code
(b) in 1973, Jamaica passed a law conceming the conduct of Members of Parliament
(c) in 1974, Zambia introduced a leadership code48

2.34 Indeed prior to Independence, the State had introduced its own range of measures to regulate the conduct of certain leaders, for example the Parliamentary Integrity Ordinance. However, the CPC felt that these provisions should be given a wider application.

2.35 The CPC believed that the success of a nation 'depends ultimately on its people and their leaders. No amount of careful planning in governmental institutions or scientific disciplines will achieve liberation and fulfilment of the citizens of our country unless the leaders – those who hold official positions of power, authority or influence – have bold vision, work hard and are resolutely dedicated to the service of their people.'49 The leader's responsibility was first and foremost to the people they represent and that must override any self-interest.50 The CPC viewed this responsibility as becoming more significant the higher the office held.51 Breaches of this responsibility were also considered to be one of the more significant threats to the effective implementation of the National Goals and Directive Principles.52

2.36 The CPC recommended the implementation of a Leadership Code. This was regarded as pivotal to ensuring quality leadership and enabling representative democracy.

> We believe most strongly that the effectiveness of many of our proposals depends heavily on the acceptance of the Leadership Code which we propose. The Code is among our most fundamental recommendations and as such it should be entrenched in the Constitution.53

What is the Leadership Code?

2.37 The Leadership Code is a legally binding code of conduct for persons holding public office in the State, which they are expected to know and comply with. It derives its authority from

Constitutional laws as it is provided for both under the Constitution and the Organic Law on the
Duties and Responsibilities of Leadership (OLDRL).

2.38 The Constitution provides that the Leadership Code applies to:
(a) the Prime Minister, the Deputy Prime Minister and the other Ministers

(b) the Leader and Deputy Leader of the Opposition
(c) all other members of the Parliament
(d) members of Provincial Assemblies and Local-level Governments
(e) all constitutional office-holders within the meaning of Section 221 (definitions)
(f) all heads of Departments of the National Public Service
(g) all heads of or members of the boards or other controlling bodies of statutory authorities
(h) the Commissioner of Police
the Commander of the Defence Force
(i) all ambassadors and other senior diplomatic and consular officials prescribed by an
Organic Law or an Act of the Parliament
(k) the public trustee
(I) the personal staff of the Governor-General, the Ministers and the Leader and Deputy
Leader of the Opposition

(m) executive officers of registered political parties;
(n) persons holding such public offices as are declared under Subsection (3) to be offices in
relation to which the relevant Division applies54

2.39 Where a person was covered by the operation of the Code but has left any such position it seems
they cannot be the subject of published findings but they may be investigated and provisional
findings prepared and held in abeyance pending their holding such a position in future.

2.40 The Commission later recommends that the position be put beyond doubt.

2.41 Where there is a doubt as to whether a person is subject to the Leadership Code, the
Ombudsman Commission is empowered to make a final determination.55

2.42 The Constitution sets out the General Duties and

Responsibilities of Leaders which are supplemented by Specific Duties and Responsibilities contained in the OLDRL. Those general duties require leaders to:

(a) not place themselves in a position where they could have a conflict of interests or might be compromised when discharging official duties56

(b) not demean their office or position5/

(c) not allow their integrity to be called into question58

(d) not endanger or diminish respect for and confidence in the integrity of government in Papua New Guinea59

(e) not use their office for personal gain or enter into a transaction or activity that might cause the public to doubt they are carrying out their duties as leader6°

(f) ensure, within their lawful power, that their spouse, children and any other person for whom he is responsible do not conduct themselves in a way that might be expected to rise to doubt in the public mind as to their complying with their duties61

2.43 Some of the relevant OLDRL duties and responsibilities include:

(a) a requirement to submit Annual Statements to the Ombudsman Commission detailing particulars of spouses, children, incomes, assets, liabilities, bank accounts, business connections/positions, business transactions and gifts62

(b) a prohibition on directly or indirectly obtaining any benefit in relation to or in the course of public duties63

(c) a prohibition on Government Ministers, their spouse or children holding a directorship in any company or foreign enterprise,64 unless as a nominee of the State65

(d) a prohibition on holding shares or investments in a company where this could cause a conflict of interest66

(e) a prohibition on paid employment unless otherwise approved by the Ombudsman Commission67

(f) a prohibition on asking for, receiving or obtaining any property, benefit or favour for themselves or another individual66

(g) a prohibition on divulging or otherwise using confidential information for their own benefit or the benefit of an associate69

2.44 A person who fails to comply with the OLDRL duties and responsibilities is guilty of misconduct in office. The penalties for misconduct in public office include a fine of PGK 1,000, suspension without pay from office, issue of a reprimand, or a reduction in salary.7° A recommendation of dismissal from public office can also be made. Where a person is dismissed from office they will no longer be eligible for election to public office, for appointment as Head of State, or for appointment to provincial legislature and executive!'

Ombudsman Commission

2.45 The Ombudsman Commission of Papua New Guinea (Ombudsman Commission) is an independent Constitutional institution established under s. 217 of the Constitution.

2.46 The Ombudsman Commission is comprised of the Chief Ombudsman and twc Ombudsman,72 who are appointed for a term of six years in the case of a citizen73 and three years in the case of a non-citizen.74 The members of the Ombudsman Commission are appointed by the Governor General on the advice of an independent committee comprising the:

(a) Prime Minister
(b) Leader of the Opposition
(c) Chief Justice
(d) Chairman of the Public Services Commission
(e) Chairman of Parliamentary Committee on Appointment75

2.47 In the performance of its functions the Ombudsman Commission is not subject to the direction or control by any person or authority:78 Importantly, the proceedings of the Ombudsman Commission are also not reviewable, in any way, except by the Supreme or National Court on the ground that it has exceeded its jurisdiction.77

2.48 The Ombudsman Commission was established:
(a) to ensure that all governmental bodies are responsive to the needs and aspirations of the People
(b) to help in the improvement of the work of governmental bodies and the elimination of unfairness and discrimination by them
(c) to help in the elimination of unfair or otherwise defective legislation and practices affecting or administered by governmental bodies
(d) to supervise the enforcement of the leadership code78

2.49 The primary functions of the Ombudsman Commission are to investigate complaints about the administrative actions of governmental bodies, agencies and employees, administer the Leadership Code and investigate discriminatory practices under the Discriminatory Practices Act. 79

2.50 Any person may make a complaint to the Ombudsman Commission concerning the alleged or suspected misconduct in office of a person to whom the OLDRL applies.8°

2.51 The Ombudsman Commission must investigate, or cause to be investigated, any complaint received by it unless, it determines not to because:8'
(a) the complaint is trivial, frivolous, vexatious or not made in good faith
(b) it is not within the jurisdiction of the Commission
(c) the complainant has available to him another remedy or channel of complaint that he could reasonably be expected to use
(d) the complainant has not a sufficient interest in the subject of the complaint
(e) the complaint has been too long delayed to justify an investigation
(f) it has before it other matters more worthy of its attention
(g) its resources are insufficient for adequate investigation

2.52 Investigations by the Ombudsman Commission are conducted in private,82 with the Ombudsman

Commission able to receive evidence from anyone it considers can assist in its inquiries.83

2.53 The Ombudsman Commission may summon any person who is able to give any information in relation to any matter being investigated to attend the Ombudsman Commission at a time and place specified in that summons.84 Any witness appearing before the Ombudsman Commission has the same privileges and is subject to the same penalties as a witness appearing before the National Court.85

2.54 A person is guilty of an offence that attracts a penalty of PGK 500 or a term of imprisonment not exceeding three months if they

(a) refuse or fail, without reasonable excuse, to appear or to continue in attendance in obedience to the summons86
(b) refuse to be sworn or make an affirmation87
(c) wilfully insult a member of the Ombudsman Commission or interrupt proceedings88
(d) refuse without lawful excuse to produce any book, paper or document89

Leadership Tribunal

2.55 The Leadership Tribunal makes up part of the National Court registry.

2.56 The composition of a Leadership Tribunal differs based on the subject of investigation. The OLDRL provides set tribunal composition for certain situations where the Chief Justice,86 a Judge or Law Officer,91 or the Prime Minister92 are investigated. In any other case the Leadership Tribunal shall consist of:
(a) a Judge (Chairman)
(b) two senior magistrates appointed by the Chief Justice93

2.57 Where the Ombudsman Commission investigates breach of the Leadership Code and is satisfied that a person is guilty of misconduct in office it is required to refer the matter together with a statement of reasons to the Public Prosecutor.84

2.58 If the Public Prosecutor is satisfied that the matter should be proceeded with, a referral will be made to the Leadership Tribunal.°

2.59 Should the Public Prosecutor not elect to proceed, the Ombudsman Commission can refer the matter directly to the Leadership Tribunal.96

2.60 The Leadership Tribunal is then required to make due inquiry into the matter, without regard to legal formalities or rules of evidence, and may inform itself in such manner it thinks appropriate, subject to compliance with natural justice principles.97

2.61 Where the Leadership Tribunal finds that a person is guilty of misconduct in office it can recommend to the appropriate authority that:
(a) the individual be dismissed from office or position
(b) as permitted by s. 28(1A) of the Constitution some other penalty provided for by an Act of the Parliament88

2,62 The Leadership Tribunal is required to publicly announce its decision and send a copy to the Speaker for presentation to the Parliament.99

2.63 Again, because a person who did hold such a position could hold it again, and because of the importance of both specific deterrence against future wrongdoing by the individual and general deterrence against anyone else tempted to so transgress. the Commission recommends that the law be amended to permit continued investigation and sanction against any living person who is or was amenable to this jurisdiction.

Independent Commission Against Corruption

2.64 On 12 November 2020, the Parliament unanimously passed the Organic Law on the Independent Commission Against Corruption Law 2020. This was certified on 14 January 2021.'=(' The interim

Chairman of the Independent Commission Against Corruption (ICAC) has stated publicly that the
ICAC will not be in full operation until 2023.101

2.65 The ICAC will consist of a Commissioner and two Deputy Commissioners to be appointed by the
Head of State, acting with, and in accordance with, the advice of the Appointments Committee.1°2
To be considered for appointment as an ICAC commissioner a person must be of high integrity,
independent of mind and good reputation,103 and:
(a) in the case of the Commissioner be qualified for appointment as a Judge of the National
Court104
(b) in the case of the Deputy Commissioner hold qualifications and demonstrated experience
of at least seven years in fields relevant to the functions of the ICAC1°5

2.66 The ICACL also expressly prohibits certain categories of persons from appointment as an ICAC
commissioner, for example members of or candidates for election as Parliament.''==

2.67 In pursuing its overall goal of preventing and reducing corrupt conduct, the ICAC may perform any
of the following functions:
(a) undertake or commission research
(b) review and make recommendations regarding the systems, strategies, policies, practices
and procedures of any public body or public official
(c) undertake or commission education, training or awareness, to the public generally or to a
particular section of the public or private sector, including education institutions
(d) enlist and foster public support for preventing and reducing corrupt conduct
(e) analyse information regarding complaints, investigations and prosecutions
(f) make recommendations for legal, operational or policy reforms
(g) publish recommendations, research, reports, policies or guidelines and provide such
material to other agencies and bodies
(h) make public statements necessary for its purpose
(I) work in cooperation with other agencies and bodies102

2.68 In addition to the above, the ICAC is also given powers to

investigate alleged or suspected corrupt
conduct and prosecute indictable offences relating to corrupt conductrca

2.69 Conduct of a public official will be corrupt where it could not amount to a disciplinary or criminal
offence and constitutes or involves:
(a) dishonestly exercising official functions
(b) abusing official functions
(c) exercising official function in a way that is not impartial
(d) misusing information or material acquired in the course of official functions
(e) obstructing, interfering with or perverting the administration or the course of justicelw

2.70 The definition of 'corrupt conduct' is broad and the ICACL has been drafted to capture the conduct
of both primary offenders and conspirators and alders and abettors.11° The ICACL has been
drafted to include conduct occurring outside Papua New Guinea.'"

2.71 Any person subject to the Leadership Code is under a duty to report to the ICAC any matter that
the person suspects on reasonable grounds concerns or may concern corrupt conduct,112 as soon
as practicable after becoming aware of the matter.113 The ICACL also provides for certain carve
outs114 in cases of national security115 or where the Commissioner of Police becomes aware of the
matter in the course of performing official duties. 118

2.72 Upon receipt of a complaint the ICAC must assess the complaint.117 In doing so, the
commissioners may have regard to certain matters identified in the ICACL118 including whether
the complaint raises a potential matter of corrupt

conduct119 or whether it is trivial, vexatious or frivolous.120 The ICAC can choose to investigate, take no further action or refer all or part of the matter to an external agency.121

2.73 The ICAC can hold hearings for the purposes of investigation, and may decide to hold them wholly or partly in public or private.122 In conducting these hearing the ICAC is not bound by the rules of evidence.123

2.74 The ICAC can summon a person to attend a hearing to give evidence, product documents or a combination of both.124 Failure to comply with a summons or make an oath or affirmation is an offence which carries a penalty of a fine not exceeding PGK 10,000 or imprisonment for a term not exceeding two years or both.128

2.75 The investigatory powers of the ICAC are also significant with the Commission Investigator able to apply for,128 and with the assistance of technical experts or the police, execute search warrants on certain individuals.127 These investigatory powers also extend to the interception warrants which enable the Commission Investigator to use an interception device for the purposes of investigation. 128

2.76 The ICAC also has powers to prosecute the trial of an indictable offence relating to corrupt conduct with the written consent of the Public Prosecutor in accordance with the ICACL.129 -1

3. Legislative Safeguards

Public Finances (Management) Act 1995

3.1 The Constitution defines the fiscal roles of the executive, legislative and judicial branches. Within this framework, the primary laws governing the management of public funds include the PFMA, the Public Services (Management) Act 1995, the Audit Act 1989 and the Papua New Guinea Fiscal Responsibility Act 2006.

These laws set out basic budget and accountability provisions and structures, including:

a) responsibility and accountability for the management of public funds, delegated to individuals and entities through the system;

b) appropriate oversight by the legislature;

c) the powers and duties of the central Departments of Treasury and Finance, and of the independent Auditor-General;

the roles and responsibilities for all other stakeholders;

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e) the requirement that all revenues be paid into the Consolidated Revenue Fund (CRF) and can be only withdrawn through appropriations; and

f) responsibility for the transparent reporting and disclosure of information on public finances.'3°

3.2 The PFMA was passed to make provision for the management of public finances and is drafted to ensure responsibility and accountability for the management of public funds.

3.3 Dr Ken Ngangan, then Acting Chair of the National Procurement Committee, indicated an important first step in the public procurement process is the issue of an Authority to Pre-Commit (APC).131 The APC authorises a Head of Department to enter into a contract up to the limit of the amount specified in the APC. The APC must be applied for and obtained by a spending Department prior to inviting any tender or applying for a Certificate of Inexpediency (Col).132

3.4 Amongst other things the PFMA establishes the Central Supply and Tenders Board (CSTB, now the NPC) to control and regulate the purchase and disposal of property and stores133 and the supply of works and services.134

3.5 Under the PFMA. any contract for the purchase or disposal of property or stores, or the supply of works and services to a Government Department in Papua New Guinea exceeding PGK 100,000135 must be publicly tendered.136

3.6 A public tender process is not required where the CSTB certifies that the inviting of tenders is impracticable or inexpedient, through the issue of a Col. Part

13, Division 4.14 of the Financial
Instructions issued by the Department of Finance limited the issuance of a COI to the following
declared situations:
(a) Natural Disaster
(b) Defence Emergency
(c) Health Emergency
(d) Civil Unrest

3.7 The National Court has affirmed that any other situation apart from those outlined above are not
justified in law.137

3.8 Under a tender process the Government invites bids from multiple suppliers or service providers
in a competitive process for projects exceeding the mandated PGK 100.000 value. These bids
must be provided by tenderers within a specified time.

3.9 In examining a tender, the CSTB will give consideration to the capacity, experience, integrity,
financial status and past performance of the tenderer and such other matters as it considers
relevant.138

3.10 A Departmental Head or head of a public body or other officer who authorises or permits a breach
of procedures relating to the:
(a) calling, consideration and awarding of tenders
(b) the execution of a state contract
is for the purposes of the PFMA guilty of a serious disciplinary offence.

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Independent Public Business Corporation of Papua New Guinea Act 2002

3.11 The Independent Public Business Corporation of Papua New Guinea Act 2002 (IPBC Act)
provided for in 2013 and 2014, amongst other things, the establishment and management of IPBC
'to hold certain assets including interests in business

enterprises as trustee for the benefit of the State'.139

3.12 The IPBC Act was amended in 2015, by the Independent Public Business Corporation of Papua New Guinea (Kumul Consolidated Holdings) (Amendment) Act 2015 as part of a broader SoE restructure. However, the provisions outlined below in relation to the IPBC Act survived these amendments. Accordingly, all references are to the IPBC Act.

3.13 The IPBC Act specifically includes provisions to limit Government interference in the operations of IPBC. Section 59(1) provides that no Minister, Member of Parliament or any member of provincial or Local-level Government may seek to direct or influence the exercise by a Director of his or her duties, powers or judgments or any Board decision other than through a written communication that is tabled concurrently in the National Parliament'. 14°

3.14 Any Director who received any such representations was required to inform the Board of IPBC at the next Board Meeting.141 Failure to comply with these provisions would result in immediate termination of the Director.142

Conclusions and Recommendations

1. The Commission recommends that the Leadership Code and related laws concerning the jurisdiction of the Ombudsman Commission and Leadership Tribunals be amended to ensure that a person ('a Leader') who was subject to these jurisdictions continues to be subject to them so that they can be investigated and subject to sanction for actions done as Leaders even if they have ceased to hold such positions.

2. This is because:

(a) such a person should not be able to escape investigation and sanction by resignation

(b) if they did hold such a position they could hold it again

(c) of the importance of punishment but also both

specific deterrence against future
wrongdoing by the individual and general deterrence against anyone else
tempted to so transgress

Constitution, s. 211(2).
2 Constitution, s. 209(1).
3 Constitution, s. 209(2).
G. Hassell, The Parliamentary Committee System in PapuaNew Guinea, 1975–1997, page 2, accessed 24 March 2022:
httm– \wen ac nz/law'reseal ch/nunItcations/about-niacrpublicationstcliprden-iournalsivolurne–17 –2011/1–lassall.nclf
5 Constitutional Planning Committee, Final Report of the Constitutional Planning Committee, 1974, Chapter 6, [63(a)].
'Constitutional Planning Committee, Final Report of the Constitutional Planning Committee, 1974, Chapter 6. [65(1)(a)].

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7 Constitutional Planning Committee, Final Report of the Constitutional Planning Committee, 1974, Chapter 6, [65(1)(b)].
Constitutional Planning Committee, Final Report of the Constitutional Planning Committee, 1974, Chapter 6, [65(1)(c)].
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CHAPTER 6

Exploration and development of oil and gas resources

1. Relevance of this chapter to the Terms of Reference

1.1 The Terms of Reference focus on a number of LNG transactions in which the Government of Papua New Guinea and its SoEs were involved. The circumstances concerning the purchase of shares in an oil and gas exploration and development company and the financing into, and subsequent surrender of the proceeds of an equity participation in, an LNG project are fundamental to this Commission of Inquiry. In order to provide some background and context to the transactions that are the subject of this Inquiry, this chapter provides some of the history of petroleum exploration within the State, including the PNG LNG Project and its significance to the State.

2. Background

2.1 It will be recalled that National Goal 4 in the Constitution concerns natural resources and the environment of Papua New Guinea as follows:

> 4. Natural resources and environment

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all and be replenished for the benefit of future generations.

WE ACCORDINGLY CALL FOR –

(1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and

(2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and

(3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.'

2.2 In his evidence Chief Dr John Momis stated that:

.. the fourth National Goal and Directive Principles apply to natural resources and environment. ... These provisions make clear – in a manner unusual, and perhaps unique to a national Constitution – that the protection and management of natural resources are matters of the greatest importance."

2.3 The Oil and Gas Act defines 'petroleum' to mean any naturally occurring hydrocarbon, whether in gaseous, liquid, or solid state or any naturally occurring mixture which includes hydrocarbons. It does not include coal, shale or any substance that may be extracted from coal, shale, or other

rock.2 The hydrocarbons provide the energy component of the compound, which is usually released as heat through combustion.3

2.4 Natural gas, of which Papua New Guinea has a good supply,4 is

known as LNG when in its liquified form. Natural gas 'mainly comprises methane and ethane which has been liquified at cryogenic temperatures. This process occurs at an extremely low temperature and at a pressure near atmospheric pressure'.5

2.5 The time and significant cost in exploring promising terrain, particularly in a country like Papua New Guinea, with steep mountains, heavy jungle vegetation and limited infrastructure, requires significant commitment. Similarly, once tests support extraction, the development phase can be complex and economically challenging before production and a financial return begins.

2.6 There is also inevitable tension between the legislated State ownership of mineral and petroleum resources and the interests of customary landowners on whose land the resources are located, and concerns whether revenue from resource exploitation will meet the community development objectives of Papua New Guinea's people,6 and the remediation of the land following LNG extraction.

2.7 Petroleum products like oil and pitch have been used for energy sources and cultural purposes for thousands of years in all parts of the world where they could be readily found, for example in streams and pools, or extracted by mining. The search for and exploitation of petroleum for industrial purposes in the modern era, is seen as beginning in the mid-nineteenth century with drilling and production in Azerbaijan, closely followed by the United States of America.?

2.8 The development of a process to extract kerosene from oil improved lighting and replaced whale oil and, like much industrial development where one improved invention replaces another, with the invention of the electric lightbulb, the demand for kerosene waned and the oil industry entered a recession. But the use of oil burners on steam engines and the development of the internal combustion engine to power automobiles towards the end of the nineteenth century led to a vast demand for petroleum products.°

2.9 In the United States of America, a number of key corporations in the development of the petroleum industry emerged in the mid-to-late nineteenth century. Standard Oil, founded by J.D. Rockefeller in 1865 (and dispersed by anti-trust rulings

in 1911) became, in due course,
Exxon Mobil. Gulf Oil, Texaco and Chevron were established and subsequently took up
concessions in Kuwait, Saudi Arabia and Libya. The Dutch exploited oil in the Netherlands Indies
and merged with Shell, a large transport company, to form Royal Dutch Shell. The discovery of
oil in Persia led to the formation of the Anglo-Persian Oil Company in 1907, to exploit the
concessions granted by the then rulers.9 The British Government purchased a 51% interest in the
company in 1914 and it later became part of BP.'° Under concessions, Venezuela became a
major producer of oil by the end of the 1920's with a large investment from Royal Dutch Shell.

2.10 This group of companies controlled the world's oil and gas business, including price and
production, until the oil-rich countries took back control of their resources, forming the
Organisation of the Petroleum Exporting Countries (OPEC)11 in the 1960's and thereafter
controlled the production and price of petroleum products. The waxing and waning of the price of
oil through political and economic cycles has been well-documented12 and serves to emphasise
its unpredictability as a financial resource.

2.11 Natural gas, which had largely been regarded as a relatively useless by-product of oil production,
was burnt-off or flamed. However, political concerns about oil security after the Second World

War led to its use as an alternative source of energy, and to the development of the natural gas
industry.73

3. Early exploration in the State

3.1 The history of the attempted commercial exploitation of petroleum in Papua New Guinea began in
1911, when planters discovered indications of petroleum near the Vailala River, which runs into
the Gulf of Papua, about 290 kilometres west of Port

Moresby.

3.2 Initially, the Australian Government proposed to permit private exploration and development of any potential oil resources in Papua New Guinea, but it subsequently determined to conduct exploratory operations as a national undertaking. 14 The geological view at the time was that the prospect of finding oil in commercial quantities in Australia was very low, while prospects in Papua New Guinea were seen as 'hopeful'.''

3.3 The want of technical expertise within Australia led to the appointment of the Anglo-Persian Oil Co. to undertake the field work in Papua New Guinea in 1920, funded by the Australian Government. At about the same time, Anglo-Persian geologists carried out survey work in the Aitape and Madang Districts of the Mandated Territory of former German New Guinea.16 By the Mining Ordinance (No. 2) 1923, exploration in the Mandated Territory was opened to private explorers. Similarly, by the Mineral, Oil and Coal Ordinance 1923 which came into effect in 1924, the Commonwealth of Australia permitted private individuals or companies to prospect for oil in Papua New Guinea. reserving for the Commonwealth of Australia an area of approximately 3,000 square kms, including the Popo District. By the time a Joint Parliamentary Committee investigating the expenditure on oil exploration in Papua New Guinea presented its report to the Australian Parliament in 1925, 14 licences had been granted, but no finds had been developed on a commercial scale. Later, in 1936, exclusive prospecting permits were granted,17 which encouraged larger-scale exploration. In 1938, Anglo-Persian (BP). Mobil (Stanvac) and Oil Search formed the Australasian Petroleum Company (APC).

3.4 Exploration was suspended for the duration of the Second World War and recommenced in 1947, but it was not until the advent of large helicopters18 and the construction of the Highland Highway in the 1960's, that access to geologically promising regions became practicable leading, ultimately, to success.19

4. The Kutubu Project

4.1 The first commercially viable oil discovery was made in 1986 at Lagifu/Hedinia in the Southern Highlands, by a joint venture consortium of companies drilling many wells over a large area

collectively known as the Kutubu Project. The State. for the first time, took equity in an oil and gas venture.79

5. The Hides Gas Field

5.1 The Hides gas field in central Papua New Guinea was discovered in 1987. As originally envisaged, it was to join with gas from the off-shore Pandora field to be transported by pipeline under the Torres Strait to the Gulf of Carpentaria in Far North Queensland for supply to the Australian east coast domestic market_21

5.2 After a long and complex period of negotiating, the venture failed to complete, essentially foundering in disputes over the price which could be charged to the Australian domestic market for Papua New Guinea gas. The State concluded that a far more competitive return could be obtained in the growing East Asian export market.

