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

OUTLINE OF FINAL SUBMISSIONS BY COUNSEL ASSISTING

24 February 2022

May it please the Commission, we now make our closing submissions. This will take the best part of a day. Our aim is to say something of the background to the inquiry, its conduct, and scope and then proceed to submit key findings of fact and recommendations that we say should be made, thereby providing further natural justice and procedural fairness.[1]

We emphasise to those listening that these are submissions by Counsel Assisting which you, Commissioners, may or may not yourselves make, especially having heard submissions, due in the next 2 weeks ie. by 10 March, from persons affected who have leave to appear.

[1] This has also been provided in questioning of witnesses.

What follows should be read with the opening statements we have earlier made.

Establishment of the Commission

This Commission of Inquiry was established by instrument dated 30 August 2019, amended in October 2021, both made under the *Commissions of Inquiry Act*. It followed the tabling in the National Parliament in May 2019 of the December 2018 Final Report of the Ombudsman Commission.[2] In the circumstances outlined in the opening remarks period in December last year,[3] the terms of reference were amended and further time provided to complete the hearings and the report.

The Ombudsman Commission investigation had commenced in or about March 2014, shortly after the approval by the National Executive Council (NEC) for the State to enter into a loan agreement with the Union Bank of Switzerland (Australian Branch) (UBS) for AU1.39 billion to purchase approximately 149 million newly issued shares in Oil Search Limited, which before its recent takeover by Santos Ltd, was a long-established Papua New Guinea oil and gas exploration company listed on both the Papua New Guinea and Australian Stock Exchanges.

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

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[2] *An Investigation into the alleged improper borrowing of AUD1.239 billion loan from the Union Bank of Switzerland, Aktiengesellschaft (Australia Branch) to purchase 149,390,244 Shares in Oil Search Limited and improper tender and procurement of consultants in relation to the borrowing*.

[3] '(a) Despite the efforts and the cooperation and assistance provided by many witnesses, up to the end of the August hearings, there remained matters which seemed to warrant further consideration.
(b) That situation arose, unfortunately, due to a number of factors outside of the control of the Commission, in particular, delays occasioned by the late and incomplete production of important documents by a number of relevant persons and entities.
(c) The need to consider documents produced at a very late stage (and since then, even more has been produced).
(d) A desire to provide one further and final opportunity to hear from key witnesses who had not yet provided evidence, including those in jurisdictions outside of Papua New Guinea.
(e) Continued complications caused by the Covid 19 Pandemic.'

On assuming office as Prime Minister, the Honourable James Marape MP undertook to establish a commission of inquiry to investigate the facts surrounding the transaction. The Prime Minister at the time of the UBS transactions, the Honourable Peter O'Neill CMG MP, has told the Commission that he supported its establishment and work.

In our submission, it is significant that both the current and former Prime Ministers have supported the work of this Commission and also have recently agreed with some of the recommendations which we now put forward.

Jurisdiction

The jurisdiction of the Commission is set out in the *Commissions of Inquiry Act 1951*.

It is important to appreciate what the Commission can and cannot do. The Commission has the power to summons any person to attend the Commission to give oral evidence on oath (ss.6 and 7).

The Commission also has the power to summons the production of documents (s.6).

It is an offence to fail, without reasonable excuse, to comply with a summons to give oral evidence or produce documents (s.9) or to give false evidence (s.10A) or to act in manner which amounts to contempt of the Commission (s.11).

However, the Commission, as a commission of "inquiry", is not an investigative agency with the kind of powers extended to those institutions with power to conduct investigations into criminal conduct and other offences.

Relevantly:

- the powers of the Commission do not have extra-territorial application and cannot compel oral evidence or the production of documents outside Papua New Guinea;
- the Commission has no power to establish a taskforce to conduct investigations (although in a more limited sense the Minister may appoint "persons with the appropriate technical or professional expertise to assist the Commission": s.4A(2));
- 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;

- 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;
- the Commission has no ready access to data matching services with other authorities or bodies.

Rather, the function of the Commission is to inquire into any matter of public welfare (s.2), assemble the facts using the powers available to it and report on its proceedings and the results of its inquiry (s.15) – that is, answer its terms of reference – for tabling in Parliament (s.17).

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 (breaches of the Leadership Code), Public Prosecutor and the police (breaches of the Criminal Code or prosecutions of other offences) or ICAC (prosecution of corrupt conduct, including official corruption).

Hearings

The Commission began hearings soon after its establishment, however many factors delayed its progress, including the world-wide Covid-19 pandemic (which began in early 2020 and still continues), delays in finding further suitable persons who could undertake the work and who had no conflicts of interest, and thus, were to be found overseas, and obstructive approaches towards the Commission by some persons and entities with relevant information and documents. We continue to thank the many persons who did assist the Commission, in private and in public, and especially those under no legal compulsion to do so.

We will later say something about the recalcitrant witnesses and entities, but we say this now about the State's former bankers and lawyers who declined to appear in person or remotely by video: the Commission only had powers of compulsion over those within the Independent State, but as a nation State it is not defenceless, and both Mr Marape and Mr O'Neill have expressed, to you, Commissioners, in their oral evidence, their support in principle of our recommendation, that such persons or entities should be banned, if necessary by law, from doing any work for 5 years for the State or its emanations.

Following many directions hearings and return of summonses, and also the tragic death of former Commissioner Gilmour and the subsequent appointment of Commissioner White, and the appointments of those assisting, the principal hearings involving witnesses began in March 2021 and continued, intermittently, until August 2021, following which amended terms of reference were subsequently issued. Hearings re-commenced in December 2021, continued in late January 2022 and this month. Following today's final submissions from Counsel Assisting and any responses by those with leave, the report is due by 31 March 2022.

Especially because of Covid, the hearings have been conducted from *APEC Haus*, but with some counsel and some witnesses (and one Commissioner), at times, being located elsewhere and participating by video-link. Although this is not the traditional approach, it has created real and practical advantages: indeed we submit that it has been a resounding success. Thus, there has been a very large saving in the accommodation costs and travel expenses for witnesses, and those assisting, who have not had to travel to and from Port Moresby, some on multiple occasions. Persons who had covid-caused travel and health restrictions have still been able to appear. The hearings, which have been entirely in public, have been live-streamed on *Facebook* (with recordings placed on the Commission's website), sometimes attracting more than 1000 viewers at a time on the livestream. The Commission has been able to have witnesses from many overseas locations, sometimes, as in the case of experts, from multiple overseas locations simultaneously. We submit this has proved to be a flexible, practical and efficient model which should be used in the future.

We later have some submissions as to amendments that might be made to the *Commissions of Inquiry Act*.

The Commission has engaged experts to assist it. We acknowledge the detailed work of the *Brattle Group* who have provided significant financial analysis of the complex transactions which are the focus of this Commission. There has been nothing in the hearing which has cast any doubt on their assumptions, analysis or conclusions. Their reports should be accepted in their entirety. We shall return to their reports.

Terms of Reference

The Terms of Reference set out the Commission's purpose, jurisdiction and the questions which must be dealt with.

The instrument containing the Terms of Reference for this Commission begins with a brief explanation followed by the Terms of Reference:

> *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* USD*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.*

Those Terms of Reference may be grouped under a list of financial transactions, following, and then key issues:

(a) Orogen Minerals Merger with Oil Search Limited in 2002;

(b) PNG LNG Project;

(c) IPIC Loan;

(d) UBS Loan of AUD1.39 billion to the State in 2014;

(e) Purchase of Oil Search Shares by the State in 2014;

(f) Elk/Antelope PRL-15 Transaction by Oil Search in 2014;

(g) Sale of Oil Search Shares by a State-Owned Enterprise in 2017;

(h) Sovereign Wealth Fund;

(i) Who is responsible?

(j) Who benefited?

(k) What should be done: recommendations.

Role of the Commission of Inquiry

The Commission is directed to investigate, and establish, the facts relating to these financial transactions, their lawfulness and propriety, the nature of the conduct of those involved in them and the consequences for the State and the people of Papua New Guinea.

The Terms of Reference require that this Commission 'shall, so far as reasonably possible, inquire into, make findings and report on' a list of matters designated by paragraph headings (a) to (gg) inclusive. Given time and Covid constraints and the limits of voluntary co-operation by those located off-shore, we submit that the inquiry has indeed gone 'as far as reasonably possible': yet your report may well lead to others taking action.

The Commission is charged with making findings and recommendations arising out of its findings. We make two important submissions about what is involved.

- First, the Commission is not reviewing the Ombudsman Commission report which was the catalyst for the establishment of this Commission
- Second, as this Commission is an inquiry, not a court of law, it cannot 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 those relating to constitutional matters. But it does not transgress those limits when, as we submit it should, the Commission expresses an opinion as to how laws should be construed.

1. History, the *Constitution*, and key legal structures

1.1 Answering the Terms of Reference requires some understanding of fundamental matters of *Constitution*al law and practice, and statute law, especially such as concern the

commercial exploitation of natural resources, the potential role of the State in that regard, and parliamentary control of borrowing by the executive government of the day.

1.2 The Inquiry's initial phase of evidence involved obtaining evidence on these topics from some of the founders of the *Constitution* of the Independent State and contemporary experts: we refer you to the opening in March last year, and the evidence, particularly that of two key founders, Chief Dr John Momis GCL and the Right Honourable Sir Chief Julius Chan GCL GCMG KBE (who of course later became Prime Minister).

1.3 Dr Momis in his evidence said that the founders such as himself saw the need to have:

"…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".[4]

1.4 Papua New Guinea became the Independent State in 1975 and the *Constitution* then came into force. By reflecting both spiritual and material links of the citizens to the country's land and resources, the *Constitution* is unusual, and perhaps unique. Thus, its preamble states, in terms which must be continually borne in mind in this inquiry:

"All persons in our country have the following basic obligations to themselves and their descendants, to each other and to the Nation …

(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

[4] Chief Dr John Momis GCL, oral evidence; transcript (29 April 2021) at page 173.

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."

State borrowing

1.5 It is not uncommon for countries from within the Commonwealth of Nations to have constitutional provisions requiring parliamentary approval for government borrowing and expenditure. So it is here. In the Independent State the key provision is s 209(1) of the *Constitution*, which provides:

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

1.6 The Ombudsman Commission's report on the UBS Loan concluded that s 209(1) was not complied with in the case of the borrowing arrangements entered into by the State, as later that year novated to a State-Owned entity, Kumul Petroleum Holdings Limited (**KPHL**), concerning the UBS Loan of AUD 1.239 billion in 2014. The Commission received much evidence and submissions on this topic. For reasons we will come to, we submit you should *not* make the same findings that s 209 was transgressed.

Exploitation of Papua New Guinea natural resources, law and practice

1.7 The Independent State is rich in many natural resources, among them the valuable, and internationally marketable, commodities of petroleum and liquefied natural gas (LNG).

1.8 National Goal 4 in the *Constitution* concerns natural resources and the environment of Papua New Guinea. It states:

" 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."

1.9 On this point, Dr Momis said in his evidence 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."[5] *... 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."*

1.10 The proper role of the government in a capitalist system was spoken of at-length by the witnesses who gave evidence in the first phase of hearings. They spoke of four main governmental functions, namely:

(a) the traditional and essential role of government to make good policies and laws that create an environment that is conducive for business growth but without direct government intervention, while the government focuses on provision of quality public services such as in education, health and law and order;"[6]

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[5] Supplementary Statement of Chief Dr John Momis (Exhibit "K.2") at page 2, WIT.0088.0004.0001.

[6] Statement of Sir Michael Somare (Exhibit "B"), page [5], WIT.0001.0002.0002; Sir Charles Lepani's statement (Exhibit "C") on page 2, WIT.0008.0003.0003.

(b) the government raises tax revenue from private businesses to fund public goods and services;[7]

(c) the government regulates business in order to achieve proper exploitation of labour and natural resources and to promote equitable distribution of economic benefits;[8] and

(d) the government invests in public and private business enterprises.[9]

1.11 There was no dispute over the first, second and third functions. The fourth attracted different views from witnesses.

1.12 Although Grand Chief Sir Michael Somare passed away before he could give oral evidence, the Grand Chief's testamentary evidence supported direct government investment. He referenced his time as Prime Minister when the government invested heavily in State-Owned Enterprises (**SoE's**) which were managed by the then Independent Public Business Corporation (**IPBC**). These SoE's 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 a 19.4% stake in the PNG LNG Project.[10]

1.13 In contrast Sir Julius Chan stated that ordinarily government should stay out of business because it involves a lot of risks.[11] However, the notion that government ought to be involved in business is a good idea, as long as the government mitigate risks".

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[7] Statement of Sir Charles Lepani (Exhibit "C") on page [2], WIT.0008.0003.0003; Statement of Dr Osborne Sanida (Exhibit "E") at paragraphs [28] and [31] to [32] on page [5], WIT.0009.0002.0001.

[8] Statement of Sir Charles Lepani (Exhibit "C") on page [2], WIT.0008.0003.0003.

[9] Sir Michael Somare's statement (Exhibit "B") at page 8 to 11] WIT.0001.0002.0002, oral evidence of Chief Dr John Momis on 29 April 2021; transcript at page 164, Sir Charles Lepani's statement (Exhibit "C") at page 2 WIT.0008.0003.0003, oral evidence of Dr Osborne Sanida; transcript at pages 182-183 (29 April 2021), oral evidence of Dr Lawrence Sause; transcript at pages 310 to 311(13 May 2021)

[10] Statement of Sir Michael Somare (Exhibit "B") at pages 8 to 11, WIT.0001.0002.0002.

[11] Statement of Sir Julius Chan (Exhibit "H"), paragraphs [24] to [46], pages 3 to 5, WIT.0002.0004.0002; oral evidence of Sir Julius Chan; transcript at pages 282 to 285 (12 May 2021).

1.14 Dr Osborne Sanida of the Papua New Guinea National Research Institute said this:[12]

"... 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 SoE's and interest in the large projects … . 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. Ideally, the main focus of the State should be on ensuring that public affairs/Institutions are functioning effectively and efficiently to provide a conducive environment for the private sector to perform its role as an engine of 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."

1.15 In our submission, you can find that there was general agreement amongst witnesses that under the capitalist free market economic system operating in the country, government appropriately tends to avoid involvement in private businesses, but if it considers it necessary to intervene in private business as an investor itself, it can do so, *provided*, and we emphasise the following proviso, *any risks inherent in private business investment are managed properly so as to avoid losses*.[13]

1.16 Examples of government investment in natural resource development projects through equity participation includes the following models:

(a) *Government directly taking up equity in a joint-venture company with multinational companies* such as 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;

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[12] Statement of Dr Osborne Sanida, (Exhibit "E"), paragraphs [21] to [27] at pages 3-4, WIT.0009.0002.0001..

[13] Statement of Dr Waine (Exhibit "F") at page 5, WIT.0039.0005.0007.

(c) *Government taking up shares in a multinational company that operates the project*, such as Bougainville Copper Limited; and

(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.

1.17 The witnesses 'broadly' agreed that where business involves investment risks, the government must be cautious in engaging in business ventures and only undertake such investments using public funds 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 then required. Some witnesses expressed the view that the State should not be involved in a purely private business enterprise involving multinational companies in which the State does not hold any controlling interest[14] because the risks are too high.

1.18 This evidence sets the historical context for the events the Commission is inquiring into. The Terms of Reference of this Inquiry focus on a number of petroleum and LNG transactions in which the Government of Papua New Guinea and its agencies were involved.

1.19 Before coming to those we mention some key legal provisions.

1.20 There are laws such as the *Mining Act 1992* and the *Mineral Resources Authority Act 2005* designed to prevent the improper exploitation of natural resources,[15] and also to ensure that the State can participate in the commercialisation of its natural resources.[16]

1.21 The *Oil and Gas Act 1988:*

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[14] See also Statement of Sir Charles Lepani (Exhibit "C") at page 7, WIT.0008.0003.0003; statement of Sir Julius Chan (Exhibit "H") at pages 3 to 5, WIT.0002.0004.0002; oral evidence of Sir Julius Chan; transcript at pages 284 to 288, 12 May 2021; oral evidence of Dr Sanida; transcript at page 321 (13 May 2021).

[15] See *Mining Act 1992*; *Mineral Resources Authority Act 2005*; *Oil and Gas Act 1998*, pt IV; *Environment Act 2000* s 4; *Unconventional Hydrocarbons Act 2015*.

[16] See *Oil and Gas Act 1998*, s 165.

(a) creates a licensing regime of five categories of licence including Petroleum Development Licence (PDL) and a Petroleum Retention Licence (PRL), [17]

(b) imposes a duty to compensate traditional landowners affected by the exploitation of natural resources, and

(c) preserves an optional participating interest – the 'back-in rights' – for the Independent State in all petroleum and liquefied gas projects.

1.22 Thus, s 165(1) of the *Oil and Gas Act* provides for 'back in rights' in these terms: *The State has the right (but not the obligation) to acquire, directly or through a nominee, all or any part of a participating interest not exceeding 22.5% in each petroleum project.*

1.23 Where the State exercises this right, affected landowners are granted royalties or equity out of the State's interest in the project.[18] Historically, the State has opted to exercise this right through a State nominee.

1.24 It is important to note that there are a number of different ways the State (and we include in this SoE's) can participate in large petroleum/LNG projects.

1.25 As already noted, some witnesses stated that the State has no role at all to play in such projects, beyond the traditional role of governments to provide an economically and politically stable State, which delivers public services as needed, and allows miners and

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[17] The licences are as follows:

Petroleum Prospecting Licence, which provides exclusive rights to explore for oil and gas, and to complete the necessary appraisal processes to determine whether the resource is commercially viable;[17]

Petroleum Development Licence, which provides exclusive rights to explore for, appraise, recover and sell petroleum and liquefied natural gas;[17]

Petroleum Retention Licence, which provides exclusive rights to explore, appraise gas fields and, with authorisation, carry out drill stem tests for appraisal of a petroleum pool;[17]

Pipeline Licence, which is required to construct, alter or reconstruct a pipeline which is used for transport of petroleum or liquefied natural gas;[17] and

Petroleum Processing Facility Licence, which is required to construct or operate a petroleum or liquefied natural gas processing facility.

[18] *Oil and Gas Act 1998,* ss 167 and 168.

their workers to operate safely. (No-one in this Commission has argued for the theoretical alternative that the State should itself operate all aspects of petroleum/LNG projects.)

1.26 Rather, in this inquiry, the debate has been between two available approaches, namely:

(a) exercising (and paying for) the back in rights under s 165 of the *Oil and Gas Act*, so that when the LNG begins to be exported and sold, the State shares directly in profits made under the licence; or

(b) Buying shares in a company which itself owns the licence, so that it receives such dividends as the company chooses to declare from time to time: there being no guarantee as to the amount or frequency of dividends.

1.27 Another debate in this inquiry has been the role of the Sovereign Wealth Fund which is provided for by existing laws but not yet established. In the 4th Report by the Brattle Group, they said this:

In general, Sovereign Wealth Funds can be designed to achieve several different purposes. Often these include: a) smoothing out volatile revenues in order to insulate spending programs from fluctuations, such as those caused by volatile commodity prices; and b) investing surplus revenues for use later (including possibly much later, to facilitate "intergenerational equity"). If a fund is mostly trying to smooth out volatile revenues, it is likely to invest mainly in low-risk, low-return assets such as bonds issued by governments with very strong credit ratings (such as the USA or Japan). Such investments generally hold their value from one year to the next but do not generate high returns over the long term. If a fund is mostly investing for the long term, it is more likely to invest in equities: although the value of equities is volatile, returns over the long term tend to be much higher than returns from investing in bonds. Thus the investment mandate of a Sovereign Wealth Fund will depend on whether it is mostly trying to invest surplus revenues for the long term or is mostly trying to smooth out volatile revenues to support current spending. The former will have relatively low and relatively stable returns, while the latter will have higher returns that are more volatile.

1.28 We heard some important evidence on this topic from Professor Sir Tim Besley CBE of the London School of Economics, an expert on developing economies, and Mr David Murray AO, former Chairman of the Board of Guardians of Australia's Sovereign Wealth Fund, *the Future Fund*. We shall have more to say about this topic later on.