6. P'nyang Gas Project

6.1 The P'nyang Gas Project, licenced under PRL 3, was discovered in the 1990's by Chevron Niugini Ltd. It is located in Papua New Guinea's Western Province.22 The current participants are:

(a) Exxon Mobil with 36.86%
(b) Oil Search with 36.86%
(c) Santos with 14.3%
(d) Merlin Petroleum Company with 11.96%23

6.2 Following a 'stalemate' period,24 Prime Minister, the Hon James Marape MP, announced in September 2021 that heads of agreement had been struck with Exxon Mobil for the fiscal, regulatory and licensing terms of the project. However. it has been reported that it may be several years before construction commences.25

7. PNG LNG Gas Project

7.1 The PNG LNG Project is an integrated system of gas production, processing, liquefication and storage facilities stretching across the State. There are gas fields and production facilities in Hela, Southern Highlands and the Western Province. The gas fields and production facilities are connected by some 700 kilometres of pipelines to the liquefication and storage facilities in the Gulf of Papua and Port Moresby

Areas in the PNG LNG Project

7.2 Figure 1 below show the licences underlying the PNG LNG Project and Table 1, its geographical expanse across the State.

Table 1 – Licences and areas part of the PNG LNG Project26

Licence	Area
PDL1 and Hides PRL12	Hides gas field and part of the Angore gas field
PRL2	Juha Fields
PRL11	Part of the Angore and Hides fields
PDL2	Kutubu fields and part of the Moran field
PDL4	Gobe field
PDL5	Part of the Moran field
FDL6	Part of the Moran field

Figure 1 – PNG LNG Project overviewn

Brief history of the PNG LNG Project
The State seeks LNG projects in 2007

7.3 As mentioned briefly above, in 2005, the State and Oil Search entered into Heads of Agreement with the State of Queensland, Australia, for a natural gas project (PNG–Queensland HoA).28 In accordance with that agreement, the State would have supplied natural gas via a pipeline to the Australian domestic market. However, the State's earning potential under the project would have been limited by Australian domestic market gas prices.

7.4 The PNG–Queensland HoA had an expiry date of December 2007 which the State allowed to pass. Mr Arthur Somare, who was Minister for National Planning at the time, told the Commission that the State did not terminate the agreement before the agreed expiry 'to avoid a perception that the State would prematurely and unilaterally terminate a standing agreement'.29

7.5 Allowing the PNG–Queensland HoA to lapse did not indicate that the State was not keen to commercialise its gas reserves. In his State of the Nation address in 2007, then Prime Minister, Sir Michael Somare, announced a policy imperative for the commercialisation of Papua New Guinea's natural gas, saying:

> The Government will facilitate the development of our Gas Resource, with the Petroleum Development License (PDL) holders so that commercialisation of gas reserves is accomplished by the year 2011. For this, the Government is committed and will work with the PDL holders to achieve the above target.3°

7.6 Mr Arthur Somare said that Prime Minister Sir Michael

Somare's policy statement 'set the stage for the policy pathway that the NA-led Coalition Government adopted to deliver the PNG LNG Project from 2007 onwards'. Mr Somare stated that the decision by the Government to pursue gas commercialisation was based on advice by the Department of Petroleum and Energy that there were adequate gas reserves in Papua New Guinea to proceed.31 Mr Somare noted that from 2007 onwards the Government continued to pursue its policy agenda of economic expansion through its export-driven economic growth strategy for the State.

7.7 The policy to commercialise the country's gas resources was stated in annual National Budget documents, Medium Term Development Plan 2011-2015, PNG Development Strategic Plan 2010-2030 and PNG Vision 2050.32

7.8 In July 2007, a group of significant oil and gas companies presented the State with a proposal to develop natural gas reserves in the Southern Highlands by transporting it to an LNG processing plant in the Central Province for international export.33 The commercial rationale for the proposal was that the aggregate natural gas reserve was large enough to warrant the costs associated with extracting, processing and piping the product; but each individual reserve was not.

7.9 This was the origin of the PNG LNG Project. The Commission has not been provided with the original NEC submission but understands34 that the proposal was conceptually the same as the final outcome: PDL-holders would operate a joint venture to extract natural gas for international export.

The development of the PNG LNG Project

7.10 ExxonMobil PNG Limited (ExxonMobil) currently operates the PNG LNG Project on behalf of the PNG LNG participants (PNG LNG Participants). The PNG LNG Project was set up as an unincorporated joint venture by subsidiaries of Exxon Mobil,

Oil Search, Santos, Merlin Petroleum
Company, AGL and JX Holdings Incorporated. State-owned companies also have equity stakes
in the project. The partnership shares were: 15
(a) ExxonMobil with 32.2%
(b) Oil Search with 29%
(c) KPHL (an SoE) with 16.2%
(d) Santos Limited with 13.5%
(e) MRDC (Landowners' interests) with 2.8%
(f) JXTG Nippon Oil& Energy with 4.7%

7 11 The PNG LNG Project extracts gas from the gas fields and pipes it to shared gas processing or
liquefication facilities. The gas is then aggregated and exported to international markets from the
gas processing facility in Port Moresby. The income is to be distributed amongst the PNG LNG
Project equity holders (which includes the State-owned companies).

7 12 The PNG LNG Participants' proposal led to significant negotiations between those companies and
the State resulting in agreements being entered into in 2008 and 2009. The principal agreements
were executed in May 2008. These negotiations and agreements are described in more detail
elsewhere in the Report.

7.13 The Final Investment Decision (FID) for the PNG LNG Project was made on 8 December 2009
and this immediately resulted in the start of construction.

7.14 Construction of the PNG LNG Project facilities, pipelines and ancillary infrastructure was
completed by about April 2014. Gas production started around that time and the first gas export
from the PNG LNG Project occurred on 25 May 2014.36 The PNG LNG Project has the capacity
to produce about 7 million tonnes of LNG each year. Since its first export in 2014, the PNG LNG
Project has exported approximately 8 million tonnes of LNG per year.37

7.15 ExxonMobil says that the PNG LNG Project is a USD 19 billion project. The production operations include gas production and processing facilities, onshore and offshore pipelines and liquefaction facilities.39

PNG LNG Project significance

7.16 The PNG LNG Project is one of the most significant (if not the most significant) natural resource projects in the State.39 Mr Peter Graham CBE, former Managing Director of Exxon Mobil, told the Commission that, in the 'very early stages of the project', a study was conducted by The University of Queensland which forecast 'a very significant positive impact on the size of PNG s economy'.40

7.17 The project covers great expanses of the State. Mr Arthur Somare in his oral evidence said that:

> The footprint that the PNG LNG Project covered was essentially over five different provinces; Western Province, Southern Highlands, the newly created Hela Province, Gulf Province and Central Province as well. The project had 800 kilometres of pipeline, 400 kilometres of that was under-sea pipeline; 400 kilometres of that had to cross virgin rainforest from the hinterlands of the Highlands to the coastal provinces of Gulf and then at Omati, undersea at depths of about 100 metres, at the deepest depths, 400 kilometres then into Portion 152 in Port Moresby where a two-train LNG plants were to be located each with the capacity of 3.2 million tonnes and storage facility of 165,000 [cubic] metres of gas each. Each tank could possibly fit a 747 into it and a new wharf which is about 2 kilometres long that would accommodate LNG tankers that could carry cargos of about 150 cubic metres of gas to markets in China, Japan and Taiwan:"

7 18 Mr Dairi Vele, Secretary for the Treasury, stated:

> The Exxon Mobil led PNG LNG Project represents by far the most significant natural resources project ever proposed or undertaken in Papua New Guinea. The Project has in many ways radically transformed the PNG economy and will positively impact on the fiscal position over the coming years and decades.

7 19 David Towe, Chief Commissioner of Customs, produced documents to the Commission showing the volume and price of LNG exported from the State by ExxonMobil. Table 2 below shows the volume and value of LNG exported:

Table 2 – LNG exported by ExxonMobil from the State43

Year	Total Volume Exported (TNE)	Total Value Exported (Kina)
2014	6,378,694.42	6,875,226,414.27
2015	27,133,229.64	27,133,229.64
2016	16.926,225.00	8,598,292,273.27
2017	29,248,608.04	10,695,111,805.45
2018	10,695,111,805.45	10,611,703,114.03
2019	17,786,566.04	17,786,566.04

Year	Total Volume Exported (TNE)	Total Value Exported (Kina)
2020	17,786,566.04	12,732,132289.23
2021	8,636,900.79	8,636,900 79
TOTAL	142,109,512.04	79,716,855,247.96

7.20 The PNG LNG Project has generated significant revenue for the State." Mr Wapu Sonk,

Managing Director of KPHL, gave evidence of the income received from the PNG LNG Project.

Mr Sonk said that KPHL's subsidiary, NPCP Kroton, has received a total of USD 1,644,298,00 as

dividend revenue from the PNG LNG Project from the year 2014 to date."

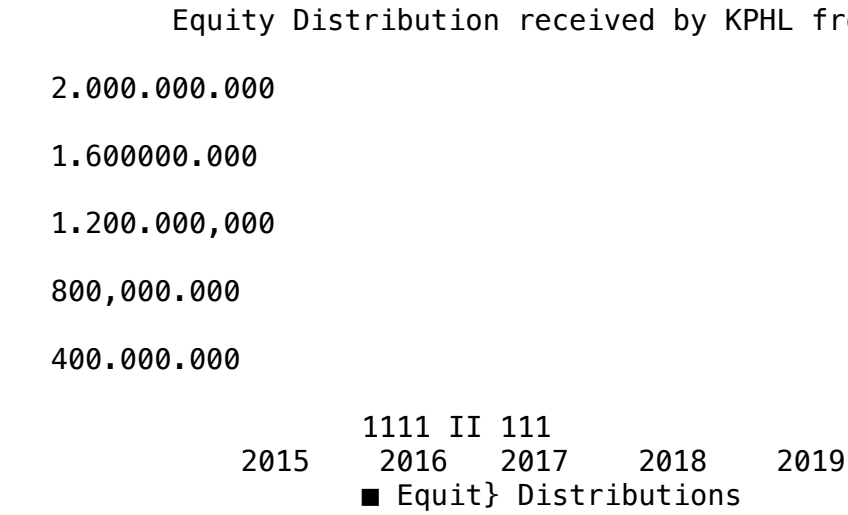
7.21 The Papua New Guinea Extractive Industries Transparency Initiative (EITI) reports also refer to

the revenue generated from the PNG LNG Project for the State. EITI reports are available for the

years 2014 – 2019. Figure 61 from the 2019 EITI Report is replicated below and shows the equity

distribution received by KPHL from the PNG LNG Project for the years 2015 to 2019.

Figure 61: Equity distributions received by KPHL from PNG LNG



7.22 The 2019 EITI Report says average annual equity distribution received by KPHL from the PNG

LNG Project during the 5 years from 2015 to 2019 amounted to 957 million. Highest collections

were recorded in 2015 amounting to PGK 1,790 million. Lowest receipts, on the other hand, were

recorded in 2016 amounting to PGK 297 million."

7.23 Although it may not be possible for the Commission to definitively state the actual amounts

received by the State from the proceeds of the PNG LNG Project, on any view they amount to a

very large total sum.

7.24 The Hon Peter O'Neill's oral evidence was that there must not have been excess funds from the

equity received by KPHL available to invest in the SWF.47 Mr O'Neill's view was that there would

be excess funds after the project finance had been fully repaid, which he understood to be after

10 years of the project in operation, that is, from 2024 onwards." In his oral evidence,
Mr Somare rejected that view and in response to a question from the Chief Commissioner said:49

> Chairman, the 70 per cent that you are talking about relates to project debt ... Yes, there is a debt, but at no time does the State pull out from any other funds to service that debt.
> That is serviced specifically by the project's owners and the project operator Exxon Mobil and the financing arrangement from the beginning had always contemplated that. The returns that come in to the State at this time that go into Kumul Petroleum are returns on equity and Kumul Petroleum to date has received over 1.6 billion.

7.25 As discussed elsewhere in the Report, project debt financing constituted 70% of the total PNG LNG Project capital cost, as the project has a 70/30 debt to equity ratio.5° In terms of the project debt, Mr Somare said that when the project debt is serviced, there will be a 'tsunami of cash flow' that comes in under corporate tax from about 2026.51

7.26 The physical and financial dimensions are not the PNG LNG Project's only significance.
Mr Steven Kane (then of Exxon Mobil) presented a paper in April 2013 and emphasised the importance of the project to the people of the State. Mr Kane stated that the 'PNG LNG Project underpins the future economic and social aspirations of the people of PNG, as it is forecast to double the nation's GDP once it comes on stream in 2014'. 52

7.27 ExxonMobil say the benefits to Papua New Guinea include:53
(a) production workforce of over 2,700, 91 percent of whom are Papua New Guinean and 20 percent of whom are women
(b) around 1 billion cubic feet of natural gas turned into LNG every day at the LNG plant

(c) capacity to produce over 8 million tonnes of LNG each year
(d) 220 Papua New Guinean operations and maintenance technicians trained to run facilities –
25 percent of whom are women
(e) more than PGK 15 billion spent on services provided by Papua New Guinean companies
since 2010
(f) 196 PNG businesses and 15 landowner companies providing services to PNG LNG
(g) more than 20,000 Papua New Guinean entrepreneurs assisted by the ExxonMobil
established Enterprise Centre to help develop their business
(h) PGK 1 billion invested in community and infrastructure programs focused on education,
health, women's empowerment, environment and agriculture

7.28 The PNG LNG Project certainly provides work to a great many of the people of the State. The geographical expanse of it means that some 14 local governments and numerous local landowners are involved.54 The income received from the project is substantial. Whether significant portions of those amounts which went to KPHL and then by way of dividend to the State should instead have gone to a SWF is a matter discussed elsewhere in the Report.

8. Papua LNG
Western LNG Project

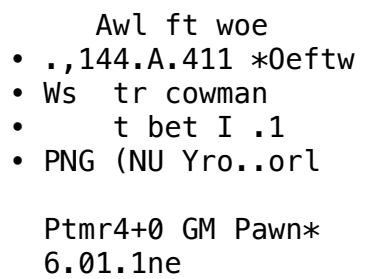
8.1 This gas project, known initially as the Elk-Antelope gas field was discovered in 2007 by IntenCM, an oil and gas explorer. It is located to the west of Port Moresby.

8.2 it subsequently partnered with the French company, Total, which purchased a 60% interest.

8.3 Oil Search purchased the PacLNG group that held a 22.8% interest in the Elk-Antelope field. It is

this purchase which was funded by a placement of shares with the State, which is a major focus
of this Commission. This will be further discussed later in the Report.

8.4 After litigation and arbitration proceedings, the final shareholding was:
(a) Total with 31.1% interest
(b) Exxon Mobil with 28.3%
(c) Oil Search with 17.7%



8.5 The Western LNG Project does not appear to have progressed beyond the pre-FEED studies on
the exploration areas.

9. Pasca Gas Field

9.1 This is a proposed off-shore gas project located approximately 95 km offshore from the Gulf
Province and operated by Twinza Oil (PNG) Ltd (Twinza). It is expected to be developed in two
phases.55

9.2 A Petroleum Development Licence grant is anticipated shortly. Twinza has completed pre-FEED
studies and is preparing to commence delivery of the first phase.58

10. Oil Search in Papua New Guinea

10.1 Oil Search was incorporated in January 1929 to undertake exploration for oil and gas in Papua New Guinea, as a consequence of the published results of the Anglo-Persian Oil Company's geological survey results."

10.2 Oil Search continued to explore for over 40 years before receiving its first production revenue from the Hides GTE and Kutubu projects in 1992.58

10.3 Oil Search had earlier acquired BP's assets in Papua New Guinea in the late 1990's.

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10.4 In 2002, Oil Search merged with the State-owned Orogen and took over as operator.

10.5 In 2003, Oil Search acquired Chevron's assets in Papua New Guinea. Oil Search took up exploration licences in Yemen and Egypt in 2003, which were later sold in 2008.

10.6 By 2003, it had become the operator of all Papua New Guinea's producing oil fields.

10.7 As will be discussed in later chapters, Oil Search acquired an interest in the Elk-Antelope gas field in 2014, which is known as the Papua LNG project.

10.8 Until its takeover by Santos in late 2021, Oil Search was listed on both the Papua New Guinea and Australian stock exchanges and was the biggest investor company in the State, with understandably close links to governments.

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CHAPTER 7

Orogen Minerals/Oil Search Merger

Summary

This chapter considers the decision of Orogen to merge with Oil Search and some of the consequences of the decision.

1. Introduction

1.1 Orogen was a publicly-listed company in which the State-owned Mineral Resources Development Corporation (MRDC) held 51% of the shares. In 2002, Orogen merged with and was 'absorbed' into Oil Search. This chapter considers the decision by the State to enter into that merger.

2. Relevance of this chapter to the Terms of Reference

2.1 This chapter concerns items 1(a)-(d) of the Amended Terms of Reference, which pose the following questions:

(a) What was the reasoning behind the decision by the Morauta Government to approve the sale of Orogen Minerals to Oil Search Limited

(b) Were alternative structures /transactions considered? If so, why were these rejected

(c) What was the impact of the Orogen Minerals merger with Oil Search

(d) How the merger impacted the relationship with Oil Search and successive Governments of Papua New Guinea

3. Orogen

3.1 MRDC was established in 1975 as a 100% State-owned company to hold and manage the State's and landowners' equity interests in mineral and petroleum development projects within the State. In 1996, through a successful Initial Public Offering (IPO), MRDC launched a subsidiary company, Orogen, and it 'floated' on the Australian Stock Exchange. MRDC offered a 49% stake in Orogen to the public and retained 51%.1 The decision to release 49% of the shares in Orogen was made for the purpose of raising finance.2

3.2 As at 31 January 2002, the other large shareholders in Orogen were:

(a) National Nominees Ltd (14.86%)
(b) Westpac Custodian Nominees Ltd (3.05%)
(c) Public Officers Super Fund (2.03%)
(d) Chase Manhattan Nominees (1.84%)
(e) NRMA Nominees Pty Ltd (1.56%)
(f) ANZ Nominees Ltd (1.54%)
(g) AMP Life Ltd (1.18%)3

3.3 There were also 'many average PNG citizens (mums and dads)' who were shareholders.' As at
30 September 2001, the other large shareholders in Orogen were:
(a) National Nominees Ltd (19.69%)
(b) Chase Manhattan Nominees (2.19%)
(c) Westpac Custodian Nominees Ltd (2.14%)
(d) Public Officers Super Fund (2.03%)
(e) AMP Life Ltd (1.67%)
(f) NRMA Nominees Pty Ltd (1.65%)
(g) ANZ Nominees Ltd (1.58%)
(h) Neilstock Nominees Pty Ltd (1.49%)
•
(i) National Australia Financial Management Limited (1.15%)5

3.4 Orogen had an independent board of directors, although there was one 'State director'. It was
intended that Orogen be run without too much State interference. 6

3.5 The Managing Director and Chief Executive Officer of Orogen from 1996 to 2000 was Sir Charles
Lepani KBE CBE OBE.' From 1996 until 2000; Mr John Francis Kaupa was an independent
director of Orogen, and from 2000 until the merger in 2002 Mr Kaupa was the Managing Director
and Chief Executive Officer.8

3.6 At the time of the merger, Orogen had oil and gas interests (including an effective 13.07% interest
in the PNG Gas Project) as well as a 20% stake in the Porgera gold mine, a 20% stake in the
Misima gold mine and a 31.5% stake in the Ramu nickel project.9

3.7 Upon being 'floated', Orogen started generating revenue for the State in the form of dividends and
tax.1° The State received approximately USD 8,180,400 per annum in dividends from 1997 to
2001. Further, on two occasions Orogen declared a special dividend, equalling a total of
approximately USD 40,902,000.11

3.8 Orogen's net profit after tax (before abnormal items) increased from USD 33.9 million in 1997 to
USD 68 million in 2000. By 31 December 2001, Orogen's cash balance had increased to
approximately USD 93 million and the company was debt free.12

3.9 Orogen was one of the most successful companies in the country in which the State had a

majority ownership.13

3.10 According to Mr Kaupa, the vision of Sir Julius Chan, who was Prime Minister when Orogen was 'floated', 'was that the people would participate in the Oil and Gas business and in the Mining Industry in Papua New Guinea through [Orogen" Mr Kaupa and the rest of the board considered that Orogen was there 'for the long haul not just fora short term'.14

4. The Merger of Orogen and Oil Search
The details of the merger

4.1 The merger terms were AUD 0.45 and 1.2 Oil Search ordinary shares for each Orogen share. This valued Orogen at AUD 632 million or AUD 1.97 a share, 22% higher than the pre-announcement share price of AUD 1.62 a share.15

4.2 After the merger, MRDC would hold approximately 18% of the Oil Search shares.18 This equated to approximately 196,604,177 Oil Search shares.17

4.3 The merger agreement contained terms about board representation. Clause 6.7(a) of the Merger Implementation Agreement provided that Oil Search would take all actions necessary to cause the appointment to the Oil Search Board of two nominees from Orogen (being those individuals identified in a document called the Letter Agreement) and one further representative of the State (being the person identified in accordance with the provisions of the Letter Agreement).18 It was proposed that former Orogen directors, Mr Clive Hildebrand and Mr Martin Kriewaldt, both non-resident Australians, become directors of Oil Search after the merger, together with one person nominated by the State.19 The State nominee was Sir Kostas Constantinou OBE.29
Mr Hildebrand and Mr Kriewaldt became directors on 16 April 2002, and remained on the board until 2007 and 2012 respectively. Sir Kostas Constantinou also became a director on 16 April

2002 and remained on the board until 2021. Mr Robert Igara, who was the State's nominee on the Orogen board, became a director of Oil Search on 16 April 2002 and remained on the board until 2012.

4.4 In order for Oil Search to hold 100% of the shares in Orogen, the Orogen constitution had to be amended to remove a 15% restriction on non-Government shareholdings in Orogen. The Mineral Resources Development Company Pty Ltd (Privatisation) (Amendment) Act 2001 contained provisions which had this effect.21 This Act was passed or 11 December 2001 (as certified on 18 February 2002) to facilitate the merger

The decision-making process

4.5 On 23 October 2001, Orogen announced that:

> Discussions have commenced between Orogen and the PNG Government's advisors, ABN-AMRO, to explore alternatives for re-structuring the State's participation in Orogen.22

4.6 On 12 December 2001, Orogen announced that 'it is presently in negotiations with Oil Search Limited with respect to a possible merger of the two companies'.23

4.7 Mr Botten's evidence was that it was Oil Search who was approached by the State and asked if it would be interested in putting forward a merger proposal with Orogen.24

4.8 On 21 January 2002, Oil Search and Orogen announced the proposed merger. It was also announced that the State had indicated its support for the merger.25

4.9 However, Mr Kaupa was concerned about the State's decision and wished to understand the rationale for it. Mr Kaupa sought a meeting with Prime Minister Mekere Morauta, but was unsuccessful. Mr Kaupa also gave evidence that numerous attempts by Orogen's chairman to meet with the Prime Minister were 'thwarted', as were attempts by other members of the board to meet with 'the State'.26 Mr Kaupa was never given an explanation as to why he could not see the Prime Minister.27

4.10 Mr Kaupa was able to speak to Mr Igara and Mr Kolar' Tarata, the Treasury Secretary (and previously the State's nominee on the Orogen board).

According to Mr Kaupa:

> The message from both gentlemen was blunt. That I was to do my job and facilitate the acquisition and not to question the State's decision.
>
> It was obvious from the outset that the State as the 51% Shareholder of Orogen had already taken a decision for Oil Search to acquire Orogen. That the State's decision was not negotiable. And for me to work with the Board of Directors to facilitate the acquisition.28

4.11 Accordingly, Mr Kaupa was not given an opportunity to ask any questions about the State's decision.29

4.12 Mr Kaupa also gave evidence that in late 2001 or early 2002 he had a meeting with senior Opposition members of Parliament who were concerned about the Government's 'privatisation agenda', and whether Orogen was part of that agenda. According to Mr Kaupa, the members were 'quite concerned' that the Government, especially the Prime Minister, may not have been fully briefed about how well Orogen was performing as a listed company and that the merger may not be in the best interests of the State and the people of Papua New Guinea.30

4.13 Mr Kaupa and Orogen's chief financial officer, Mr Jeff Quartermaine, spoke to other shareholders about the proposed merger. According to Mr Kaupa:

> They were upset about it. They preferred that State did not get Oil Search to acquire Orogen Minerals. They preferred it to have direct participation in PNG's mining and hydrocarbon resources through Orogen Minerals and not through Oil Search.
>
> They knew that the mining assets of Orogen Minerals were not going to be managed by Oil Search in the long term. They knew that somewhere along the line or as soon as

possible after the acquisition of Orogen Minerals by Oil Search, that Oil Search would
endeavour to sell off those money assets, mineral assets and they were quite concerned
about it and I do not have the records to show but I think some of them refused to be part
of the acquisition process and sold out their shares before the acquisition was
completed.31

4.14 However, as noted above, from 30 September 2001 to 31 January 2002 the identity and
shareholding of the large shareholders of Orogen did not change significantly. Mr Botten also did
not think that substantial numbers of Orogen shares were sold: 32 Further, as noted below, 99.5%
of the shareholder votes cast were in favour of the merger.

4.15 On 21 March 2002, the following statement was released by the NEC:
The Prime Minister, Sir Mekere Morauta, announced today that National Executive
Council had endorsed a recommendation to accept a merger offer by Oil Search Limited
for Orogen Minerals Limited.

'The decision was clear-cut,' Sir Mekere said. 'The Oil Search scheme of arrangement
offers more to Papua New Guinea, and in particular to the Gas-to-Queensland project,
than a recent counter-proposal from Santos.

This decision means that the State can now sell its 51% shareholding in Orogen to Oil
Search.
1 regard NEC's decision as a major incentive for a Papua New Guinea-owned oil and gas
industry, for exploration and development of the nation's rich resources, and as a big step
towards final agreement on a go-ahead for the gas project'

The Prime Minister said NEC accepted that Oil Search's proposal had convincing
advantages over the Santos proposal.

It was certainly superior in terms of the underlying fundamental value, despite the attraction of the cash-only offer from Santos.

In particular, the State would benefit from a market re-rating of the merged group through the shares that it would have in it after the transaction was completed.

Substantial re-rating is expected on the development of the gas project.

NEC also considered that the Oil Search offer represented the best way to move the gas project ahead, and at the same time allow the state to participate in its undoubted upside.

Sir Mekere said the Santos proposal had a number of draw-backs.

They included a proposal that in effect meant that the State would have borne all the risk in relation to the mineral assets held by Orogen.

It also required a fee amounting to $A6.4 million in the event that the State accepted a competing offer.

• • • 33

4.16 At a Orogen shareholders meeting held in Port Moresby on 26 March 2002, 99.5% of the votes cast were in favour of the merger.34

4.17 On 3 April 2002, the Scheme of Arrangement was approved by the National Court, and it then went ahead.35

The reason for merger

4.18 Sir Charles Lepani gave evidence that: 'there was pressure on the State's budget, so the State wanted to sell its interest'.36 However, as noted above, at the time that Orogen was merged, Sir Charles was no longer involved in the management of the company.

4.19 It was also contended that the Government of Sir Mekere

had a 'privatisation agenda' in the early 2000's. At the time of the merger between Orogen and Oil Search, other State-owned entities were being privatised.37

4.20 From Oil Search's perspective, it viewed Orogen as a 'very profitable company. Oil Search saw the proposed merger as an opportunity 'to bring more value, not only to the Oil Search shareholders but also to the Government'.38 Mr Botten gave evidence that:

> One of the factors that contributed to the discount of the Orogen share price to the underlying value of its assets was the majority ownership of the company's shares by the State and associated market concerns relating to the State's intentions in relation to future ownership, the independence of the Board and the preparedness of the State to permit new equity to be raised to finance new development projects.39

4.21 There was also a clear benefit to Oil Search from the merger. For example, the Oil Search chairman, Mr Trevor Kennedy stated: 'We] merged up company will have enough muscle to have a real influence on both building up production from our existing oil producing wells and have a more aggressive exploration programme'.4°

4.22 When the proposed merger was announced to the market, Mr Kennedy was quoted as saying that Oil Search believes that the merger:

> * provides shareholders with exposure to an attractive combination of production, development and exploration assets, including an enlarged equity interest of approximately 37% in the PNG Gas Project;
> * produces an entity with majority interests in all major PNG oil and gas fields, the pro forma share of production from which was approximately 11.6 mmboe in the 12 months

to December 2001;
* provides the merged company with a strong balance sheet and debt coverage ratios,
with pro forma net debt as at 31 December 2001 of approximately A$320 million (after
allowing for the proposed A$0.45 capital return to Orogen shareholders) compared to the
merged company's aggregate market capitalisation of A $1.4 billion;
* will deliver earnings and operating cash flow per share accretion to shareholders in the
merged entity compared to current expectations for Oil Search;
* creates a larger and more liquid company, with an aggregate market capitalisation in
excess of A$1.4 billion, ranking as the 3rd largest E&P company on the ASX and an ASX
Top 100 company. We believe that these factors are likely to lead to a re-rating of Oil
Search.'"

4.23 Further, an oil and gas analyst stated that the 'obvious physical attraction to Oil Search [from the
proposed merger) was the cash'.42

4.24 Mr Lindsay MacAlister, Chairman of Orogen, described the benefits of the proposed merger as
follows:
The Board of Orogen has actively sought ways of enhancing shareholder value, given
that Orogen's shares have been trading at a significant discount to their underlying value
despite outstanding operational and financial achievements since listing of the company
in 1996. Accordingly, we have examined a range of alternatives to maximise value for all
shareholders.
The Board of Orogen believes that this merger proposal offers shareholders the best way
to unlock value and offers Orogen shareholders attractive premiums. The value of
Orogen's shares under the merger terms is A$1.97 per share (based on Oil Search's
pre-announcement share price of A$1.27) which represents premiums of:
* 22% to Orogen's pre-announcement price of A$1.62;
* 54% to Orogen's share price of A$1.28 on 11 December 2001 (the day before Orogen
announced that it was in discussions in relation to possible transactions); and
* 97% to Orogen's price of A$1.00 on 22 October 2001 (the day before release of
Orogen's 3rd Quarter Activities Report in which it was disclosed that the PNG

Government had appointed advisers with respect to its Orogen shareholding).
Shareholders will have the opportunity through an investment in Oil Search to retain their
exposure to the PNG hydrocarbons industry, that is expected to shortly enter a new
phase with the development of the PNG Gas Project. Shareholders will also have the
opportunity, if they wish, to realise a value for their Orogen shares that is closer to the
underlying value of the company's assets than the recent market price.
The Directors of Orogen intend to unanimously recommend that Orogen shareholders
support the Scheme, in the absence of any higher offer.43

CHAPTER 7 > Orogen MinersIsf011 Search Merger

4.25 The State's position in relation to the proposed merger was quoted as being as follows:
The Independent State of Papua New Guinea (which through a nominee holds a 51%
shareholding in Orogen) has indicated its support for the transaction, subject to no
material adverse change in circumstances affecting the value of the offer, final National
Executive Council approval which will be sought immediately prior to the shareholders
meeting to approve the merger and in the absence of any higher offer.'"

4.26 The NEC's final position in relation to the merger is outlined above. The NEC position followed a
policy submission to the Prime Minister and Treasurer dated 19 March 2002, which sought NEC
approval for the proposed merger between Orogen and Oil Search. The policy submission noted
that ABN AMRO, who had been selected to advise the State, had recommended acceptance of
the Oil Search offer for the following reasons:
• the proposal is superior [to a proposal by Santos Limited] in terms of underlying fundamental
values
• the State may benefit from a re-rating of Oil Search

post-merger due to the gas project, market
size, etc
• enhances Oil Search's capacity to move the gas project forward
• State retains its exposure to the upside on the gas project
• facilitates early cancellation of the Option Agreement (PDL-1 and PDL-5)
• enhances future of hydrocarbon's industry

4.27 The 'PNG Gas PrOject' or 'Gas-to-Queensland' was a project to commercialise the natural gas in the Southern Highlands and transport this via a 3,000 kilometre pipeline to customers in Queensland, Australia. In 2007, it was decided that this project was not feasible and work started to evaluate a project which became the PNG LNG Project. 45 According to Mr Arthur Somare, the 'project economics' of the PNG Gas Project 'did not stack up' compared to the economics of the PNG LNG Project, including because there was a higher price for LNG.46

4.28 Grant Samuel & Associates were engaged by Orogen to act as an independent expert to advise on the proposed merger. They advised that the proposed merger was in the best interests of Orogen shareholders. The summary of their opinion was as follows:

> Orogen shares have traded at a deep discount to underlying value over the past year.
>
> The terms of the proposed Merger represent a substantial premium to the recent Orogen share price and materially reduce the discount to underlying value. Shares in Orogen have outperformed the Australian oil and gas sector by a significant margin since the announcement of merger discussions, reflecting the Merger terms and the prospect of a market re-rating of shares in the merged company.
>
> The merged Orogen/Oil Search will become a significant oil company by Australian standards. It will have attractive growth opportunities, with the financial capacity to participate in major developments such as the PNG Gas Project, and exposure to the upside provided by Oil Search's exploration program,
>
> Based on the current Oil Search share price, the consideration offered to Orogen shareholders is less than Grant Samuel's assessment of Orogen's full underlying value.
>
> However, analysis of the Merger on the basis of underlying value is of limited relevance.

In the absence of the Merger or some other corporate transaction involving the company,
Orogen shares are likely to revert to trading at a deep discount to underlying value.

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There is currently nothing to suggest that there is an alternative transaction available that could deliver greater value to Orogen shareholders.

Orogen shareholders should be aware that the risk profile of the merged company will be different from the risk profile of Orogen on a stand alone basis. The merged company will have higher gearing than Orogen. Oil Search's share price appears to reflect expectations of significant exploration success and the commercialisation of the PNG Gas Project. Oil Search's exploration program and its significant exposure to the PNG Gas Project provide upside potential for the merged company. On the other hand, the share price of the merged company could fall, perhaps materially, if exploration results prove disappointing or there are delays in the commercialisation of the PNG Gas Project.

In the absence of some other corporate transaction that delivers greater value, Grant Samuel believes that Orogen shareholders are likely to be better off if the Merger proceeds that if it does not.47

Mr Kaupa's criticism of the merger

4.29 Mr Kaupa gave evidence that at the time of the merger Orogen was placed in a very good position to participate meaningfully and fully in the mining and hydro carbon assets/resources of Papua New Guinea'.48

4.30 Accordingly, Mr Kaupa described the merger of Orogen and Oil Search as:

... a very unfortunate and sad day for Papua New Guinea. I could not believe that the State was prepared to forego their 51% majority shareholding

in a company that was performing well with no debts, upwards of US$100 million cash,
healthy balance sheet, consistently paying regular dividends to shareholders, and
performing well on the international stock markets.49

4.31 Mr Kaupa later stated that:
Orogen Minerals Limited was formed when Sir Julius Chan was Prime Minister and he
wanted the State and the people of Papua New Guinea to participate in a very
meaningful way in the mining resources and the hydro carbon resources of Papua New
Guinea and that was why he wanted to form a State company with the State having
majority 51 per cent shareholding in the company and the remaining 49 per cent floated
through various parties that may be interested in participating in the mining industry and
the petroleum industry of Papua New Guinea.
And so, the company was launched and formed to do that. And with the – when I was
director of Orogen Minerals and then later on CEO, I could see that the company was
placed in a very good position to participate meaningfully and fully in the mining and
hydrocarbon assets/resources of Papua New Guinea. So, when the company was
acquired by Oil Search, it really made me very sad ...

4.32 Mr Kaupa gave evidence that the minority shareholders and the people of Papua New Guinea got
a 'raw deal' as a result of the merger. Mr Kaupa noted that the merger valued the Orogen shares
at AUD 1.97 per share, or a total value for the company of USD 328 million. This meant that
MRDC's interest was valued at USD 167 million. However, Mr Kaupa noted that Orogen's net
assets at the end of 2001 were USD 451.2 million, which would equate to USD 230 million for
MRDC's interest.51 Mr Kaupa stated that the Orogen's share price was floating between AUD 1.90
and AUD 2.10 at the time of the mercer.52

4.33 However, against this criticism is the fact that Mr Kaupa (along with the other directors) ultimately recommended that Orogen shareholders vote in favour of the merger, as they overwhelmingly did.53

5. Were Alternative Structures/Transactions Considered?
Proposal by Santos Limited

5.1 According to an announcement made by Santos Limited (Santos) on 21 March 2002, the Government approached Santos in November 2001 to invite the company to make a bid for Orogen and discussions continued thereafter.54

5.2 On 20 March 2002, Santos announced that it was considering making a takeover offer for Orogen at a cash price of AUD 2.00 per share, which would value Orogen at AUD 642 million. Santos also announced that it would only proceed with its proposal if MRDC elected not to support the proposed merger between Orogen and Oil Search, and if MRDC agreed to enter into certain agreements with Santos including:

(a) an agreement granting Santos an option to acquire a minimum of 14.9% of Orogen's issued capital at the proposed offer price of AUD 2.00 per share

(b) an agreement under which Santos could procure Orogen to sell certain minerals assets to MRDC in the event that any of the assets were not successfully divested to a third party55

5.3 Santos said that its proposal would be superior to the Oil Search offer for the following reasons:

* Santos' proposed offer is cash. In comparison, Oil Search is offering the significant investment risk of shares; and

* Santos' proposed offer represents a premium to Oil Search's offer. Oil Search's offer currently values Orogen at $1.88 per share, based on Oil Search's closing share price on Tuesday 19 March 2002 and at $1.79 per share, based on Oil Search's weighted average share price since 26 February 2002, being the date on which Oil Search announced that the Bakari well was unsuccessful.56

5.4 Santos further considered that its proposal would be beneficial to the State for the following reasons:

MRDC will realise A$328 million in cash from

accepting Santos' proposed offer. In comparison MRDC will only receive A$74 million in cash from the Oil Search proposal; and

* Santos believes that participation by foreign oil and gas companies is crucial to the long-term success of the oil and gas industry in Papua New Guinea. This proposal highlights Santos' commitment to Papua New Guinea.

If Santos is successful in acquiring Orogen there will be three significant participants in the PNG Gas Project. A US based multi-national (Exxon Mobil – the operator) will hold approximately 31%, a PNG company (Oil Search) will hold approximately 27% and Santos, a major Australian oil and gas company, will hold approximately 26% (under the present structure). Santos believes that the involvement of three partners with material equity interests will substantially improve the commercial viability of the PNG Gas Project in terms of project execution, financing and marketing. Santos is also currently in discussions with Exxon Mobil to re-enter the PNG Gas Project in respect of Santos' existing interest in the Hides Gas Field.57

CHAPTER 7 > Orogen Minerals/Oil Search Merger

5.5 As noted above, it appears as though discussions between the Government and Santos had been ongoing since November 2001. Santos announced that it made a public announcement of its proposed offer after being advised that it was necessary to do so in order for the proposal to receive full consideration at the NEC.58

5.6 However, it appears the Santos proposal did go before NEC, at the latest via the policy submission to the Prime Minister and Treasurer dated 19 March 2002 which sought NEC approval for the proposed merger between Orogen and Oil Search. This submission noted that there were 'a number of unfavourable conditions'. It further noted that ABN AMR() had recommended that

the State reject the Santos proposal on the basis that:

• the cash consideration is significantly below the underlying fundamental value of Orogen

• it has a number of unattractive conditions

• it is below underlying fundamental value of the Oil Search offer

• it would give Santos blocking rights over the gas project as currently structured59

5.7 In response to Santos's announcement, on 21 March 2002 Orogen announced that it had not received a formal takeover proposal from Santos and further:

> The board remains of the view that shareholders should, in the absence of any superior offer, vote in favour of the merger between Orogen and Oil Search Limited ('Oil Search) that was announced to the market on 21 January 2002. At present, Orogen has not received any alternative offer to the Oil Search merger proposal (superior or otherwise) nor has it received a firm indication that any alternative offer will be made by Santos or any other party.
>
> A meeting of Orogen's minority shareholders will be convened on Tuesday, 26 March 2002 to vote on the proposed Oil Search merger. Orogen has been advised that the National Executive Council of the Independent State of Papua New Guinea will meet today to consider the proposed merger between Orogen and Oil Search.66

Other proposals

5.8 Mr Kaupa gave evidence that at the time of the proposed merger there was a meeting of the board of Orogen where 'a number' of counter proposals to the merger were discussed. One of these was a proposal that Orogen acquire Oil Search. Another counter proposal was for Orogen to assist to 'fund Oil Search cash flows for exploration work in return for equity in Oil Search'.61 This option was 'quite an advanced option ... because it was common knowledge in the industry then that Oil Search had debts that they were struggling to service'.62

5.9 However, according to Mr Kaupa, these counter proposals, and the 'status quo option', were never discussed with the State as the Prime Minister refused to meet with Mr Kaupa, the management team or any other international directors.63

5.10 Mr Kaupa considered:

... it was my unpleasant task to advice Orogen's Board that the State as 51%
Shareholder would not budge on it's decision for Oil Search to acquire Orogen. And that
our collective efforts were better spent facilitating the acquisition."

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5.11 Mr Kaupa's evidence is somewhat inconsistent with the information memorandum to Orogen
shareholders, in which the company did note that:
... the Board conducted a comprehensive analysis of all realistic strategic initiatives that
could increase and unlock shareholder value. These included:
• retention of the existing structure but with a modified corporate strategy
• a selective buy-back and cancellation of part of the State's shareholding in Orogen
combined with a swap of the Stale's remaining ordinary shares for non-voting preference
shares
• an equal access buy-back of Orogen Shares
• a partial sell-down of the State's shareholding
• demerger of petroleum and minerals assets to form two smaller, focussed public
companies
• a liquidation of Orogen and distribution of proceeds to Orogen Shareholders
• various mergers or acquisitions with other companies
Following this strategic review, and after consultations with officers of the State (as 51 %
shareholder in Orogen) and their advisers regarding the State's preparedness to support
some or any of the proposed alternatives, it was determined by the Directors that the best
alternative to maximise and unlock shareholder value was the proposed merger with Oil
Search.65

5.12 The advice to the State from ABN AMRO also considered (but recommended against) various other proposals (albeit none being those raised by Mr Kaupa).66

6. Impact of the Merger

6.1 Mr Botten gave evidence that Oil Search's total shareholder return (being a measure of the performance of a company's shares over time, combining share price and dividends paid to show the total return to the shareholder expressed as an annualised percentage) over the period from January 2002 (when the merger was announced) to March 2014 (when IPBC transferred its Oil Search shares to IPIC under the Exchangeable Bond Transaction) was approximately 780%.67 It seems that from 2002–2014, Oil Search paid dividends twice yearly (with the exception of 2003, when there was only a single dividend) and occasionally a special dividend. The dividend amount ranged from USD 0.01 to USD 0.04 per share.68 The dividends the State received (from Oil Search) following the merger were, therefore, comparable to the dividends it received (from Orogen) prior to the merger (ignoring special dividends). Further, from April 2002 to March 2014, the Oil Search share price increased from approximately AUD1.08 to approximately AUD 8.20.69

7. Conclusions in relation to the Terms of Reference

TOR 1(a): What was the reasoning behind the decision by the Morauta Government to approve the sale of Orogen Minerals to Oil Search Limited?

7.1 The reasoning behind the decision by the Morauta Government to approve the sale of Orogen to Oil Search Limited was that contained in the NEC minutes, namely that 'it was the best way to move the 'Gas-to-Queensland project' ahead and at the same time allow the State to participate in the project's upside', a justification which was backed up by the advice of ABN-AMRO and Grant Samuel & Associates, and by the overwhelming support by shareholders for the merger. As

noted above, the merger also occurred in a context in which other State-owned entities were being privatised.

TOR 1(b): Were alternative structures / transactions considered? If so, why were these rejected?

7.2 A proposal by Santos was considered, but rejected on the advice of ABN-AMRO, on the basis that the Oil Search offer was the better option. Similarly, the board of Orogen considered a number of alternatives to the merger but considered that the Oil Search offer was the best option for the company.

TOR 1(c)-(d): What was the impact of the Orogen Minerals merger with Oil Search and how did the merger impact the relationship with Oil Search and successive Governments of Papua New Guinea?

7.3 An obvious consequence of the merger was that the State and its people lost control of its company that held investments in the mining and petroleum sector, being a profitable and well-performing company. When the Gas-to Queensland project was abandoned, a key factor in the State's decision to approve the merger had 'fallen away'.

7.4 In terms of the impact of the merger on the relationship between Oil Search and the State, the most notable impact was that Oil Search and the State (directly or through SoEs) grew ever 'closer' in their dealings, and the large shareholding by the State / SoEs in Oil Search came to be regarded by some at least as the normal course of events.

7.5 Oil Search was the biggest company in the State. It was not unreasonable for it to have a close relationship with the State in the ordinary course of its business. That relationship became complicated with the Exchangeable Bond Transaction due to the State's large shareholding in Oil Search as the State had a direct interest in Oil Search's success.

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CHAPTER 7 > Orogen Minerals/Oil Search Merger

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CHAPTER 8

The participation of the State in the PNG LNG Project

Summary

This chapter provides detail about the State's involvement in the PNG LNG Project including the Gas Agreement, the State's need to finance its participation and the Exchangeable Bond Transaction.

1. Relevance of this chapter to the Terms of Reference

1.1 This chapter relates to sub-paragraphs 1(e)-(k) of the Terms of Reference. It is arranged in three parts. Part 1 addresses 1(e) and (b)(i) to (iii) of the Terms of Reference: namely:

(a) How the State financed its equity participation in

the PNG LNG Project

(b) Whether due and proper legal and administrative processes were followed to obtain the loan to finance the State's equity participation in 2009, including but not limited to:

(I) how the was process commenced

(ii) how IPIC was selected

(iii) what process was utilised

1.2 Part II discusses the terms of the IPIC Loan itself as required by 1(b)(iv) of the Terms of Reference.

1.3 Part III summarises the Commission's conclusions for those sub-paragraphs of the Terms of Reference.

PART I

2. Approval of the PNG LNG Gas Agreement

The PNG LNG Gas Agreement 2008

2.1 The PNG LNG Gas Agreement was made pursuant to ss. 184 and 185 of the Oil and Gas Act and was a result of a decision by eight individual exploration licence holders to enter into an agreement to commercialise gas. These licence holders were required by the provisions of the Oil and Gas Act to offer to the State a back-in right constituting 22.5% of each new petroleum development licence. It was the responsibility of the Minister for Petroleum to decide under the overarching control of the NEC whether to exercise the State's option to take up the back-in right.

2.2 Between the PNG LNG Project Companies'l proposal to the State in July 2007 and April 2008, the State and the PNG LNG Companies negotiated the details and terms of what was is known as the PNG LNG Project. Three of the key persons involved for the State were:

(a) the late Grand Chief Sir Michael Somare, who was responsible for licensing, regulatory and landowner issues2

(b) the Hon William Duma MP, who was responsible for the commercial aspects of gas commercialisation3
(c) Mr Arthur Somare, who, as Minister for State Enterprises, was responsible for financing the State's equity participation4

2.3 On 8 April 2008, the NEC endorsed an in-principle agreement with ExxonMobil PNG Limited (then Esso Highlands Limited) (ExxonMobil), on behalf of the PNG LNG Project Companies, as to fiscal terms for the PNG LNG Project (subject to agreement on technical and commercial matters).5 The State's decision to commit to the ExxonMobil-led proposal in 2008 was largely based on ExxonMobil's track record to deliver major LNG projects on time and within budget across the world. The State had earlier satisfied itself through Department of Energy analysis that there were, across the fields, sufficient volumes of gas to warrant commercialization.8

2.4 On 13 May 2008, at Special Meeting No. 14/2008, the NEC:7
(a) noted the content of Policy Submission 64/20088
(b) noted the structure to fund the State's equity share in the PNG LNG Project
(c) approved IPBC to appoint advisers and undertake the further analysis and work necessary to finalise the terms and conditions of the funding offer in consultation with Treasury to present to the NEC
(d) directed the Ministerial Committee on Gas to assess other financial options for NEC's consideration

2.5 On the same day, the State and the PNG LNG Companies entered into a Co-ordinated Development and Operating Agreement (CDOA). The CDOA9 is the central document that governs the relationship between each of the PNG LNG Project Participants.1° The CDOA formalised the unincorporated joint venture (JV) between the PNG LNG Project Companies.