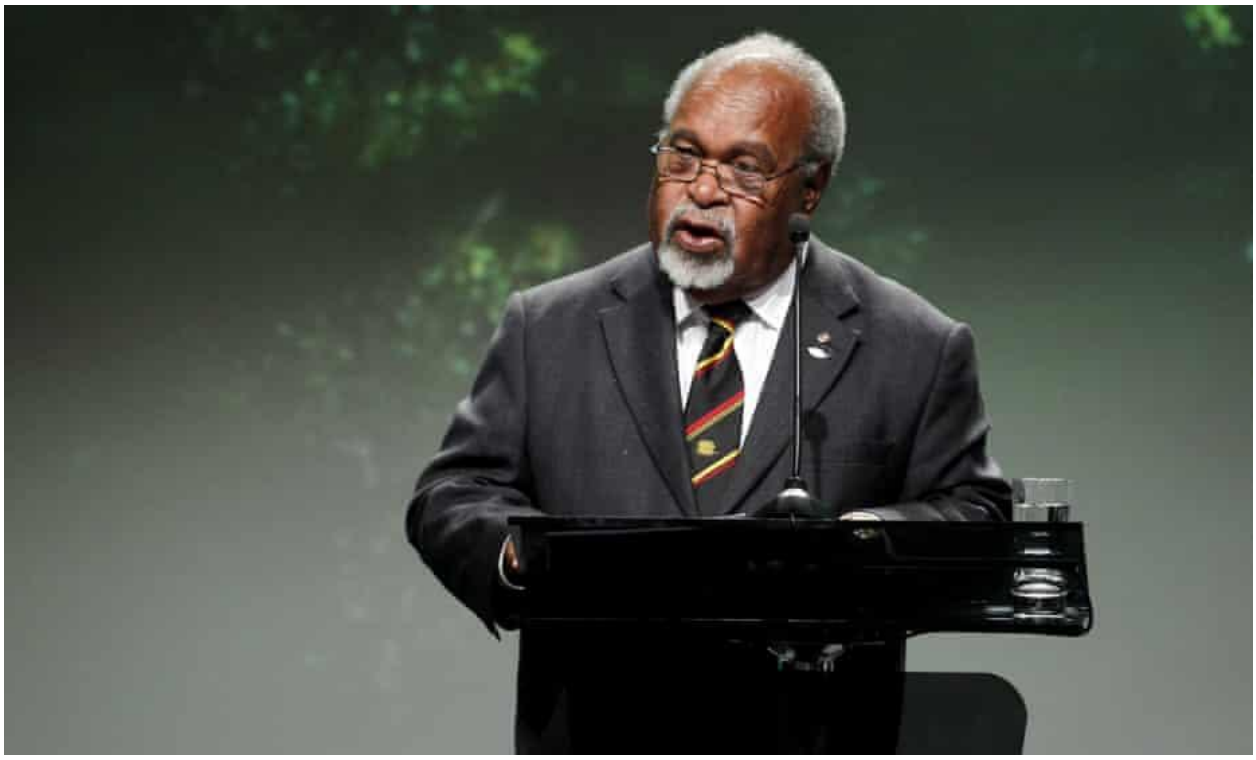
2. Key Persons and Events

2.1 Let me now mention some key persons and events.

People

2.2 The Prime Minister the Honourable James Marape MP

2.3 The Right Honourable Grand Chief Sir Michael Somare GCL GCMG CH CF SSI



2.4 Mr Arthur Somare;

2.5 The Honourable Peter O'Neill CMG MP, the former Prime Minister;

2.6 Mr Dairi Vele, relevantly the former Director of the Gas Production Coordination Office, Secretary and Acting Secretary of the Department of Treasury;

2.7 Mr Wapu Sonk, CEO of Kumul Petroleum Holdings;

2.8 Mr Carlos Civelli

2.9 Dr Clement Waine, former Secretary and Acting Secretary of the Department of Public Enterprises and State Investments;

2.10 Mr Ben Micah, former Minister for Public Enterprises and State Investments;

2.11 Mr Anthony Latimer, former partner at NRFA;

2.12 Mr Steven Moe, former Senior Associate at NRFA;

2.13 Mr Vittorio Casamento, former Senior Associate at NRFA;

2.14 Mr Paddy Jilek, UBS;

2.15 Mr Mitchell Turner, UBS;

Companies

2.16 **Oil Search** is a company which since 17 December 2021 has been merged with Santos Limited and is now part of the Santos Group, but before that has for many years described itself as 'the largest single investor in [Papua New Guinea]'. For at least that reason, and because from time-to-time the State or its SoE's have been significant shareholders in Oil Search, it has had significant economic and political influence in Papua New Guinea: but we are not thereby suggesting such influence was bad or inappropriate. For a long time Mr Peter Botten AC CBE was its CEO: its local representatives included the director Mr Gerea Aopi.

2.17 In 2002, Orogen Minerals Limited (**Orogen**) which was a publicly listed company in which Mineral Resources Development Company (**MRDC**) (a 100% State owned company) held 51% of the shares - merged with Oil Search. Orogen was created by the State to hold the State's private investments in the mineral resource sector.

2.18 **UBS AG** is a Swiss multinational investment bank and financial services company founded and based in Switzerland. The Australian branch of UBS AG was engaged as both financial advisor and financier to the Independent State on the UBS loan. UBS continues to operate out of Sydney, Australia and is not compellable by the Commission to provide evidence. UBS provided some assistance to the Commission, producing certain relevant documents, providing a statement of its view of relevant facts and answering specific questions from the Commission.[19] Despite requests, it did not make any current or former UBS employees available to give evidence.

2.19 Norton Rose Fulbright is an international law firm. The Sydney office of the Firm, Norton Fulbright Australia (**NRFA**), was engaged as a legal advisor for the State on the UBS Loan. NRFA was engaged on a number of other matters throughout 2012 and 2013. These related matters included:

(a) advising on the establishment of a 'Temasek style' enterprise to own and operate certain SoE's and hold certain investments for the State;[20]

(b) the IPIC Exchangeable bonds refinancing; and

(c) advising on the enabling legislation and regulations necessary to give effect to the Sovereign Wealth Fund and drafting such legislation and regulations.[21]

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[19] Statement by UBS AG, Australia Branch, 4 August 2021, UBS.0001.0002.0007; Supplementary Information from UBS AG Australia Branch – Response to questions from COI Solicitors Assisting received on 6 August 2021, 9 August 2021, UBS.0001.0003.0001.

[20] WIT.0015.0001.0691 at 0691 [2.2].

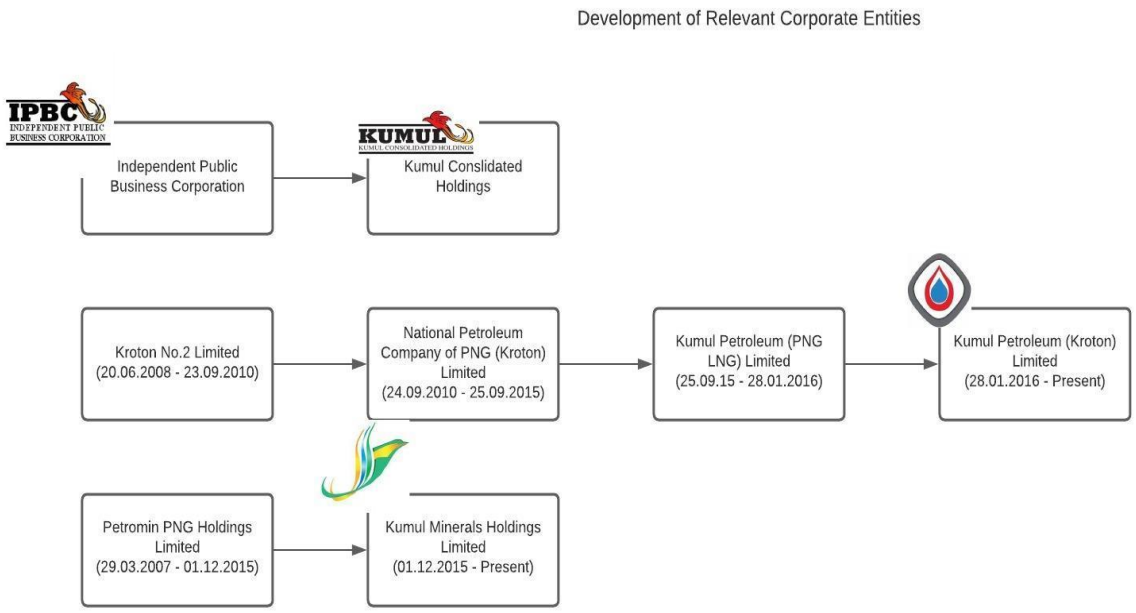
[21] WIT.0015.0001.0691 at 0693 [2.5(3)].

2.20 The lawyers who were asked to give evidence in this inquiry (who declined) were Mr Latimer, Mr Moe and Mr Casamento.

2.21 **KPMG** is a multinational network of professional firms providing audit, tax and advisory services. It advised the State on the UBS Loan.

SoE's

2.22 We mentioned that various SoE's have been created to participate in petroleum and liquefied natural gas projects. The main relevant entities for the purpose of this Commission are as follows:



2.23 The key executives include Mr Wapu Sonk the inaugural CEO of Kumul Petroleum Limited, who still holds that role.

Two LNG projects

2.24 Commissioners, you will recall that two LNG projects are central to the work of the Commission, namely:

(a) The PNG LNG Gas Project; and

(b) The variously named Papua LNG/ PACLNG / Elk Antelope project.

2.25 As explained in the opening submissions in March last year, the PNG LNG Project is one of the most significant natural resources undertaken in Papua New Guinea. Operated by ExxonMobil, the PNG LNG Project has already contributed some USD19 billion to the development of Papua New Guinea's economy.

2.26 The PNG LNG Project stretches across the Hela, Western, Southern Highlands, Gulf and Central provinces. Gas for the project is primarily produced from the Juha, Hides and Angore gas fields before it is transported by pipeline for storage and liquefication at facilities located north-west of Port Moresby. The liquefied natural gas is then loaded onto ships for export.

2.27 The PNG LNG Project produces approximately 6.9 million tonnes of liquefied natural gas each year,[22] which is exported throughout Asia.

2.28 The project is structured as an unincorporated Joint Venture.[23]

2.29 Gas for the project is sourced from seven different gas fields, and nine PDL's.[24]

2.30 This project is central to the Commission's Terms of Reference.

2.31 The other gas project of relevance to this inquiry was known initially as the Elk-Antelope gas field. It is located to the west of Port Moresby. It was discovered in 2007 by InterOil, an oil and gas explorer. InterOil subsequently partnered with the French company Total which purchased a 60% interest.

2.32 We now turn to some key transactions: the IPIC exchangeable bonds and the UBS Loans.

2.33 As we said in opening last March:

In 2009, the late Grand Chief Sir Michael Somare, the first Prime Minister of the Independent State, was again Prime Minister … [and], seeking to finance the

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[23] Between ExxonMobil, Oil Search Limited, Santos, JX Nippon Oil & Gas Exploration, and the Independent State, through Kumul Petroleum Holdings Limited and Mineral Resources Development Company Limited. WIT.0014.0001.0003 at .0005.

[24] WIT.0014.0001.0003 at .0006.

*Independent State's share of capital investment in the LNG Project, pledged, among other assets, its 14.7% stake in Oil Search to raise a large sum: AUD1.7 billion. However, the Oil Search shares were not worth AUD1.7 billion and so they were pledged against their future projected value in a deal with the International Petroleum Investment Company (**IPIC**) [a foreign Sovereign Wealth Fund]. Among other matters, it was initially proposed that IPIC agree that the Independent State would have the rights to buy back the shares in 2014, provided that the Independent State could then raise the money to do so. But the eventual agreement was more one-sided than that, with IPIC having the option of keeping the shares.*

2.34 When the bonds came due in 2014 the agreement was for IPIC to take the shares unless there was an agreement otherwise. The government did not seriously attempt to obtain an extension until it was too late, and despite its desire to retain the shares, IPIC held on to the Oil Search shares including the shares the government or its SoE's had previously owned, thus leaving the State with a situation it had not faced since the Orogen merger that is, owning no shares in Oil Search. Former Prime Minister O'Neill said this was unacceptable so he persuaded his government to make the entirely optional decision to ask Oil Search to issue 10% of its share capital to the State in what we call *the UBS loan*. Oil Search agreed as it allowed it to purchase the PacLNG group that held a 22.8% interest in the Elk-Antelope field.

2.35 The new Oil Search shares and the UBS Loan were swiftly transferred to the SOE, Kumul Petroleum.

2.36 The evidence, in our submission, is that Kumul Petroleum didn't want the shares or the large UBS Loan debt but for years it could not obtain the permission of its Trustee, Mr O'Neill, to sell the shares.

2.37 The so called 'vital strategic interest' of the State in owning Oil Search shares, which was the stated justification for the UBS Loan, in our submission, having regard to the evidence, ceased to be vital when the shares were eventually sold, after the election which returned Mr O'Neill's government, in 2017. If Mr O'Neill first withheld and then gave Kumul Petroleum permission to sell the shares for non-commercial purposes, as Mr Sonk says he did, that would in our submission, be a potential breach of his Trustee's duties

and as we later submit, *could* be a leadership Tribunal matter and thus *would* justify referral by this inquiry to the Ombudsman Commission; it could also, in our submission, amount to conduct relevant to the *Organic Law on the Independent Commission Against Corruption Law 2019*.

2.38 Be that as it may, there can be little doubt that, unlike the IPIC Exchangeable bonds which provided the only realistic way for the State to exercise its valuable back in rights, and was cost effective, the UBS Loan was, for the State and its people, an unnecessary disaster – and we use both words *unnecessary* and *disaster* deliberately.

2.39 It was entirely *voluntary* – there being no prior obligation to take out the loan; and entirely unnecessary - the stated rationale – continued ownership of a strategic parcel of Oil Search shares- was never convincing, and cannot withstand scrutiny in view of the almost immediate desire, following the UBS Loan in March 2014, and its novation to Kumul later that year, of both Kumul and Mr O'Neill for an early sale of the shares, which did not happen until 2017 for apparently non-commercial reasons. The *disaster* was the enormous loss of K862,000,000 (AUD 340m) and the lost opportunity to put that money lost to better use. A far better financial decision would have been to use money saved by not entering into the UBS Loan to establish the Sovereign Wealth Fund, to otherwise invest through back in rights which give direct access to profits of a petroleum licence, or to pay down debt rather than being beholden to a company for its dividend decisions.

2.40 The complex UBS Loan was not well understood by the State and its in-house officials and advisers, but it turns out to have involved over-charging by UBS (above its separately declared fees) of approximately K456,000,000 (AUD180 million) – the State should in our submission ask for this money back and the Australian authorities should be asked to investigate and if appropriate take action.

2.41 The governmental processes for the assessment of the UBS Loan were inadequate, uncoordinated and rushed.

2.42 The NEC/Cabinet process - and the benefits of debate and consideration it should bring - was undermined by the then Prime Minister O'Neill's decision to put to the NEC a UBS

Loan of enormous complexity, based on a cabinet submission which no other Cabinet member *including the Treasurer* had prior sight of.

2.43 We now turning to the sub-paragraphs of the Terms of Reference.

3. TOR (A): What was the reasoning behind the decision by the Morauta Government to approve the sale of Orogen Minerals to Oil Search Limited?

3.1 The background to this topic is as follows: the Mineral Resources Development Company (**MRDC**) was established in 1975 as a 100% State owned company to hold and manage the State and landowners' equity interests in mineral and petroleum development projects in the State. In 1996, through a successful Initial Public Offering, MRDC launched a subsidiary company, Orogen Minerals Limited (**Orogen**), and listed it on the Australian Stock Exchange. MRDC offered a 49% stake in Orogen to the public and retained 51%.

3.2 On 21 January 2002, Oil Search and Orogen announced a proposed merger. It was also announced that the State had indicated its support for the merger.[25] Mr Botten's evidence was that it was Oil Search who was approached by the State and asked whether it would be interested in putting forward a merger proposal with Orogen.[26]

3.3 The merger terms were AUD0.45 and 1.2 Oil Search ordinary shares for each Orogen share. This valued Orogen at AUD632 million or AUD1.97 a share, 22% higher than the pre-announcement share price of AUD1.62 a share.[27] The proposed merger would result in MRDC holding approximately 18% of the Oil Search shares.[28]

3.4 On 21 March 2002, the then Prime Minister, The Right Honourable Sir Mekere Morauta KCMG, announced that NEC had endorsed a recommendation to accept the merger offer by Oil Search for Orogen.[29]

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[25] Company announcements - Text version - ASX.

[26] Further Statement of Peter Botten dated 27 January 2022 [7], WIT.0021.0006.0001.

[27] Company announcements - Text version - ASX.

[28] OSL.0022.0001.0001 at .0011.

[29] OSL.0022.0001.0259 at .0627.

3.5 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.[30]

3.6 On 3 April 2002, the merger (by way of Scheme of Arrangement) was approved by the National Court.[31]

3.7 As to the reasoning for the merger, the board of Orogen considered that the shares in the company were trading at a significant discount to their underlying value. Accordingly, they examined various options to maximise value for shareholders. The board noted that the Oil Search offer represented a premium on Orogen's share price and that the merger was, in their view, the best way to unlock value in the company.[32]

3.8 As noted, the proposed merger offer by Oil Search was supported by NEC, for the principal reason 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. [33]

3.9 ABN-AMRO, the State's advisors, advised in favour of the proposed merger on the basis that it would assist Oil Search to move the Papua New Guinea Gas Project forward and allow the State to retain its exposure to the project.[34] Similarly, Grant Samuel & Associates, who were engaged by Orogen to act as an independent expert to advise on the proposed merger, advised that the proposed merger was in the best interests of Orogen shareholders as the offer represented a premium to the recent Orogen share price and the merger would enable the company to participate in attractive growth opportunities, including the Papua New Guinea Gas Project.[35]

3.10 From Oil Search's perspective, Orogen was a "very profitable company". Oil Search saw the proposed merger as an opportunity "to bring more value, not only to the Oil Search

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[30] Company announcements - Text version - ASX.

[31] Company announcements - Text version - ASX.

[32] Company announcements - Text version - ASX.

[33] OSL.0022.0001.0259 at .0627.

[34] WIT.0016.0005.0007.

[35] OSL.0022.0001.0001 at .0082.

shareholders but also to the [Papua New Guinean] Government".[36] In this regard, Mr Botten stated:[37]

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.

3.11 At the time of the merger, Mr John Francis Kaupa was the Managing Director and Chief Executive Officer of Orogen.[38] Mr Kaupa described the acquisition of Orogen by Oil Search as "a very unfortunate and sad day for Papua New Guinea". Mr Kaupa was concerned about the State's decision to support the merger. In particular Mr Kaupa was critical of the merger, given the financial strength of Orogen and his view that the Oil Search offer undervalued Orogen.[39]

3.12 Mr Kaupa said his attempts to discuss his concerns with the then Prime Minister Sir Mekere Morauta were "thwarted" and the attempts of Orogen's board of directors to meet with the State were "spectacularly unsuccessful" as he was told to do his job and facilitate the acquisition and not to question the State's decision to sell. [40]

3.13 However, we submit that this evidence is not of great significance as, ultimately, Mr Kaupa (along with the other directors) recommended that Orogen shareholders vote in

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[36] Transcript, Gerea Aopi, 28 July 2021, p 2261.

[37] Further Statement of Peter Botten dated 27 January 2022 [7], WIT.0021.0006.0001.

[38] Statement of John Francis Kaupa dated 19 May 2021 [4]-[5], WIT.0096.0002.0003.

[39] Evidence of John Francis Kaupa T1886 (24 June 2021); Statement of John Francis Kaupa dated 19 May 2021 at [11]-[12], WIT.0096.0002.0003; Statement of John Francis Kaupa dated 22 July 2021 at [17]-[20], WIT.0096.0002.0003.

[40] Statement of John Francis Kaupa dated 19 May 2021 at [13]-[17], WIT.0096.0002.0003; Evidence of John Francis Kaupa T1887 (24 June 2021).

favour of the merger,[41] and there was then overwhelming support for the merger and the courts approved it.

3.14 **So, in our submission, the submission as to TOR (A) is that the reasoning behind the decision by the Morauta Government to approve the sale of Orogen Minerals to Oil Search Limited was that provided by 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, and by the overwhelming support by shareholders for the merger.**

4. TOR (B): Were alternative structures / transactions considered? If so, why were these rejected?

4.1 In November 2001, the State approached Santos Limited (**Santos**) to invite the company to make a bid for Orogen.[42]

4.2 On 20 March 2002, Santos announced that it was considering making a takeover offer for Orogen at a case price of AUD2.00 per share, which would value Orogen at AUD642 million.[43]

4.3 The proposal by Santos was considered by the NEC on 19 March 2002 but rejected on the advice of ABN-AMRO on the basis that the Oil Search offer was the better option given:[44]

(a) the cash consideration for the Santos proposal was still significantly below the underlying fundamental value of Orogen;

(b) the Santos proposal was below the underlying fundamental value of the Oil Search offer;

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[41] OSL.0022.0001.0001 at .0057.

[42] Company announcements - Text version - ASX.

[43] Company announcements - Text version - ASX.

[44] WIT.0016.0005.0007.

(c) the Santos proposal had a number of unattractive conditions; and

(d) the Santos proposal would give Santos blocking rights over the PNG Gas Project.

4.4 On 21 March 2002, Orogen announced that it had not received a formal takeover proposal from Santos and that its board recommended to shareholders that, in the absence of any superior offer, they should vote in favour of the merger between Orogen and Oil Search.[45]

4.5 The board of Orogen also considered a number of other alternatives to the merger with Oil Search but considered that the Oil Search offer was the best option for the company.[46]

4.6 The advice to the State from ABN AMRO also considered (but recommended against) various other proposals.[47]

5. TORs (C) – (D) - Impact

5.1 The most notable impact of the merger was that Oil Search and the State (directly or through SoE's) grew ever 'closer' in their dealings, and the large shareholding by the State/SoE's in Oil Search came to be regarded by some at least as the normal course of events.

5.2 Oil Search was the biggest company in the Independent State. It was not unreasonable for it to have a close relationship with the Independent State in the ordinary course of its business. That relationship became complicated with the State's large shareholding in Oil Search as it had a direct interest in its success.

6. TORs (E) – (K) : The PNG LNG Project

Overview of the PNG LNG Project

[45] Company announcements - Text version - ASX.

[46] OSL.0022.0001.0001 at .0010.

[47] WIT.0016.0005.0007 at .0027-0028.

6.1 The PNG LNG Project is one of the most significant (if not the most significant) natural resource projects in the Independent State.[48]

6.2 In July 2007, the companies involved 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.[49] The rationale for the proposal was that the aggregate natural gas reserve was large enough to warrant the large costs associated with extracting, processing and piping the product; but each individual reserve was not.

6.3 This led to significant negotiations between those companies and the State and a number of agreements being entered into in 2008 and 2009. The principal agreements were executed in May 2008.

6.4 The Final Investment Decision for the PNG LNG Project was made on 8 December 2009 and this immediately resulted in the commencement of comprehensive construction activities. Construction of the PNG LNG Project was completed by about April 2014. Gas production started around that time and the first gas export from the PNG LNG Project was on 25 May 2014.[50]

6.5 Since its first export in 2014, the PNG LNG Project has exported approximately 7 million tonnes of LNG per year. The total capital expenditure by the project sponsors in the construction and commissioning period from 2010 to 2014 exceeded USD19 billion.

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[48] The PNG LNG Project is an integrated system of gas production, processing, liquefication and storage facilities stretching across the Independent State. It comprises gas fields and production facilities in Hela, Southern Highlands and the Western Province connected by some 700 kilometres of pipelines to the liquefication and storage facilities in the Gulf of Papua. The PNG LNG Project has the capacity to produce about 7 million tonnes of LNG each year. The gas is exported to international markets from the Gulf of Papua. The income is to be distributed amongst the PNG LNG Project equity holders (which includes the Independent State-owned companies). The PNG LNG Project was initiated by companies including ExxonMobil, Nippon Oil, Oil Search and Santos.

[49] Policy Submission 73/2008 dated 20 May 2008, [3], WIT.0014.0007.0300.

[50] Statement of Peter Graham dated 9 June 2021, Exhibit YY, WIT.0072.0003.0002.

6.6 The PNG LNG Project has produced significant revenue for the State, through KPHL.

6.7 The principal agreement entered into for the Project is known as *the Gas Agreement*. It was made under sections 184 and 185 of the *Oil and Gas Act* and sets out the terms by which the State could exercise its back-in rights to become an equity participant in the PNG LNG Project.

6.8 Through the Gas Agreement, the State acquired a 19.4% interest in the PNG LNG Project. The State had to find the substantial means to fund that involvement initially of its equity interest but subsequently its share of the development costs. The State's total financing exposure to the PNG LNG Project was approximately USD 3 billion comprising equity financing of USD1 billion and project financing of USD2 billion. At its time, it was the largest fundraising that the State had ever attempted.

6.9 It was this significant need for finance which directly led to what is known as the IPIC Exchangeable Bond transaction. That transaction links to paragraphs 1(e) to (k) of the Terms of Reference, which we now address.

7. TOR 1(E): How the State Financed its Equity Participation in the PNG LNG Project

7.1 **The submission, in summary, as to this TOR is that the State financed its equity participation through the IPIC Exchangeable Bond Transaction.**

7.2 This was as agreed between IPBC and International Petroleum Investment Corporation (**IPIC**), a state-owned entity from Abu Dhabi. IPIC was a passive investment company involved in administering Abu Dhabi's sovereign wealth fund, rather than an active commercial or trading organisation.

7.3 The Exchangeable Bond Transaction sought to leverage IPBC's ownership of General Business Trust assets and, in particular, the 17.6% shareholding that IPBC then held in Oil Search. IPBC had become the state's nominee to hold the Oil Search subsequent to

the merger of Oil Search and Orogen pursuant to the *IPBC Act 2002*.[51] The key concepts of the transaction were as follows:

(a) IPBC was to issue exchangeable bonds to IPIC. Fundamentally, IPIC would pay money to receive the bonds and at maturity, after 5 years, take IPBC's shareholding in Oil Search as repayment. It is critical to understand this aspect.

(b) At the time of the transaction, the Oil Search share price was about AUD4.33, but it was predicted to rise. This was because Oil Search was a participant in the PNG LNG Project and its share price was likely to rise as the Project progressed.

(c) In order to raise sufficient funds to participate in the Project and to take advantage of the forecast rise in Oil Search's share price, the value of the bonds was calculated not by reference to Oil Search's then share price but to an agreed future price of AUD8.55. This enabled IPBC to raise AUD1.681 billion. This was significantly more than it could have raised from a simple loan secured against the current value of the Oil Search shares.

(d) 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 bonds.[52]

(e) IPBC would keep the dividends paid on the shares up to a certain limit, after which the excess would be held in the quarantined accounts.

(f) On maturity, the bonds would be exchanged for IPBC's entire shareholding in Oil Search. When that happened, if:

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[51] Section 7(a) of the IPBC Act 2002 provided that IPBC were to act as trustee of the Trusts [including the General Business Trust] and hold assets and liabilities that have been vested in or acquired by it, on behalf of the State. IPBC were registered as shareholders of Oil Search in March 2004.

[52] Bond Deed Poll Annexure A, cl. 17, WIT.0056.0006.0021

(i) the Volume Weighted Average Price of the shares over a certain period of time was less than AUD8.55 a share, IPBC was obliged make up the shortfall in cash;

(ii) if the Volume Weighted Average Price of the shares was greater than AUD8.55 a share, IPIC would only receive shares totalling the face value of the bonds and IPBC would keep the remainder of the shares. [53]

(g) IPIC also had early exchange rights. 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.[54] On this early exchange, IPIC would receive all of the shares (even if the share price was above AUD8.55), but would not receive a cash payment if the share price was below AUD 8.55. The effect of this was to transfer the upside of the shares above AUD8.55 to IPIC as if the shares rose above that price, IPIC could take all of them.

(h) The risk of having to make up the shortfall was the principal risk that IPBC took in the transaction.

(i) IPBC was required to pay interest to IPIC at the rate of 5% per annum.[55] About AUD390M of the funds raised by the bonds was placed in escrow to meet the interest payments as they fell due so that no further payments would be needed.

(j) The Oil Search shares were held by an escrow agent for the duration of the bond to protect IPIC's redemption rights. Also, 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 IPIC.[56]

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[53] Bond Deed Poll, Annexure A, cl 7.5 WIT.0056.0006.0021

[54] Bond Deed Poll Annexure A, cl 10.1 WIT.0056.0006.0021

[55] Bond Deed Poll Annexure A, cl. 6, WIT.0056.0006.0021 [To be tendered]

[56] Bond Deed Poll Annexure A, cl. 15, WIT.0056.0006.0021 [To be tendered]

(k) Subject to certain conditions, IPIC could exchange the bonds for IPBC's shareholding in Oil Search before maturity, *but it never sought to do so.*

(l) IPBC had the option to redeem the bonds but this depended on the average share price being above 130% of AUD8.55 (ie. the very high price of AUD11.115) for 20 or more trading days during a period of 30 consecutive trading days. The price of the shares never gave rise to this option and, if it had, it is more likely that, by that point, IPIC would have already sought the early exchange of the shares. IPBC's option to redeem early was, therefore, unlikely ever to be usable.

(m) Neither IPIC nor IPBC had the right to seek a cash substitute for the shares.

7.4 Over the years, some individuals expressed views showing a very significant misunderstanding about the exchange rights in relation to the shares and how the transaction was to end. Some people said that IPIC did not have a legal right to take the shares at maturity, or that IPBC had a right to repay IPIC in cash and so retain the shares. Neither is correct. IPIC was entitled to the shares on maturity. This was as IPBC and the NEC, which approved the transaction, intended and there was no misunderstanding about this at the time of the transaction. There was also no misunderstanding in the NEC during 2012 and 2013.[57] We submit you should be sceptical of those such who suggest they had that misapprehension at the relevant times.

7.5 This exchange right was a conscious choice by IPBC and the NEC when each approved the transaction. In particular, IPBC was clear in its understanding that the shares would be transferred to IPIC on maturity of the bonds. Crucially, IPBC did not envisage that there ever would be an option to buy the shares back as IPBC would not have had the capacity to borrow the necessary sums to do so. 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.

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[57] NEC Decision 63/2012 (March 2012), WIT.0016.0001.0316, NEC Decision 117/2013 (April 2013) WIT.0016.0001.0331.

7.6 Anyone in Government circles who said that IPIC was legally obliged to return the shares to IPBC – such as Mr O'Neill – were mistaken. There should not have been any confusion about this. 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.[58]

7.7 Mr O'Neill's misunderstanding or lack of recollection of the IPIC transaction in 2013 is all the more surprising as he was a member of the NEC which approved it. In truth this evidence of Mr O'Neill is not credible, in our submission, for the additional reason that Mr Vele, who discussed the refinancing of the bonds with Mr O'Neill, was clearly not under the same misapprehension.

8. TOR 1(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 utilised?

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

1(f)(i): How was the process commenced?

8.2 The history of the State's consideration of how to find its equity share in the PNG LNG Project is complicated by a number of factors:

(a) There were three organisations involved and a degree of competition between them as to how and through which entity the Project should be financed, so:

[58] WIT.0027.0001.0538

(i) *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 notion that it might become so. However, it 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, the holder of 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 find the State's equity interest. Financial close was not until December 2009 but the State needed to have its funding in place by September 2009.

(c) The transaction also needs to be seen in its context. At the time that the finance was being sought, the world was in the midst of the global financial crisis. This presented significant challenges in raising funds.

(d) The State was seen as being the weak link amongst the 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 project.

8.3 The Treasury started to take financial advice about funding the project in August 2007, using Lazard Freres. Lazard's involvement continued through to the time that the NEC approved the IPIC Exchangeable Bond Transaction. The Treasury continued to seek funding alternatives even after the NEC had approved the deal.

8.4 The Commission has less information about the steps that Petromin took to seek finance. An Oil Search document of May 2008 notes that ENI, the Italian oil and gas company, through Petromin, had approached the then Prime Minister to purchase the State's shareholding in Oil Search. It is also understood that Petromin sought finance from Japan and South Korea.

8.5 For IPBC, the process commenced in late 2007 or early 2008. Oil Search approached IPBC about a proposal to use its 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 bonds proposal. It appears that UBS, acting for Oil Search, may have had the original idea although they were not involved in the subsequent negotiations about it.

8.6 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. In addition, UBS had been engaged by Oil Search as advisors as Oil Search was seen as a possible takeover target. The State's shareholding represented a significant impediment to a potential takeover. 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 business prospects in the Middle East. It is clear that Oil Search had already discussed the concept of the exchangeable bonds with IPIC before raising it with IPBC.

8.7 IPBC attended initial meetings in Dubai and Abu Dhabi in early 2008 with Oil Search and IPIC to discuss the proposal. It then reported to the Gas Committee about it. The Gas Committee directed IPBC to examine the proposal and consider whether it was in the State's interests and was feasible.

8.8 IPBC obtained legal advice from Freehills Lawyers and financial advice from Goldman Sachs JBWere.

8.9 **Therefore, the submission as to this TOR, as to how the process to obtain the Exchangeable Bond Transaction commenced, is that the idea of it originated with Oil Search. Oil Search raised it with IPBC and introduced IPBC to IPIC.**

1(f)(ii) How was IPIC selected?

8.10 Goldman Sachs JBWere were initially engaged on a fact-finding mission in April 2008 to familiarise themselves with the proposal.

8.11 On 13 May 2008, the NEC approved the IPBC appointing advisors 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.[59]

8.12 Goldman Sachs JBWere and Freehills largely ran the negotiations with IPIC. There was another meeting between representatives of Goldman Sachs JBWere, IPBC and IPIC on 17 June 2008 in Singapore.[60] Mr Botten, Mr Aopi and Oil Search's CFO sought to attend that meeting but IPBC refused to allow them to do so. Their attendance was not thought appropriate as they were not a party to the proposal.[61]

8.13 Goldman Sachs JBWere's advice was that the IPIC 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 reference price for the Oil Search shares in the deal. The price was reached through negotiation. Oil Search estimated that on production of first gas, its share price would be AUD12.50. IPBC had a figure between AUD8.25 and AUD8.70. The final figure of AUD8.55 was agreed between IPBC and IPIC.[62]

8.14 IPBC also tried to get the term of the bonds to match as closely as possible with Exxon's estimate of when the project would be completed and first gas delivered. This was the most important factor in determining the length of the bond. It too was a matter for negotiation and agreement with IPIC.[63]

8.15 Throughout the negotiations, briefings for the State were held in Goldman Sachs JBWere's office in Sydney. Generally at least four ministers were present. They were

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[59] NEC Decision 82/2008, WIT.0026.0001.0722

[60] PwC Report, "Transaction Review Project Kumul", p7 WIT.0056.0005.0001

[61] PwC Report, "Transaction Review Project Kumul", p43 WIT.0056.0005.0001 and Affidavit of Glenn Blake, 20 December 2021, [23-24] Exhibit WWW WIT.0092.0001.0001

[62] Affidavit of Glenn Blake, 20 December 2021, [29] Exhibit WWW WIT.0092.0001.0001

[63] Affidavit of Glenn Blake, 20 December 2021, [31] Exhibit WWW WIT.0092.0001.0001

usually the Minister for State Enterprise, the Treasurer, the Minister for Planning and Mr O' Neill as the Minister for Public Services.

8.16 In about August 2008, Backwell Lombard approached Mr Glenn Blake, the managing director of IPBC, with an alternative proposal from JP Morgan. Mr Blake rejected this proposal.

8.17 Commercial terms for the Exchangeable Bond Transaction appear to have been agreed by 12 September 2008. On that date, Goldman Sachs JBWere produced a document titled "Project Kumul – Post Negotiations Debrief Discussion Materials" reporting on the key terms.[64] Mr Hogan of Goldman Sachs JBWere presented that document to the MCES and the directors of IPBC on that day.[65]

8.18 The paper explained the key commercial terms agreed between the parties and provided Goldman Sachs JBWere's evaluation of the transaction:

(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 for raising funds than an outright sale of the Oil Search shares via a broader process.

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[64] Project Kumul – Post Negotiations Debrief Discussion Materials WIT.0026.0001.0741

[65] Minutes of IPBC board meeting of 13 September 2008 WIT.0026.0001.0770

(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).

(g) Using the Oil Search shares to fund the interest in the PNG LNG Project only made sense if IPBC held that interest – because it held the shares.

(h) IPIC had introduced IPBC and the PNG LNG Project to six commercial banks. They had shown some interest in providing debt finance in the future for the PNG LNG Project.

(i) It was unlikely that "concessional" funding would be delivered, however pressure should continue to be applied to obtain this.

(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.

8.19 The IPBC Board as a whole was first briefed[66] on the proposal at a board meeting on 13 September 2008.

8.20 In our submission, the Commission should be surprised that the IPBC board had not been briefed about the proposal at an earlier date. It is the case that the IPBC board was in some disarray throughout 2008. There was no board meeting between December 2007 and August 2008. In part this was because the board was inquorate as the government had not appointed sufficient directors. Mr Arthur Somare was then the minister responsible for making the appointments. In August 2008, the board could have been informed about the proposal but this was not done. Instead, the appointment of advisors for the State's participation in the PNG LNG Project was tabled but not discussed. The minutes record

[66] WIT.0026.0001.0770

the shortage of members on the board and the volume of matters to be deliberated meant that the meeting would deal with urgent matters only.

8.21 An additional issue is that two of the directors, Mr Aopi and Mr Baliki, appear, in our submission, to have been appointed to the IPBC board in contravention of section 11(4)(b)(vi) of the *IPBC Act* as it then stood as both were employees of a business enterprise in which IPBC held an interest. Mr Baliki was an employee of BSP. Mr Aopi, who was appointed as the chair of IPBC, was a director of Oil Search, which is a particular concern. The evidence suggests that he did declare his conflict of interest but that he remained present when the exchangeable bonds proposal was being discussed. In our submission, he should not have been present. It created the risk and certainly the perception that IPBC's confidential deliberations about the proposal would be reported back to Oil Search.

8.22 The confusion over the constitution of IPBC's board allowed the Treasury later to assert that IPBC's decisions in relation to the exchangeable bonds were invalid. Legislation was required to correct the position. 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.[67]

8.23 In our submission, it is inexcusable for the government not to have complied with its own legislation in appointing Mr Aopi and Mr Baliki to the IPBC board. It is equally concerning that neither of them turned down the appointment on the basis that it was prohibited by legislation. When offered the position, they should have read the IPBC Act to understand the organisation that they were joining and this should have alerted them to the issue.

8.24 Returning to the September board meeting, Mr Hogan of Goldman Sachs JBWere again presented the Project Kumul document.[68] The minutes of the meeting record that:

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[67] First Statement of Anthony Yauieb 28 July 2021, [105] Exhibit BBB, WIT.0104.0002.0239

[68] Minutes of IPBC board meeting of 13 September 2008 WIT.0026.0001.0770

(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 IPIC transaction was essential to protect the Oil Search shares from acquisition.

(d) Mr Tosali, a nominee of the Treasury on the board of IPBC, questioned the serviceability of the coupon on the bonds and asked that Goldman Sachs JBWere 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 JBWere's 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 JBWere 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 JBWere's 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 JBWere would be paid only to market rates.

(g) The board noted that Lazard had been engaged as financial advisors 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 IPIC transaction to the NEC, subject to the Treasury being accorded the opportunity to comment on it. The board also ratified the appointment of Goldman Sachs JBWere.

8.25 Thus, by this point, it is clear that the Treasury did not support the exchangeable bonds proposal.

8.26 In addition, Petromin had been pursuing its own course to obtain funding. It appears that the government had not provided any clear guidance by this point as to who should be the State's nominee for the Project. It may have been that the government wished to see which entity would find funding first before making such a decision. However, under the Gas Agreement, the government was required to decide on the nominee by November 2008.

8.27 On 25 September 2008, then Prime Minister Sir Michael Somare wrote to Petromin[69] stating his reasons for preferring the IPBC proposal.

8.28 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 IPBC proposal be put to the NEC. The Prime Minister urged all State entities work together with Goldman Sachs JBWere and IPBC to conclude the transaction. The letter notes that it superseded previous letters, in particular his letter dated 4 September 2008 to the Minister for Public Enterprises.

8.29 Prime Minister Michael Somare also wrote to Ministers Pruaitch, Tiensten, Duma and Arthur Somare in the same terms. The purpose of the letter (which is 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*…".

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[69] WIT.0027.0001.0506

8.30 On 6 October 2008, Mr Arthur Somare wrote to Treasurer Pruaitch,[70] noting the IPIC 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.

8.31 On 10 October 2008, Mr Tosali[71] gave a presentation to the MCES emphasising that financial close was not until December 2009 and the State was not required to provide equity until September 2009, and that the PNG LNG Project had not been subject to open competition or legal advice on the negative pledge. The presentation noted that Lazard and the State had been approached by numerous lenders and had commenced soliciting proposals.[72]

8.32 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.

8.33 By this time, Backwell Lombard had taken their JP Morgan proposal to the Treasury. It was not accepted.

8.34 On 16 October 2008, Lazard 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.[73]

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[70] WIT.0104.0002.0095

[71] Transcript, Wapu Sonk, 5 August 2021, p2621.

[72] Presentation to the MCES "Financing of the State's Entitlement in the PNG LNG Project" dated 10 October 2008 WIT.0104.0002.0037

[73] Letter Lazard Freres to Prime Minister, 16 October 2008, WIT.0104.0002.0173

8.35 On 20 October 2008, policy submission 167/2008 was produced for the NEC.[74] It was signed by Mr Pruaitch and Mr Tiensten.

8.36 The purpose of the submission was to seek the NEC's approval of the terms that had been negotiated.

8.37 The key points made in the submission were:

(a) The State's total financing exposure to the PNG LNG project was approximately USD3 billion comprising project financing of USD2 billion and equity financing of USD1 billion, making this the largest investment in the State's project financing history.

(b) In return, the State stood to benefit from its equity interest to about USD850 million annually in addition to tax receipts. There were also substantial indirect benefits including generating jobs and accelerating economic growth and underpinning the future socio-economic growth and development of the State. In comparison, the State currently received USD16 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 PNG 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 PNG's traditional financing

[74] NEC Submission 167/2008 dated 20 October 2008 [22] Exhibit BB, Annexure T, WIT.0027.0005.0216

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 cheaply sell off assets but to add value to them.

(g) Mr Pruaitch further explained the State's reasons for not raising the finance by selling down the State's interest in the PNG LNG Project in his supplementary affidavit of 30 July 2021.[75] In summary, there was no financial need to do so. Consistently with its policy, the State wanted to benefit fully from the PNG LNG Project. Further, selling down the stake would create risks with the landowners who were looking for a greater share of equity from the State's 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.