2.6 Under the CDOA, the PNG LNG Companies agreed (among other matters) that:
(a) they would co-operate to develop the underlying gas fields
(b) proceeds of the sales of natural gas from the PNG LNG

Project would go to a company
established in Singapore for that purpose, called the PNG LNG Global Company (GloCo)
(c) GloCo would re-distribute the proceeds to the licence-holders (generally based on their
respective gas reserves)

2.7 On 19 May 2008, the Ministerial Gas Committee resolved to endorse to the NEC the final fiscal,
technical and commercial outcomes, as negotiated between the State and ExxonMobil on behalf
of the PNG LNG Project Companies and in particular to endorse the proposal that the PNG LNG
Project be exempt from s. 67'1 of the Oil and Gas Act, to accept a project interest of 19.4%, and
to present the substantially agreed terms of the PNG LNG Gas Agreement to the NEC.12

2.8 On 20 May 2008, the NEC approved a submission13 seeking approval for the key terms of the
agreement negotiated between the State and ExxonMobil for the PNG LNG Project. The
submission, signed by Mr Duma (in his capacity as chairman of the Ministerial Gas Committee
and Minister for Petroleum and Energy) and the Hon Patrick Pruaitch MP (The Minister for
Treasury and Finance), noted the background to the PNG LNG Project as follows:

(a) with the termination of the Papua New Guinea to Australia Gas Pipeline Project in 2006,
the Government had been seeking to commercialise the country's vast gas reserves
(b) in July 2007, ExxonMobil, Australian Gas Light, Santos, Nippon Oil Exploration and the
State-owned MRDC had presented the State with a proposal to develop the gas
resources in the Southern Highlands by transporting the gas to an LNG processing plant
to be situated at the Konebada Petroleum Park, in the Central Province for export
(c) the PNG LNG Project proposed a development concept and

certain key fiscal, commercial
and technical terms, which recognised the cost and risk of developing the resource in
Papua New Guinea, and the fact this might be a foundation gas development. It was the
intention of the PNG LNG Project that these key terms would be set out in a gas
agreement under the Oil and Gas Act to be executed between the State and the project
sponsors
(d) since July 2007, the State's technical team comprising the relevant Government
department and agencies had been negotiating terms with ExxonMobil
(e) the key subject matters of negotiations between ExxonMobil and the State were the fiscal
regime and technical and commercial matters

2.9 The submission noted that the State had proposed to the PNG LNG Project Companies that it
was entitled to a 22.5% interest in the PNG LNG Project based on its interpretation of the Oil and
Gas Act but that the PNG LNG Project Companies maintained that the State's equity interest in
the underlying licenses should dictate its equity entitlement (19.4%). The Ministerial Gas
Committee, based on advice, concurred with this. Mr Somare's evidence was that if all 8 licences
held by the State were 'green fields', then the State's back-in right would have been 22.5% in the
form of direct participation. However, as 4 of the 8 were 'brown fields', the State's rights had
either already been exercised or had been lost as a consequence of the State electing not to
exercise its rights fully." The State had however acquired the landowners' equity interest of 2%
in the 'brown fields'. Mr Somare stated that the State did exercise its full 22.5% back-in rights in
PDL 5 (Moran).16

2.10 On 21 May 2008, the NEC approved the final draft of the PNG LNG Gas Agreement, advising the
Head of State to execute the agreement.16

2.11 On 22 May 2008, the PNG LNG Project Companies and the State formally signed the PNG LNG
Gas Agreement.1-

2.12 The PNG LNG Gas Agreement:
(a) defined the terms under which the joint venture would build and operate the PNG LNG
Project including taxation, fiscal and banking stability, issue of development licenses,
State participation, landowner identification, training

and local business development
(b) established the fiscal regime and legal framework by which the PNG LNG Project was to
be regulated throughout its lifetime and set the terms and 'mechanism' for the State's
equity participation in the PNG LNG Project

2.13 On the day of execution of the PNG LNG Gas Agreement, Prime Minister Sir Michael Somare
made a speech to Parliament18 to mark the signing of the agreement, stating that the PNG LNG
Gas Agreement was a 'major achievement' and provided a 'clear signal of my Government's
commitment to this project. It also clearly demonstrates our ability to do business on a world

scale.' Sir Michael Somare noted that the agreed terms represented value for the State and
addressed the issue of accessing a share of the windfall revenues that will be generated by the
PNG LNG Project:
This project is especially important to PNG. It will set the benchmark for other projects
and I expect it to facilitate other developments in our country in the oil and gas and other
industries.... The potential impact of this project is significant as it could double the
GDP of PNG.

2.14 The PNG LNG Gas Agreement confirmed the State's involvement in the PNG LNG Project. It
also meant that the State had to find the means to fund that involvement. The initial requirement
was to fund its 19.4% equity interest in the project. The State's total financing exposure was
estimated in 2008 to be approximately USD 3 billion, comprising of project financing of USD 2
billion and equity financing of USD 1 billion, making it the largest investments in the State's project
financing history.19
The Benefits Sharing Agreement

2.15 On 23 May 2009, the PNG LNG Project Companies, the State, the

State-owned equity holders,
and the various provincial and local governments entered into the PNG LNG Project Umbrella
Benefits Sharing Agreement (Umbrella Agreement).20 The Umbrella Agreement related to the
earlier CDOA, in that it provided the terms and conditions on which the parties would share the
costs and benefits of the PNG LNG Project. It was a significant point in the project, prior to the
next phase: financing and design.

2.16 In addition to the Umbrella Agreement, several of the PNG LNG Project Companies entered into
specific PDL benefits sharing agreements, governing their rights and responsibilities in respect of
the individual PDLs. These were in place to deal with the PDLs which operationally over-lapped
and/or were held by more than one of the PNG LNG Project Companies.

3. Establishment of committees to manage the State's interest in the PNG LNG
Project

3.1 Following the execution of the PNG LNG Gas Agreement, the PNG LNG Project entered the Front
End Engineering and Design (FEED) Stage. The State established a number of committees to
manage the PNG LNG Project.
- •
3.2 On 24 July 2008, Mr Pruaitch, as the Minister for Treasury and Finance and Mr Paul Tiensten as
Minister for National Planning and District Development, sponsored a submission to the NEC2'
which requested approval for the proposed FEED structure to fulfil the obligations of the State in
the PNG LNG Project.

3.3 As part of the submission, a management structure was proposed by which the Ministerial
Committee Economic Sector (MCES) would take responsibility for the PNG LNG Project on behalf
of the State. It would receive reports from the PNG LNG Project FEED Committee comprised of
heads of various government departments. In turn, the PNG LNG Project FEED Committee
would collaborate with the PNG LNG Project Director who would head the PNG LNG Project
FEED Coordination Office. Mr Dairi Vele was suggested as the Project Co-ordinator, based on
his involvement in the PNG LNG Project to that date. The submission noted the State:

CHAPTER 8 > The participation of the State in the PNG LNG Project

> ... remains disparate since the signing of the Gas Agreement. This is clearly untenable as the State moves towards the delivery of the single largest and most valuable investment project in Papua New Guinea ...

3.4 The submission was approved by the NEC on 7 August 2008.22

3.5 Various witnesses gave evidence to the Commission on the State's management structure as approved by the NEC. Mr Somare's oral evidence was that:23

> The State needed to put into place [a] State coordination mechanism by which reporting would happen all the way up to the Cabinet, the Ministerial Economic Committee of which as Minister for State Enterprises, I was one of the key five committee members ... – it is a subcommittee of the National Executive Council. It is the function and the role of the Ministerial Economic Committee to look at projects like the PNG LNG Projects [sic] or any other significant economic undertaking that we would scrutinize in the first instance, so that we as a subcommittee of Cabinet, would then discuss with Cabinet itself.

3.6 Mr Pruaitch stated24 that Mr Somare, as the Minister responsible for IPBC, and the IPBC Board, took carriage of the commercial nature of the PNG LNG Project:

> The IPBC Board and management were given the task of overseeing the State's participation in the PNG LNG project in consultation with the Department of Treasury and myself as Treasurer, pursuant the terms of the PNG LNG Gas Agreement as agreed to by the Ministerial Economic Committee.

3.7 As Chair of the MCES, Mr Pruaitch says he initiated all bilateral and multi-lateral engagements prior to hand-over to the relevant Ministers for Foreign Affairs & Trade. Planning & Monitoring and State Enterprises to engage with their counterparts on matters relating to the PNG LNG Project both domestically and abroad:25

I recall that any major decision that had to be taken was done through proper processes that was initiated and approved by the IPBC management and board and where a matter requires NEC approval then in consultation with Department of Treasury, myself, the Ministerial Economic Committee and finally NEC.

4. Financing the State's equity interest in the PNG LNG Project

How the process commenced

4.1 The State's consideration of how to fund its equity share in the PNG LNG Project was complicated by a number of factors:

(a) There were three entities involved and a degree of competition between them as to how and through which the Project should be financed:

Petromin appears to have considered itself to have been the most likely participant in the project, given its role in holding the State's oil and gas assets

(ii) The Treasury necessarily had a role in advising on funding of such magnitude

(iii) IPBC, the eventual participant, originally had no interest in being involved nor any notion that it might become so. However, IPBC held assets which could be leveraged to raise the funds needed and, in particular, it held a substantial number

of Oil Search shares. This was how it became involved

and, ultimately, held the
State's interest in the PNG LNG Project

(b) Two further complications were the question of how much money needed to be raised and when the money needed to be available to fund the State's equity interest. The Commission understands that financial 'close' was not until December 2009, but the State needed to have its funding in place by September 2009. This understanding comes from a Treasury presentation made to the MCES in October 2008.26

(c) It was not a condition of the Gas Agreement. The NEC submission noted the Final Investment Decision (FID) for the PNG LNG Project at the end of 2009 and also emphasised the need to immediately secure the transaction, given the fact it was a purely commercial transaction which, if not secured, would be lost given market realities, dynamics and forces. In essence, an immediate approval by Cabinet will seal the transaction from the consequences of market hostilities, add further credibility to Governments and add certainty to the project.

A Presentation given by the Treasury to the MCES in October 2008 noted the State's entitlement will arise at FID (October 2009) and not before and that the State will be required to pay funds for the Project at Financial 'close' (December 2009) and not before. The presentation also noted that no sponsor, contractor, off taker or financier expected or required the State's equity financing to be in place before September 2009.27

(d) The transaction also needs to be seen in context. At the time that finance was being sought, the world was in the midst of the global financial crisis. This presented a significant challenge in raising funds28

(e) The State was seen as being the 'weak link' amongst the PNG LNG Project participants in raising funds. If the State succeeded in obtaining the funds at an early stage, it was thought that this would add 'momentum' and credibility to the project29

Background to the relationship between IPIC and Oil Search and the introduction to IPBC

4.2 The Oil Search documents identify that the idea of some form of exchangeable bond to finance the State's participation in the PNG LNG Project was discussed

between Oil Search and IPIC
before it was raised with IPBC.3° It also appears that UBS, acting for Oil Search, may have had
the original idea about using a bond structure, although it was not involved in the subsequent
negotiations. Mr Peter Gotten of Oil Search stated that the concept of the Exchangeable Bond
Transaction was first raised with Oil Search by UBS in April 2008 as part of UBS' engagement by
Oil Search to provide advice in connection with responding to a potential takeover of the
company.31

4.3 For IPBC, the process commenced in late 2007 or early 2008. Oil Search approached IPBC. or
Mr Somare, about a proposal to use IPBC's shareholding in Oil Search to assist in raising the
funds to pay for the State's equity interest. This was the origin of the Exchangeable Bond
Transaction.

4.4 Oil Search was itself a participant in the PNG LNG project and it therefore had something to gain
by assisting the State in finding this funding. Mr Botten's evidence was that it was of concern to
the PNG LNG Project Companies how the State was to raise the considerable funds required to

finance its equity share of the project's capital costs. Without these funds, the PNG LNG Project
could not proceed. Mr Botten said that Oil Search was aware the State was considering various
financing options, including the possibility of selling or mortgaging the shares it owned in Oil
Search (through IPBC) to raise the necessary money.32 In oral evidence, Mr Botten could not
recall who in the Government he discussed the matter with, but that it would have been various
Government representatives, and the 'focus' was on utilising the Oil Search shares.33

4.5 The Commission received evidence from Mr Glenn Blake who

was the managing director of IPBC during the period in which the Exchangeable Bond Transaction was negotiated and agreed. Mr Blake stated to the Commission that:34

(a) IPBC had not envisaged playing any role in funding the State's equity interest in the PNG LNG Project. Nor had it been requested to do so

(b) In late 2007 or early 2008, Oil Search approached either IPBC or Mr Somare about a proposal to use IPBC's shareholding in Oil Search to assist in raising the funds to pay for the State's equity interest

4.6 Mr Botten said that UBS had been engaged by Oil Search as advisers, as Oil Search was seen as a possible takeover 'target' and the State's shareholding represented a significant impediment to a potential takeover.35 It may have been that Oil Search had an interest in ensuring that IPIC became the holder of that substantial shareholding, sufficient to deter potential takeover bids, as its style was to be a passive investor. IPIC's involvement would also have enhanced Oil Search's current business prospects in the Middle East.

4.7 Mr Botten's evidence was that, at the time, Oil Search was in the process of attempting to diversify its assets into the Middle East and had commenced discussions with IPIC in 2007 about a potential strategic partnership.36 Oil Search formed the view that IPIC would be both interested in acquiring the State's shareholding in the event that it was to be sold, and being a long-term strategic partner. Oil Search discussed with IPIC in early April 2008 potential investment opportunities, including the potential to acquire the State's shareholding in the event that it was made available. Mr Botten further stated that, after some initial discussions, IPIC, with support from Oil Search, indicated its intention to seek to acquire the State's shareholding in Oil Search, although ultimately IPIC and the State elected to enter into the Exchangeable Bond Transaction.37

4.8 As mentioned above, Oil Search had already discussed the concept of an exchangeable bond with IPIC before raising it with IPBC. Documents received from Oil Search indicate that at least four meetings may have been held between Oil Search and IPIC prior to IPBC being introduced to IPIC. A presentation was prepared for a meeting entitled 'meeting #4' held on 27 April 2008.38 That presentation set out the objectives and principles of the proposed actions, the background,

options, timing and next steps. It also set out the key 'drivers' for the State. Oil Search's and IPIC's objectives and key principles included 'to establish Falcon [IPIC] as a long term material stakeholder in Oryx [Oil Search]'. The presentation noted that the State was interested in reviewing all options and was not 'wedded to a single proposal. This was noted as a 'direct message from PM'. The presentation also noted that UBS had been engaged by Oil Search as defence advisers, with recent indications that certain companies were seeking to take positions in Oil Search. It also set out details of companies interested in acquiring the State's shareholding.

4.9 A presentation to IPIC on 28 May 2008 entitled 'Project Kumul – A Compelling Strategic Transaction'39 noted discussions between IPIC and Oil Search commenced in March 2008, the

parties having met or held video conferences on ten or more occasions. The presentation noted that '(t]he State wish(edj to consummate the deal by [the] end [of] June or focus on alternatives'.

Oil Search Introduces IPBC to IPIC

4.10 The documents provided by Oil Search show that a Papua New Guinean delegation travelled to the United Arab Emirates and was introduced to IPIC for the first time at a meeting on about 28 April 2008, shortly after the meetings between Oil Search and IPIC.45 A presentation was prepared entitled: 'Introduction to Falcon [IPIC], Presentation to Pelican [the State]'. The presentation noted IPIC's intention to acquire the State's 17.6% share of Oil Search. Mr Botten stated that in late April 2018 Oil Search raised the concept of exchangeable bonds with both the State and IPBC as an option for consideration.41 In a 2011 report prepared by PwC for the State Solicitor on the IPIC transaction (PwC Report), Mr Blake, in an interview with PwC,42 said 'we

were approached by Oil Search that there was a proposal that they had discussed with Abu Dhabi government through one other entity called IPIC.43

4.11 Mr Somare stated to the Commission" that he had no prior relationship with IPIC and that IPIC were introduced to the State by Oil Search. Mr Somare could not recall whether the approach by Oil Search was first made to Mr Blake or himself.45 Mr Blake similarly could not recall to whom the approach was first made.46 Mr Blake said that Oil Search persons explained the funding proposal and offered to introduce IPBC and the Minister to IPIC. The delegation was asked to travel to Dubai and then onto Abu Dhabi to meet IPIC. Mr Blake said that that initial meeting occurred in early 2008. Mr Somare said that the State applied Papua New Guinea government processes for the procurement of the IPIC transaction and at no stage in the decision-making process did they need to consult with Oil Search, nor did they.

4.12 Minutes of an IPBC board meeting record Mr Blake explaining to the board that Oil Search informed IPBC of financial sources in the Middle East because of Oil Search's business activities in Abu Dhabi.47

Dr Keiran Wulff of Oil Search confirmed to Mr David Forbes of IPIC by email on 2 May 2008 that 'There is a strong desire to progress this by the Minister and IPBC and we were very pleased by the results of the meeting'.48

4.13 Mr Gerea Aopi, who was a director of Oil Search at that time, gave evidence that conflicted with the foregoing. Mr Aopi said that it was Mr Ross King of Goldman Sachs who introduced IPBC to IPIC in around early 2008:45

Following Mr King's introduction, Oil Search's Managing Director, Mr Peter Botten, and 1 facilitated and attended a meeting between IPBC's managing director, Mr Glen (sic] Blake, Mr Somare and representatives from IPIC in Abu Dhabi at some time in or around early 2008.

4.14 Mr Aopi subsequently clarified in oral evidence that Mr King made the formal introductions. At that time, Oil Search had an office in Dubai and the Papua New Guinea Government had asked Oil Search if it could organise a meeting for Mr Somare and Mr Blake with IPIC officials in Abu Dhabi.55 In his oral evidence, Mr Aopi confirmed that he travelled to Dubai in early 2008 to meet

representatives of IPIC with Mr Botten, Mr Blake and Mr Somare prior to his appointment to the board of IPBC.51

4.15 Mr Aopi was subsequently appointed Chairman of IPBC in or about August 2008.52

4.16 The Commission considers that Mr Aopi's recollection is likely incorrect. It is not consistent with documents produced to the Commission by Oil Search, the evidence of Mr Botten, the PwC Report which was prepared nearer to the events in question and Mr Blake's more recent evidence which is consistent with what he reported to PwC.

Appointment of advisers by the Treasury

4.17 The Treasury engaged Lazard Freres in August 2007 as part of a two-phased approach to engage a financial adviser to assist the State in determining an appropriate financing arrangement to finance its equity in the PNG LNG Project. Phase 1 was to involve the preparation of a preliminary financing plan and strategy.53 Phase 2 involved conducting a detailed analysis of the financial plan and implementing that plan as approved by the NEC.

4 18 On 1 June 2008, a request for proposals was prepared by the Treasury seeking bids for financial advisers for the financing of the PNG LNG Project.54 This was the start of the second phase of the financial advisory work. Potential bidders were given an overview of the PNG LNG Project and an estimate of its capital cost.

4.19 The role of the financial adviser was to develop finance plans, including developing financial models and assessing the costs and benefits of the State's participation in the PNG LNG Project, conducting a debt sustainability analysis, developing a methodology and assessing the valuation

of the State's PNG LNG Project equity interest for potential sell-down finance plan scenarios.

4.20 The proposal was issued to seven institutions. Three expressions of interest were received, from ING, Lazard Freres and Origin Capital, respectively.

4.21 Financial adviser evaluation meetings were held in Brisbane on 17 July 2008. The evaluation team was: Mr Aloysius Hamou (Chair), Mr Vele (Adviser), Mr Igimu Momo, Mr Damien Horiambe and Mr John Tuaim, all of Treasury, Mr Lars Mortensen of Pertusio Capital and Mr Anthony Latimer, solicitor, (then of Corrs Chambers Westgarth, Sydney) as the Probity Officer.55 Mr Latimer produced a Probity Report on the meetings. Based on the qualitative evaluation criteria, Lazard Freres scored highest. The submission to the NEC noted that:

> ... most importantly, Lazard has a strong advantage in advising the State because of its earlier involvement in the project and wealth of experience in sovereign advisory.

4.22 On 29 July 2008, Mr Pruaitch signed a submission56 seeking the NEC's approval to appoint Lazard Freres as adviser to the Treasury. That submission noted the overall timetable, including the need for the State to finance its interest, had become 'very tight' as financial 'close' was scheduled for the last quarter of 2009. The Treasury would pay a monthly retainer of USD 200,000 until financial 'close', along with a USD 3.5 million fixed success fee if the PNG LNG Project was successful (depending on the financing option ultimately taken by the State). The NEC approved that submission on 11 August 2008.57

4.23 The contract with Lazard Freres was agreed on 19 August 2008.58 The fees were approved by the NEC.

4.24 A further submission was made, dated 18 September 2008. to inform the NEC about the outcome of negotiations between the State and Lazard Freres, and to seek approval to engage legal counsel.59 That submission noted financial 'close' as December 2009. The NEC approved the engagement of Lazard Freres and directed the Treasury and Office of the State Solicitor to engage legal counsel on 24 September 2008.60 The approval included the approval of fees of

USD 7.1 million made up of a retainer fee of USD 200,000 per month and a success fee for equity/debt at a fixed amount of USD 3.5 million.61 The process of appointment and the fees agreed were subsequently approved by then Acting State Solicitor (Mr Daniel Rolpagarea) and the CTSB.62

4.25 It has not been stated to the Commission as to why the NEC approved a contract of that size in late September 2008 when it is clear from the documents, in particular the letter from the Prime Minister dated 25 September 2008 referenced below,63 that the proposal by IPBC about funding advice was in the final stages of approval at that time and the Prime Minister had decided to put it to the NEC. It may be that the approval was to some extent retrospective, as happened in relation to IPBC's engagement of Goldman Sachs and perhaps also that the NEC was content for Lazard Freres to continue to work with the Treasury to source other financing solutions, while IPBC progressed the exchangeable bond proposal.

4.26 Mr Vele gave evidence that a considerable break fee was paid to Lazard Freres at the end of their engagement.64 The Commission does not have any further evidence about such a fee.

4.27 As to the role of the Treasury, Mr Somare told the Commission65 that the Treasury was essentially responsible for the oversight of debt management and as the transaction would impact the State's overall debt, consultation with the Treasury was required. This was especially so given the considerable impact of the PNG LNG Project and the fact the Treasury was responsible for both economic and fiscal policy.

Appointment of advisers by IPBC

4.28 Mr Blake's evidence was that:66

(a) After the initial meetings in Dubai and Abu Dhabi in early 2008 with Oil Search and IPIC to

discuss the proposal, IPBC reported to the Ministerial Gas Committee about it. The
Ministerial Gas Committee directed IPBC to examine the proposal and consider whether it
was in the State's interests and feasible

(b) IPBC looked to engage advisers to assist it in considering the proposal

(c) It chose to obtain legal advice from Freehills Lawyers who were one of the panel of law
firms used by IPBC

4.29 For financial advice, IPBC engaged KPMG to run a selection process. KPMG were instructed to
identify a financial adviser based in Sydney that had global capacity and was of high calibre.
KPMG recommended that IPBC should consider engaging Goldman Sachs and this is what
transpired.

4.30 Mr Blake's evidence is consistent with the PwC Report. As part of their work, PwC considered
how Goldman Sachs and Freehills were appointed as advisers to IPBC.67 In an interview PwC
conducted in 2011 with Mr Blake, he stated that once the NEC approved the appointment of
advisers in May 2008, IPBC retained Mr David McDougall of KPMG to find advisers. A number of
advisers were conflicted and this resulted in Goldman Sachs and Freehills being appointed,
although this took some time. The Commission does not have any documentary evidence
relating to these appointments.

4.31 Mr Blake recalled that Goldman Sachs were first engaged on a fact-finding mission in April or May
2008 to familiarise themselves with the proposal. Initially, their engagement was on a month-to-
month basis. IPBC did not require NEC authority for this.68

4.32 However, on 13 May 2008, the NEC approved IPBC appointing advisers and undertaking further
analysis and work to finalise the funding offer in

consultation with the Treasury, before this would then be put before the NEC for approval. It also directed the Ministerial Committee on Gas to assess other financial options for the NEC's consideration.69

4.33 An IPBC board meeting took place on 20 August 2008. The minutes record that that was the first meeting of the board since December 2007. The appointment of advisers for the State's participation in the PNG LNG Project was tabled but not discussed. The minutes record the shortage of members on the board and the volume of matters to be deliberated, agreeing that the meeting would deal with urgent matters only.29

4.34 It is a puzzle to the Commission why the appointment of advisers was not considered to be an urgent matter, given that Goldman Sachs and Freehills had by then been working on the transaction for some months, the transaction seemed to be advancing and there were time constraints.

4.35 Mr Somare signed Statutory Business Paper No. 87/2007, dated 28 August 200871 seeking approval by the NEC for the engagement of advisers to the 'State' for funding the State's equity shares and debt component in the PNG LNG Project. The paper noted the fees of Goldman Sachs as:

(a) 1% of the gross proceeds of any bond or exchangeable offering or sale of assets

(ID) 0.1% of the aggregate loan facility to be agreed with IPIC

tcl 0.5% of the aggregate facility limit of any investor introduced by Goldman Sachs to the State

(d) 0.4% of the aggregate facility limit of any other loan facility or other capital raising executed as part of the financing

4.36 The fees in respect of a transaction contemplated by (b), (c) and (d) above were payable in two instalments. The paper also noted that upon execution of the letter of engagement the State was required to pay a monthly retainer fee in arrears and in cash of AUD 100,000. The maximum aggregate monthly fee would be AUD 2 million, with the aggregate monthly fee received to be rebated against the finance fees received by Goldman Sachs for the financing work. The paper annexed an engagement letter between Goldman Sachs and IPBC dated 28 August 2008.

4.37 The paper noted that, based on the interim scope of the work outlined, the estimated total professional fees and disbursements for Freehills would be in the order of AUD 500,000 - AUD 750,000. This fee was subject to finalisation of the scope and likely to change. The paper annexed an engagement letter that Freehills issued to IPBC dated 4 July 2008, to provide legal advice on the establishment of arrangements under which IPIC would provide funding to IPBC and/or the State, potentially by way of exchangeable note and concessional loan to fund investment in the PNG LNG Project and structuring and negotiation of such funding.

4.38 On 29 August 2008,72 the NEC noted Statutory Business Paper No. 87/2007 and:

(a) the appointment of Goldman Sachs as IPBC advisers on the funding

(b) the appointment of Freehills Lawyers as IPBC's probity advisers

(c) approved the fee structure for those advisers

4.39 Mr Blake noted that NEC approval was necessary at this point because Goldman Sachs' remuneration included success fees.73

4.40 The minutes of an IPBC board meeting on 13 September 2008 record that the board ratified the appointment of Goldman Sachs on that date. Mr Simon Tosali, an ex officio member of the board, as the Secretary of the Treasury at the time, raised concerns at the meeting that the board had not been part of the appointment process. Mr Tosali also questioned the level of fees that would be paid to Goldman Sachs.74

4.41 Mr Blake stated that KPMG was engaged to model the anticipated revenue flows from the PNG LNG Project.75

4.42 The evidence suggests that within IPBC, the transaction and the appointment of advisers was led by Mr Blake. The board of IPBC was not involved in the appointment of Goldman Sachs and Freehills, the selection of IPIC or the negotiations with IPIC until the proposal was put to them at the meeting on 13 September 2008. Mr Blake's evidence was that there were no board meetings in 2008, prior to August, because the board lacked a quorum. Mr Blake stated that, whilst the board was inquorate, 'IPBC looked to the Minister, the Gas Committee and, where appropriate, the NEC to approve its actions'.76 The decision was then ratified by the board on 13 September 2008. The PwC Report also records that PwC spoke with directors Mr Moses and Mr Hitali and

> ... a couple of others who didn't seem to remember a lot of discussion or briefing about the loan until it was presented to them.77

5. The negotiation and approval of the IPIC Exchangeable Bond Transaction

5.1 As stated above, negotiations between IPBC and IPIC appear to have started at the meeting on 28 April 2008. This is consistent with policy submission 167/2008, which also states that negotiations started in April 2008,78 in accordance with the documents provided by Oil Search and the evidence of Mr Botten and Mr Blake.