(h) The nature of IPIC as a passive investor would allow the State to maintain its relationship with Oil Search.

(i) A direct sale of the Oil Search shares would have opened the door to a takeover bid for Oil Search.

(j) There should be no impact on the State's finances from the proposed transaction.

(k) 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.

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[75] Supplementary affidavit of Patrick Pruaitch dated 30 July 2021, Exhibit ZZ.1, WIT.0028.0004.0003

(l) 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 a summary of the transaction prepared by Freehills).

(m) 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.

(n) 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.

(o) The Government 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.

(p) 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.

(q) Further, it was in the best interests of the State to preserve the value of its 19.4% stake in the Project 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.

8.38 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 exchangeable bond transaction.

8.39 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 AUD8.55.

(b) The submission stated that Oil Search dividends were excluded from the quarantine account. This was not correct. Rather, 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 JBWere presentation to the NEC dated 22 October 2008, which included the same misstatement.[76] The Goldman Sachs JBWere presentation appears to have formed the basis for much of the NEC 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.

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[76] PNG LNG Project State's Equity Financing, "Exchangeable Bond Option" Presentation to the National Executive Council 22 October 2008, WIT.0097.0005.0213

(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 AUD500 million but this was highly sensitive to foreign exchange and interest rates.

8.40 The submission also noted some risks in 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 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 for this. 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 out of the transaction.

8.41 The submission noted that the transaction had the support of the Prime Minister and key economic ministers including the Ministers 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.

8.42 In its concluding section, the NEC submission noted 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

8.43 On 21 October 2008, Mr Tosali wrote a lengthy letter to Mr Blake setting out the Treasury's objections to the proposed transaction.[77] The letter was copied to a number of people including the Prime Minister, Deputy Prime Minister, Mr Arthur Somare, Mr Pruaitch and the members of the MCES. The main points of objection to the transaction were that:

(a) 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 AUD8.55 and the then market price. If the price was below AUD8.55, IPBC would be required to make a cash payment. If the price was below AUD5.50 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

[77] Letter, Department of Treasury to IPBC 21 October 2008, WIT.0056.0006.0762

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.

8.44 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…

8.45 A presentation was made to the NEC by Goldman Sachs JBWere on 23 October 2008 on the exchangeable bonds option.[78]

8.46 The NEC approved the exchangeable bonds proposal at its meeting on 23 October 2008, as recorded in NEC Decision 223/2008.[79] 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.

8.47 On 24 October 2008, IPBC's board discussed and then approved its entry into the exchangeable bond transaction.[80] Mr Tosali was represented at the meeting by Mr Yauieb. Remarkably, he stated that the Minister for Treasury (his own Minister) had not given the Treasury Department 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. The objections were in the nature of the exchangeable bond transaction not being 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

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[78] PNG LNG Project State's Equity Financing "Exchangeable Bond Option" Presentation to the NEC 22 October 2008, WIT.0097.0005.0213

[79] NEC Decision223/2008 Exhibit BB Annexure R, WIT.0027.0005.0174

[80] Minutes of IPBC board meeting 24 October 2008, WIT.0026.0001.0789

discussions, the board apparently waited to have sight of the NEC decision 223/2008 of the previous day before passing resolutions to enter into the exchangeable bond transaction. Mr Aopi left the meeting whilst resolutions were being put to the board and resolved.

8.48 And so that is how IPIC was selected.

8.49 On 23 November 2008, IPBC and IPIC entered into the exchangeable bond transaction. The bonds were issued in March 2009.

8.50 Remarkably, the Treasury continued to explore alternative financing options despite the fact that IPBC had already entered into the exchangeable bond transaction, as approved by the NEC.

8.51 It is also important to note Mr Blake's evidence 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.[81]

1(f)(iii) What process what utilised?

8.52 While the process for its election was somewhat disorganised and ad hoc it was infinitely more careful, thoughtful and appropriate than that leading up to the UBS Loan. The following matters deserve emphasis:

(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 advisors' work so that, at that level, each entity's process was as would normally be expected.

(b) It is clear from Sir Michael 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

[81] Affidavit of Glenn Blake, 20 December 2021, [46] Exhibit WWW, WIT.0092.0001.0001

the Project. This may well be because the State simply did not know who the nominee should be and that it was the IPBC exchangeable bonds proposal which forced a decision. 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 been helpful rather than destructive. 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. To the extent that there was disagreement, this reflected a testing of the market and the options available to the State; a ground upon which the exchangeable bond transaction has been criticised in the past.

(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 JP Morgan via Backwell Lombard.

8.53 We again emphasise that there is a marked and unfavourable contrast between the largely careful process preceding, and the time taken for the State to deliberate over, the IPIC Exchangeable Bond Transaction, and the few hours that the NEC was permitted to consider the UBS loan and the purchase of Oil Search shares in 2014.

8.54 Nevertheless, particularly because of the State’s limited resources, it is clear that a more efficient process could have been to have a single set of advisers testing the market and considering the best way forward.

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

8.55 The State did not obtain a loan to finance its equity participation in the PNG LNG Project. The exchangeable bonds were not a loan although in some respects they were similar to one.

8.56 The main terms of the bonds have already been explained.

8.57 This Commission retained financial experts, the Brattle Group, to consider the terms of the exchangeable bonds. They did this in the first report that they submitted to the Commission in July 2021.

8.58 Brattle's largely favourable observations on the objective of the transaction and alternative means of achieving it are as follows:

(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 USD3 and 5 billion. Its share of the equity funding was likely to be about USD1 billion.

(c) Selling about one fifth of the State's equity interest in the PNG LNG Project would have been likely to 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.

8.59 In relation to these points, the Treasury did initially favour the State selling its entire interest in the PNG LNG project and benefiting from it solely through tax and royalties. However, when it appreciated that the government wished the State to have a direct interest in the project, it accepted this and considered other alternatives. This included selling part of the State's interests to finance the equity funding for the remainder.

8.60 There was apparently no detailed consideration of issuing a sovereign bond at the time. Given the global financial crisis at that time, this is not surprising.

8.61 Goldman Sachs JBWere gave advice to IPBC about concessional funding and considered that it would not raise sufficient funds.

8.62 Brattle's views on the terms of the IPIC 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 AUD8.55, but it had transferred to IPIC all of the upside in the Oil Search shares above AUD8.55.

(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 AUD8.55.

(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 Brattle'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.

8.63 **On the basis of Brattle's views, it is submitted that the terms of the exchangeable bonds were commercially reasonable and not unfair to the State.**

9. TOR 1(g): Who were the legal and financial advisors engaged in the IPIC exchangeable bond transaction

9.1 IPBC received legal advice from Freehills and financial advice from Goldman Sachs JBWere.

10. TOR 1(h): Were legal and administrative processes followed to engage in any legal and financial advisors?

10.1 The Commission received evidence on this question from Mr Glenn Blake, the managing director of IPBC at the time.

10.2 Freehills were on a panel of law firms used by IPBC at the time.

10.3 IPBC sought KPMG's assistance in finding a suitable financial advisor. 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 JBWere and this is what transpired.

10.4 Mr Blake also gave evidence that KPMG was engaged to model the anticipated revenue flows from the PNG LNG Project.[82]

10.5 Freehills and Goldman Sachs both started work on the matter in early 2008. Goldman Sachs JBWere 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. [83]

10.6 On 13 May 2008, the NEC approved the IPBC appointing advisors 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.[84]

10.7 An IPBC board meeting was held on 20 August 2008. The appointment of advisors for the State's participation in the PNG LNG Project was tabled but not discussed. The

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[82] Affidavit of Glenn Blake, 20 December 2021 [26], Exhibit WWW, WIT.0092.0001.0001

[83] Affidavit of Glenn Blake, 20 December 2021, [21] Exhibit WWW, WIT.0092.0001.0001

[84] NEC Decision 82/2008, WIT.0026.0001.0722

minutes record the shortage of members on the board and the volume of matters to the deliberated, led to the board agreeing that the meeting would deal with urgent matters only.

10.8 On 29 August 2008,[85] the NEC noted Statutory Business Paper No. 87/2007 and:

(a) noted the appointment of Goldman Sachs JBWere as the IPBC advisors on the funding;

(b) noted the appointment of Freehills Lawyers as the IPBC's probity advisors; and then

(c) approved the fee structure for those advisors.

10.9 The NEC decision attaches a summary of the fee structure for Goldman Sachs JBWere but not Freehills. The structure was:

(a) 1% of the gross proceeds of any bond or exchangeable offering or sale of assets;

(b) 0.1% of the aggregate loan facility to be agreed with IPIC;

(c) 0.5% of the aggregate facility limit of any investor introduced by Goldman Sachs to PNG;

(d) 0.4% of the aggregate facility limit of any other loan facility or other capital raising executed as part of the financing.

10.10 Mr Blake noted that NEC approval was necessary at this point because Goldman Sachs JBWere's remuneration included success fees.[86]

10.11 The minutes of an IPBC board meeting on 13 September 2008 record that the board of IPBC ratified the appointment of Goldman Sachs JBWere on that date. Mr Simon Tosali, an ex officio member of the board as the Secretary of the Treasury at the time, raised

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[85] NEC Decision 189/2008 was made at Special Meeting No: 30/2008 WIT.0027.0001.0498

[86] Affidavit of Glenn Blake, 20 December 2021 [21], Exhibit WWW, WIT.0092.0001.0001

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 JBWere.[87]

10.12 The Commission does not have any evidence to show the board of IPBC was involved in appointment of Goldman Sachs JBWere 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. The evidence suggests that within IPBC, the transaction and the appointment of advisors was led by Mr Blake.

10.13 In the result:

(a) The fees paid to Freehills for their work on the Exchangeable Bond Transaction were AUD1.136 million.

(b) The fees paid to Goldman Sachs JBWere were AUD16.895 million.[88]

11. TOR 1(i): 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?

11.1 The exchangeable bonds did not permit payment to be made by an election of cash or shares or a combination of the two. Also, the Oil Search shares were not the subject of a mortgage in a technical legal sense although they were held in an escrow account to preserve them for the maturity of the bond.

11.2 The bonds could be redeemed in the following ways as noted to an extent above:

(a) Prior to maturity:

(i) 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.[89] On this early exchange, IPIC would receive all of the shares (even if the share

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[87] Minutes of Meeting No. 1 of 2008 of the Board of Directors of IPBC WIT.0026.0001.0730

[88] PwC Report, "Transaction Review Project Kumul", p21 WIT.0056.0005.0001

[8989] Bond Deed Poll Annexure A, cl 10.1 WIT.0056.0006.0021

price was above AUD8.55), but would not receive a cash payment if the share price was below AUD 8.55. Acting rationally, IPIC would not exercise this right unless the relevant average share price was above AUD8.55 and therefore able to redeem the bonds in full. Had the share price risen to that level, 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 when, 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.[90]

(ii) after the payment of the sixth interest payment date, 15 October 2011, IPBC had the option to redeem the bonds but this depended on the average share price being above 130% of AUD8.55 (ie. AUD11.115) for 20 or more trading days during a period of 30 consecutive trading days.[91] 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. *The share price never reached this level;*

(iii) Importantly, 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. It is almost inevitable that IPIC would have exercised its rights to an early exchange in that circumstance because the shares would have reached a value (130% of AUD8.55) that would redeem the bonds in full and leave some upside for IPIC;

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[90] Brattle 1, [114], Exhibit VV, WIT.0132.0001.0002

[91] Bond Deed Poll, Annexure A, cl 7.2 WIT.0056.0006.0021

(iv) The effect of this is that whilst IPBC had the right to seek to redeem the bonds early if the share price rose sufficiently, it is unlikely that it would ever have been able to exercise that right.

(b) 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 AUD8.55 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 AUD8.55 a share, IPIC would only receive shares totalling the face value of the bonds and IPBC would keep the remainder of the shares;[92]

(iii) IPBC did not have a right to seek to redeem the bonds in cash at maturity.

11.3 In summary, given the conditions attached to either party's early exchange rights, it was likely that the exchangeable bonds would run to maturity. At that point, they would be redeemed through IPIC taking IPBC's holding in Oil Search up to the value of the bonds and IPBC paying any shortfall between the share price at that point.

11.4 The rationale behind IPBC's agreement to this 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.

11.5 In February 2014, IPIC issued the Mandatory Exchange Notice. It received the State's Oil Search shares and IPBC was required (after litigation) to pay AUD74 million.

12. TOR 1(j): What was the rationale for allowing the mortgaged Oil Search shares to be used in payment of the Loan?

[92] Bond Deed Poll, Annexure A, cl 7.5 WIT.0056.0006.0021

12.1 In our submission, it has always been clear that the exchange of Oil Search shares as the means for redeeming the bonds was mandatory under the terms of the IPIC Exchangeable Bond Transaction.

12.2 The rationale for the exchangeable bonds 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. 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 bonds represented was better than an immediate sale of the shares in 2008.

(b) Whilst the Commission has not confirmed this (and it would be likely to be information only available within IPIC), it seems 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. It may also have increased the amount that IPBC could raise from the bond.

(c) The exchange right was a conscious choice by IPBC and the NEC (which included Mr O'Neil) 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.

(d) 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.[93] Neither Petromin nor the Treasury were able to present a competing offer at the time that the IPIC Exchangeable Bond Transaction was

[93] PwC Report, "Transaction Review Project Kumul", p40 WIT.0056.0005.0001

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 IPIC transaction might prove to be the only option available and one that might not be available at a later date.

13. TOR 1(k): Whether IPIC has 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

13.1 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 AUD8.55 with IPBC being obliged to make up any shortfall between the actual price of the shares at that date and AUD8.55.

14. When and what decision did IPIC make on the repayment of the Loan?

14.1 It appears that up until the end of 2013 or early 2014, IPIC may have been open at least in principle to discussion about accepting cash to redeem the bonds or refinancing (ie extending) the bonds rather than proceeding with the mandatory exchange. This was for example IPIC's stated position at a meeting in Abu Dhabi on 30 October 2013.

14.2 It is not known at what precise point after that IPIC's position changed, but, by 13 February 2014, it had rebuffed the State's belated attempt to meet with it in Abu Dhabi and, on that day, it issued the formal notice to require the exchange of the shares for the bonds.

Other issues

The Currency Risk

14.3 The bond was paid in Australian dollars and interest was payable in Australian dollars. However, the payments for the PNG LNG Project were required to be made in US

dollars. In addition, the funds were being received some considerable while before they were needed. These factors created a currency risk.

14.4 Mr Vele criticised the IPIC transaction on the basis that it created a currency risk that was not well managed and in particular the timing of the exchange into US dollars. He noted that during the period after the exchange, the Australian dollar went on a "once in a generation ride" reaching highs in excess of USD1.10.

14.5 Mr Vele also questioned whether it was necessary to exchange all of the Australian dollars into US dollars. Whilst 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 dollars.[94]

14.6 But the currency risk was recognised at the time. The evidence is that Goldman Sachs JBWere 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.[95]

14.7 IPBC received advice from Goldman Sachs JBWere about how to deal with the currency risk. Over a period of months in the lead up to the bonds being issued, it considered that advice and ultimately, it decided to follow the course that its financial advisor proposed.

14.8 In our submission, nothing adverse arises in relation to currency risk. The risk was understood, IPBC took advice which it considered and then followed.

Investment of the bond funds until needed

14.9 A similar issue arose from the funds being received long before they were needed for the PNG LNG Project. This created the need to try to enhance the value of the funds

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[94] Affidavit of Dairi Vele, 26 April 2021 p25-26, Exhibit QQ WIT.0014.0007.0001

[95] PwC Report, "Transaction Review Project Kumul", p10 WIT.0056.0005.0001

received to minimise the risk that there might be a shortfall against the sums required to fund the State's interest in the PNG LNG Project.

14.10 IPBC and its advisors recognised this need. IPBC approached Goldman Sachs JBWere 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. IPBC then looked at other banks for rates to invest. Mr Blake's recollection was that they approached Westpac, Commonwealth Bank of Australia and to other banks.[96]

14.11 In our submission, there is nothing untoward in the manner in which IPBC dealt with this issue.

The Treasury's opposition and other funding alternatives

14.12 The Treasury opposed the proposed transaction on a significant number of bases in its letter of 21 October 2008, outlined above.

14.13 PricewaterhouseCoopers were engaged by the Treasury years later in 2011 to review the IPIC Exchangeable Bond Transaction. The PwC report provides further information about the Treasury's views on the transaction.[97] 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 government'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 bonds being approved in October 2008 and the agreement being

[96] Affidavit of Glenn Blake, 20 December 2021, [36] Exhibit WWW WIT.0092.0001.0001

[97] PwC Report, "Transaction Review Project Kumul", p12 WIT.0056.0005.0001

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 Cooperation, the Asian Development Bank (**ADB**), the European Investment Bank (**EIB**) 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, and

(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 an 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 USD400m, state budget funding of USD230, international bond issue of USD600 million and domestic bond issues for any cost overruns;

(ii) a Japan Bank for International Cooperation 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 oil and gas company options involved an 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 bonds. The Treasury reported to PwC that they did not receive a 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 from this.

14.14 In summary, the Treasury had been operating on the basis of a longer timescale to raise the funds. The Treasury's timescale was 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.

14.15 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. It is unsatisfactory that there was a disagreement between the Minister and his department in Cabinet, a position which also arose albeit in a different fashion in relation to the UBS Loan discussed below. But in the PNG system, as in the Westminster system more generally, disagreements between Ministers (who are elected) and Departments (whose officers are not) are generally resolved in favour of the former.

Conclusions

14.16 Save for Treasury, there was little disagreement as to *whether* the State should participate in the PNG LNG Project. According to the PwC Report, the Treasury was initially against the idea based on the costs and risks involved. Its modelling 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 for how to do that.

14.17 There was much more debate about *how* the State should finance its participation in the PNG LNG Project.

14.18 In our submission, the decision to enter into the exchangeable bond transaction was a rational and justifiable decision in the circumstances then prevailing which would (and did), over the long term, generate greater revenues for PNG than the shareholding in Oil Search and in providing the State with an equity interest in its most significant resource project. The State took a 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, and it did.

14.19 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 well regarded PNG LNG Project advanced. Indeed, at the date of maturity of the bonds, the share price was over AUD8.55, 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.[98]

14.20 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.

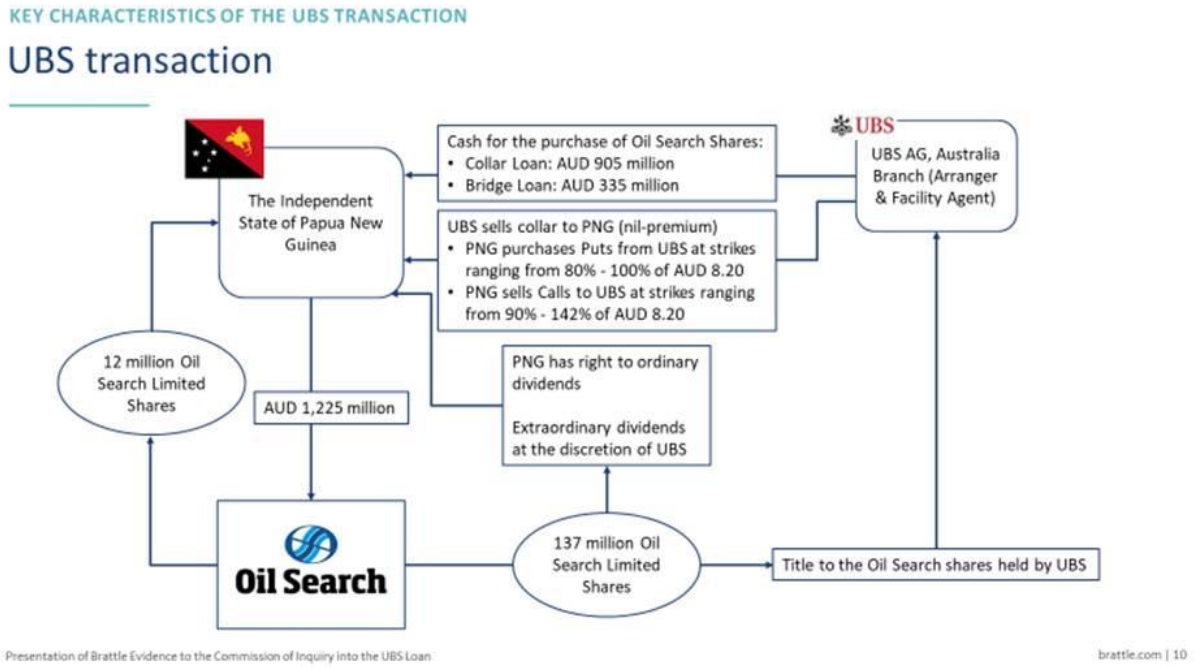
14.21 In our submission, viewed overall, the IPIC Exchangeable Bond Transaction received appropriate levels of review and scrutiny before being approved by the NEC.

14.22 However, as noted, the process by which the State obtained funding for its entry into the PNG LNG Project was somewhat inefficient.

15. UBS Loan

15.1 We now turn to the genesis and detail of the UBS Loan which is complex.

[98] Brattle 1, [114] Exhibit VV WIT.0132.0001.0002



15.2 We begin by saying something about the collar loan concept. Collar loans are complex but are standard products within the banking industry. These loans are commonly used when the sum lent is used to purchase shares which then provide the security for the lender. The essence of the loan is that it is generally structured so that the lender has no risk of default by the borrower. This is done by ensuring that all of the interest is paid at the outset of the loan, having the shares as collateral and using options. As will be seen, the options provide the 'collar' which gives this type of loan its name.

15.3 In 2014, the stated purpose of the loan was to enable the State to buy about 10% of shares in Oil Search. The purchase price was $8.20 a share but of course, there was market risk about how the share price would move over the two year period of the loan, as occurred. No doubt UBS would have conducted some extremely complicated modelling about how to design the collar element of the loan, and in particular what strike prices to use in the options. This modelling will have been done using a mathematical model called Black Scholes. This model is in widespread use in the banking industry. It includes assumptions about how a share price might move over time and requires inputs to be made about the expected volatility of the share price in question. As a result of this, whilst the banks generally use the same model, the variable inputs and assumptions will often lead to different outcomes.

15.4 The modelling allowed UBS to provide the State with not only the loan but a series of put options, one for each share purchased. Each option had a date upon which it could be exercised and a 'strike price' for the shares to which it related. The put options allowed the State to sell or 'put' the shares to UBS at the strike price if, at the date that the option was to be exercised, the share price was below the strike price of the option.

15.5 The strike prices of put options and the amount of the loan were calculated so that the total amount that UBS would lend would be equivalent to the strike prices of all of the put options. The effect of this was that if the share price fell below the strike price of the put options, the options would provide the State with the means to repay UBS in full. This had two important effects:

(a) First, it meant that the State did not need to worry about finding funds to repay the loan. If it just allowed the loan to mature according to its terms, the loan would be repaid.

(b) Second, it meant that UBS had no exposure to the State as a credit risk from the loan because repayment was assured through the put options. In other words, it did not have to worry about whether the State would be able to repay the loan.

(c) If a lender has no exposure to the borrower's credit risk, as in this case, the interest payable on the collar loan should be at or close to the risk free rate, because the lender has no significant credit risk. As will be seen, that did not happen here with UBS charging unwarranted interest of about AUD 56 million..

15.6 The put options therefore provided a *floor* for the loan as far as the State was concerned.

15.7 In return for the protection provided by the put options, the State provided a call option for each share to UBS. As with the put options, each call option had a date upon which it could be exercised and a 'strike price' for the share to which it related. The call options allowed UBS to buy or 'call' for the shares from the State at the strike price if, at the date that the option was to be exercised, the share price was above the strike price of the option.

15.8 The call option therefore provided a ceiling for the loan.

15.9 For each share, there is a put option and a call option with the same expiry date. Together, the puts and calls provide a notional collar of protection for both parties.

15.10 A relevant phrase in this context is to describe an option as being 'in the money'. *A put option is in the money* when the market price of the share is below the strike price of the option so that the borrower makes a gain by putting the share on the lender for more than the share is then worth. *A call option is in the money* when the market price of the share is above the strike price of the option so that the lender makes a gain by calling for and obtaining the share for less than it is then worth.

15.11 If an option is in the money, the difference between the value of the share in the market and the strike price of the option is said to be the 'intrinsic value' of the option. The intrinsic value therefore varies with the share price.

15.12 If at any option date, the share price is between the put and call options, neither option can be exercised. The share is still sold to repay the loan and the excess above what is needed to repay the loan (which is the strike price of the put option) is returned to the borrower.

15.13 What has just been explained describes the position in relation to a single share. To illustrate the complexity of the UBS loan, it should be remembered that each share had its own put and call option. There were therefore 137 million put options and 137 million call options. The dates upon which the options could be exercised spread over a period of some months towards final end date of the loan and the options had a range of different strike prices. With so many options, many of the strike prices and exercise dates were the same.

15.14 The significance of this is that it is 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 advisor who can conduct their own Black Scholes modelling to test the fairness involved in the options structure proposed: as UBS would have, and as the Commission has through the unchallenged work of Brattle. In particular, this modelling was necessary in order to check that the pricing of the collar loan was fair. The State did not have or obtain the ability to do this and was vulnerable to being

overcharged as a result. But it is clear that the State, notably Mr Vele, did not appreciate this risk.

15.15 A further relevant term is 'nil premium'. The State was told by UBS that the collar option structure was nil premium. Its normal meaning in this context (and there was no suggestion it was not being used in its normal meaning by UBS) meant that nothing was payable to UBS for providing the collar option structure and that 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. Again, the State had no ability to verify this. This matters because, far from being nil-premium, the premium or excessive profit UBS made in this regard was substantial at about $25 million, but it never told the State this.

15.16 Two other concepts should be mentioned.

(a) The first is *hedging*. Although UBS had no exposure to the State as a credit risk, it was possible that at the maturity of the loan, it would be left holding shares that were worth less than the principal that it had lent to the State. UBS traded Oil Search shares in the market to hedge against or mitigate this risk.

(b) The second is *value*. In the Brattle report, there are frequent discussions about value being transferred by one party to the other. A transfer of value is not necessarily a transfer of money at that point. It describes a transaction between the parties at a different price to what Brattle considered to be a fair price. Thus, for example, if, as Brattle advise, the collar loan option structure was not nil premium and was unfairly slanted against the State so that the call options that UBS received were worth more to a potential purchaser than the put options that the State received, this would represent a transfer in value from the State to UBS at the date that the transaction took place. As the loan matured, that transfer of value might then be realised depending on how the options came to be exercised at that point. The value could also have been realised in other ways, including selling the options in the market.

15.17 In summary, the key points are these:

(a) once the loan was created, and interest paid in advance, as it was, the State had nothing further to pay and had no risk of defaulting;

(b) this meant that UBS had no exposure to the State's credit risk,

(c) the State had no ability to understand the fairness of the option structure;

(d) the nil-premium statement was untrue, quite misleading and expensive for the State.

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

16.1 The State first decided to initiate discussion with IPIC and to investigate options for refinancing the IPIC Bond on 14 March 2012.[99] Although the NEC decision does not record why the decision was made, a number of witnesses gave evidence to the Commission that it was thought important to the State to remain a shareholder of Oil Search.

16.2 But no steps were taken in relation to initiating discussion with IPIC or to investigate options for refinancing the IPIC Bond until after the 2012 election.

16.3 In the second half of 2012, the then Minister for Public Enterprise and State Investments, Mr Ben Micah, had initial discussions with and engaged Backwell Lombard Capital to provide advice on the IPIC Bond.[100]

16.4 On 5 December 2012, IPBC formally retained NRF to provide legal advice on the IPIC Exchangeable Bonds.[101] NRF's engagement letter records retaining the Oil Search shares as the objective of the engagement.[102]

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[99] NEC Decision NG 63/2012, WIT.0016.0001.0316.

[100] Letter Backwell Lombard Capital to Minister Micah dated 16 October 2012, WIT.0155.0001.1624

[101] Affidavit of Dairi Vele, 26 April 2021 at [189] and exhibit DV16, Exhibit QQ, WIT.0014.0007.0001

[102] WIT.0015.0001.0691.

16.5 The first meeting with IPIC did not occur until on or about 15 March 2013.[103] It was apparently promising in relation to the possibility of the State refinancing the IPIC Bond and regaining ownership of the Oil Search shares.[104] The second meeting occurred on or about April 20013. Dr Waine's evidence was that IPIC's attitude towards the refinancing had changed by this meeting and it required the IPIC Bond to be redeemed within two weeks. The State did not have the funds to meet this deadline.[105]

16.6 Despite this imperative, no further engagement with IPIC appears to have occurred until September and October 2013. In the meantime, the evidence before the Commission suggests that there were a number of parallel processes including:

(a) IPBC's efforts through Mr Kumarasiri who was appointed as Managing Director of IPBC on 5 April 2013.[106] These included:

(i) in early April 2013, a Goldman Sachs proposal;[107]

(ii) engagement with Helmsley Capital.[108]

(b) proposals by Shell, Marubeni and others to Mr Kramer and Mr Sonk.[109]

(c) Minister Micah's engagement of Backwell Lombard Capital on 31 May 2013 as Lead Manager and Arranger in consultation with his advisors on a non-exclusive basis;[110]

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[103] An email from Mr Paki to Mr Latimer of 15 March 2013, copied to Dr Waine, stated that as at that date, Dr Waine and Mr Kumarasiri were in Abu Dhabi with Mr Botten: NRF.001.001.2153

[104] Transcript, Dr Clement Waine, 11 February 2022, page 4055; see also Supplementary Statement of Dr Clement Waine dated 11 February 2022, Exhibit SSSS, WIT.0039.0007.0001.

[105] Transcript, Clement Waine, 6 August 2021, page 2632-5

[106] NEC Decision No. 117 of 2013, NRF.001.001.2368

[107] NRF.001.001.2245

[108] Transcript, Dr Clement Waine, 11 February 2022, p 4058.

[109] Email, R Paki to A Latimer, 3 April 2013, Re: Goldman Sachs IPBC Overview, NRF.001.001.2273

[110] Letter Minister Micah to Backwell Lombard, 31 May 2013, WIT.0155.0001.1597

(d) engagement with UBS by Mr Vele and his adviser and former business partner Mr Mortensen;

(e) the IPIC Bond Review Committee and its near relative the IPBC internal review committee;

(f) the Bank of Papua New Guinea's review.

16.7 These processes were duplicative and inefficient: but, critically, they focused on something other than an acquisition of newly issued shares from Oil Search.

16.8 In a formal sense, the State commenced the procedures to obtain the UBS Loan to purchase the Oil Search shares on or about 23 February 2014 following a meeting between then Prime Minister Peter O'Neill, Mr Vele, Mr Botten and Mr Aopi, whose recollections vary.

17. TOR (M): 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 utilised in the past to obtain loans?

<u>Section 209</u>

17.1 Before turning to the factual evidence before the Commission, this TOR raises for consideration section 209 of the *Constitution* and particularly the *Loans (Overseas Borrowings) No 2 Act.*

What view was taken in 2014 about what s 209 and the *Loans (Overseas Borrowings) No 2 Act* required?

17.2 On 5 March 2014, Mr Vele wrote to Mr Rolpagarea, as State Solicitor, requesting that he review the documents relating to the proposed UBS transaction and "provide clearance"

before the documents went to the NEC on 6 March 2014.[111] The documents were provided to the State Solicitor by Pacific Legal Group earlier on 5 March 2014.[112]

17.3 Later on 5 March 2014, the State Solicitor replied to Mr Vele's letter. The State Solicitor advised that "section 209 of the … *Constitution* also requires the Parliament's approval be obtained for this Bridge and Collar Loans which totals up to Australian dollars 1.225 billion through the budgetary process."[113]

17.4 On 6 March 2014:

(a) Prime Minister O'Neill announced a proposal to the NEC for the purchase of 149,390,244 million Oil Search shares for AUD1.239 billion, funded by UBS; and

(b) the NEC advised the Governor General to approve the UBS loan pursuant to section 2(1) of the *Loans (Overseas Borrowings) Act 1976*.[114]

17.5 On 7 March 2014, Mr Vele wrote to the State Solicitor communicating to him the NEC decision and requesting the State Solicitor's "legal clearance".[115]

17.6 On 9 March 2014, the State Solicitor replied to Mr Vele's letter. In his reply, the State Solicitor advised that the appropriate person to execute loan agreements on behalf of the State was the Minister for Treasury pursuant to section 2(7) of the *Loans (Overseas Borrowings) (No. 2) Act 1976*. Mr Rolpagarea reminded Mr Vele of the statements in relation to the transaction raised in his 5 March 2014 letter. The State Solicitor stressed the need to comply with section 209 of the *Constitution*, but, given the urgent nature of the transactions, approved the Minister for Treasury to execute the documents.[116]

17.7 On 10 March 2014:

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111 Statement of Daniel Rolpagarea dated 22 June 2021, Annexure B, WIT.0019.0004.0001.

112 Statement of Daniel Rolpagarea dated 22 June 2021, Annexure A, WIT.0019.0004.0001.

113 Statement of Daniel Rolpagarea dated 22 June 2021, Annexure C, WIT.0019.0004.0001.

114 Advice from NEC to Governor General (WIT.0019.0002.0392).

115 Statement of Daniel Rolpagarea dated 22 June 2021, Annexure D, WIT.0019.0004.0001.

116 Statement of Daniel Rolpagarea dated 22 June 2021, Annexure E, WIT.0019.0004.0001.

(a) the State Solicitor advised the Governor General to execute the UBS transaction documents upon receipt of advice from the NEC;[117] and

(b) the IPBC board approved the execution of the Payment Direction Deed by NPCP while noting the State Solicitor's advice in respect of section 209 of the *Constitution*.[118]

17.8 On 26 March 2014, Mr Vele sent a letter to the State Solicitor regarding the section 209 constitutional approval for the UBS transaction. The letter requested confirmation in writing of the advices given and steps taken by the Office of the State Solicitor to obtain the necessary authorisation of the National Parliament under s 209(1) of the *Constitution*.[119]

17.9 On 27 March 2014:

(a) the the State Solicitor replied to Mr Vele's letter;[120] and

(b) the NPCP board met and discussed the UBS transaction and the advice received from external counsel including concerns about the application of section 209 of the *Constitution*. The NPCP company secretary, Mr Rogen Wato, sent a text message to Mr Steve Lewin, an external lawyer, regarding this concern. Mr Lewin responded "reaffirming his view that the State/UBS Loan transaction has not been in breach of s 209 of the *Constitution*" but asked that management obtain a second opinion and provide it to the NPCP board.[121]

17.10 In his reply of 27 March 2014, the State Solicitor advised that section 209 approval *could be obtained retrospectively* and that this was appropriate for the UBS transaction, as it was impracticable for NEC to call Parliament at the time it made its decision, due to the

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117 Letter from Rolpagarea to PNG Governor General WIT.0019.0003.0030.

118 Statement of the Honourable Don Poyle dated 1 June 2021 WIT.0051.0008.0045.

119 Letter from Dairi Vele to Daniel Rolpagarea: section 209 - Constitution of the Independent State of Papua New Guinea NEC Decision No 79/2014 State Acquisition of Shareholding in Oil Search Ltd and Consequential Borrowing WIT.0007.0004.0844.

120 Letter from Daniel Rolpagarea to Dairi Vele WIT.0007.0004.0751.

121 Minutes of Meeting No 2 of 2014 - Held on 27 March 2014 at 9.14 AM WIT.0036.0001.0284

urgency of the matter. The State Solicitor also noted section 212 of *Constitution*, regarding expenditure without prior Parliamentary approval. Ultimately, the State Solicitor advised that Parliament may invoke its power under section 212 "to facilitate the transaction" that had by then already been entered into. He advised it was important that the approval by Parliament be expressed to have retrospective effect.

17.11 On 19 May 2014, former Treasurer Don Polye filed an application in the Supreme Court of Justice pursuant to section 18(1) of the *Constitution* seeking declarations that, on the proper interpretation and application of section 209 of the *Constitution* and the *Organic Law on the Sovereign Wealth Fund 2012* (PNG), the executive actions of the Prime Minister and NEC in entering into the UBS transaction without Parliamentary approval (which Polye had opposed) were unconstitutional and illegal and that the transaction was illegal and unenforceable against the State.[122] That application appears to have been discontinued in 2017.[123]

17.12 On 5 September 2014, Mr Pruaitch, as the new Treasurer, made a Ministerial Statement to Parliament in relation to the UBS transaction and tabled the relevant transaction documents.[124]

17.13 On 18 November 2014, Treasurer Pruaitch presented the 2014 Supplementary Budget and the 2015 National Budget to Parliament. Mr Pruaitch said: "the O'Neill-Dion Government made the decision to purchase 10.1 per cent stake in Oil Shares as part of the 2014 Supplementary Budget in accordance with *Section 209* of the *Constitution* we have appropriated for interest payments."[125]

What is the proper construction of s 209 and relevant legislation

17.14 We have earlier submitted that this Commission cannot make binding determinations on parties as to the meaning of the *Constitution* or any other law. But that does not mean the

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122 WIT.0035.0001.5718.

123 Letter Don Polye to the Commission of Inquiry, 18 July 2020, p 3 WIT.0051.0002.0001.

124 Hansard, 5 September 2014, pp 2-10, WIT.0014.0012.0015.

125 Hansard, 18 November 2014, pp 3-30, WIT.0014.0015.0088.

Commission should not express its considered view of their meaning in answering the questions posed by the terms of reference and making recommendations accordingly.

17.15 We thus submit the proper construction is as follows.

***Constitution*al provisions**

17.16 Section 109(1) of the *Constitution* invests the Parliament with power, subject to the *Constitution*, to make laws for the peace, order and good government of Papua New Guinea and the welfare of the People. Section 109(2) provides that: "Acts of the Parliament, not inconsistent with the *Constitution*al Laws, may provide for all matters that are necessary or convenient to be prescribed for carrying out and giving effect to this *Constitution*".

17.17 Sections 209-210 and 212 of the *Constitution* relevantly provide:

> ***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 authorization and control by the Parliament, and shall be regulated by an Act of the Parliament.*
>
> *(2) For each fiscal year, there shall be a National Budget comprising—*
>
> *(a) estimates of finance proposed to be raised and estimates of proposed expenditure by the National Government in respect of the fiscal year; and*
>
> *(b) separate appropriations for the service of that year in respect of—*
>
> *(c) the services of the Parliament; and*
>
> *(d) general public services; and*
>
> *(e) the services of the Judiciary; and*
>
> *(f) such other supplementary Budgets and appropriations as are necessary.*
>
> ...

(3) Before any Budget or appropriation is prepared for submission to the Parliament, the National Executive Council shall consult with any appropriate Permanent Parliamentary Committee, but this subsection does not confer any right or impose any duty of consultation after the initial stages of the preparation of the Budget or appropriation.

210. Executive initiative

(1) The Parliament shall not provide for the imposition of taxation, the raising of loans or the expenditure of public moneys of Papua New Guinea except on the recommendation of the Head of State, acting with, and in accordance with, the advice of the National Executive Council.

(2) Subject to subsections (3) and (4), Parliament may reduce, but shall not increase or re-allocate, the amount or incidence of, or change the purpose of, any proposed taxation, loan or expenditure.

…

212. Revenue and expenditure without prior approval

(1) If at the beginning of a fiscal year the Parliament has not made provision for public expenditure by the National Executive or expenditure by the Parliament or the Judiciary for their respective services for that year, the National Executive, the Parliament or the Judiciary, as the case maybe, may, without authorization other than this section but in accordance with an Act of the Parliament, expend amounts appropriated out of the Consolidated Revenue Fund for the purpose not exceeding in total one-third of its respective budgeted expenditure during the immediately preceding fiscal year.

(2) The authority conferred by Subsection (1) lapses when the Parliament has made provision for the public expenditure for the fiscal year in question, and any amounts expended by virtue of that subsection are a charge against the expenditure so provided for and shall be properly brought to account accordingly.

17.18 Part 2 of Schedule 1 of the *Constitution* contains various provisions relating to the interpretation of the *Constitution*. Similarly, section 24 states that certain material may be

used as aids to interpretation of the *Constitution*, including, relevantly, the Final Report of the pre-Independence *Constitution*al Planning Committee dated 13 August 1974.

17.19 Section 2(1) of the *Loans (Overseas Borrowings) Act 1973* relevantly provides that:

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

17.20 Section 2(1) of the *Loans (Overseas Borrowings) (No. 2) Act 1976* is in similar terms, although one of the listed purposes for borrowing is "the purchase of equity in companies" and the limit for the sum borrowed "shall be such that the total value of overseas commercial debt which will be owed by the State after any borrowing shall not exceed 125% of the estimated internal revenue for the year in which the borrowing takes place except only as a result of any bridge financing and subject to Subsection 2(b)": see section 2(3).

17.21 Section 2(8) requires the Minister to cause a copy of the loan agreement to be laid before the Parliament for its information "[a]s soon as practicable after the execution of a loan agreement".

17.22 The *Loans (Overseas Borrowings) (No. 2) Act 1976* appears to have been enacted because the view was taken that the borrowing authority in the *Loans (Overseas Borrowings) Act 1973* had been exhausted, although the 1973 Act continues in force.[126]

17.23 Sections 35 and 36 of the *Public Finances (Management) Act 1995* are also relevant and provide as follows:

35. Restrictions on borrowing

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126 Statement of David Crichton Frecker dated 29 January 2022 [21], Exhibit EEEE, WIT.0143.0001.0001.

(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.

17.24 The limit provided for in the *Central Banking Act 2000* is K100,000,000.00 (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): see section 55(4)(a).