5.2 The PwC report noted that the negotiations were kept relatively confidential, even within IPBC and managed by Mr Blake. The report identifies that the first reference to the IPIC transaction was in the board papers for the meeting on 17 August 2008, when the item was marked 'NOT DISCUSSED', with the next reference to the transaction being in the meeting on 13 September 2008.

5.3 Mr Blake said briefings were held in Goldman Sachs' office in Sydney, where generally (at least) four ministers were present, usually the Minister for State Enterprise, the Treasurer, the Minister for Planning and the Hon Peter 0' Neill as the Minister for Public Services.79

5.4 There was another meeting between representatives of Goldman Sachs, IPBC and IPIC on 17 June 2008 in Singapore.8° The PwC Report states that Goldman Sachs successfully sought to exclude representatives of Oil Search from being involved in any

further negotiations at the start
of this meeting.81 Mr Blake's evidence is that Mr Botten, Mr Aopi and Oil Search's Chief Financial
Officer had tried to attend the meeting and that it was Mr Blake who told the Oil Search
representatives that their attendance was not appropriate as they were not a party to the
proposal. Mr Blake said that they were 'surprised as to what he said but did not attend.82

5.5 When asked about that particular meeting, Mr Botten said Oil Search were not involved in any
direct negotiations between IPIC and IPBC and thought it would be inappropriate for Oil Search to

attend the meetings. Mr Botten said Oil Search were there to assist IPIC or IPBC if required.83
Mr Somare's evidence was that while Oil Search were an introducing party to IPIC in the first
instance, in terms of the processes that would be applied for the actual transactions themselves,
internal IPBC processes and internal Government of Papua New Guinea processes, Oil Search
did not have a role to play.84

5.6 Mr Blake's evidence was also that Goldman Sachs and Freehills primarily ran the negotiation with
IPIC. Goldman Sachs' advice was that the Exchangeable Bond Transaction was a good structure
for the State. If the PNG LNG Project completed, it was likely the Oil Search shares would go up
in price. This was a factor in the decision about the strike rate in the IPIC deal. Goldman Sachs
advised on a range of what they thought Oil Search shares would be worth at first gas production.
Their figure was then used to reach agreement with IPIC. Oil Search estimated that on
production of first gas, its share price would be AUD 2.50. IPBC had a figure between AUD 8.25
and AUD 8.70. Mr Blake confirmed that the final figure of AUD 8.55 was negotiated between
IPBC and IPIC.85

5.7 Mr Blake also stated IPBC tried to get the term of the bond to match as closely as possible ExxonMobil's estimate of when the project would be completed and the first gas delivered. This was the most important factor in determining the appropriate length of the bond. However, it too was a matter for negotiation and agreement with IPIC.88

5.8 In about August 2008, Backwell Lombard Capital approached Mr Blake, with an alternative proposal for funding the State's participation in the PNG LNG Project from J.P. Morgan. Mr Blake rejected this proposal on the basis that it would not generate sufficient funds.87

5.9 Mr Blake confirmed that at the time of the Exchangeable Bond Transaction, there was no misapprehension about the mandatory nature of exchangeable bonds. IPBC was 'clear' in its understanding that the shares would be transferred to IPIC on maturity of the bonds. IPBC did not envisage that there would ever be an option to buy the shares back, as IPBC would not have had the capacity to borrow the necessary sums to do so.88 It was also well-understood by those in the State knowledgeable about the Exchangeable Bond Transaction at the time that the surrender of the State's Oil Search shares was the price to participate in the project.89

6. Composition of the Board of IPBC

6.1 The minutes of the IPBC board meeting held on 20 August 2008 record that no IPBC board meetings were held in the period between December 2007 and 20 August 2008.99 The minutes also record that Mr Tosali told the board that the Treasury had been 'pushing' for the vacancies to be filled with new appointments so as to have a fully functioning board. Mr Blake's evidence was that IPBC were waiting for the appointment of further directors by the Minister to make up a quorum.9' Mr Somare's evidence was that, normally, directors would be appointed in consultation with the NEC and the NEC would ultimately advise as to who the directors would be for any SoE.92

6.2 Mr Aho Baliki and Mr Thomas Bullen, as new directors, and Mr Aopi as Chairman, were welcomed to the board at the meeting of 20 August 2008. Mr Blake noted that three vacancies remained to be filled. The difficulties in convening meetings, due to the shortage of board

members was emphasised by Mr Blake.

6.3 At the time Mr Aopi and Mr Baliki were appointed to their IPBC board positions. the former was a director of Oil Search and the latter an employee of BSP. Each appointment thus contravened s. 11(4)(b)(vi) of the IPBC Act 2002 which did not permit:

> ...(vi) an employee or officer (including director) of any business enterprise in which the Board holds any interest unless appointed to that position by the Board in accordance with this Act...
>
> to be appointed a director of IPBC.

6.4 The PwC Report notes that the Treasury advised PwC that they had raised concerns relating to invalid appointment of directors, due to directors holding positions with companies in which IPBC held an interest. The Treasury stated that the appointments contravened s. 11(4)(b)(vi) of the IPBC Act, up until that section was repealed in 2008, as both were employees of businesses in which IPBC held an interest (Oil Search and BSP respectively).

6.5 Mr Aopi stated that he was approached for the role and appointed by Mr Somare. Mr Aopi said he was not aware of any issues regarding his appointment as a director and no one raised the matter with him.93 In response to a question from the Commission as to whether he had ever read the IPBC Act, Mr Aopi said 'no'. Mr Aopi said he had 'a look' at the IPBC Act but not in detail.94 Mr Blake's evidence was that Mr Aopi declared his conflict of interest that arose from his directorship of Oil Search. Mr Aopi's written evidence was that he abstained from attending any IPBC Board meetings, or having any involvement in any IPBC Board discussions or decisions relating to funding options that involved the use of IPBC shares in Oil Search, although he may

have informally discussed this with IPBC directors from time to time.95 Mr Blake said that if he had been aware of any questions as to the ability to appoint a particular person to the board, he would have raised it with the Minister.96

6.6 Contemporaneous evidence confirms that Mr Aopi was aware of his conflict of interest at the time. The minutes of the board meeting of 13 September 2008 record that Mr Aopi declared his conflict of interest, stayed in the meeting for a presentation by Goldman Sachs, but left the meeting whilst the directors deliberated. It was also recorded that he would not participate in the board's decision on the IPIC proposal.

6.7 Oil Search has submitted that during Mr Aopi's oral evidence before the Commission, it was not put to Mr Aopi that he was present at the 13 September 2008 board meeting when the exchangeable bond proposal was discussed; that his presence during that discussion was inappropriate or that his presence at the meeting meant that he could have reported IPBC's confidential deliberations about the proposal back to Oil Search.

6.8 However, in the Commission's view, Mr Aopi should not have been present at the discussion at the relevant board meeting, as it created the risk and the perception that IPBC's confidential deliberations about the proposal would be reported back to Oil Search.

6.9 As mentioned above, the confusion over the constitution of IPBC's board allowed the Treasury later to assert that IPBC's decisions in relation to the Exchangeable Bond Transaction were invalid because there was not the required quorum of four directors; only three members present were eligible to vote, due to the appointments of Mr Aopi and Mr Baliki. A draft letter provided to IPBC in 2011 in connection with the PwC investigation into the Exchangeable Bond Transaction also noted that the IPBC board members were not 'fully conversant with the transaction and did not have the full details of the transaction.

6.10 Legislation was required to correct the position. On 25 November 2008, the Liquefied Natural Gas Project (State Participation) Act 2008 was introduced, which retrospectively repealed the relevant subsection of the IPBC Act and sought to expunge any invalidity.

6.11 The Government should have complied with its own legislation in appointing Mr Aopi and Mr Baliki to the IPBC board. Mr Aopi and Mr Baliki should have considered the IPBC Act to understand the roles that they had been offered and the organisation they were joining. If they had done so, they would have become aware that their appointments would contravene the IPBC Act. They should then have turned down their appointments unless the problem could be resolved in another way

7. Presentation of the proposal to the IPBC Board and NEC

7.1 The IPBC board meeting on 20 August 2008 was Mr Aopi's first meeting as chair. The minutes do not record any discussion about the PNG LNG Project or the negotiations with IPIC. This is surprising given the importance of the topic to IPBC at that time.97

7.2 Commercial terms for the transaction appear to have been agreed by 12 September 2008. On that date, Goldman Sachs produced a document titled 'Project Kumul – Post Negotiations Debrief Discussion Materials'.98 The paper highlighted that key commercial terms had been agreed. It appears that Mr Hogan of Goldman Sachs presented that document to the MCES and the directors of IPBC on that day.99 It is not clear which directors attended and, in particular, whether Mr Aopi attended and what he did in relation to his conflict of interest. Mr Aopi's general evidence was that he always disclosed his interest and did not take part in any decisions where his conflict arose.

7.3 The Goldman Sachs paper explained the outcomes from the negotiations with IPIC including the key commercial terms agreed between the parties and an evaluation of the transaction Goldman Sachs'

(a) The terms were very 'attractive' and offered a compelling source of financing. They
exceeded what could be obtained in an on-market transaction
(b) There was a benefit in having funding certainty at that point given market volatility
(c) There was no recourse to the State
(d) IPBC and the State could consider alternatives. in particular a broader process to sell the
Oil Search shares
(e) At that point, the IPIC transaction (absent any debt solution), economically and
strategically, looked to be a better alternative to an outright sale via a 'broad& process
(f) However, this was predicated on Oil Search shares remaining around the current levels
prior to settlement (that is, the date upon which the bonds would be issued). The AGL
sales processlm could be a 'strong' catalyst for the Oil Search shares increasing in price
(g) Using the Oil Search shares to fund the interest in the PNG LNG Project only made sense
if IPBC held that interest
(h) IPIC had introduced IPBC and the PNG LNG Project to six commercial banks. They had
shown some interest in providing debt finance for the PNG LNG Project

(I) It was unlikely that 'concessionar funding would be delivered; however pressure should
continue to be applied to obtain this. Accessing contingency funding for IPBC would be a
satisfactory outcome
(j) As the bond was not a clean exit from Oil Search, there was a residual exposure to Oil
Search's performance during the life of the bond. This was partly mitigated by Oil
Search's value being linked to the PNG LNG Project
(k) To mitigate the market risk to which the transaction was

naturally exposed, the State and
IPBC should move as quickly as possible to decide if they wish to proceed along this path

7.4 The IPBC board, as a whole, was first briefed101 on the proposal at a board meeting on
13 September 2008. It is surprising that the IPBC board had not been briefed about the proposal
at an earlier date. As outlined above, while the IPBC board was in some disarray throughout
2008, the board could have been informed about the proposal in August 2008 but this was not
done. Given the vital importance to the State, the Minister responsible ought to have taken steps
earlier to ensure a fully functioning board with an effective chair.

7.5 Mr Hogan again presented the Project Kumul document.102 The minutes of the meeting record
that:
(a) Mr Aopi declared his conflict of interest. The minutes record that Mr Aopi would stay in
the meeting for Mr Hogan's presentation but leave the meeting whilst the directors
deliberated upon it. It was also recorded that he would not participate in the board's
decision on the proposal
(b) Mr Hogan informed the board that there had been 'extensive' negotiations with IPIC that
had resulted in the terms contained in the paper
(c) Mr Blake commented that Petromin posed a threat to the Oil Search shares and that this
impacted upon the PNG LNG Project, The 1PIC transaction was essential to protect the
Oil Search shares from acquisition
(d) Mr Tosali questioned the serviceability of the coupon on the bonds and asked that
Goldman Sachs should prepare a model that would show the merits of the transaction as
against an outright sale of the Oil Search shares
(e) After Mr Hogan had left the meeting, the board questioned Goldman Sachs' appointment.
Mr Blake explained that Oil Search had been the source of the transaction. Subsequent
discussions had led to the appointment of a financial adviser. Of the firms considered,
Goldman Sachs was not conflicted and had experience of matters in Papua New Guinea.
Mr Tosali expressed concern that the IPBC board had not been involved in Goldman
Sachs' appointment and asked about the fees to be paid to them
(f) Mr Blake responded that confidentiality meant that management had made the

appointment, with the board to ratify this at the appropriate time. Mr Blake added that Freehills had been requested to ascertain what market rates were and that Goldman Sachs would be paid only to market rates

(g) The board noted that Lazard Freres had been engaged as financial advisers to the State and that any financing options put together by the Treasury as an alternative to the IPIC transaction should be considered. It was recorded that there were 'lengthy discussions in the nature of concerns that the Department of Treasury had on the IPIC Transaction'

(h) These concerns were noted, but the board resolved to recommend the Exchangeable Bond Transaction to the NEC, subject to the Treasury being accorded the opportunity to comment on it. The board ratified the appointment of Goldman Sachs

7.6 On 25 September 2008. Prime Minister Somare wrote to Petromin103 stating the reasons for preferring the IPBC proposal and that he was briefed on the proposal that day by Goldman Sachs.

7.7 The letter noted that the Prime Minister was convinced that of Petromin and IPBC, IPBC was better placed to be the State Nominee. The letter also noted that he had directed that the proposal be put to the NEC. The Prime Minister urged all State entities work together with Goldman Sachs and IPBC to conclude the transaction. The letter noted that it superseded previous letters, in particular a letter dated 4 September 2008 to the Minister for Public Enterprises.

7.8 The Prime Minister also wrote to Ministers Pruaitch, Tiensten, Duma and Somare in the same terms. The purpose of the letter (which was undated) was to inform the Ministers of recent

decisions made by the Prime Minister concerning the PNG LNG Project: 'Basically, the decisions seek to address misunderstandings that may have been inadvertently created during the course of the year ... '.104 Mr Somare told the Commission that, as best as he could recall, the reference to 'misunderstandings' would have been in relation to the competing interests as to who would be the State nominee.105

7.9 On 6 October 2008, Mr Somare wrote to Mr Pruaitch105 noting the Exchangeable Bond Transaction was in its final stages of approval and inviting the Treasury's detailed comments as soon as possible, providing a draft copy of the submission to the NEC, which was to be presented at an MCES meeting the following day.

7.10 On 10 October 2008, Mr Tosali107 gave the presentation to the MCES, emphasising the State was not required to provide equity until September 2009, and that financing the State's participation in the PNG LNG Project had not been subject to open competition or legal advice about the negative pledge. The Treasury's view was that the State needed legal advice to confirm the bonds to be issued as part of the Exchangeable Bond Transaction would not breach the States negative pledge obligations, a breach of the negative pledge being an event of default in the PNG LNG Project which might result in the State's share of project debt becoming repayable. The presentation noted that Lazard Freres and the State had been approached by numerous lenders and had commenced soliciting proposals. 108

7.11 On 10 October 2008, the MCES issued a directive instructing the Treasury to report to the MCES on 24 October 2008 with all financing alternatives so that the MCES could make a decision and recommendation to the NEC.

7.12 By this time, Backwell Lombard Capital had taken their J.P. Morgan proposal to the Treasury. It was not accepted.109 It is likely that this was because the proposal was not fully developed and it was uncertain how much finance it would raise. Neither Petromin nor the Treasury were able to present a competing offer at the time that the Exchangeable Bond Transaction was being considered by the NEC that matched it in terms of the amount that it would raise and the certainty of delivery.

7 13 On 16 October 2008, Lazard Freres wrote to the Prime Minister stating that they could see no basis for curtailing the competitive assessment and review process. and that they saw significant

disadvantage to the State in doing so. They noted also that 'time was on our side' and encouraged the Prime Minister to reinstate the assessment and review process.11°

7 14 In October 2008, Freehills produced a document named: 'Project Kumul Board Information Pack'.111 The purpose of the document was to explain the proposed Exchangeable Bond Transaction to the IPBC board of directors. Relevantly, the document explained:

(a) AUD 1.681 billion would be raised from issuing the bonds
(b) the term of the bonds was 5 years, with a coupon of 5%
(c) the Oil Search shares would be held in escrow for the duration of the bonds
(d) the exchange process during the term of the bonds and at maturity, including adjustments to be made depending on the share price of the Oil Search shares at the time of exchange
(e) the circumstances in which IPBC could seek early redemption of the bonds
the funds raised would held in quarantined Australian and US dollar accounts to pay the coupon and fund IPBC's equity stake in the PNG LNG Project

(g) Oil Search dividends were required to be paid into the quarantined accounts unless they were below a certain threshold, in which case they could be retained by IPBC

7.15 On 20 October 2008, policy submission 167/2008 was produced for the NEC.112 It was signed by Mr Pruaitch as Treasurer and Mr Tiensten as Minister for National Planning and Rural Development.

7.16 The purpose of the submission was to seek the NEC's approval of the terms that had been negotiated and to inform the NEC of risks which could derail the transaction if not efficiently addressed. The submission stated that Treasury was 'involved every step of the way' and notes:

> However, such a significantly large financing, if not handled appropriately would lead to greater risks in the form of State debt exposure, State guarantee exposure, and other related issues, as experienced in the PNG to Queensland Gas Pipeline Project. With these challenges firmly in mind, the Government led by IPBC, supported by Department of Treasury and Department of National Planning and Monitoring, the Attorney General, and Department of Petroleum and Energy entered into negotiations with Abu Dhabi State Government through the International Petroleum Investment Corporation, on the exchangeable bond financing option, leveraging the State's 17.6% shareholding in Oil Search Limited, vested with IPBC pursuant to the IPBC Act. The Negotiation was concluded in early September 2008, triggering the current process of final evaluation and approval by both sides – that is, the International Petroleum Corporation of Abu Dhabi, United Arab Emirates on one hand and the IPBC Board, and Cabinet on the other.

7.17 Mr Pruaitch said that IPBC referred the submission to the MCES for its consideration on or about 20 October 2008 and Mr Somare briefed the MCES. The MCES endorsed and referred the submission to the NEC.113

7.18 The key points made in the submission were:

(a) The State's total financing exposure to the PNG LNG project was approximately USD 3 billion, comprising project financing of USD 2 billion and equity financing of USD 1 billion, making this largest investment in the State's project financing history

(b) In return, the State stood to benefit from its equity interest to about USD 850 million annually in addition to tax receipts. There were also substantial indirect benefits including generating jobs and accelerating economic growth and under-pinning the future socio-economic growth and development of the State. In comparison, the State currently received USD 16 million annually in dividends from its shareholding in Oil Search

(c) IPIC was regarded as a long-term strategic investor, which was unlikely to 'launch' a takeover bid for Oil Search with whom it already had a close association through Oil Search's ventures in the Middle East. IPIC saw Papua New Guinea as an attractive investment destination and considered the exchangeable bond transaction to be the beginning of a long-term presence in the region

(d) The involvement of IPIC would support the commercial value and position of Oil Search as the State's strategic partner in long-term development of the hydrocarbon sector

(e) The involvement of IPIC and access to Abu Dhabi's financing institutions was essential to create competitive 'tension' with Papua New Guinea's traditional financing institutions. This would benefit the State's commercial and development financing over the long-term

(f) The difference between the revenue currently received through the Oil Search shareholding and the revenues anticipated from the PNG LNG Project meant that it made more sense to monetise the Oil Search shares to finance the State's full equity interest in the PNG LNG Project, as opposed to selling down some of the State's equity in the project to raise the finance. Maintaining the full equity interest was also consistent with the Government's policy not to sell-off assets cheaply, but to add value to them

(g) The nature of IPIC as a 'passive' investor would allow the State to maintain its relationship with Oil Search

(h) A direct sale of the Oil Search shares would have 'opened the door' to a takeover bid for Oil Search

(I) There should be no impact on the State's finances from the proposed transaction

(i) The price at which the State was securing its equity

interest in the PNG LNG Project was
favourable in comparison to the value attributed by financial analysts to AGL's 3.6% share
of the PNG LNG Project in its equity sale process
(k) The State's dividend 'stream' was unencumbered (although the Commission notes that
this was not in fact the ultimate outcome of the transaction, nor was this statement
consistent with the Freehills' summary of the transaction)
(I) The bond was compelling given the global credit 'squeeze' and the expectation that the
financial crisis would continue for at least the next year. It would be very difficult for the
State to raise capital in its own right from capital markets or financial institutions
(m) The revenues from the PNG LNG Project would assist the State in exercising its back-in
rights in relation to other resource projects in the future
(n) The State was seen to be the 'weakest link' in raising equity for the PNG LNG Project.
The transaction would add certainty to the overall project financing efforts
(o) There was no need to sell down the State's equity to finance reduced equity from the
proceeds of that sale when the returns from the PNG LNG Project were extremely

attractive and the transaction allowed the State to fund its full equity participation at
effectively no cost
(p) Further, it was in the best interests of the State to preserve the value of its 19.4% stake,
so as to enable it to deal effectively with the Benefit Sharing Agreement process which
could threaten the entire PNG LNG Project. Having the full-stake would assist the State in
negotiating the imminent issue of additional equity demanded by resource owners and
pipeline communities

7.19 The submission also considered why the transaction should be concluded as soon as possible:

(a) The primary motive was to bring certainty to the PNG LNG Project given that the State was regarded as the 'weakest link' so far as equity was concerned. This was particularly relevant as dealings with debt financiers and rating agencies was intended to start in November 2008

(b) Delaying the transaction might put the transaction itself at risk. The State could not control the market

(c) Securing the deal would also support Oil Search's share price. This was ultimately in the State's interest

(d) The Treasury's comments were important but further delay was unwarranted. The Treasury had been part of every step of the negotiation process. Further, the Treasury had a 'concrete' financing option that was as conclusive and developed as the Exchangeable Bond Transaction

7.20 The submission described and discussed the terms of the proposed transaction:

(a) The submission was clear in explaining IPIC's rights to obtain the Oil Search shareholding and IPBC's liability to make up any shortfall if at the time of exchange, the Oil Search share price was below AUD 8.55

(b) The submission stated that Oil Search dividends were excluded from the quarantine account. This was not quite correct. If dividends exceeded a certain threshold, the excess would be paid into the quarantine account. The Freehills document drew attention to the fact that dividend payments might be divided between the parties in some circumstances. The incorrect statement in the submission may have been derived from a draft of a Goldman Sachs presentation to the NEC dated 22 October 2008, which included the same misstatement.114 The Goldman Sachs presentation appears to have formed the basis for much of the submission

(c) The submission explained the separate Australian and US dollar quarantined accounts and that the majority of the funds raised by the bonds would be converted into US dollars

(d) The submission stated that on current modelling, the 5% coupon could be met by IPBC and the funds raised from issuing the bonds would be sufficient to cover the State's

equity-based capital expenditure in the PNG LNG Project. It was possible that there would be a residual fund of AUD 500 million but this was highly sensitive to foreign exchange and interest rates

7.21 The submission also noted some risks to the transaction:

(a) IPIC was undertaking legal due diligence, to obtain comfort that IPBC would continue to hold the state's shareholding in Oil Search during the term of the transaction. IPIC

needed to be certain that IPBC would be the State's nominee for the PNG LNG Project. This would require changes to be made to legislation

(b) The deadline for the State to determine its nominee under the PNG LNG Gas Agreement was November 2008 and there was still competition between Petromin and IPBC as to which of them should take that role. The Prime Minister's letter of 25 September 2008 informed Petromin that IPBC was better placed to do this and started the process of obtaining the State's approval. Presenting the Exchangeable Bond Transaction proposal to the NEC was a step in that process. The NEC needed to make an immediate decision on this issue as without it, IPIC might 'pull our of the transaction

7.22 The submission noted that the transaction had the support of the Prime Minister and key economic ministers including the Minister for Treasury and Finance, the Minister for National Planning and District Development and the Minister for Public Enterprise. There was also support from the Minister for Public Service and the Minister for Petroleum and Energy. The submission was signed by Mr Pruaitch and Mr Tiensten.

7.23 In its concluding section, the NEC submission concluded that:

Cabinet should note that based on all available

information, the exchangeable bond transaction being pursued by IPBC in consultation with the Department of Treasury, the Department of National Planning, key ministers, the Ministerial Economic Committee, the Prime Minister, and Cabinet, is the only serious financing option available to the Government at this point in time.

7.24 On 21 October 2008, Mr Tosali wrote a lengthy letter to Mr Blake setting out the Treasury's objections to the proposed transaction.115 The letter was copied to a number of people including the Prime Minister, Deputy Prime Minister, Mr Somare, Mr Pruaitch and the members of the MSEC.

7.25 The main points of objection to the transaction were that:

(a) It would give IPIC the right to acquire the Oil Search shares at an unknown time up to 5 years in the future at a price which would be the lower of AUD 8.55 and the then market price. If the price was below AUD 8.55, IPBC would be required to make a cash payment. If the price was below AUD 5.50 at maturity, the State would have insufficient funds left from the transaction to finance its involvement in the PNG LNG Project and would need to raise further finance

(b) The Oil Search shareholding was a significant asset of the State

(c) The State was exchanging a liquid asset for an illiquid one and losing the diversification of assets that the shareholding in Oil Search represented

(d) Whilst Oil Search currently paid very low dividends, they were likely to improve in the future as a result of the PNG LNG Project. The PNG LNG Project itself would not generate a return to the State until 2015, resulting in a loss of revenue in the intervening period

(e) The transaction might increase the risk of Oil Search being taken over, including by IPIC

(f) The transaction was being entered into before the funds were needed and the bonds would need to be redeemed before the State started to receive any income from the PNG LNG Project

(g) There had not been open competition for the financing. It would be better for the State to establish and maintain competition for the financing for as long as possible. The State did not require committed finance until September 2009 and would not need to actually have the funds until financial close on the PNG LNG Project. It was too early to say what the total PNG LNG Project cost would be

(h) A delay in obtaining finance would not affect the credibility of the PNG LNG Project given the other participants involved and the growing demand for LNG

7.26 In summarising its position, the Treasury strongly recommended that the State should:

> continue to evaluate all financing proposals, including the Bonds ... There is sufficient time to carry out a traditional evaluation of financing alternatives ...

7.27 On 23 October 2008 Goldman Sachs made a presentation to the NEC by Goldman on the exchangeable bond option.116

7.28 Following that presentation the NEC approved the Exchangeable Bond Transaction, as recorded in NEC Decision 223/2008.117 The meeting also determined that the State's shareholding in Oil Search should continue to be held by IPBC and that IPBC would be the State's nominee for the PNG LNG Project.

7.29 Mr Pruaitch, in response to a question in cross-examination from Ms Twivey-Nonggorr on behalf of Mr Vele and the Treasury, as to whether the decision to select IPBC over Petromin was the need to have a guaranteed position because of the perceived difficulty in accessing funds due to the global financial crisis in 2008 despite the Treasury's views, said:

> Again, like I indicated earlier and you rightly pointed out that in that period there was this global financial crisis. And for us to go out to the market to undertake this kind of negotiation is quite difficult and given the window that we were provided under 60 days, the State opted to pursue the option presented by IPBC.

7.30 The Commission has not seen any other evidence of a 60-day time-limit, which it expects it would have seen, should such a limit have existed. The Commission therefore considers Mr Pruaitch to be incorrect in his recollection on this point.

7.31 It seems that, IPBC responded to Mr Tosali's letter of 21 October 2008 detailing the Treasury's objections to the proposed exchangeable bond transaction two days later. The Commission was unable to obtain a copy of this letter.

7.32 On 24 October 2008, IPBC's board discussed and then approved its entry into the Exchangeable Bond Transaction.118 Mr Tosali was represented at the meeting by Mr Yauieb. Mr Yauieb stated that the Minister for Treasury had not given the Treasury a hearing at the NEC meeting on the previous day and he therefore requested that the Treasury's objections be recorded in the minutes of the meeting. Broadly, the Treasury maintained that the Exchangeable Bond Transaction was not an appropriate financing option to fund the State's equity. Mr Yauieb was advised that the Treasury had previously been given the opportunity to comment on the transaction by 19 September 2008, but had failed to do so and so the board had proceeded to recommend the Exchangeable Bond Transaction to the NEC. At this point in the discussions, the board apparently waited to see the NEC decision 223/2008 of the previous day before passing resolutions to enter into the Exchangeable Bond Transaction. Mr Aopi is recorded as having left the meeting whilst resolutions were being put to the board and resolved.

7.33 According to the PwC report, at least one participant at the meeting (who was not identified) reported feeling compelled to approve the transaction because it had already been approved by the NEC.119

7.34 Mr Yauieb's evidence was that whilst the Treasury did recognise there were merits to the proposed transaction, he was concerned that 'a robust competitive process to secure a higher price had not been undertaken.'12°

7.35 On 3 November 2008, Mr Yauieb wrote to Mr Moses Koiri of IPBC contending that the meeting of 24 October 2008 was inquorate. This was on the basis that Mr Aopi and Mr Baliki were disqualified from being directors as they were also employed by businesses in which the state had an interest and Mr Yauieb himself was disqualified under section 11 of the IPBC Act. This section requires directors to make declarations of office and secrecy in the presence of a witness and provide the declaration to the secretary of the board. Mr Yauieb sought Mr Koiri's urgent views on whether the resolutions were invalid.121

7.36 On 23 November 2008, IPBC and IPIC entered into the Exchangeable Bond Transaction.

7.37 On 25 November 2008, a joint press release was issued by IPIC, the State and Oil Search announcing the deal. The release explained that subject to certain conditions, IPIC would be acquiring the State's shareholding in Oil Search.122

7.38 The Treasury continued to explore alternative financing options, despite the fact that IPBC had already entered into the Exchangeable Bond Transaction. It is not clear why this was done but it may have been in case they could find a better proposal or to cater for a situation in which the exchangeable bond transaction did not proceed, for example through the failure of a condition precedent. As nothing came from this work that relates to the Terms of Reference, the Commission does not consider it any further.

8. Petromin and IPBC in competition

8.1 As noted, there was a question as to which State entity would be the State's nominee to hold the participating interest under s. 165 of the Oil and Gas Act (back-in rights), as well as some additional commercially agreed rights.

8.2 Petromin was created in 2007. Hon Kerenga Kua was a director of Petromin at the relevant time. Mr Kua's evidence was that Petromin was specifically set up under its own enabling legislation to

be the State's nominee in all future mining and petroleum projects.123

8.3 IPBC was established as a statutory corporation under an Act of the same name.124 It was a trustee of the General Business Trust in which the ownership of many of the State's State-owned enterprises was vested.

8.4 Petromin had the support of Prime Minister Sir Michael Somare and IPBC had the support of Mr Somare. Mr Vele said that the issue was always contentious and that 'Petromin and IPBC were waging a battle as to which of the two entities would become the state nominee'.125 Mr Vele's view was that Petromin's proposal was the first attempt by the State to put in place a structure or an office to house both petroleum and mineral assets, whereas IPBC already held the shares in Oil Search.126 Mr Somare said that the difference between Petromin and IPBC was that

Petromin did not have the balance sheet to support the transaction, whereas IPBC had the Oil Search shares. IPBC came under the oversight of his Ministry, as a SoE.127

8.5 The gazette! in February 2008 to nominate Petromin as the State's nominee was subsequently revoked.128 Blake Dawson provided advice to IPBC in June 2008 that it was not mandatory for Petromin to be the State's nominee, that the State had no right to nominate Petromin before the right to acquire arose and that the revocation was valid.129

8.6 Mr Joshua Kalinoe, the managing director of Petromin in 2008, raised this issue with the State Solicitor who responded by letter in April 2008.130 The State Solicitor described the rights of the State and the role of the nominee in the PNG LNG Project. The State Solicitor's view was that:

(a) the PNG LNG Project was not a petroleum project for the purposes of the Oil and Gas Act. 'Petroleum project' is defined in section 3 of the Oil and Gas Act to mean a project • • 1 'for the production of petroleum'

(b) a project for the production of petroleum requires the grant of a licence to permit such production, such as petroleum prospecting licence or a petroleum retention licence both of which permit extended productions tests, and the petroleum development licence. All such licences necessary for the PNG LNG Project were currently in force. Correctly speaking, the PNG LNG Project was a coordination project

8.7 The Commission has not seen any documents evidencing financing proposals put forward by Petromin. Mr Vele's said that the proposals focused generally on structures which included a partial divestment of equity in the PNG LNG Project in an effort to secure funding for the balance of equity taken up. 'It was envisaged that this would be done through the nomination of a majority Petromin-owned subsidiary with either Japanese partnership and funding, or in collaboration with an international oil major such as Royal Dutch Shell or Petronas from Malaysia. It was termed 'the new concept".131

8.8 The Prime Minister's letters of 25 September 2008 refer to Petromin's 'NewCo concept' but do not provide any detail of the proposal.132 Despite the lack of evidence on the proposal itself, it is clear that, at a certain point, IPBC, the Treasury and Petromin were all separately working on proposals to fund the State's equity share in the PNG LNG Project, each engaging their own advisers.

8.9 Mr Kua's recollection133 was that Petromin's intended and proposed involvement came to an end:

'Petromin Holdings was left out in the cold and I disputed that because the legislation says that; the Petromin Holdings Authorization Act says that the nomination should be Petromin Holdings'.

Mr Kua said he resigned from his position on the board of Petromin due to the issue.

8.10 Mr Blake did not consider that there was competition between IPBC, Petromin and the Treasury over which entity should hold the State's equity interest in the PNG LNG Project. In particular, he noted that he had a very good relationship with Mr Kalinoe, the managing director of Petromin.

He observed that at the outset, Petromin may have assumed it would be the nominated entity and
he believes that members of the board went to Singapore and Japan looking for funds. In
contrast, IPBC had no reason to become involved in any discussion about the project until Oil
Search proposed that one of its main assets, the shareholding in Oil Search, should be used as
the means to obtain the funding. Once that idea progressed and looked feasible, IPBC had the
mandate from the State and the Oil Search shareholding needed for the transaction to proceed.
By comparison, Petromin did not have the assets or sufficient political support. Mr Blake did not

recall Petromin making any significant efforts to obtain its own financing once the Exchangeable
Bond Transaction was being seriously pursued.134

8.11 Mr Blake also noted that IPBC never saw itself as a long-term holder of the interest in the PNG
LNG Project because the plan was that the revenues generated by the project should go into a
sovereign wealth fund. Once the fund was established. the revenues from the project would
either pass through IPBC into the fund or be held by a different entity altogether.135

9. Were any alternatives to IPIC considered?

9.1 It is apparent from the above that IPBC, the Treasury and Petromin all considered ways to finance
the State's equity participation in the PNG LNG Project. It is also clear that the IPIC proposal was
the only one which was sufficiently developed to be accepted within the time-frame established by
the MCES.

9.2 Mr Blake's evidence was that IPBC itself considered other alternatives to the IPIC proposal. IPBC

was intent on presenting an informed and best position to the Ministerial Gas Committee which is why it had sought the advice of Goldman Sachs. Although it did not have a mandate to try to find other sources of funding, IPBC did consider alternatives. Mr Blake approached Mr Peter Graham of Exxon Mobil to see whether Exxon Mobil would provide funding but without success. The global financial crisis was one of Exxon Mobil's reasons for refusing. Mr Blake also asked Backwell Lombard Capital to look at other options. Backwell Lombard Capital approached J.P. Morgan for a loan which would use the Oil Search shares as security but the security offered by the shares would only have raised been sufficient to have raised AUD 400 – 500 million. IPBC had no other significant assets to offer as security. The options included internal State funding through the budget or the sale of general business trust assets. The IPBC bond was a negative pledge over the general business trust assets, so they were relevant to that extent, but no other proposals looked to take advantage of the IPBC assets.

9.3 Mr Aopi said:

> I am pretty sure that they would have looked at some of the options but during that time there was the global financial crisis and so they would have taken into consideration those aspects. The other was to whether to just outright sell some of the equity either in the project or in Oil Search shares. That could have also been considered.136

9.4 Mr Pruaitch said IPIC was the only proposal put to the government, 'I believe IPIC was selected after severe consultation and based on advice, legal advice and commercial advice they were selected137 and was unaware if IPBC considered other sources of finance.

9.5 Mr Pruaitch also explained about the approval of the IPBC proposal, that:

> And therefore the proposal put by Lazard is considered but we opted not to go down that path because it will not assist the State in coming with the kind of money to participate in the project. Do not forget we were given a window of opportunity and we need to demonstrate that we are capable of participating in this project and that is why we went for the IPIC option as proposed by IPBC. 138

9.6 Mr Erastus Kamburi of KCHL (formerly !PBC) said that 'the

EBT from IPIC was considered to be
the only option for finance' and commented that the IPBC board did not have sufficient time and

information to consider the risks as it was only briefed on the transaction at the board meeting on
13 September 2008 when the board resolved to recommend the transaction to the NEC.

9.7 Mr Somare confirmed in his evidence that in terms of the IPBC process, IPIC was the only
proposal. He said14° that he could not interfere with the selection process undertaken by IPBC by
reference to the IPBC Act. Mr Somare's evidence was that IPBC identified IPIC and they
recommended IPIC to the NEC through Mr Pruaitch as the responsible Minister

PART II

10. The Exchangeable Bond Transaction
Introduction

10.1 In November 2008, IPBC entered into the Exchangeable Bond Transaction.

10.2 The transaction has already been the subject of review. PwC investigated it at the request of the
Acting State Solicitor, Mr Rolpagarea, and produced the PwC Report.141

11. The terms of the Exchangeable Bond Transaction

11.1 The essence of the Exchangeable Bond Transaction was that:
(a) IPBC issued AUD 1.681 billion of exchangeable bonds to IPIC. Each bond was for AUD
500,000142 and 3,362 bonds were issued143
(b) IPBC would use the funds generated from issuing the bonds principally to fund its equity
participation in the PNG LNG Project. The funds were placed

in quarantined US dollar
and Australian dollar accounts for that purpose and to meet interest payments on the
bonds144
(c) At the time of the transaction, IPBC held 196,608,197 shares in Oil Search. The
transaction therefore placed a value on those shares of AUD 8.55 a share. This was
significantly above the market value of the shares when the transaction documents were
executed on 23 November 2008 which was approximately AUD 4.33145
(d) If cash dividends paid on the Oil Search shares exceeded a specified threshold, the
excess above the threshold was to be paid into the quarantined accounts 146
(e) IPBC was required to pay interest to IPIC at the rate of 5% per annum on the principal
sum.147 However, the bonds were self-funding in that about AUD 390 million of the funds
raised by the bonds was placed in escrow to be used to meet the interest payments as
they fell due
(f) For the duration of the bonds, IPBC was not permitted to grant security over any of the
assets of the General Business Trust to secure financing debt unless it offered the same
or equivalent security to IPIC148
(g) From 40 days after the bonds were issued until 10 days before maturity, IPIC could
exchange the bonds for IPBC's shareholding in Oil Search. 149 On this early exchange,
IPIC would receive all of the shares (even if the share price was above AUD 8.55), but
would not receive a cash payment if the share price was below AUD 8.55

(h) On maturity, the bonds would be exchanged for IPBC's entire shareholding in Oil Search_
When that happened, if:
(I) the Volume Weighted Average Price of the shares

over a certain period of time
was less than AUD 8.55 a share, IPBC was obliged make up the shortfall in cash

(ii) alternatively, if the Volume Weighted Average Price of the shares was greater
than AUD 8.55 a share, IPIC would only receive shares totalling the face value of
the bonds and IPBC would keep the remainder of the shares150

(i) After the payment of the sixth interest payment date, 15 October 2011, I PBC had the
option to redeem the bonds but this depended on the average share price being above
130% of AUD 8.55 (ie. AUD 11.115) for 20 or more trading days during a period of
30 consecutive trading days.151 If IPBC sought to redeem the bonds, it only needed to
provide shares to the face value of the bond but needed to redeem all of the bonds
If IPBC chose to seek early redemption, IPIC had 25 business days following receipt of
notice of the desire to redeem in which to decide whether to exercise its rights to an early
exchange
(k) The Oil Search shares were held by an escrow agent for the duration of the bond to
protect the rights relating to the shares152
(I) Neither IPIC nor IPBC had the right to seek a cash substitute for the shares

11.2 As mentioned, the Exchangeable Bond Transaction was negotiated between April and September
2008153. The pricing of the bonds was agreed before 12 September 2008, the date of Goldman
Sachs' report on the negotiations. However, the exchangeable bonds were not issued until
5 March 2009. At that point, the share price was AUD 4.82 per share.154

12. Comments on the Exchangeable Bonds
The exchange right

12.1 The Exchangeable Bond Transaction gave IPIC the right to take IPBC's Oil Search shares both
during the period of the bond and at maturity. This was a conscious choice by IPBC and the NEC
when each approved the transaction. Whilst the transaction would result in IPBC losing its
investment in Oil Search, including any dividends flowing from the shares, this was considered an
acceptable price to pay to obtain the much greater revenues that would ultimately 'flow' from the

PNG LNG Project.

12.2 As IPIC had a right of early exchange which could require all of the Oil Search shares to be transferred to it, it is overwhelmingly likely that if the price of the shares was sufficiently high for IPBC to be entitled to redeem the bonds and IPBC chose to do that, IPIC would have responded by seeking early exchange, thus taking all of the shareholding even though the price was above AUD 8.55. It was therefore highly unlikely that IPBC would ever have been able to redeem the bonds.

12.3 Further, if prior to maturity, the relevant average share price of the Oil Search shares was above AUD 8.55, it is likely that IPIC would have chosen to exercise its early exchange rights in order to obtain the full Oil Search shareholding rather than wait until maturity wher, under the mandatory

exchange provisions, it would only be entitled to take shares up to the face value of the bonds. In the event, however, the Oil Search share price did not provide this opportunity.15E

13. Currency risk

13.1 Mr Vele criticised the transaction on the basis that it created a currency risk that was not well managed:

(a) He questioned the timing of the exchange into US dollars. Whilst Mr Vele did not know when the Australian dollars were converted into US dollars, he believed that the exchange rate achieved was approximately AUD 1 to USD 0.63/0.64 and the Australian dollar was `weak' at that point in time. Mr Vele noted that during the period after the exchange, the Australian dollar went on a 'once in a generation ride'

reaching highs in excess of
USD 1.10

(b) Mr Vele also questioned whether it was necessary to exchange all of the Australian dollars into US dollars. While the cash calls on the equity contributors to the PNG LNG Project would be in US dollars, much of the underlying expenditure on the project would be in Australian dollars156

13.2 But the currency risk was recognised at the time. The PwC report records that Mr Blake informed PwC that Goldman Sachs had tried to negotiate for the loan to be in US dollars as that was to be the currency of the capital expenditure on the PNG LNG Project. However, IPIC required the transaction to be in Australian dollars as this was the currency of Oil Search's share price.167

13.3 The US dollar account was considered necessary because the capital expenditure on the PNG LNG Project would be in US dollars. The PwC report states that AUD 1.25 billion of the funds raised by issuing the bonds was converted to US dollars on 23 March 2009.168 On that date, the exchange rate was about USD 0.70 for AUD 1.00.

13.4 The Goldman Sachs Post-Negotiation debrief document confirms that the US dollar account was to meet capital expenditure requirements on the PNG LNG Project. The Australian dollar account was to hold the monies needed to pay the interest on the bonds. 169 It also drew attention to the exchange rate risk and proposed strategies to deal with this.

13.5 In December 2008, Goldman Sachs produced a presentation entitled 'Hedging Market Risk for Project Kumuf .16° The presentation drew attention to the currency risk that arose from the split in currencies and suggested ways in which this risk could be hedged.

13.6 The presentation was tabled at an IPBC board meeting that took place on 19 December 2008.161 The board resolved that the issue was too complex to be decided at the meeting and established a sub-committee comprising Mr Blake and Mr Yauieb (who had attended the meeting as an alternate director for Mr Tosali) to consider the issue, liaise with Goldman Sachs and make recommendations.

13.7 There is evidence of correspondence between Mr Blake and Mr Yauieb about the foreign

currency issue. This includes an apparent agreement between them to approach other institutions for indicative quotations to ensure that Goldman Sachs' pricing was in line with the market.162

13.8 It is evident that by March 2009, IPBC had not settled on a strategy to deal with the currency risk.

On 2 March 2009, Mr Sean Hogan of Goldman Sachs wrote to Mr Blake noting that the bonds were to be issued on 4 March 2009.163 The note set out the following options:

(a) agree an 'at or above' market rate directly with IPIC and settle part (or all) of the transaction in USD. This was attractive to IPIC as they were a natural USD funder, however IPIC had not set out any concrete proposal

(b) use the 'Limited Average Forward Strategy' proposed by Goldman Sachs. This provided IPBC with a means of reducing the market risk of large exchanges and benefit from any improvement in the Australian dollar over either a one or two week period by taking the average rate over the relevant period. The disadvantage was that the base case would be below the spot rate, which is the 'cost of the strategy'

13.9 The note advised that while Goldman Sachs would continue to pursue the IPIC option vigorously, given the timing, it was prudent to obtain approval to execute the Limited Average Forward.

13.10 Goldman Sachs also provided indicative pricing of the Limited Average Forward under contemplation.164

13.11 On 4 March 2009, by written resolution, IPBC adopted the foreign exchange strategy

recommended by Goldman Sachs.166

13.12 Mr Blake's evidence about the course adopted in relation to the foreign currency issue was:166

> The State would not need to make any US dollar payments until a long while after it received the Australian dollars so it needed to consider when the right moment would be to convert the Australian dollars to US. We sought advice from Goldman Sachs and Backwall Lombard about when to convert the funds. The exchange rate between the Australian and US dollar was very volatile at the time, and it was not possible for either institution to predict where the rate might go. On Goldman Sachs' advice, a decision was made to convert enough of the proceeds of the bond into US dollars as soon as the monies were received to ensure that IPBC could meet the US dollar commitments. This eliminated the foreign exchange risk from the outset of the transaction. We considered this to be the most prudent course of action rather than to take the risk on fluctuating exchange rates.

13.13 On 13 March 2009, IPBC held a board meeting, at which the board received a report from Mr Hogan about the completion of the Exchangeable Bond Transaction, which included a report on the strategy being adopted in relation to currency risk.'67

Investment of the bond funds until needed

13.14 Another issue that arose of a similar nature to the currency risk was that the funds were received long before they were needed for the PNG LNG Project. This created the need to try to enhance the value of the funds received to minimise the risk that there might be a shortfall against the sums required in due course to fund the equity stake in the PNG LNG Project.

13.15 IPBC and its advisers recognised this need. On 13 March 2009, IPBC held a board meeting which considered the cash management strategy for the funds paid by IPIC for the exchangeable bonds.166

CHAPTER 8 > The participation of the State in the PNG LNG Project

13.16 On 28 September 2009, IPBC held a further board meeting at which it noted KPMG had been retained to prepare a tender process for banks to offer terms and strategy to manage the cash held by IPBC pending investment in the PNG LNG Project.

13.17 Mr Blake has given evidence that IPBC approached Goldman Sachs about the rates that they might offer on the investment of the funds until the funds were needed at financial close. Goldman Sachs advised that the conservative risk profile needed for the funds did not warrant using any of their investment products. This is why IPBC looked at other banks for rates to invest. Mr Blake's recollection was that they approached Westpac, Commonwealth Bank of Australia and two other banks.169

The Treasury's opposition and other funding alternatives

13.18 The Treasury opposed the proposed transaction on a significant number of bases in its letter of 21 October 2008, outlined above.

13.19 The PwC report provides further information about the Treasury's views on the transaction.") Relevantly, the report states that:

(a) Treasury's initial view was that the State should not take up its equity position in PNG LNG Project given the risks and costs involved. It prepared a comparison which demonstrated that the projected tax receipts would be twice as much as the PNG LNG Project's equity dividends. However, the State's determination to maintain a stake in the project, consistent with its policies, meant that the Treasury directed its attention to supporting the government's ambition

(b) Between October and mid-December 2008, the Treasury sought to evaluate the various financing options that might be available. This was despite the Exchangeable Bond Transaction with IPIC being approved in October 2008 and the agreement being signed in November 2008. However, the PwC report states that none of the options considered by

the Treasury allowed the equity to be fully funded. Some of the options considered included:

(i) discussions with concessional lenders. such as the Japanese bank for International Co-operation, the Asian development Bank, the European Investment Bank and the World Bank

(ii) talking to possible strategic equity investors such as Nippon Oil, LNG Japan and Shell

(iii) evaluating the proposals put forward by IPBC and Petromin

(iv) considering limited domestic financing through the market, or direct budget support

(c) Whilst it was clear that the equity finance would not be required until late 2009, the MCES believed that it would be advantageous to the State to raise the finance at an earlier date and decided that it needed to make a decision on the source of finance by 24 October 2008. It then told the Treasury that it would only consider proposals that would enable the State to take up its full direct interest in the PNG LNG Project and would not result in the State taking on additional debt

(d) These requirements reduced the options available considerably and effectively precluded the Treasury from pursuing any further options. The Treasury then presented four options to the MCES that were immediately available:

(i) a combination of ADB and EIB debt of USD 400 million, state budget funding of USD 230 million, international bond issue of

USD 600 million and domestic bond issues for any cost over-runs

(ii) a Japan Bank for International Co-operation proposal whereby the State and other Project sponsors would sell up to 5% of the PNG LNG Project to a Japanese party with JBIC financing the State's participation in the PNG LNG Project on concessional terms

(iii) an international oil and gas company would enter into a transaction with the State which would allow the State to take up its full entitlement in the PNG LNG Project and retain its shareholding in Oil Search. The international oil and gas company would finance the State's equity on favourable terms

(iv) the State assignee would enter into a joint venture with the oil and gas company with the State holding the majority position and the company paying the State for its equity in the joint venture. The company would fund the balance if the proceeds from the sale of the State's interest was insufficient to fund the balance of the State's interest

(e) The PwC Report noted that one of the options involved a major oil and gas company acquiring control of Oil Search and then assisting the State to finance its equity involvement in the PNG LNG Project. That commitment would be up to a maximum of USD 650 million and would be secured only against the State's interest in the PNG LNG Project. The financing would be repayable over four years following first production and carry an interest rate equal to the blended PNG LNG Project debt. The price to be offered for the Oil Search shares was at a significant premium to the then prevailing share price

(f) The Treasury's proposal was presented to the MCES but it was not supported despite the Treasury considering it to be a better proposal than the Exchangeable Bond Transaction. The Treasury reported to PwC that they did not receive clear explanation for the rejection of the proposal but one of the grounds was a concern that Oil Search might fall into the hands of a foreign entity. PwC noted Mr Aopi's position as the chair of IPBC and as an

employee of Oil Search in this context, but without drawing any inferences

13.20 In summary, the Treasury had been operating on the basis of a longer timescale to raise the funds governed by when the funds would be needed. The MCES appears to have been guided by a concern, in a challenging economic environment, to seize the opportunity presented by the Exchangeable Bond Transaction. This was not only to secure funds that might not otherwise be available but also to inject credibility and momentum into the PNG LNG Project.