17.25 There has been limited judicial consideration of s 209.

17.26 In *Mairi v Tololo, Secretary for Education* [1976] PGSC 9; [1976] PNGLR 125 (15 April 1976) there was a challenge to the imposition of a fee of K400 per pupil for students attending multi-racial schools in the Independent State. In the course of determining that there was no power to impose the fee under the *Education Act 1970*, it was held, in the context of examining section 209 of the *Constitution*, that "[t]o render imposition of tax for the raising of revenue constitutional, the statutory grant of power must be clear and

unambiguous and the circumstances bringing it into operation sufficiently clear" (Prentice DCJ and Williams J) and that section 209 required "clear authorization by Parliament" (Frost CJ).

17.27 *Papua New Guinea Forest Industries Association Inc v Tomuriesa* [2017] PGSC 24; SC1601 (1 September 2017) was a proceeding concerning the validity of section 121 of the *Forestry Act 1991*. The Supreme Court held: "The vesting of wide and ambiguous taxation powers on the Executive to make decisions on essentials of the imposition of taxation in the form of a levy of the type found in s 121 … cannot be *Constitution*ally justified". Rather, section 209 of the *Constitution* required "the essentials of imposition of taxation to be determined by an Act of the Parliament". However, the Court also held that section 209(1) of the *Constitution* did, in principle, permit a statute to authorise a revenue system outside of the National Budget framework found in section 209(2).

17.28 Then Treasury Secretary, Mr Vele, stated in evidence that: "The process for loans from the private sector is the *Loans (Overseas Borrowing No 2) Act 1976*", and that "[a]ll types of Loans must also have Section 209 of the *Constitution* authorisation by way of the budgetary process".[127] Further, where a loan is negotiated, executed and drawn down in the same year, the authorisation for the purposes of section 209 is obtained by way of a supplementary budget.[128]

17.29 Mr Vele said that the Parliament did not need to approve the UBS transaction before it was entered into. Significantly, Mr Vele conducted an analysis of 288 external loans to the State and could not find one in which the loan terms and conditions were approved prior to its execution. We submit that none was of the consequence or size of the UBS Loan. Mr Vele considered that loans could be executed and then subsequently approved in the following National Budget.[129]

17.30 Mr Vele stated that in 2014 he followed the advice of Ashurst and Norton Rose that the "mechanics" of section 209 were contained in the *Loans (Overseas Borrowings) (No. 2)*

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127 Affidavit of Dairi Vele sworn 5 August 2021 [57]-[58], Exhibit MMM, WIT.0014.0015.0012.

128 Affidavit of Dairi Vele sworn 5 August 2021 [67]-[68], Exhibit MMM, WIT.0014.0015.0012

129 Transcript, Dairi Vele, 24 June 2021, p 1908.

Act 1976 and that by fulfilling the requirements of this statute the requirements of section 209 were also complied with.[130] He said he followed the advice of the State Solicitor of 5 March 2014 that Parliamentary approval could be obtained through the budgetary process and that such approval could be given after the relevant NEC decision.[131]

17.31 The State Solicitor's advice referred specifically to the case of *Tomuriesa* in support of the proposition that statutes for the purposes of section 209 should not seek to restrict the exercise of overall financial control by Parliament. In the State Solicitor's view:[132]

The Act(s) of Parliament referred to in Section 209 prescribe in detail the requirements and processes for revenue generation activities or expenditure within the broad limits set by Parliament for any given year. These Acts of Parliament include inter alia: the Public Finance (Management) Act 1995 (PFWIA), the Loans (Overseas Borrowings) Act Chapter 133 (Loans Act), and the National Procurement Act 2018 (NPA), and are applied depending on the aspect of Section 209 which it regulates.

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

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

17.32 The State Solicitor further stated in oral evidence that "borrowing or the expenditure by the State must first be approved and authorized by parliament and then it can be processed through the legislation".[133] The State Solicitor noted that section 4 of the *Loans (Overseas Borrowings) (No. 2) Act 1976*, which provides "All payments of principal and

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130 Affidavit of Dairi Vele sworn 26 April 2021 [559]-[560], Exhibit PP, WIT.0014.0007.0001..

131 Affidavit of Dairi Vele sworn 26 April 2021 [563], Exhibit PP, WIT.0014.0007.0001.

132 Statement of Daniel Rolpagarea dated 28 July 2021 pp 2-3 [5]-[7], Exhibit OO.2, WIT.0019.0005.0003.

133 Transcript, Daniel Rolpagarea, 23 June 2021, p 1823.

interest and other charges payable under a loan agreement shall be made out of the Consolidated Revenue Fund", indicated that even if a loan was effected under that statute it still had to be reflected in the Budget process.[134]

17.33 In relation to the possibility of retrospective approval, the State Solicitor's view was that "Outside of Section 212, I am of the view that prior parliamentary approval is mandatory for all matters concerning revenue raising and expenditure."[135]

17.34 In relation to the UBS transaction, the State Solicitor's view was that it "ought to have been pre-approved by Parliament during the 2014 budgetary process" and that the requirements of section 209 were not complied with.[136]

17.35 Dr Kalinoe, the Secretary for Justice, agreed with the State Solicitor's approach and interpretation of the law, specifically including the State Solicitor's advice of 27 March 2014.[137]

17.36 Former Attorney-General the Honourable Kerenga Kua noted that s 209 of the *Constitution* begins with the phrase “notwithstanding anything else in the *Constitution* or elsewhere”, which he took to mean that whatever the *Loans (Overseas Borrowings) No 2 Act 1976* states, the *Constitution* overrides and prevails.[138] He considered that the "minimum requirement of section 209 … is the retention of the power to approve or reject [a] particular loan … done by a law made by parliament once all the preparatory work is done and brought to the parliament for approval".[139] Mr Kua's view was that retrospective approval pursuant to section 212 of the *Constitution* was possible in limited circumstances, not including borrowings or revenue raising for the purposes of commercial investment purposes.[140]

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134 Transcript, Daniel Rolpagarea, 23 June 2021, p 1824.

135 Statement of Daniel Rolpagarea dated 28 July 2021 [10], Exhibit OO.2, WIT.0019.0005.0003.

136 Statement of Daniel Rolpagarea dated 28 July 2021 [18]-[19], Exhibit OO.2, WIT.0019.0005.0003.

137 5.05.14 Dr Lawrence Kalinoe_Brief Attorney General.pdf (WIT.0019.0002.0506)

138 Transcript, Kerenga Kua, 18 June 2021, p 1512.

139 Transcript, Kerenga Kua, 2 August 2021, p 2522.

140 Transcript, Kerenga Kua, 2 August 2021, p 2523.

17.37 Mr Kua considered that section 209 *had* been breached in the context of the UBS transaction. His view was that if the State wanted to proceed with the UBS loan, it should have brought a bill urgently before the parliament and sought parliamentary approval, irrespective of the urgency of the transaction (and that the urgency of the transaction did not allow the State to bypass constitutional and statutory procedures). This may have involved the urgent recalling of Parliament.[141]

17.38 Other witnesses also gave their views as to whether the UBS transaction complied with section 209 of the *Constitution*. Prime Minister Marape stated that in 2013 there should have been an indication to the Parliament as to the transaction which was to occur in 2014.[142]

17.39 Mr Pruaitch[143] and Mr Yauieb[144] were of the view that section 209 was not complied with.

17.40 Mr Lupari said that retrospective Parliamentary approval was possible.[145]

17.41 Mr O'Neill considered that the UBS transaction was an investment and therefore did not fall within the scope of section 209.[146] Mr O'Neill's view was that investments and expenditure by State Owned Entities were not required to be approved by Parliament.[147]

Our submissions on statutory and constitutional construction

17.42 The key provision is s 209(1) which states:

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

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141 Transcript, Kerenga Kua, 18 June 2021, pp 1517-1518.

142 Transcript, James Marape, 21 June 2021, p 1643.

143 Affidavit of Patrick Pruaitch sworn 28 June 2021, pp 13-14 [75]-[77], Exhibit ZZ, WIT.0028.0003.0002.

144 Statement of Anthony Yauieb dated 28 July 2021, pp 12-15 [47]-[59], Exhibit BBB, WIT.0104.0002.0239.

145 Transcript, Isaac Lupari, 2 August 2021, p 2506.

146 Transcript, Peter O'Neill, 17 June 2021, p 1493.

147 Transcript, Peter O'Neill, 17 June 2021, p 1494.

subject to authorization and control by the Parliament, and shall be regulated by an Act of the Parliament.

17.43 It will be noticed that:

(a) Section 209(1) is a provision which applies '*Notwithstanding anything in this Constitution*';

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

(c) It provides that such activity is '*subject to authorization and control by the Parliament*' and mandates that such matters '*shall be regulated by an Act of the Parliament*'.

17.44 We respectfully adopt the approach to construction enunciated in the statement and evidence to you by the very experienced Papua New Guinea and Australian lawyer, David Frecker, as follows:

(a) section 209 of the *Constitution* is a general statement of constitutional principle about the supremacy of Parliament in all matters pertaining to taxation and the control of public finances;

(b) it must be balanced with the function of the executive government to manage finances in a responsible manner (see section 210).[148]

(c) no additional authorisation by Parliament is required if there is to be a new loan which is authorised by and under an existing Act of Parliament, and similarly a specific loan is not required to be included in or pre-approved by the National Budget prepared for each fiscal year.[149] (He was only aware of one instance where the Parliament had passed a specific Act to authorise a specific loan, being the

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148 Statement of David Crichton Frecker dated 29 January 2022, p 3 [14], Exhibit EEE, WIT.0143.0001.0001.

149 Statement of David Crichton Frecker dated 29 January 2022, p 5 [17], Exhibit EEE, WIT.0143.0001.0001.

Loans Act 2011 which gave authority for the State to borrow an amount to fund its participation in the PNG LNG Project.[150])

(d) the State has the power under section 209(1) of the *Constitution* to raise loans and that power can be exercised in the manner set out in the *Loans (Overseas Borrowings) (No. 2) Act 1976*, which provides for matters required for carrying out and giving effect to s 209. That is, the *Loans (Overseas Borrowings) (No. 2) Act 1976* was an "Act of the Parliament" within the meaning of the phrase "regulated by an Act of the Parliament" in section 209(1).[151] This Act deals specifically with borrowing from overseas commercial institutions.[152]

(e) the UBS transaction was thus validly *entered into* by the State under the *Loans (Overseas Borrowings) (No. 2) Act 1976*.[153]

(f) the requirement in the Act for the relevant loan agreements to be laid before Parliament "as soon as practicable after execution" (see section 2(8)) meant that the loan agreements were required to be laid before Parliament without "unreasonable delay".[154] He considered that, in circumstances in which Parliament had sat for more than a couple of days in a period from March to November, a delay over this period in laying documents before Parliament would not be consistent with section 2(8) of the *Loans (Overseas Borrowings) (No. 2) Act 1976*.[155] [However, we would add, this may breach section 2(8) but it could hardly retrospectively invalidate the loan: if there is a remedy for breach of the tabling requirement it apparently lies in parliamentary scrutiny].

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150 Transcript, David Frecker, 2 February 2022, p 3567.

151 Statement of David Crichton Frecker dated 29 January 2022, p 6 [27], Exhibit EEE, WIT.0143.0001.0001; Transcript, David Frecker, 2 February 2022, p 3571-3572.

152 Transcript, David Frecker, 2 February 2022, p 3567.

153 Statement of David Crichton Frecker dated 29 January 2022, p 6 [25], Exhibit EEE, WIT.0143.0001.0001.

154 Statement of David Crichton Frecker dated 29 January 2022, p 6 [25], Exhibit EEE, WIT.0143.0001.0001.

155 Transcript, David Frecker, 2 February 2022, p 3568.

17.45 Mr Frecker also noted that the *Constitution* does not specifically require a referral of a loan of significance to the Public Accounts Committee (whose function is to review matters of public finance), [156] and he was not aware of any instances where the Public Accounts Committee has had loans referred to it, nor held public hearings.[157]

17.46 The view Mr Frecker enunciates and which we adopt also corresponds with almost invariable State practice since Independence.

17.47 In our submission you can thus conclude that in your (necessarily non-binding) opinion, s 209 was not breached in relation to the UBS Loan. However, it is submitted that you should make recommendations designed to ensure that there be greater legal procedural safeguards, including the statutory amendment to require both State Solicitor and Attorney-General confirmation as to the *Constitution*al and statutory validity of a commercial loan over a specified monetary threshold.

17.48 The other matter of specific recommendation concerns the easy avoidance of the statutory borrowing limits on the State by novating the UBS loan to Kumul Petroleum prior to the next budget: we recommend amendments to avoid a reoccurrence.

17.49 We now turn to some factual questions.

How was the process commenced?

17.50 The process of obtaining a loan from UBS to acquire new Oil Search shares commenced on 21 February 2014. On that date Mr Vele met with Mr Botten and Mr Aopi in Sydney. Mr Vele said that the State expected to received funding from UBS for the purchase of

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156 Statement of David Crichton Frecker dated 29 January 2022 [20], Exhibit EEE, WIT.0143.0001.0001.

157 Transcript, David Frecker, 2 February 2022, p 3566.

Oil Search shares.[158] On 22 February 2014 Mr Turner sent Mr Vele a briefing paper for meeting with Prime Minister O'Neill and the subsequent meeting with Mr Botten.[159]

17.51 On 23 February 2014, Prime Minister O'Neill and Mr Vele met with Mr Botten and Mr Aopi in Port Moresby. At this meeting Mr O'Neill said that the State wished to retain at least a 10% shareholding in Oil Search, and asked if Oil Search would issue shares to the State as a placement, as part of Oil Search's capital raising to fund its acquisition of an interest in PRL-15.

How was UBS selected?

17.52 UBS appears to have been selected by Mr Vele and Prime Minister O'Neill as the financier for the purchase of new Oil Search shares as it had been chosen as the preferred financier for refinancing the IPIC Exchangeable Bond.[160]

17.53 On 27 February 2014, Prime Minister Peter O'Neill wrote to UBS AG to advise that the commercial terms proposed by UBS were "expected to be acceptable to the State" but were subject to an approval process.[161]

17.54 On the same date, Oil Search announced to the ASX that, subject to approvals, the State would purchase 149 million new shares at AUD 8.20, for a total of AUD 1,225 million. Once this purchase was complete, the State would have a 10.1% shareholding in Oil Search.[162]

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[158] See, e.g., Statement of Peter Botten dated 14 June 2021, Exhibit JJ, WIT.0021.0003.0001; Email A Latimer to D Vele, 22 February 2014, Re: PM briefing paper, NRF.001.001.5052

[159] Email M Turner to D Vele, 22 February 2014, Re: PM briefing paper, NRF.001.001.5054, attaching NRF.001.001.5055.

[160] Affidavit of Dairi Vele dated 26 April 2021, p 42 [280], p 43 [284], Exhibit PP, WIT.0014.0012.0011.

[161] P O'Neill letter to UBS, 27 February 2014, UBS.0001.0001.0029.

[162] Oil Search ASX Announcement, 27 February 2014, ASH.002.008.6760.

17.55 Mr Vele also issued a press release.[163]

What process was utilised?

17.56 No formal process was utilised.

What were the terms of the loan?

17.57 The UBS Loan comprised two interdependent loans:

(a) the 'Collar Loan'; and

(b) the 'Bridge Loan'.

17.58 The Collar Loan was for an amount of AUD 1.011 billion, being AUD 904.56 million for the purchase of the Oil Search shares and approximately AUD 106 million for interest.

17.59 Its terms included:

(a) a term of two years;

(b) a stated interest rate of 4.95%. However, all of the interest was paid up front rather than over the life of the loan, which was equivalent to 5.3% every 12 months in arrears;

(c) the State providing sufficient security for the AUD 1.011 billion (in Oil Search shares and put options);

(d) UBS providing the State with 137 million put options (one per share) with an average strike price of AUD 7.38 per share;

(e) the State providing UBS with 137 million call options with an average strike price of AUD 10.00 per share.

(f) UBS was given title to the shares held as collateral as part of their hedging programme but the parties shared dividends in agreed amounts.

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[163] Press Release, 27 February 2014, WIT.0064.0002.0370.

17.60 The Bridge Loan was for an amount of AUD 335 million and was used to pay AUD 14.6 million in fees and expenses and to purchase 39.1 million Oil Search shares.[164] Of these shares, 12.4 million were used as collateral for the bridge loan. The remainder were collateral under the collar loan

17.61 Its terms included:[165]

(a) an initial term of 6 months, but could be extended once at the State's option for a further 6 months;

(b) an initial interest rate spread of 5.5% over BBSY, increasing to 6.5% after 3 months, then to 7.5% after 6 months and finally to 9.5% after 9 months;

(c) an establishment fee of 2% (of the total amount available to be borrowed), and an extension fee of 1.5% (of the amount then borrowed).

17.62 The Brattle Group summarised the UBS Loan as follows:[166]

(a) the effect of the options was that the State's exposure to the Oil Search share price was limited for the shares covered by the options (about 92%). Up to the expiry of the options (two years), if the share price fell significantly, the State's maximum exposure on the shares covered by the options was AUD 0.82 per share, and the State's maximum upside if the share price rose significantly was AUD 1.80 per share. These sums are the difference between the average put option strike price and the average call option strike price and the price at which the State acquired the shares;

(b) the Independent State was fully exposed to share price movements on the remaining 8%.

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[164] Payment Direction Deed, clause 2, UBS.0001.0001.0608; Brattle Group, p 50 [146], WIT.0132.0001.0002.

[165] Brattle Group, p 50 [148] – [149], WIT.0132.0001.0002.

[166] Brattle Report, p 7 [20], WIT.0132.0001.0002

(c) the State pledged all of its Oil Search shares as security for the money it borrowed from UBS;

(d) as a result of the hedging in the collar, UBS had reduced exposure to Papua New Guinea credit risk: even if the Oil Search share price fell, the put options in the collar loan would most of the total principal outstanding under both loans to be repaid.

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

17.63 Mr Vele gave evidence before the Commission that there "are essentially two types of foreign loans being firstly loans from multilateral partners and secondly loans from the private sector."[167]

17.64 The process for obtaining loans from multilateral partners is governed by the *Loans and Assistance (International Agencies) Act 1971*, whereas the process for obtaining loans from the private sector is governed by the *Loans (Overseas Borrowing No 2) Act 1976.*[168]

17.65 This legislation regulates the process for obtaining the respective loans, not the authorisation of expenditure. Authorisation is governed by s209 of the *Constitution*.

17.66 Mr Vele provided the below outline of the ordinary process for obtaining a foreign loan:

(a) Treasury together with Department of National Planning (**DNP**) identifies funding need;

(b) Treasury and DNP then seek approval to negotiate loans from the Treasurer;

(c) the Treasurer then sponsors an NEC submission for approval by NEC;

(d) Treasury together with the Office of the State Solicitor then negotiates the funding;

(e) the loan is executed in accordance with the provisions of the governing legislation;

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[167] Affidavit of Dairi Vele dated 5 August 2021, WIT.0014.0016.0012 at 0022, [55], Exhibit MMM.

[168] Affidavit of Dairi Vele dated 5 August 2021, WIT.0014.0016.0012 at 0022, [56] – [57], Exhibit MMM.

(f) the loan is tabled before Parliament as soon as practicable following execution; and

(g) a provision is made in the Budget papers for the loan and expenditure for the year in which it is intended to be used.[169]

17.67 As evidence of this process, Mr Vele provided a table summarising some 30 project loans obtained by the State from the previous 10 years.[170] The examples provided by Mr Vele were "multilateral partner" loans administered and therefore not comparable to the UBS Loan which was a loan between the State and a private commercial entity.[171]

17.68 It is submitted that in these circumstances, little weight can be given to Mr Vele's evidence on processes followed for prior loans as none were governed by the *Loans (Overseas Borrowings No 2) Act 1976*.

17.69 The Commission also received evidence from Mr John Leahy whose then firm, Leahy Lewin Lowing & Sullivan, was engaged to provide advice on Papua New Guinea law to IPIC in the IPIC Exchangeable Bond transaction.

17.70 Mr Leahy gave evidence that he was "generally uncomfortable with relying on the Overseas Borrowings Legislation" for the purposes of satisfying the requirements of s209 of the *Constitution*.[172]

17.71 Accordingly, the *Liquefied Natural Gas Project (State Participation) Act 2008* was drafted and laid before Parliament. This legislation was drafted specifically to authorise the IPIC Exchangeable Bond transaction and accordingly, set out key elements of that

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[169] Affidavit of Dairi Vele dated 5 August 2021, WIT.0014.0016.0012 at 0022-0023, [60] – [65], Exhibit MMM.

[170] Affidavit of Dairi Vele dated 5 August 2021, WIT.0014.0016.0012 at 0130, Annexure DV-18, Exhibit MMM.

[171] Transcript 12 August 2021, TS3203.14-3206.12 (XXN of Hon Don Polye MP by Ms Twivey-Nonggorr).

[172] Witness Statement of John Edmund Leahy dated 2 February 2022, WIT.0144.0001.0001 at 0004, [22].

transaction such as a nominee of the State acquiring an interest in the PNG LNG Project.[173]

18. TORs 1(n) and (o) The rationale as to why the State determined to buy shares in Oil Search in 2014 and when the decision was made to purchase the Oil Search shares.