13.21 A notable feature of the Treasury's work is the apparent disagreement between the Minister and his department. Mr Tosali is recorded in minutes of IPBC's board meeting of 24 October 2008 as stating that the Minister, Mr Pruaitch, would not let him speak at the NEC meeting on 23 October 2008. There was therefore a point of contention between the Minister and the department, a position which also arose in relation to the UBS Loan discussed below.

13.22 Petromin also considered how the PNG LNG Project might be funded but its efforts ceased once IPBC was chosen to be the State's nominee for the PNG LNG Project.

13.23 There is limited evidence about whether IPBC looked in any detail for other alternative ways to find its equity participation in the PNG LNG Project. Mr Blake informed PwC that IPBC did consider other options and that the Treasury was unable to provide an alternative to the Exchangeable Bond Transaction. This included selling the shares and some analysis by Goldman Sachs. There was also an approach by J.P. Morgan through Backwell Lombard Capital to monetise the Oil Search shares but this would only have

produced probably AUD 4 – 500 million.
However, he accepted that IPBC did not conduct an open tender. Mr Blake's explanation for this
is not clearly recorded.17' The Commission has not received documentary evidence confirming
Mr Blake's account.
Brattle's observations

13.24 The Commission's retained experts, the Brattle Group, considered the Exchangeable Bond
Transaction in its first report (Brattle 1). Brattle's observations on the objective of the transaction
and alternative means of achieving it are:
(a) The aim of the transaction was to raise the funds required to enable the State to
participate to the full extent of its equity interest in the PNG LNG Project
(b) At the time of the IPIC transaction, the State's interest in the PNG LNG Project was worth
between USD 3 and 5 billion. Its share of the equity funding was likely to be about
USD 1 billion
(c) Selling about one fifth of the State's equity interest in the PNG LNG Project would likely
have raised sufficient funds to pay for the equity contributions attributable to the remaining
four-fifths
(d) The State could also have sought to sell its entire interest rather than seek to participate in
the PNG LNG Project, but Brattle do not know whether a sale of such magnitude would
have been achievable at that time
(e) It is unlikely that the State could have funded its participation by issuing sovereign bonds
given the economic climate of the time
(f) The State would not have been able to raise sufficient funds from concessional loans from
multi-lateral organisations

13.25 Braille's views on the terms of the transaction are:
(a) From March 2009 to March 2014, the State was exposed to the downside risk of the Oil
Search share price, and the upside risk up to AUD 8.55, but it had transferred to IPIC all
of the upside in the Oil Search shares above AUD 8.55
(b) A fair interest rate for such an exchangeable bond would have been lower than the fair
rate on a regular bond which did not give the lender the benefit of the upside in the Oil
Search share price above AUD 8.55
(c) The interest rate on the bond was fair if IPIC assessed the credit risk of IPBC failing to pay
a required cash top-up as non-negligible, but was too high if IPIC perceived there to be no

such risk. It is not known what assessment IPIC in fact made of this credit risk

(d) To illustrate the magnitude of the relationship between credit risk and fair pricing, Brattle valued the bonds at the time the bond documentation was executed. If there was no

credit risk, so that it was certain that IPBC would pay any cash top up required on maturity, the bonds were worth 119% of face value. Conversely, if it was certain that IPBC would not pay any cash top up that might be required on maturity, the bonds were worth 69% of face value. In Brettle's view, issuing the bonds for 100% of face value was consistent with fair pricing of a bond with a non-negligible degree of credit risk. Further, Brattle concluded that the circumstances of the transaction made it reasonable to assume that IPIC did consider there to be a non-negligible credit risk and that on that basis, the bonds were fairly priced

Consideration of the evidence and issues

13.26 There was little disagreement at the time about whether the State should participate in the PNG LNG Project. There was much more debate about how the State should finance its participation in the PNG LNG Project.

13.27 According to the PwC Report, the Treasury was initially against participation at all based on the costs and risks involved. The PwC report noted that modelling appears to have suggested that it may have been financially better for the State to sell its equity stake and simply receive tax royalties and other indirect benefits as the PNG LNG Project proceeded. It does not seem that the Treasury's view was explored in detail given the Government's determination to participate in the PNG LNG Project. The Treasury then focused on exploring the best options how to do so.

13.28 The Commission concludes that the decision to enter into the Exchangeable Bond Transaction was a well-considered decision in the global financial circumstances then prevailing which was designed, over the long term, to generate greater revenues for Papua New Guinea than the shareholding in Oil Search, and to meet the ambitions of the Constitution in providing the State with an equity interest in its most significant resource project. The State took a calculated risk that the Oil Search share price would rise over time to eliminate or reduce any shortfall that it might have to pay to IPIC at maturity, but the prevailing view at the time was that the share price would rise, not least as a result of Oil Search's involvement in the PNG LNG Project. It did.172

13.29 The Commission notes the view expressed in the PwC report, that the downside risk for IPBC was comparable to the option of selling the Oil Search shares in the open market at the start of the PNG LNG Project and borrowing the balance of the monies needed to fund the cost of participation. The upside of the transaction was that it gave IPBC the opportunity to benefit from any appreciation of the Oil Search shares over the duration of the bonds up to a share price of AU AUD 8.55. PwC also noted that there was a low cost of funding in the meantime. However, this is not in fact correct as the transaction left IPBC exposed to the risk that, against forecasts, the price of the Oil Search shares might fall below their market value at the time of the transaction, increasing the shortfall amount that IPBC would have to pay on maturity.173

13.30 As Oil Search was itself a participant in the PNG LNG Project, it was not unreasonable for the State to consider that its share price would be likely to rise over the term of the bonds as the PNG LNG Project advanced. Indeed, at the date of maturity of the bonds, the share price was over AUD 8.55, although it had not been above that price for sufficiently long to avoid the need for IPBC to make a top up payment to IPIC at that point.174

13.31 Alternative ways of raising the funds were put to the State but rejected; it would appear for the reasons set out in policy submission 167/2008. Mr Pruaitch described the State's reasons for not

raising the finance by selling down the States interest in the PNG LNG Project in his
supplementary affidavit of 30 July 2021.175 In summary:
(a) There was no financial need to do so. Consistently with its policy, the State wanted to
benefit fully from the PNG LNG Project
(b) Selling down the stake would create risks with the landowners who were looking for a
greater share of equity from the States current interest in the project and might create
doubt about the State's commitment to the PNG LNG Project amongst the partners in the
PNG LNG Project

13.32 It also appears that none of the other funding alternatives being explored by the Treasury or
Petromin was sufficiently advanced to pose a real alternative to the Exchangeable Bond
Transaction at the time that the NEC decided to proceed with it.

13.33 A criticism levelled at IPBC is that it should have made greater efforts to consider other funding
options in order to satisfy itself that the Exchangeable Bond Transaction was the best way
forward. The underlying premise of this criticism is that IPBC was determined to be the State's
chosen nominee to hold the State's equity in the PNG LNG Project. This misunderstands the
origin of the IPIC transaction. IPBC was approached by Oil Search because it held the shares
that could be leveraged to raise the finance. As Mr Blake explained, IPBC was not previously
looking to be involved in the PNG LNG Project and its mandate from the Ministerial Gas
Committee was to examine and progress the IPIC transaction, not to look for finance more
generally.

13.34 In any event, Mr Blake's evidence was that IPBC did consider some alternatives. Mr Blake
approached Exxon Mobil and, at his request, Backwell Lombard Capital considered other options,
including a loan from J.P. Morgan. It is also notable that the

Freehills engagement letter
referenced seeking concessional funds and that this was discussed in the Goldman Sachs' presentation about the Exchangeable Bond Transaction. Further, IPBC and the NEC did consider the objections raised by Treasury prior to making the decision to proceed with the exchangeable bonds and it is notable that neither the Treasury nor Petromin was able to produce a sufficiently defined and certain alternative proposal.

13.35 A further criticism that might be made is the level of secrecy attached to the Exchangeable Bond Transaction. It would appear that the outline of the transaction was devised by Oil Search and IPIC in time for IPIC's introduction to IPBC in early 2008. The first negotiation meeting involving IPBC's advisers took place in April 2008. Commercial terms were agreed by 12 September 2008 but the IPBC board (which included representatives of the Treasury) were not informed of the transaction at all until the board meeting on 13 September 2008. Whilst there were statements expressing a clear intention that IPBC and the Treasury would work cooperatively176 to identify funding for the PNG LNG Project, the secrecy attached to the negotiation of the Exchangeable Bond Transaction prevented that from happening and created an impression of competition rather than cooperation. There was also the risk that the interests of Oil Search were not aligned with those of the State at least to the extent that a serious competitive tender process could be dispensed with. Mr Botten maintained that Oil Search extended its good offices with contacts within the United Arab Emirates to assist the State achieve its stated goal. Oil Search had its own interest in promoting its Middle East business at the time and an even stronger interest in how 10% of its issued shares would be used by the State.177

13.36 Petromin may have been a further factor in creating an environment of secrecy and competition. At the same time as IPBC was negotiating the Exchangeable Bond Transaction, it would have been aware that the State had not yet made a decision about which entity would participate in the PNG LNG Project and hold the Oil Search shares notwithstanding its gazettal as the nominee in February 20008. Mr Blake's evidence about not sensing any competition are, of course, his own perceptions which may not have been shared by others. The Commission finds that the failure of the State to make an early. clear and final decision about the State's nominee was a major factor in creating a measure of dysfunction, duplication and inefficiency, leading, in particular, to additional but unnecessary significant expenditure on advisers.

13.37 While the dysfunction created inefficiencies, it may nonetheless have provided a degree of market-testing beyond what IPBC itself was considering. It also provided an incentive to all of the agencies involved to seek to obtain the best deals available.

13.38 It is clear from the PwC report that ultimately, the key reasons why acceptable alternatives were not found was the desire of the State, in accordance with its policies, to maintain its full equity stake in the PNG LNG Project and the decision to secure the funding at an earlier stage than needed for the reasons mentioned above. These were matters for the judgement of the Government at the time. They were not irrational. Whilst there can be different views about the decisions made, they do not by themselves give rise to a concern that would fall within the Commission's Terms of Reference.

13.39 The Commission does not accept the criticism made in relation to currency risk. There was always going to be a need for US dollars to meet capital expenditure on the PNG LNG Project. Currency risk was therefore a relevant matter, but it had been identified from the outset and was addressed. IPBC took and followed advice from Goldman Sachs about how to manage the risk in what was then a volatile market.

14. Timetable of negotiation of Exchangeable Bond Transaction

14.1 The table below is intended to guide the reader

through the various events that led to the Exchangeable Bond Transaction in the order in which they occurred.

Date	Oil Search	IPBC	Petromin Treasury	PNG LNG Gas Agreement / IPIC Transaction approvals
August 2007			Treasury first engage Lazard Freres for phase 1 of the PNG LNG Project	
19 February 2008			Act nominating Petromin as the State's nominee is gazetted	
Early 2008	Oil Search held meetings with IPIC to discuss State's	IPBC introduced to IPIC		

Date	Oil Search	IPBC	Petromin Treasury	PNG LNG Gas

Agreement / HNC Transaction approvals	requirements to raise funding	
April 2008		NEC Submission notes negotiations between IPIC and IPBC began
25 April 2008	Meeting between IPIC, Oil Search, IPBC, Mr Blake and Mr Arthur Somare held in Abu Dhabi	Meeting between IPIC, Oil Search, IPBC, Mr Blake and Mr Arthur Somare held in Abu Dhabi
13 May 2008		NEC approves the structure to fund PNG's equity share in the PNG LNG Project; IPBC to appoint advisers and Ministerial Committee on Gas to assess other options
19 May 2008 Ministerial Gas Committee resolves to endorse final negotiated outcome between the State and Exxon to the NEC		

					21 May 2008 NEC approves submission seeking approval of key terms of PNG LNG Project
					22 May 2008 PNG LNG Gas Agreement is signed
					1 June 2008 Treasury prepare a request for proposal for bids

Date	Oil Search	IPBC	Petromin	Treasury	PNG LNG Gas
					Agreement / IPIC Transaction approvals
					for appointment of financial advisers
17 June 2008		PwC Report notes meeting			

	held between Goldman Sachs, IPBC and IPIC	
17 July 2008		Treasury holds financial adviser evaluation meetings
24 July 2008		Submission 118/2008 to the NEC requesting approval for FEED structure signed by Mr Pruaitch and Mr Tiensten
29 July 2008		Mr Pruaitch signs a submission seeking the NEC's approval to appoint Lazard Freres as adviser to Treasury
7 August 2008		NEC approves submission 118/2008 re FEED and committee structure (decision 161/2008)
11 August 2008		NEC approves submission for Treasury to appoint Lazard Freres
19 August 2008		Treasury agree

					contract with Lazard Freres
	20 August 2008			IPBC Board meeting – appointment of advisers is	

Date	Petromin	Oil Search	Treasury	IPBC	PNG LNG	Gas	Agreement /	IPIC	Transaction	approvals
										tabled but not discussed
29 August 2008										NEC note the appointment of Goldman Sachs and Freehills to IPBC
13 September 2008										IPBC board meeting – appointment of Goldman Sachs and Freehills ratified – Presentation by Sean Hogan of Goldman Sachs on IPIC proposal
18 September 2008										Submission to the NEC to inform

NEC of outcome

of negotiations

between Treasury

and Lazard Freres

24 September 2008

NEC approve contact between Treasury and Lazard Freres

25 September 2008

Prime Minister Sir Michael Somare is briefed by Goldman Sachs on the IPIC proposal

25 September 2008

Prime Minister Sir Michael Somare writes to Petromin and Ministers confirming his view that IPBC were to be the state nominee and he would be bringing the IPBC proposal to the NEC

Prime Minister Sir Michael Somare writes to Petromin and Ministers confirming his that IPBC be the nominee would be the proposal to the NEC

6 October 2008

Mr Arthur Somare writes to Pruaitch

Date	Oil Search	IPBC	Petromin	Treasury	PNG LNG Gas Agreement / IPIC Transaction
					approvals noting the IPIC transaction was in the final stages of approval and invited Treasury's comments as soon as possible, enclosing a copy of a submission to be presented to the MSEC the following day
10 October 2008					Treasury present to the MSEC emphasising the State was not required to provide equity until September 2009
16 October 2006					Lazard Freres write to the PM encouraging him to not to make a decision at that point and to keep the position open
20 October 2008		Pruaitch says the NEC submission for the IPIC proposal is referred to the MSEC by IPBC			

		for its consideration			
	21 October 2008	Letter from Treasury to IPBC opposing the transaction (we do not have this)	Letter from Treasury to IPBC opposing the transaction (we do not have this)		
	23 October 2008	PwC Report refers to a letter from IPBC to Treasury	PwC Report refers to a letter from IPBC to Treasury		
	23 October 2008			NEC approves the submission for the IPIC Transaction	

Date	Oil Search	IPBC	Petromin	Treasury	PNG LNG Gas Agreement!
					IPIC Transaction approvals
24 October 2008		IPBC board approve the IPIC proposal			
23 November 2008					IPIC exchangeable bond is executed
4 March 2009		IPIC exchangeable bond issued			

15. Answering the PNG LNG Project amended terms of reference

15.1 The responses of the Commission to the questions arising in the Terms of Reference about the
PNG LNG Project are set out below.
How the State financed its equity participation in the PNG LNG Project

15.2 The State financed its equity participation in the PNG LNG Project through the Exchangeable
Bond Transaction described above.
Whether due and proper legal and administrative processes were followed to obtain the loan to
finance the State's equity participation in 2009. including but not limited to

(a) How was the process commenced
(b) How was IPIC selected
(c) What process was utilised
(d) What were the terms of the loan from IPIC
How was the process commenced?

15.3 The State did not obtain a loan to finance its equity participation in the PNG LNG Project. The
Exchangeable Bond Transaction was not a loan although in some respects it was similar to one

15.4 The process of obtaining the exchangeable bond was as described above. The idea of it
originated with Oil Search. Oil Search raised it with IPBC and introduced IPBC to IPIC.
How was IPIC selected?

15.5 IPBC did not conduct a tender process either to select IPIC as financiers or to consider the merits
of the exchangeable bond transaction in comparison to other possible ways of raising the
necessary finance.

15.6 IPBC did consider other alternatives although not through any formal process. This included approaching Exxon Mobil, considering a proposal from J.P. Morgan via Backwell Lombard Capital and considering the availability of concessional loans. It is to be noted that IPBC was not given a mandate to look more broadly for finance for the State's equity interest and, prior to the approach from Oil Search. had not considered that it would have any role in this task or the PNG LNG Project as a whole.

15.7 In addition, the State received presentations from the Treasury about other possible sources of finance, none of which were in a sufficiently advanced state to proceed in time to meet the Government's preferred close date. Petromin also explored ways of financing the participation. There was therefore a degree of market testing.

15.8 Further, the various financing proposals were considered by the MCES as was the Treasury's opposition to the IPIC proposal. These matters were also considered by the NEC.

15.9 It should be recognised that at the time that the NEC and IPBC approved the Exchangeable Bond Transaction, it appears to have been the only certain proposal available in a climate of great financial uncertainty. If the State wished to obtain its funding then rather than take the extra time that the Treasury urged, the IPIC proposal was the only available choice.

What process was utilised?

15.10 While the process for its selection was somewhat disorganised, duplicative and ad hoc it was significantly more careful, thoughtful and appropriate compared to those leading up to the UBS Loan. The following matters deserve emphasis, including in any such comparison:

(a) IPBC, the Treasury and Petromin all had professional advice to assist them in trying to identify potential sources of finance. There are no grounds for criticising the advisers' work so that, at that level, each entity's process was as would normally be expected

(b) It is clear from Prime Minister Somare's undated letter sent in September 2008, that there had been a degree of confusion about who should be the State's nominee on the Project. This was so even though the State had gazetted

Petromin as the nominee in February
2008. But the introduction to IPIC and the exchangeable bond required the use of IPBC's
Oil Search shares. As that proposal provided some certainty in a very uncertain financial
context, it is easy to understand that it became the catalyst for deciding who the State's
nominee should be

(C) Whilst there was disagreement and a degree of competition between Petromin, the
Treasury and IPBC, this may have had some positive features. Certainly, Mr Blake, the
managing director of IPBC, gave evidence that he did not feel in competition with
Petromin and had a very good relationship with its CEO. The competition appears to have
been largely at the ministerial level. To the extent that there was disagreement, this did
allow for some testing of the market and exposed some of the main options available to
the State. This included concessional loans, loans secured on Oil Search shares, a
partial sale of the State's interest in the PNG LNG Project, and a proposal which sought to
vary what might be borrowed against the Oil Search shares over time as the share price
moved

(d) The transaction also received significant consideration by the MCES and the NEC. It is
notable that the MCES gave the Treasury a further opportunity to submit a competing
proposal. It is also Mr Blake's evidence that IPBC looked for alternative proposals,

including approaching Exxon Mobil for finance and receiving a proposal from J.P. Morgan
via Backwell Lombard Capital. The J.P. Morgan proposal was also considered but
rejected by the Treasury

15.11 Nevertheless, particularly because of the State's limited

resources, it is clear that a more efficient process could have been to have had a single set of advisers testing the market and considering the best way forward. A whole of government approach ought to have led to the establishment of a multi-department expert committee able to retain external advisers as necessary and in sufficient time to undertake a tender process and make recommendations to government. The outcome may very likely have been the same but there would have been not inconsiderable savings and may have eliminated the sense of grievance which was still apparent so many years later in the Petromin proponents. It should also be kept in mind that the State had had no previous exposure to participation in projects approaching the magnitude of the PNG LNG Project and the mechanics of sourcing the finances required for equity participation.

What were the terms of the loan from IPIC?

15.12 The terms of the bonds have been explained above. The Commission has been assisted by the work of the Brattle Group in concluding that the terms of the bonds were fair.

Who were the legal and financial advisers engaged in the IPIC Exchangeable Bond Transaction?

15.13 IPBC received legal advice from Freehills and financial advice from Goldman Sachs.

Were legal and administrative processes followed to engage any legal and financial advisers?

15.14 The Commission received evidence on this question from Mr Blake, the managing director of IPBC at the time.

15.15 IPBC sought KPMG's assistance in finding a suitable financial adviser. KPMG were instructed to identify a financial adviser based in Sydney that had global capacity and was of high calibre. KPMG recommended that IPBC should consider engaging Goldman Sachs and this is what transpired.

15.16 Mr Blake also gave evidence that KPMG was engaged to model the anticipated revenue flows from the PNG LNG Project.

15.17 Freehills and Goldman Sachs both started work on the matter after IPBC was introduced to IPIC in about April 2008. Goldman Sachs were initially engaged on a fact finding mission in April 2008 to familiarise themselves with the proposal. Initially, their

engagement was on a month-to-month basis. IPBC did not need NEC authority for this.

15.18 On 13 May 2008, the NEC approved the IPBC appointing advisers and undertaking further analysis and work to finalise the funding offer in consultation with the Treasury before this would then be put before the NEC for approval. It also directed the Ministerial Committee on Gas to assess other financial options for the NEC's consideration.

15.19 The NEC approved the fee structures for Freehills and Goldman Sachs at a meeting on 29 August 2008.

15.20 IPBC approved the fee structures of Freehills and Goldman Sachs at a board meeting on 13 September 2008.

15.21 The fees paid to Freehills were AUD 1.36 million. The fees paid to Goldman Sachs were AUD 16.895 million.

15.22 There is no evidence that IPIC charged the State fees. What was the rationale for allowing payment to be made by an election of either cash, or the mortgaged Oil Search shares or a combination of both?

15.23 The Exchangeable Bond Transaction did not work in the manner presumed by this question. There was no election to be made about the way in which the bonds were to be redeemed. When the bonds matured, they were to be exchanged for Oil Search shares using a reference price of AUD 8.55 a share with IPBC to pay any shortfall if the shares were worth less than that amount at maturity.

15.24 The Oil Search shares were not the subject of a mortgage in any technical legal sense although they were held in an escrow account to preserve them for the maturity of the bond.

15.25 The rationale behind IPBC's agreement to the terms of redemption appears to be an acceptance that IPBC would never have the funds to be able to redeem the bonds in cash. Its best option was therefore to enter into a transaction which might be likened to a deferred sale of the shares. This allowed it to take advantage of any increase in the price of the shares during the period of the bonds.

What was the rationale for allowing the mortgaged Oil Search shares to be used in payment of the loan?

15.26 It was always clear that the exchange of Oil Search shares as the means for redeeming the bonds was mandatory under the terms of the Exchangeable Bond Transaction.

15.27 The rationale for the Exchangeable Bond Transaction appears to have been that:

(a) It was considered at the time to be the best way of leveraging IPBC's most significant asset, namely the Oil Search shares. The shares were low in value at the time that the transaction was negotiated but were considered likely to rise (and in fact did so) during the term of the bonds as the PNG LNG Project advanced. At the time of the transaction, the shares were worth about AUD 4.82. At maturity in 2014, they were worth about AUD 8.92. Although interest was payable on the bonds, it was considered that this would be more than compensated by the likely increase in the value of Oil Search's shares which meant that the deferred sale that the exchangeable bond represented was better than an immediate sale of the shares in 2008. Also, whilst the Commission has not seen evidence to confirm this (and expects that such information would only be available within IPIC), it is likely that the fact that the bond would be partially or fully redeemed against the Oil Search shares reduced the interest rate sought by IPIC by removing some risk for IPIC. and it may also have increased the amount that IPBC could raise from the bond

(b) The exchange right was a conscious choice by IPBC and the NEC when each approved the transaction. Whilst the transaction would result in IPBC losing its investment in Oil Search, including any dividends flowing from the shares, this was considered an acceptable price to pay to obtain the much greater

revenues that would ultimately flow
from the PNG LNG Project
(c) There were limited alternatives for raising the significant sums required given the global
financial crisis at the time and that the sum was too big to be raised through concessional

loans. There were also concerns about the delays that might arise with concessional
loans, revealed in Mr Blake's interview with PwC
(d) Neither Petromin nor the Treasury were able to present a competing offer at the time that
the Exchangeable Bond Transaction was being considered by the NEC that matched it in
terms of the amount that it would raise and the certainty of delivery
(e) Whilst the funds were raised some time in advance of when they were needed, this is
explicable on the basis that the funding of the State's equity participation would add
credibility to the PNG LNG Project and a concern that in the economic climate of the time,
the Exchangeable Bond Transaction might prove to be the only option then available and
one that might not be available at all at a later date

Whether IPIC had the sole election as to method of payment in satisfaction of the State loan from IPIC, and if so what was the rationale for giving IPIC the right of sole election to either accept cash, the mortgaged Oil Search shares or a combination of both.

15.28 IPIC did not have a right of election as to the manner in which the exchangeable bonds would be dealt with on maturity. They were to be exchanged for Oil Search shares using a reference price of AUD 8.55 with IP BC being obliged to make up any shortfall between the actual price of the shares at that date and AUD 8.55.