18.1 It is convenient to consider Term of Reference (n) - the rationale as to why the State determined to buy shares in Oil Search in 2014, and Term of Reference (o) - when the decision was made to purchase the Oil Search shares - together.

18.2 Mr Botten gave evidence in his Further Statement dated 27 January 2022 that "[d]uring most of 2011 and early 2012 the PNG Government and PNG Petroleum Minister publicly admonished InterOil for its recalcitrance in moving the PRL-15 development ahead" and that "given the importance of PRL-15 and the PNG Government's concerns about the lack of progress, there would have been many discussions between representatives of Oil Search and representatives of the PNG Government about PRL 15 prior to 22 February 2014."[174]

18.3 This evidence is largely uncontested, except by Mr O'Neill, who gave evidence (which we say cannot be accepted) that he had no knowledge of Oil Search's intention to purchase an interest in PRL-15 until 2014.[175]

Q: But your evidence remains that you simply did not know about what Oil Search were going to do with the UBS loan monies which purchased the Oil Search shares and in particular you did not know about it that they were going to buy an interest in the Elk Antelope?
A: Quite frankly I was a bit disappointed that this information did not come to government's notice or particularly at leadership level. It could have been discussed at

[173] Witness Statement of John Edmund Leahy dated 2 February 2022, WIT.0144.0001.0001 at 0004, [23] – [25].

[174] Further Statement of Peter Botten, 27 January 2022, page 9 [52] WIT.0021.0006.0001.

[175] Transcript, Peter O'Neill, 17 June 2021, p.1468; Transcript, Peter O'Neill, 7 February 2022, p. 3765.

the lower levels but if I had known that this was a transaction being discussed on the sides it would have been a different conversation.[176]*(emphasis added)*

18.4 In mid-2012, Oil Search and Total decided to make a joint bid to acquire an interest in PRL-15.[177]

18.5 During the period from 2012 to 2014, Oil Search "engaged in negotiations with several parties, including InterOil and the Pac LNG companies, concerning a possible acquisition of an interest in PRL 15".[178] This period commenced with a joint bid by Oil Search and Total, made on 17 August 2012,[179] to January 2014 when the negotiations between InterOil and Oil Search stalled as a result of InterOil insisting on "increased consideration terms".[180]

18.6 Throughout 2012 and 2013 the NEC approved several decisions authorising various representatives of the State to negotiate the refinancing of the IPIC Exchangeable Bonds. *None of these NEC Decisions proposed or contemplated a new or additional purchase of Oil Search shares*.[181] Mr O'Neill in his appearance before the Commission indicated that the NEC Decisions were very clear and were aimed at retaining the Oil Search shares held by IPIC under the Exchangeable Bonds.[182]

18.7 However, evidence before the Commission indicates that an on-market purchase of Oil Search shares was being contemplated as early as 8 August 2013. The Background Notes prepared by then Acting Secretary of Treasury Mr Vele and Mr Mortensen for

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[176] Transcript, Peter O'Neill 7 February 2022, p. 3765.

[177] Further Statement of Peter Botten, 27 January 2022, page 7 [44]–[46], [51]–[52] WIT.0021.0006.0001.

[178] Further Statement of Peter Botten, 27 January 2022, page 9 [55] WIT.0021.0006.0001.

[179] Further Statement of Peter Botten, 27 January 2022, page 9 [55](a) WIT.0021.0006.0001.

[180] Further Statement of Peter Botten, 27 January 2022, page 9 [55] (a)–(j) WIT.0021.0006.0001.

[181] NEC Decision NG 63/2012, WIT.0016.0001.0316; NEC Decision 117/2013, WIT.0016.0001.0331; NEC Decision 241 of 2013, WIT.0016.0001.0394.

[182] Transcript, Peter O'Neill, 9 August 2021, pp.2916-2917; Transcript, Peter O'Neill, 9 August 2021, p.2914.

prospective financial advisors / financiers as part of the IPIC Exchangeable bonds refinancing identified one of the key priorities of the State as:

> *Securing a State Equity position in Oil Search after the maturity date of the Exchangeable Bonds of somewhere between 10.1% and 19.99% of the total issued capital of Oil Search.*
>
> *This can most obviously be achieved in one of two ways:*
>
> - *Securing agreement with IPIC in respect of the repurchasing of all or part of the Exchangeable Bonds; or*
> - ***By making on-market acquisition of Oil Search shares during the period leading up to Bond maturity**. [emphasis added by us in bold]*

18.8 On 13 August 2013, Mr Ben O'Dwyer of Backwell Lombard Capital together with his lawyer met with Messrs Vele, Mortensen and Latimer at the NRFA offices in Sydney. During this meeting Mr Vele is reported to have said that he and Mr Mortensen were of the opinion that buying new shares on market would be better than refinancing the IPIC Exchangeable bonds.[183]

18.9 On 23 September 2013, an internal Oil Search email, later sent by Mr Botten to the Oil Search Board, also drew attention to a shift in thinking taking place in the State. Mr Botten then went on to say that Mr Vele had *"…openly canvassed the use of money to support an acquisition by Oil Search of an interest in Elk Antelope for the issuance of shares to the State"* and that this *"would be preferable to the State rather than necessarily dealing with IPIC."*[184] There is no reason why this contemporaneous record should not be accepted.

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[183] Statement of Mr Ben O'Dwyer dated 10 February 2022, WIT.0155.0009.0592 at .0608 [107(h)]; Contemporaneous file note of meeting between Mr Ben O'Dwyer and Messrs Vele, Mortensen and Latimer WIT.0155.0002.0050 at 0051.

[184] Draft email prepared by Diana Danielson on behalf of Peter Botten and later circulated to Oil Search Board, 23 September 2013, OSL.0007.0001.1190.

18.10 Dr Waine, in his supplementary statement to the Commission also recounted that:

> *"In or around September 2013, I attended the offices of Pertusio Capital Partners (**Pertusio Capital**) to meet with Mr Lars Mortensen. Mr Mortensen had invited me there to discuss a proposed purchase of new Oil Search shares. This was the first time I became aware that a purchase of new Oil Search shares was being considered. At this meeting Mr Mortensen provided me with a report he had prepared regarding this proposed purchase."*[185]

18.11 Mr Vele denies this allegation, but has instead indicated he was exploring all options available to the State.[186] But Mr Vele was unable to explain why a number of witnesses before the Commission provided contemporaneous evidence contradicting his own version of events. In our submission his recollection on this is incorrect.

18.12 Further, in his statement dated 8 February 2022, Mr Kumarasiri gave evidence that "on multiple occasions Dr Waine and Mr Sonk raised the possibility of Oil Search issuing new shares for the Independent State to purchase."[187]

Oil Search acquisition of Elk-Antelope and associated financing

18.13 Between September 2013 and February 2014, as we outlined earlier, a number of parallel processes were taking place in an effort to refinance the IPIC Exchangeable Bonds.

18.14 The Commission has received evidence that in November 2013, Oil Search engaged Goldman Sachs to consider financing the potential acquisition of PRL-15. Three options were identified:[188]

(a) the acquisition of the PAC LNG companies; or

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[185] Supplementary Statement of Dr Clement Waine dated 11 February 2022, WIT.0039.0007.0001 at 0003, [30].

[186] Transcript, Dairi Vele, 11 August 2021, p.2999; Transcript, Dairi Vele, 11 August 2021, p.3018.

[187] Statement of Bamanu Arachchige Wasantha Kumarasiri, 8 February 2022, page 6 [56] WIT.0055.0002.0001.

[188] Further Statement of Peter Botten, 27 January 2022, page 10 [57] (a)–(c) WIT.0021.0006.0001; see also Statement of Peter Botten, 14 June 2021, page 3 [28] WIT.0021.0003.0001.

(b) a back-to-back agreement with InterOil whereby InterOil would purchase the PAC LNG companies and then sell to Oil Search part of the PAC LNG companies' interest in PRL 15; or

(c) partnering with ExxonMobil or Total to acquire InterOil's interest.[189]

18.15 From 3 January 2014 to 8 January 2014, internal Oil Search emails distributed copies of a document titled "1312xx Purchase of interest in PRL15 TOTAL v21 OSL Proposed.docx". This is a draft press release titled "Oil Search to Acquire 19.35% Interest in PRL 15 (Elk/Antelope)" was dated December 2013. The three copies of this document which were distributed each state under 'Acquisition Financing':

> *"Oil Search intends to fund the acquisition and associated future commitments with existing available liquidity. A new USD[X]m short-term debt facility has been arranged to fund the acquisition costs. The Company is evaluating options to refinance this facility in the future, including the potential for an equity offering. If an equity offering is undertaken, it is Oil Search's intention to utilise a pro rata renounceable entitlement offer to all shareholders."*[190]

18.16 On 29 January 2014, an internal Oil Search email sent to Oil Search's Board of Directors attached a board pack titled ' 140129 - Project Heron - Draft Valuation Impact - Final & Cover Note'. The Board Pack, dated 29 January 2014, states under "Project Heron Financial Assumptions" that AUD900m would be raised by a placement with share price set at AUD8.20 per share, but no longer mentions Oil Search taking on its own short-term debt facility to fund the acquisition.[191]

18.17 This latter document demonstrates a shift from Oil Search's view in December 2013/early January 2014 that the PRL-15 acquisition would be funded by Oil Search taking on its

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[189] Further Statement of Peter Botten, 27 January 2022, page 10 [57] (a)–(c) WIT.0021.0006.0001.

[190] OSL.0019.0003.7797; OSL.0019.0003.7808; OSL.0019.0003.7933; OSL.0019.0003.7944; OSL.0019.0003.8974.

[191] OSL.0002.0011.1142; OSL.0002.0011.1145.

own short-term debt facility, to a view that the acquisition would be funded entirely by a share placement. While the document does not name the prospective purchaser of the shares, it is notable that the share price is set at AUD8.20/share, being the price which the State specifically negotiated with Oil Search.

18.18 In February 2014, Oil Search and PAC LNG commenced negotiations during which Mr Carlo Civelli said to Mr Botten "words to the effect that the Prime Minister [Mr O'Neill] and PNG Government supported the transaction".[192] Mr Botten said this "was consistent with conversation that [Mr Botten] had with the Prime Minister [Mr O'Neill] in which [Mr O'Neill] supported the engagement of Oil Search with the PAC LNG companies as a means to address an impasse that had arisen between the PAC LNG companies and InerOil as a result of a reluctance on Mr Civelli's part to sell the PAC LNG companies to InterOil".[193]

18.19 Notwithstanding Mr Botten's evidence, Mr O'Neill's oral evidence was that he had no knowledge of how Oil Search would use the funds received through the eventual share placement to the Independent State.[194] That evidence of asserted ignorance by the former Prime Minister should be rejected.

18.20 Mr O'Neill's evidence must be rejected in light of the contemporaneous Oil Search documents already cited and the following:

(a) the State's own press release from 27 February 2014, which stated:

The State looks forward to maintaining a material shareholding in Oil Search with a view to participating in the additional upside of Oil Search's existing projects and the Elk-Antelope project.[195]

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[192] Further Statement of Peter Botten, 27 January 2022, page 9 [56] WIT.0021.0006.0001.

[193] Further Statement of Peter Botten, 27 January 2022, page 9 [56] WIT.0021.0006.0001.

[194] Transcript, Peter Botten, 7 February 2022, 3764.

[195] Press Release by Secretary of Treasury Vele, 27 February 2014, WIT.0064.0002.0370.

(b) Oil Search's press release from 27 February 2014, which discussed the share placement and PRL 15 acquisition, and stated:

We are delighted to have reached an agreement with the PNG Government to facilitate their continued investment in the Company. There remains strong alignment between Oil Search and the PNG Government, with Oil Search regarded as a key player in driving the future development of the country's abundant gas resources.[196]

(c) Oil Search's press release from 12 March 2014, which discussed the share placement and PRL 15 acquisition, and stated:

We welcome the continuation of the Government shareholding in Oil Search, underscoring our alignment with the State through the next phase of oil and gas development in Papua New Guinea.[197]

(d) Mr O'Neill's public statement in 2017 that:

The Government's intervention to buy shares in Oil Search had a positive influence in the direction Oil Search has taken and boosted investor confidence in Papua New Guinea.

…

The Government and Oil Search have continued co-operation and mutual interests across a range of activities in Papua New Guinea. Oil Search has an outstanding reputation delivering for its shareholders, and has been an extremely responsible

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[196] Oil Search Press Release enclosing PNG Press Release, 27 February 2014, WIT.0064.0002.0369.

[197] Oil Search Press Release confirming completion of share placement to PNG, 12 March 2014, OSL.0002.0005.5201.

corporate citizen, investing millions of Kina in social development programs that help people around Papua New Guinea.[198]

(e) Mr O'Neill's statement in 2017 that the purpose of State's acquisition of new Oil Search shares in 2014 was done "to secure our interest in the biggest employer and biggest taxpayer in our country and protect our national interest".[199]

Mandatory Exchange Notice and subsequent negotiations

18.21 On 13 February 2014 IPIC issued the Mandatory Exchange Notice, confirming IPIC's irrevocable election to exchange the Exchangeable Bonds into Ordinary Shares.[200] Accordingly, the O'Neill Government was faced with the long foreshadowed reality that it would shortly lose all of the State's Oil Search shareholding for the first time since the merger of Orogen Minerals in 2002. This event led directly to the UBS loan. The State's justification for obtaining a large new Oil Search shareholding - said to be strategic – remains unconvincing even given the evidence of those who spoke of the significant position that Oil Search then held in the eyes of the people of Papua New Guinea. This position is best summarised by Mr Botten in his further statement when he said:

The depth and magnitude of Oil Search's contribution over the years to PNG's economic and social development, and its promotion and advocacy of PNG, has resulted in longstanding relationships with local communities, landowners, businesses and successive PNG Governments.[201]

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[198] Pacific Islands Report, *'PNG PM Dismisses Claims That The Divesting Of Shares In Oil Search Limited Cost The Gov A Major Loss'*, 25 September 2017, WIT.0036.0006.0151.

[199] https://www.thenational.com.pg/pm-defends-shares-sale/.

[200] Mandatory Exchange Notice, 13 February 2014, OSL.0002.0007.2678.

[201] Further Statement of Peter Botten dated 27 January 2022, WIT.0021.0006.0001 at p.15 [92].

18.22 Mr O'Neill in his appearance before the Commission also emphasised the important role played by Oil Search in *filling gaps* where successive Governments were not able to deliver services such as health care and education in remote communities.[202]

18.23 On 14 February 2014, Mr Botten provided the Oil Search board of directors with an update on the Independent State's progress in refinancing the IPIC Exchangeable Bonds. In this email Mr Botten noted:

> *The Prime Minister has expressed a strong interest in remaining a shareholder of OSH and is keenly interested in potentially receiving shares in any potential capital raising carried out as part of an Elk Antelope transaction. This is especially relevant if he is unable to buy back the shares from IPIC. He has the financing to do this from UBS. He has been informed of the very low probability of PNG being successful in any buy back from IPIC.*[203]

18.24 Again, there is no reason why this contemporaneous note by Mr Botten should not be accepted.

18.25 On 14 February 2014, Mr Jilek of UBS responded to an email from Mr Botten of Oil Search following the issuance of the mandatory exchange notice stating:

> *Thanks. I am inclined to encourage the government to engage nevertheless, to test their desire to hold the entire bloc.*[204]

18.26 On 21 February 2014, Mr Botten and Mr Aopi of Oil Search met with Mr Vele and then Governor of Bank of Papua New Guinea Loi Bakani in Sydney. At this meeting Mr Vele explained that the State was not able to refinance the IPIC Exchangeable Bonds and noted

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[202] Transcript, Peter O'Neill, 17 June 2021, pp. 1444-1445.

[203] Email P Botten to K Constantinou, F Harris, G Aopi, A Kantsler, R Lee, B Philemon, K Spence and Z Switkowski, IPIC Update, 14 February 2014, OSL.0007.0001.0647.

[204] Email P Jilek to P Botten, Re: Fwd: Update, 14 February 2014, OSL.0007.0001.0855.

the State would be willing to fund the PRL-15 purchase through an acquisition of new Oil Search shares. Mr Vele stated that the State expected to receive funding from UBS AG.[205]

18.27 In the days following this meeting Mr Vele would receive a number of emails from UBS AG providing draft loan documentation for the proposed financing and a term sheet.[206]

18.28 On 23 February 2014, Mr Botten met with Prime Minister O'Neill, Mr Vele and Mr Aopi in Port Moresby. At this meeting Mr O'Neill stated that the State wished to retain at least a 10% shareholding in Oil Search, and asked if Oil Search would issue shares to the State as a placement, as part of Oil Search's capital raising to fund its acquisition of an interest in PRL-15.[207]

18.29 Mr Botten said that the AUD8.20 share price was negotiated by Mr O'Neill in Port Moresby on or around 23 February 2014:
At the time of the meeting I thought that the price of AUD8.20 per share was negotiable, given that the market price at the time was substantially higher than AUD8.20 per share. It subsequently became clear that the Prime Minister and State were not going to move from AUD8.20 per share.[208]

18.30 Mr Botten's assertion that the State negotiated Oil Search down to the AUD8.20 share price necessarily implies one of two possible scenarios:

(a) that the AUD8.20 share price was negotiated with the State by 29 January 2014 (hence why it appears in the Board Pack from same date); or

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[205] Statement of Peter Botten dated 14 June 2021, WIT.0021.0003.0001 at p 5, [50-51].

[206] Email M. Turner to D. Vele, Financing Authority Diligence, 22 February 2014, NRF.001.001.5059; Email M. Turner to D. Vele, FW: Proposed scope of work for the Big 4 quote request, 22 February 2014, NRF.001.001.5094; Email M. Turner to D. Vele, Bridge Facility Term Sheet, 23 February 2014, NRF.001.001.5062; Engagement Letter, 25 February 2014, ASH.003.008.0001.

[207] Statement of Peter Botten dated 14 June 2021, WIT.0021.0003.0001 at pages 5–6, [54]–[55].

[208] Statement of Peter Botten, 14 June 2021, page 6 [56] WIT.0021.0003.0001.

(b) that Oil Search were open to making the placement at AUD8.20 per share from January 2014 onward, and that the negotiations were an opportunity to see if the State would pay more than that amount.

18.31 On the morning of 25 February 2014, Mr Botten, Mr Aopi and Mr Vele met at the Grand Papua Hotel. Mr Aopi gave evidence that:

> *To the best of my recollection, at that meeting I was told that Prime Minister O'Neill was maintaining his position that he wanted the State to take a placement of Oil Search shares which would give it an interest of approximately 10% in Oil Search, and that State would pay AUD8.20 per share.*[209]

18.32 At 6:30pm on 25 February 2014, Mr Botten, Mr Aopi and Mr Vele met at the Grand Papua Hotel. At this meeting Mr Vele reiterated that Mr O'Neill was maintaining the position that the State wanted to acquire approximately 10% of Oil Search shares at AUD8.20 per share.[210]

18.33 On 26 February 2014, Mr O'Neill sent a letter to Mr Botten formally expressing the Independent State's interest in investing an amount of AUD1.225 billion at a subscription price of AUD8.20 per share before 10 March 2014.[211]

18.34 On 27 February 2014, the State and Oil Search issued separate press releases,[212] the release of which was coordinated,[213] confirming:

(a) that Oil Search would be acquiring a 22.835% interest in PRL-15/Elk-Antelope;

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[209] Statement of Gerea Aopi dated 16 June 2021, WIT.0059.0003.0001 at p.3, [24]; OSL.0017.0001.0043.

[210] Statement of Gerea Aopi dated 16 June 2021, WIT.0059.0003.0001 at pp.3-4, [25]; OSL.0017.0001.0043.

[211] OSL.0001.0001.5671.

[212] WIT.0007.0005.0036; WIT.0027.0001.0630.

[213] NRF.001.001.5576 attaching NRF.001.001.5578

(b) that this acquisition would be funded through a placement of 149.39 million Oil Search shares to the State; and

(c) noting the IPIC Exchangeable Bonds had been the subject of a Mandatory Exchange Notice so that an exchange of the relevant Oil Search shares then held by IPBC would occur as prescribed under the Exchangeable bonds.

NEC Decision

18.35 On 6 March 2014, the NEC through NEC Decision 79/2014[214] formally approved:

(a) for the State to acquire 149,390,244 shares in Oil Search Limited;

(b) for the State to borrow AUD1.239 billion from UBS AG (Australia Branch), initially comprising two facilities (an AUD335 million bridge loan facility and an AUD904 million collar loan facility); and

(c) for the State to engage UBS as its advisors on the financing and acquisition of Oil Search shares.

This marked the formal decision by the Government of the day to enter into the UBS Loan and purchase the Oil Search shares.

Findings

18.36 According to Mr O'Neill, the rationale for the State's purchase of Oil Search shares in 2014 was what he perceived to be the strategic alignment between the government and one of PNG's oldest and largest companies with a broad presence throughout the State's resources industry. He was adamant, too, that the purchase had nothing to do with PRL-15.