When and what decision did IPIC make on the repayment of the loan?

15.29 It appears that up until the end of 2013 or early 2014, IPIC were open, in theory at least, to discussion about accepting cash to redeem the bonds rather than

proceed with the mandatory exchange. This was IPIC's stated position at a meeting in Abu Dhabi on 30 October 2013. As noted above, the Commission finds IPIC accepting cash to redeem the bonds was never likely to occur.

15.30 It is not known at what precise point thereafter that IPIC's position as to the loan crystallized, but by February 2014 it had rebuffed the State's attempt to meet with it in Abu Dhabi and issued the formal notice to require the exchange of the shares for the bonds, a matter taken up in later chapters.

The LNG Project Companies as defined in the PNG LNG Agreement and as at the date of the agreement were:

(a) Esso Highlands Limited (now ExxonMob!! PNG Limited);
(b) Oil Search Limited:
(C) Oil Search (Tumbudu) Limited;
(d) Santos Hides Ltd:
(e) Lavana Limited;
(f) Esso PNG Juha Limited;
(g) Ampolex (Papua New Guinea) Limited;
(h) Merlin Petroleum Company;
(0 Oil Search (PNG) Limited;
(j) Ampolex (PNG Petroleum):
(k) Merlin Pacific Oil Company Limited;
(I) AGL Gas Developments (PNG) Pty Limited:

(m) Petroleum Resources Kutubu Limited;

(n) Ampolex (Highlands) Limited;

(o) Petroleum Resources Gobe Limited; and

(p) Eda Oil Limited.

2 Statement of the Honourable William Duma MP dated 17 July 2020, [1]–[2], Exhibit HHH, WIT.0030.0004.0003.

'Affidavit of Arthur Somare dated 24 May 2021, [18], Exhibit BB, WIT.0027.0004.0001.

4 Affidavit of Arthur Somare dated 24 May 2021, [18], Exhibit BB, WIT.0027.0004.0001; Affidavit of William Duma dated 17 July 2020 at [1] – [2] ,
WIT.0030.0004.0003.

'Policy Submission No 73/2008, 20 May 2008, [9], Exhibit 364, WIT.0014.0007.0300.

'Affidavit of Arthur Somare dated 24 May 2021, [19], Exhibit BB, WIT.0027.0004.0001.

Decision No. 82/2008, Exhibit 144, WIT.0056.0006.0708.

'Policy Decision 64/2008 has not been available to the Commission. The Secretary to the NEC confirmed by letter dated 6 December 2021 that the
document is not on file at the NEC and it has not been produced by any other witness.

PNG LNG Project Umbrella Benefits Sharing Agreement dated 21 May 2009, Exhibit BB, WIT.0027.0005.0752.

Distinct from the PNG LNG Gas Agreement, which is between the Independent State and the PNG LNG Project Companies.

" Provision regarding domestic market obligation which has the effect of directing petroleum to domestic sales or use.

12 Ministerial Gas Committee Resolution, 19 May 2008, Exhibit 114, WIT.0014.0007.0314.

'3 Policy submission No. 73/2008 dated 20 May 2008, Exhibit 146, WIT.0016.0001.0797, as approved by Decision No: 9312008 at Special Meeting
16/2008, Exhibit 145, WIT.0015.0001.0228.

56 Sir Arthur Somare says the particular brown field licence where the State opted not to exercise its back-in rights, either fully or partially, are PDLs 2
(Kutubu), 4 (Gobe) and 6 (Moran). Sir Arthur Somare says the State took those decisions in the 1990s; Affidavit of Arthur Somare dated 24 May 2021,
[39], Exhibit BB, WIT.0027.0004.0001

15 Affidavit of Arthur Somare dated 24 May 2021, [39],

Exhibit BB, WIT.0027.0004.0001.

m NEC Decision No. 96/2008, 21 May 2008, Exhibit 147, WIT. 0015.0001.0231.

17 PNG LNG Gas Agreement dated 22 May 2008, Exhibit 87, W17.0015.0001.0024
to Statement by the Prime Minister on the signing of the PNG LNG Gas Agreement, Exhibit 115, WIT.0007.0004.0087.

13 NEC Submission 167/2008 dated 20 October 2008, [7], Exhibit 154, WIT.0027.0005.0216; Brattle 1, [11j, Exhibit W, WIT. 0132.0001.0002.

PNG LNG Project Umbrella Benefits Sharing Agreement dated 21 May 2009, Exhibit BB, WIT.0027.0005.0752.

31 NEC Policy Submission No 118/2008, Exhibit 152, WIT. 0015.0001.0440.

NEC Decision No: 161/2008, made at Special Meeting No: 5/2008, Exhibit 148, W17.0015.0001.0436.

33 Transcript, Arthur Somare, 16 June 2021, page 1410.

24 Affidavit of Patrick Pruaitch dated 28 June 2021, [20] and [21], Exhibit ZZ, WIT.0028.0003.0002.

25 Affidavit of Patrick Pruaitch dated 28 June 2021, [22] and [23], Exhibit ZZ, WIT.0028.0003.0002.

26 Department of Treasury proposal on the Financing of the State's entitlement in the PNG LNG Project, 10 October 2008, Exhibit 471.
WIT.0104.0002.0037

WIT.0104.0002.0037; see also Affidavit of Arthur Somare dated 20 May 2021. [74j and [75], Exhibit BB, WIT.0027.0004.0001.

23 Further Statement of Peter Botten dated 27 January 2022, [26], Exhibit HHHH, WIT.0021.0006.0001; NEC Submission 169/2008 dated 20 October
2008, [42], Exhibit BB, WIT.0027.0005.0216; Brattle 1, [13]. Exhibit W, WIT.0132.0001.0002.

29 Further Statement of Peter Soften dated 27 January 2022, [26], Exhibit HHHH, WIT.0021.0006.0001

33 Established in 1984, the International Petroleum Investment Company (IPIC) was created to advance Abu Dhabi's natural petroleum wealth for the
development of the UAE. In 2016, IPIC merged with Mubadala Development Company to create the Mubadala Investment Company.
httfs-//www.mubadala.cern/en/who-we-are/our-histoi.i,

accessed 18 March 2022. In a presentation to Oil Search in April 2008, IPIC was described as

a wholly owned Government of Abu Dhabi investment company. Since 1994, H.H. Sheikh Mansour Bin Zayed .4! Nahyan has been Chairman of (PIC].

PIC is) supervised by the Supreme Petroleum Council of Abu Dhabi which oversees the United Arab Emirates' oil and gas operations and related

industries; 080428 Introduction to Falcon – Presentation to Pelican vt .ppt, Exhibit 1297 OSL.0018.0002.5151.

31 Further Statement of Peter Batten dated 27 January 2022, [33] Exhibit HHHH. WIT.0021.0006.0001

32 Further Statement of Peter Botten dated 27 January 2022, [25] Exhibit HHHH, WIT.0021.0006.0001.

33 Transcript, Peter Botten, 3 February 2022, page 3636.

34 Affidavit of Glenn Blake dated 20 December 2021, [11] – [21], Exhibit WWW, WIT.0092.0001.0001.

35 Further Statement of Peter Botten dated 27 January 2022, [25], Exhibit HHHH, WIT.0021.0006.0001.

36 Further Statement of Peter Botten dated 27 January 2022, [28,] Exhibit HHHH, W17.0021.0006.0001.

37 Further Statement of Peter Soften dated 27 January 2022, [29] – [30], Exhibit HHHH, WIT.00210006.0001.
28 plc Mtg_April 27th KWv2.ppt, Exhibit 1305, OSL 0018.0002.6791.
Project Kumul presentation 280508 _final_combined .pdf, [5], Exhibit 1309, OSL.0018.0002.7125.
4° Email Keiran Wulff to Peter Botten and Gerea Aopi FW: Project Kumul, 27 April 2008, Exhibit 1317. OSL.0018.0004.4798.
41 Further Statement of Peter Botten dated 27 January 2022, [36] Exhibit HHHH, WIT.00210006.0001.
42 PwC Report, Transaction Review Project Kumur, [43], Exhibit 8.19, WIT.0056.0005.0001.
• PwC Report, 'Transaction Review Project Kumul', 142), Exhibit

8_19, WIT_0056.0005.0001.
44 Transcript, Arthur Somare, 4 February 2022, page 3735.

45 Transcript, Arthur Somare, 4 February 2022, page 3722.
46 Affidavit of Glenn Blake dated 20 December 2021, [12], Exhibit WVVW, WIT. 0092.0001.0001.
47 Minutes of IPBC board meeting of 13 September 2008, Exhibit 407, WIT. 0026.0001.0770_
48 RE: Project Kumul, Exhibit 1340, OSL.0018.0008.1529.
4° Statement of Gerea Aopi dated 16 June 2021, (11], Exhibit NN, WIT.0059.0003.0001.

• Transcript, Gerea Aopi, 28 July 2021, page 2253.
51Transcript, Gerea Aopi, 23 June 2021, page 1772.
52 Statement of Gerea Aopi dated 16 June 2021, [3], Exhibit NN, WIT. 0059.0003.0001.
53 Submission No. 74/2008, [5], Exhibit 149, WIT.0015.0001.0453.
54 Request for Proposal, Financial Adviser, PNG LNG Project, Annexure to Affidavit of Isaac Lupari, 22 June 2021, Exhibit FFF WIT.0015.0002.2352
'5 Submission No. 74/2008, [3L Exhibit 149, WIT.0015.0001.0453.
Submission No. 74/2008, Exhibit 149, WIT.0015.0001.0453.
"NEC Decision No. 162/2008,11 August 2008, Exhibit 1486, WIT. 0016.0001.0073.
5' Contract for Financial Advisor between the State and Lazard Freres, Exhibit 117, WIT.0015.0002.0551
5. Statutory Business Paper No. 93/2008, Exhibit 118, WIT. 0015.0001.0551.
64 Statutory Business Paper No. 93/2008, Exhibit 118, WIT. 0015.0001.0551.
61 Statutory Business Paper No. 93/2008, Exhibit 118, WIT. 0015.0001.0551.
6' Letter from the Office of the State Solicitor to the NEC, 22 September 2008, Annexure to Affidavit of Isaac Lupari, 22 June 2021, Exhibit FFF,
WIT.0015.0002.2352
63 Letter from Somare to Joshua Kalinoe, Managing Director / CEO of Petronim dated 25 September 2008, Exhibit 119, W11.0027.0001 0506.
64 Affidavit of Dein Vele dated 26 April, [120], Exhibit 00, WIT. 0014.0007.0001.
rs Transcript, Arthur Somare, 4 February 2022, page 3725.
ra Affidavit of Glenn Blake, 20 December 2021, [11–21] Exhibit WWW, WIT.0092.0001 0001.

▪ PwC Report, 'Transaction Review Project Kumul', Exhibit 8_19, WIT. 0056.0005.0001.
fi° Affidavit of Glenn Blake, 20 December 2021, [21], Exhibit WWW, WIT.009200010001.
61 NEC Decision 82/2008, Exhibit 144, WIT 0056.0006.0708.
70 Minutes of Meeting No 1 of 2008 of the Board of Directors of IPBC, Exhibit 405, WIT. 0026.0001.0730.
PNG Customs Declaration dated 18 July 2019, Exhibit 1493, WIT. 0016.0005.0034.
72 NEC Decision 189/2009 was made at Special Meeting No: 30/2008,

Exhibit 150, WI-10027.0001.0498.
73 Affidavit of Glenn Blake. 20 December 2021, [21], Exhibit WWW, WIT.0092.0041 .0001.
74 Minutes of Meeting No. 1 of 2008 of the Board of Directors of IPBC, Exhibit 405, VVIT.0026,0001.0730.
',Affidavit of Glenn Blake, 20 December 2021, [26], Exhibit WWW, WIT.0082.0001.0001.
Affidavit of Glenn Blake, 20 December 2021, [22]. Exhibit WWW, WIT.0092.0001.0001.
PwC Report, Transaction Review Project Kumul', page 46, Exhibit 8.19, WIT.0056.0005.0001.
78 NEC Submission 167/2008 dated 20 October 2008, [22], Exhibit BB, WIT.0027.0005.0215
79 Affidavit of Glenn Blake. 20 December 2021, [23], Exhibit WWW, WIT.00920001.0001.
PwC Report, Transaction Review Project Kumul', page 7, Exhibit 8.19, WIT.005.0005.0001.

bi PwC Report, 'Transaction Review Project Kurauf, page 6, Exhibit 8.19, WIT.0056.0005.0001.

PwC Report, 'Transaction Review Project Kumul', page 43, Exhibit 8.19, WIT.0056.0005.0001; Affidavit of Glenn Blake, 20 December 2021, [231-
[24), Exhibit WWW, WIT.0092.0001.0001.
a3 Transcript, Peter Botten, 3 February 2022, page 3639.
a Transcript, Arthur Somare, 4 February 2022, page 3723.

5' Affidavit of Glenn Blake, 20 December 2021, [29], Exhibit WWW, WIT.0092.0001.0001.
66 Affidavit of Glenn Blake, 20 December 2021, [31), Exhibit WWW, WIT.0092.0001.0001.
87 Affidavit of Glenn Blake, 20 December 2021, [39], Exhibit WWW, WIT.0092.0001.0001; Affidavit of Benjamin O'Dwyer, [20] - (23), Exhibit PPM.,
WIT.0155.0009.0592.
96 Affidavit of Glenn Blake, 20 December 2021, [32], Exhibit WWW. WIT.0092.0001.0001.

89 Affidavit of Patrick Pruaitch dated 28 June 2021 [54], Exhibit ZZ, WIT. 0028.0003.0002; Affidavit of Glenn Blake, 20 December 2021, (46], Exhibit
WWW, WIT.0092.0001.0001; NEC Submission 167/2008 dated 20 October 2008, [29(i)), Exhibit 154, WIT.0027.0005.021629.
99 Minutes of Meeting No 1 of 2008 of the Board of Directors of IPBC, [1), Exhibit 120, WIT.0026.0001.0730.

91 Affidavit of Glenn Blake 20 December 2021, [21], Exhibit WWW, WIT.0092.0001.0001.
32 Transcript, Arthur Somare, 4 February 2022, page 3723.
93 Transcript, Gerea Aopi, 28 July 2021, page 2257.
94 Transcript, Gerea Awe', 28 July 2021, page 2261.

us Statement of Gerea Aopi dated 16 June 2021, [9), Exhibit NN, WIT. 0059.3003.0001.
98 Affidavit of Glenn Blake dated 20 December 2021, [37], Exhibit WWW, WIT.0092.0001.0001.
97 Minutes of IPBC board meeting of 20 August 2008, Exhibit 120, WIT 0026.0001.0730.
98 Goldman Sachs, JBWere post negotiation brief on Project Kumul, 12 September 2008, Exhibit 406, WIT. 0026.0001.0741.
IPBC Board meeting minutes discussing 'Project Kumuf – Post Negotiations Debrief prepared by Goldman Sachs, 13 September 2008, Exhibit 407.
WIT. 0026.0001.0770.
100 AGL was in the process of selling all its oil and gas interests in Papua New Guinea, including its 3.6% share in the PNG LNG Project. They sold
their 3.6% interest in October 2008, AGL tc sell PNG assets for approximately AUD 1.1 billion net, AGL ASX and media release of 30 October 2008,
Exhibit 7, WIT.0132.0002.0010.

191 IPBC Board meeting minutes discussing 'Project Kumul – Post Negotiations Debrief prepared by Goldman Sachs, 13 September 2008, Exhibit 407,
WIT. 0026.0001.0770.
102 IPBC Board meeting minutes discussing 'Project Kumul – Post Negotiations Debrief prepared by Goldman Sachs, 13 September 2008, Exhibit 407,
WIT.0026.0001 0770.
193 Letter from M Somare to J Kalinoe, 25 September 2008, Exhibit 410, WIT.0027.0001.0506.

lc' Letter from the Prime Minister to Ministers, 25 September 2008, Exhibit 132, WIT,0027,0001.0510.
185 Transcript, Arthur Somare, 4 February 2022, page 3725

106 Letter from A Somare to P Pruaitch, 6 October 2008, Exhibit 472, WIT.0104.0002.0095.
wl Transcript, Patrick Pruaitch, 3 August 2021, page 2621.
198 Presentation to the MCES, 'Financing of the State's

Entitlement in the PNG LNG Project' dated 10 October 2008, Exhibit BBB.
WIT. 0104.00020037.
1°9 Statement of Benjamin Terrence O'Dwyer, 10 February 2022, Exhibit PPPP, WIT.0155.0009.0592.

'10 Letter Lazard Freres to Prime Minister, 16 October 2008, Exhibit BBB, WIT 0104.0002.0173.
1" Project Kumul Board Information Pack, October 2008, Exhibit 1489, WIT.0097.0005.0679.

"'NEC Submission 167/2008 dated 20 October 2008, [22), Exhibit 154, WIT.0027.0005.0216.
"'Supplementary Affidavit of Patrick Pruaitch dated 2 August 2021 at (6) – [8], Exhibit ZZ.2, WIT.0028.0004.0075.
810 PNG LNG Project – 'Exchangeable Bond Option' presentation to NEC, 22 October 2008, Exhibit 468, WIT.0097.0005.0213.
115 Letter, Department of Treasury to IPBC 21 October 2008. Exhibit 126, WIT.0056.0006.0762.

1t6 PNG LNG Project State's Equity Financing 'Exchangeable Bond Option' Presentation to the NEC, 22 October 2008, Exhibit 468.
WIT.0097.0005.0213.
117 PNG LNG Project Equity Financing – Exchangeable Bond Transaction – Decision No 223/2008 – Special Meeting No 36/2008, Exhibit BB, Annexure
R, WIT.9027.0005.0174.

"9 Minutes of IPBC board meeting. 24 October 2008, Exhibit 127, WIT.0026.0001 0789
119 PwC Report, 'Transaction Review Project Kumul', page 7, Exhibit 6.19, WIT.0056.0005 0001.

120 Statement of Anthony Yauieb dated 28 July 2021, [30], Exhibit BBB, VVIT.0104.0002.0239.
121 Email from Mr Yauieb to Mr Koiri, 3 November 2008, Exhibit BBB, WIT.0104.0002.0175. There is no evidence of a reply by Mr Koiri and the issue

was dealt with subsequently by legislation which removed the impediment to appointment and deemed appointees to have been validly appointed from
inception.

422 Joint Media Release, 25 November 2008, Exhibit 129, WIT. 0027.0001.0538.
"'Affidavit of Kerenga Kua dated 18 May 2021, [5], Exhibit DD, WIT. 0049.0005.0002.
'24 IBPC Act 2002.

'25 Affidavit of Dairi Vele dated 26 April 2021, [92], Exhibit GO, VVIT.0014.0007.0001.
128 Transcript, Dairi Vele, 24 June 2021, page 1839.
121 Transcript, Arthur Somare, 4 February 2022, page 3725.

128 On 19 February 2008, the Petromin PNG Holdings Limited Authorization Act 2007 was gazetted nominating Petromin as the State's nominee and
acquiring party under the Oil and Gas Act 1996 pursuant to section 6(1) of that Act. That notice was subsequently revoked. The LNG Project
Nomination Act 2008 was passed to amend the Petromin PNG Holdings Limited Authorisation Act 2007 and the Independent Public Business Corporation of Papua New Guinea Act 2002.
179 Advice from Blake Dawson to IPBC, 26 June 2008. Exhibit 130, W1–1.00970005.0012.

138 On 28 April 2008, the State Solicitor wrote to Joshua Kalinoe, MD of Petromin, responded to Petromin's letter dated 17 March 2008 which appears
to have complained about the Government's conduct in indicating a different entity would be party to the PNG LNG Project Agreement when Petromin
had been Gazetted as the entity to hold that interest; Letter born George Minjihau, State Solicitor to Joshua Kalinoe, 28 April 2008, Exhibit 131,
WIT.0027.0001.0501.
131 Affidavit of Dairi Vele dated 24 April 2021, [85], Exhibit QQ, WIT.0014.0007.0001.

'32 Letter from M Somare to .1Kalinoe, 25 September 2008, Exhibit 410, WIT.0027.0001.0506' Letter from the Prime Minister to Ministers dated 25
September 2008, Exhibit 132. WIT. 0027.0001.0510.
"3 Transcript, Kerenga Kua, 2 August 2021, page 2543.
138 Affidavit of Glenn Blake dated 20 December 2021, [42] – [45], Exhibit WVVW, WIT.0092.0001.0001.
'35 Affidavit of Glenn Blake dated 20 December 2021, [46], Exhibit WW W, WIT.0092.0001. 0001.
838 Transcript, Gerea Aopi, 28 July 2021, page 2254.
"'Transcript, Patrick Pruaitch, 26 July 2021, page 2120.
138 Transcript, Patrick Pruaitch, 26 July 2021, page 2634.

839 Statement of Erastus Kamburi dated 27 July 2021. [6], Exhibit AAA, WIT.0056.0004.0372
'40 Transcript, Arthur Somare, 30 July 2021, page 2404.
PwC Report, 'Transaction Review Project Kumul', Exhibit 8.19, WIT. 0056.0005.0001.

44:- Bond Deed Poll dated 23 November 2008, cl. 2, Exhibit 133, WIT. 0056.0006.0021.
"'Subscription Deed, page 34, definition of Subscription Bonds, Exhibit 134, WIT.0056.0006.0108.
Bond Deed Poll dated 23 November 2008. cl. 17, Exhibit 133, WIT. 0056.0006.0021.
Brattle Report to the Commission of Inquiry into the UBS Loan - The IPIC and UBS Transactions, [128], Exhibit VV WIT. 0132.0001.'3002.
848 Bond Deed Poll dated 23 November 2008, cl. 17.2.1 and 13.10, Exhibit 133, WIT.0056.0006.0021.
1°1 Bond Deed Poll dated 23 November 2008, cl. 6, Exhibit 133, WIT. 0056.0006 0021.
"'Bond Deed Poll dated 23 November 2008, cl. 15, Exhibit 133, WIT 0056.0006.0021.
"'Bond Deed Poll dated 23 November 2008, cl 10.1 Exhibit 133, WIT. 0056.0006.0021.
158 Bond Deed Foil dated 23 November 2008, cl 7.5, Exhibit 133, W11..0056.0006_0021.
Bond Deed Poll dated 23 November 2008, cl 7.2, Exhibit 133, WIT. 0056.0006.0021.
152 Bond Deed Poll dated 23 November 2008, cl. 16 Exhibit 133, W17.0056.0006_0021_
tee NEC Submission 167/2008 dated 20 October 2008, [22], Exhibit 154, WI-1.0027.0005.0216.
Brattle Report to Me Commission of Inquiry into the UBS Loan - The IPIC and UBS Transactions, [104], Exhibit VV, WIT. 0132.0001.0002.

155 Brattle Report to the Commission of Inquiry into the UBS Loan - The IPIC and UBS Transactions, [114], Exhibit VV, WIT.0132.0001.0002
158 Affidavit of Dairi Vele dated 24 April 2021, pages 25 - 26, Exhibit QQ, WIT. 0014.0007.0001_

PwC Report, 'Transaction Review Project Kumul', page 10, Exhibit 8.19, WIT.0056.0005.000.
'58 PwC Report, 'Transaction Review Project Kumul', page 8, Exhibit 8.19, WIT.0056.0005 0001.
'58 Project Kumul - Post Negotiations Debrief Discussion Materials. page 3, Exhibit 406, WIT. 0056.0006.0741.

180 Goldman Sachs JBWere Hedging Market Risk for Project Kumul dated December 2008, Exhibit 135, WIT_0026.0001.0663.

"1 Minutes of IPBC Board Meeting dated 19 December 2008; Exhibit 136, WIT.0026.0001.0815.

102 Email from Anthony Yauieb to Maree Blake dated 24 December 2008, Exhibit 137, WIT.0104.0002.0005.

103 Goldman Sachs JB Were Memorandum to Glenn Blake dated 2 March 2009, Exhibit 138, WIT.0026.0001.0672.

16" Goldman Sachs JBWere Indicative Pricing document, Exhibit 139, WIT.0026.0001.0675.

185 Circular Resolution 1/2009, Exhibit 140, WIT. 0026.0001.0653.

186 Affidavit of Glenn Blake, 20 December 2021, [35], Exhibit WVVW, WIT.0092.0001.0001.

1" Minutes of IPBC Board Meeting, 13 March 2009, Exhibit 141, WIT.0026.0001.0823.

100 Minutes of IPBC Board Meeting, 13 March 2009, Exhibit 141, WIT.0026.0001.0823.

169 Affidavit of Glenn Blake, 20 December 2021, [36], Exhibit WWW, WIT.0092.0001.0001.

''° PwC Report, 'Transaction Review Project Kumul', page 12, Exhibit 8.19, WIT.0056.0005.0001.

PwC Report, Transaction Review Project Kumul', page 44, Exhibit 8.19, WIT.0056.0005.0001.

'72 Assisted by the findings in Brattle 1, Exhibit VV

173 PwC Report, 'Transaction Review Project Kumul', page 15, Exhibit 8.19, WIT.0056.0005.0001.

Brattle 1, [114], Exhibit VV, WIT.0132.0001.0002.

115 Supplementary affidavit of Patrick Pruaitch dated 30 July 2021, Exhibit ZZ.1, WIT.0028.0004.0003.

176 NEC Decision No. 82/2008, Exhibit 144, WIT.0056.0006.0708.

177 Further Statement of Peter Botten dated 27 January 2022, [42] – [43] Exhibit HHHH, WIT.0021.0006.0001