18.37 It is submitted that it is open to the Commission to reject the rationale put forward by Mr O'Neill for the following reasons:

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[214] NEC Decision 79/2014 WIT.0016.0001.0610.

(a) The submission to the NEC on 6 March 2014 makes it clear that the NEC and therefore Mr O'Neill who signed the submission, knew that Oil Search was buying into PRL-15 and that this was how the State's funds were going to be used.

(b) The Government thought that the Oil Search share price was likely to rise and noted that the share price had reacted positively to the news that Oil Search would participate in PRL-15.

(c) By December 2015, Mr O'Neill and the NEC had given broad authority to KPHL to deal with the shares; this included selling them. This demonstrates that by this time, the government had no interest in remaining a long term shareholder in Oil Search for all of the broader benefits that it had been thought that such a shareholding would bring. It is easy to infer that the reason for the change of position was because the real purpose of the share purchase had been completed, namely providing the means of enabling the sale of the PAC LNG Companies to Oil Search.

(d) If the State was intending to be a long-term shareholder at the 10% level, it would be expected that it would seek a board position in order to have more influence over, and knowledge concerning, a company with which it sought strategic alignment. This does not appear to even being considered.

18.38 It is therefore submitted that it is impossible to disconnect the State's purchase of Oil Search shares from Oil Search's acquisition of an interest in PRL-15. Leaving aside the question of whether it is appropriate for the State to invest in listed companies, there is nothing inherently wrong in the State's finances being used in a way that promotes the development of one of its resources. This is particularly so when the State would have back-in rights to take a stake in the resource in due course.

18.39 At T1470 on 17 June 2021 and again on T3765 on 7 February 2022, Mr O'Neill was questioned about what would have happened had he known that Oil Search were going to purchase an interest in PRL15 with the money provided by the Independent State in the UBS Loan. At T1470, Mr O'Neill gave evidence that he was:

…certainly sure that it will be a different transaction and if I had knowledge of that that particular discussions going between Oil Search and Elk Antelope partners, PNG government would have reviewed its position.

18.40 At T3765, Mr O'Neill further stated:

I would have negotiated with Oil Search, InterOil or Elk Antelope to buy their shares in the PNG LNG Project because that project was ongoing. Combining these two projects would have given us a better sizeable interest in the current existing development so it would have been a different transaction, we would have had a different conversation but what has happened, has happened.

18.41 It would be expected that Mr O'Neill as the then Prime Minister would be fully conversant with developments over PRL-15 and be actively involved in trying to accelerate the exploitation of the resource. Mr Vele was certainly aware of what was going on.

18.42 In those circumstances, Mr O'Neill's attempts to distance himself from PRL-15 are extraordinary and so unconvincing that they give rise to the question of whether he might be wishing to conceal something and if so, what. For example:

(a) At T3761 on 7 February 2022, Mr O'Neill was referred to an email from Mr Botten of 14 February 2014 [OSL.0007.0001.0647] in which it was stated that Prime Minister O'Neill was keenly interested in potentially receiving shares in any potential capital raising carried out as part of an Elk-Antelope transaction. Mr O'Neill said that there was absolutely no reason why "we" would want to be part of that transaction. We say why not? And more to the point, this is exactly what the State then did.

(b) At T3764, he said there was never any discussion about Oil Search using the money to buy Elk-Antelope yet the submission that he signed on 6 March 2014 expressly mentions this.

(c) Mr Maladina gave clear evidence that, despite Mr O'Neill's denials at T3763, he had attended two meetings at which Mr O'Neill and Mr Carlos Civelli were present and Mr O'Neill and Mr Civelli had private conversations at each. Ms

Amputch's evidence denying this should not be accepted given that she is a close business associate of Mr O'Neill and telephoned him immediately after she received the Commission's summons and no-one sought to challenge Mr Maladina by cross-examination.

(d) At T4148, Mr Vele said that he would have discussed Oil Search's potential acquisition into PRL-15 with Mr O'Neill after the ill-fated trip to Abu Dhabi in February 2014. He believed that Mr O'Neill would already have been aware of rumours about this as he himself had been. At T4149 , he was surprised that Mr O'Neill said that he was not aware of the rumours.

18.43 It is submitted that balance of the evidence suggests that a significant driver of the transaction, perhaps the dominant one, may have been to assist in ensuring that the PAC LNG companies were bought out of PRL-15 and Oil Search take over their interests in the resource.

18.44 If the Commission were to accept Mr O'Neill's rationale, it would then be submitted that the rationale does not stand scrutiny and was not clear or strong enough to be used to justify a loan of more than $1.2 billion that the State had no means to repay.

18.45 Brattle considered this in their first report. They took the view that a strategic investment in relation to shares is one where the investor expects an additional return over and above the ordinary return that all investors in those shares would receive through dividends and share price appreciation. They then noted that the material that they had reviewed did not explain how owning Oil Search shares would provide value to Papua New Guinea over and above any dividends and share price appreciation that the State might receive (and which all other Oil Search shareholders would receive). Brattle concluded that a significant objective for the Government was to benefit from dividends and/or a rising Oil Search share price. If the Government had a strategic investment objective, the documents they reviewed did not explain why or how the proposed shareholding would influence Oil Search behaviour to the benefit of Papua New Guinea. Further, if the Government's objective included holding more than 10% of the shares in Oil Search, as they stated, it failed to maintain this holding after about a month of acquiring the shares.

18.46 Further, there was no need for the State to seek to participate indirectly in PNG resource projects through holding shares in Oil Search when it had the means to have a direct interest in the project through back-in rights.

18.47 We submit that in relation to Term of Reference (o) it is open to the Commission to find that:

(a) by August 2013, parties acting on behalf of the State, including Mr Vele, were considering an acquisition of new Oil Search shares and that Mr Vele in fact preferred this option over the refinancing of the IPIC Exchangeable Bonds;

(b) a decision (albeit unofficial) to issue a new placement of Oil Search shares had been made before February 2014, and certainly before the Mandatory Exchange Notice was issued on 14 February 2014;

(c) that 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.

19. TOR 1(p) The rationale as to why the State determined to utilize the UBS Loan to purchase Oil Search shares

19.1 Between 2012 and January 2014, the State conducted a tender process with a number of prospective financiers to refinance the IPIC Exchangeable Bonds. In August 2013, Mr Vele flew to Sydney to meet with prospective financiers from amongst others JP Morgan, Morgan Stanley and UBS.

19.2 On 16 August 2013, following those meetings Mr Latimer sent emails to the prospective financiers to update them on next steps. Representatives from JP Morgan and Morgan Stanley received identical emails noting that they could expect a response within a week.[215] Mr Jilek of UBS, on the other hand, received an email requesting a formal engagement letter.[216]

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[215] NRF.001.001.3693; NRF.001.001.3694.

[216] NRF.001.001.3697.

19.3 On 22 August 2013, Mr Jilek wrote to Mr Latimer and advised that he had spoken with Mr Vele who had *"made it pretty clear that we are likely to be appointed formally following his meeting with the PM"*.[217]

19.4 As identified earlier, between August 2013 and December 2013 a number of parallel processes considered proposals from potential financiers, including UBS, Citibank, ANZ Barclays and Helmsley Capital.

19.5 On 13 February 2014, IPIC issued the Mandatory Exchange Notice confirming it had elected to exchange the Exchangeable Bonds for the State's ordinary shares in Oil Search.[218]

19.6 As noted earlier:

(a) on 14 February 2014, Mr Botten provided the Oil Search board of directors with an update on the Independent State's progress in refinancing the IPIC Exchangeable Bonds.[219]

(b) On 21 February 2014, Mr Botten and Mr Aopi of Oil Search met with Mr Vele and then Governor of BPNG Loi Bakani in Sydney. At this meeting Mr Vele explained that the State was not able to refinance the IPIC Exchangeable Bonds and noted the State would be willing to fund the PRL-15 purchase through an acquisition of new Oil Search shares. Mr Vele stated that the State expected to receive funding from UBS AG.[220]

19.7 On 22 February 2014, Mr Vele received an email from Mr Mitchell Turner of UBS AG advising that the Independent State could finance the acquisition of the Oil Search shares by borrowing pursuant to the *Loans (Overseas Borrowings) (No.2) Act* utilising the

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[217] NRF.001.001.3856.

[218] Mandatory Exchange Notice, 13 February 2014, OSL.0002.0007.2678.

[219] Email P Botten to K Constantinou, F Harris, G Aopi, A Kantsler, R Lee, B Philemon, K Spence and Z Switkowski, IPIC Update, 14 February 2014, OSL.0007.0001.0647.

[220] Statement of Peter Botten dated 14 June 2021, WIT.0021.0003.0001 at p 5, [50-51].

authorised purpose of "purchasing equity in companies". The advice included a requirement that the decision be ratified by a decision of the NEC.[221]

19.8 On 23 February 2014, Mr Turner of UBS sent Mr Vele, Mr Mortensen and Mr Latimer a briefing paper for the meeting with Mr O'Neill and subsequent meeting with Mr Botten. UBS had drafted it in a way that could be used as a base for a subsequent NEC submission. Mr Jilek was copied into the email.[222]

19.9 On 23 February 2014, Mr Botten met with then Prime Minister O'Neill, Mr Vele and Mr Aopi in Port Moresby. At this meeting Mr O'Neill stated that the State wished to retain at least a 10% shareholding in Oil Search, and asked if Oil Search would issue shares to the State as a placement, as part of Oil Search's capital raising to fund its acquisition of an interest in PRL-15.[223]

19.10 The Commission has heard evidence relating to the conduct of UBS during the IPIC Exchangeable bonds refinancing tender process:

(a) circumventing the tender process by obtaining IPIC Exchangeable bonds transaction documents[224]

(b) of the tendering parties, they were the only ones who requested the independent financial advisors to IPBC be excluded from the presentation of their refinancing proposal;[225]

(c) objecting to the need to participate in a tender process;[226]

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[221] Email M. Turner to D. Vele, Financing Authority Diligence, 22 February 2014, NRF.001.001.5059.

[222] NRF.001.001.5061

[223] Statement of Peter Botten dated 14 June 2021, WIT.0021.0003.0001 at pages 5–6, [54]–[55].

[224] NEC Policy Submission – draft (Kumarasiri/Waine); Email P Jilek to A Latimer, PNG, 22 August 2013, NRF.001.001.3856.

[225] Affidavit of Igimu Momo dated 17 December 2021, WIT.0141.0001.0001 at page 9, [64].

[226] Affidavit of Igimu Momo dated 17 December 2021, WIT.0141.0001.0001.

(d) making threatening phone calls to the State's decision makers;[227] and

(e) making threats to parties acting on behalf of the State that should UBS not be selected "UBS will have to look at its other options in terms of the IPIC Bond" and that this "may not be a benefit for the State".[228]

Findings

19.11 It is open to the Commission to find that:

(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 the IPIC Exchangeable bonds refinancing;

(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' threatening conduct throughout the tender process whilst not an overriding consideration by parties acting on behalf of the State may have featured in the decision-making process; and

(d) the State determined to use the UBS Loan to acquire the Oil Search shares because UBS following the issuance of the Mandatory Exchange Notice encouraged parties acting on behalf of the State to engage with Oil Search regarding an on-market purchase of shares.

20. TOR 1(q): Whether legal and administrative processes were followed to buy Oil Search shares in 2014.

20.1 Section 40(1) of the *Public Finances (Management) Act 1995* (PNG) requires that tenders must be publicly invited and contracts let for the purchase or disposal of property or stores or the supply of works and services the estimated cost of which exceeds a prescribed amount. However, section 40(3)(b) provides an exception to section 40(1),

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[227] Supplementary Statement of Dr Clement Waine dated 11 February 2022, WIT.0039.0007.0001 at page 4, [41].

[228] Email C Waine to B O'Dwyer enclosing email chain, RE: IPIC, 21 October 2013, WIT.0155.0001.2525.

where a Supply and Tenders Board certifies that the inviting of tenders is impracticable or inexpedient.

20.2 Section 117 of the *Public Finances (Management) Act 1995* allows for the issuing of Financial Instructions, not inconsistent with the Act, as to any matter prescribed by the Act to be so provided for, or that are necessary or desirable for carrying out or giving effect to the Act and in general for the better control and management of public moneys and public property.

20.3 Financial Instruction 1A/05 ("Supply and Tenders Board Operations") are such Financial Instructions. Clause 11.1 of this relevantly provides that a certificate of inexpediency cannot be issued retrospectively to cover a contract already executed. Clause 11.2 provides that a certificate of inexpediency will only be issued in situations where a declared natural disaster, defence emergency, health emergency, or situation of civil unrest exists, and procurement processes must be undertaken urgently to remedy the situation. Clause 11.2 further provides that: "Lack of forward planning by departments is no longer acceptable. Departments must now be planning their major procurements in a timely manner".

20.4 Schedule 2, clause 3 of the UBS side letter[229] and the Bridge Facility Agreement[230] included as a condition precedent the issuing of a certificate of inexpediency.

20.5 On 6 March 2014, Mr Vele wrote to the Chairman of the Central Supply and Tenders Board (**CSTB**), Mr Philip Eludeme, requesting that the Chairman urgently consider and approve the enclosed request for certificate of inexpediency to cover the advisory fees of Pacific Legal Group and Pacific Capital Limited up to a limit of K9,000,000, and to UBS, Ashurst, Norton Rose Fulbright and KPMG limited to AUD14,555,759.[231]

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[229] NRF.001.003.5499.

[230] NRF.001.003.5690.

[231] Letter D. Vele to P. Eludeme, Financial Accommodation for The Independent State of Papua New Guinea (the State), 6 March 2014, WIT.0019.0002.0435.

20.6 The request for certificate of inexpediency was a *pro forma* document. There was a section titled "reason for certificate", which listed the four grounds in clause 11.2 of Financial Instruction 1A/05 as boxes to be ticked. However, none of the boxes were ticked. In the request, the explanation for urgency was expressed as that the State had until 4pm on Thursday 6 March to approve a share placement and until 5pm on Thursday 6 March for the relevant documentation to be executed, failing which the State would not secure a shareholding and would be exposed to costs of up to AUD18,000,000.[232]

20.7 On 7 March 2014, the CSTB met and resolved to issue the certificate of inexpediency. The minutes of the meeting noted that the CSTB "is satisfied that all process have been followed and the award was made in accordance to the Provisions of the Public Finance (Management) Act". The decision was not expressed to be conditional. The State Solicitor was not present at this meeting but his alternate, Deputy State Solicitor Jeklin Talonu, was present.[233]

20.8 On 10 March 2014, Mr Eludeme wrote to Mr Vele explaining that the CSTB had approved the issue of certificates of inexpediency in respect of the local and international advisors but qualified the approval by noting that it was subject to the State Solicitor's clearance and receipt of the original authority to pre-commit.[234]

20.9 On 12 March 2014, the Acting Board Secretary of the CSTB, Mr Babaga Naime, wrote to the State Solicitor seeking advice in relation to the certificate of inexpediency.[235]

20.10 On 20 March 2014, the State Solicitor wrote to Mr Naime declining to give the required legal clearance for the certificate of inexpediency on the basis that it was not requested for

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[232] WIT.0019.0002.0438

[233] Minutes of CSTB meeting no. M-0/14, 7 March 2014, WIT.0023.0001.0028, p 6 (8.5).

[234] Letter P. Eludeme to D. Vele, Application for certificates of inexpediencies for the engagement of financial, legal and technical advisors in connection with the purchase and related financing of the purchase by the State, 10 March 2014, WIT.0019.0004.0038.

[235] Letter D. Vele to D. Rolpagarea, Request for issuance of legal clearance – CSTB Col 02/14 – application for certificate of inexpediencies for engagement of financial, legal and technical advisors in connection with the purchase of shares in Oil Search Limited and related financing of the purchase by The State of Papua New Guinea, 12 March 2014, WIT.0019.0002.0431.

one of the four grounds listed in the relevant Financial Instructions and could not be issued retrospectively to cover a contract that had already been performed. However, he advised that: "Treasury and the Central Bank may consider paying for the services rendered by the Consultants on a Quantum Meruit basis," and noted: "the payment for legal services should be done in consultation with the Attorney General."[236]

20.11 On 28 March 2014, Mr Eludeme wrote to Mr Vele attaching the letter from the State Solicitor dated 20 March 2014 and noting that the certificate of inexpediency cannot be issued nor could the CSTB retrospectively approve the payments of services for the engagement of the consultants. Mr Eludeme advised instead that: "The engagement and payment of legal services from private firms must be done in consultation with the Attorney General. Payment for the provisions of legal services should be made on Quantum Meruit basis provided the State is fully satisfied with the services rendered."[237]

20.12 On 3 April 2014, the CSTB met and resolved to rescind its decision to engage the consultants in reliance on the State Solicitor's advice in relation to the certificate of inexpediency.[238]

20.13 On 10 April 2014, Mr Eludeme wrote to Mr Vele advising of the CSTB's rescission of its decision and advising that this "effectively nullifies the issuance of the Certificate of Inexpediencies for these engagements."[239]

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[236] Letter D. Rolpagarea to B. Naime, RE: Request for Issuance of Legal Clearance – CSTB Col 02/14 – Application for Certificates of Inexpediency for engagement of Financial, Legal and Technical advisors in Connection with the Purchase of Shares in Oil Search Limited and related Financing of the Purchase by the State of Papua New Guinea, 20 March 2014, WIT.0025.0001.0190, p 4 (18).

[237] Letter P. Eludeme to D. Vele, Legal clearance for applications for certificates of inexpediencies for the engagement of financial, legal and technical advisors (x3) in connection with the purchase and related financial advice of the proposed purchase of shares in Oil Search by the State, 28 March 2014, WIT.0025.0001.0203.

[238] Minutes of CSTB meeting no. M-05/14, 3 April 2014, WIT.0025.0001.0194, p 6 (8.7).

[239] Letter P. Eludeme to D. Vele, Rescinding award of contracts and nullifying issurance [sic] of inexpediencies for the engagement of financial, legal and technical advisors (x3) in connection with the purchase and related financial advice of the purchase of share in Oil Search by the State, 10 April 2014, WIT.0023.0001.0046.

20.14 Mr Vele incorrectly contended that that the CSTB had an "unfettered discretion" to issue a certificate of inexpediency if it determines that it is inexpedient or impracticable to require a tender process. He also contended that the Financial Instructions which limit the grounds on which a certificate of inexpediency can be issued are inconsistent with the *Public Finances (Management) Act 1995*.[240]

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

20.16 Further, in *Robmos Ltd v Punangi* [2008] PGNC 70; N3372 (14 May 2008) (a case cited by the State Solicitor in his advice dated 20 March 2014), the relevant Financial Instructions were in issue and there was no suggestion or finding that they were invalid.[241] The National Court also held that the Financial Instructions have "similar force and effect" as the *Public Finances (Management) Act 1995*.

20.17 It is clear that the issuing of the certificate of inexpediency by the CSTB on 7 March 2014 was done contrary to clauses 11.1-11.2 of Financial Instruction 1A/05. This is because: a) there was no declared natural disaster, defence emergency, health emergency, or situation of civil unrest in existence; and b) it was effectively issued retrospectively. The request for the certificate was also deficient and should have been recognised as such.

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

21. TOR (r) What role did Papua New Guinean and international legal and financial advisors play in relation to the UBS Loan

[240] Affidavit of Dairi Vele sworn 26 April 2021, WIT.0014.0007.0001 [521].

[241] See in particular *Robmos Ltd v Punangi* [2008] PGNC 70; N3372 (14 May 2008) [58]-[59], [61], [63].

UBS

21.1 As noted earlier, the Australian branch of UBS AG was engaged as both:

(a) the State's sole financial advisor and sole lead arranger (on 25 February 2014) in relation to:

(i) the management of the State's investment in Oil Search; and

(ii) associated matters flowing from the issuance of the 2009 IPIC Exchangeable Bonds in respect of the State's shareholding.[242]

(b) exclusive arranger of the financing facility to the State (27 February 2014).[243]

21.2 As previously mentioned, an expert report prepared by the Brattle Group indicates that over the life of the UBS loan, 2014-2016, the Independent State paid an estimated AUD336,300,000 to UBS.[244] The Brattle Group further assessed that the loan involved a transfer of AUD174,800,000 in value from the State to UBS (excluding fees).[245]

21.3 The two key personnel involved on behalf of UBS were Patrick "Paddy" Jilek and Mitchell Turner. Both were the persons named in the "Key Man Provision" in clause 8 of the advisory mandate letter and were identified as "Senior Team Members".

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[242] Letter UBS AG, Australia Branch to Dairi Vele, 25 February 2014, WIT.0015.0001.1425.

[243] Commitment letter – financial accommodation for the Independent State of Papua New Guinea, 27 February 2014, WIT.0015.0001.1063.

[244] Exhibit PPP, Third Brattle Report to the Commission of Inquiry into the UBS Loan, WIT.0132.0003.0002 at 0037, [111].

[245] Exhibit PPP, Third Brattle Report to the Commission of Inquiry into the UBS Loan, WIT.0132.0003.0002 at 0039, [116].

21.4 Mr Turner was a witness to the execution of the financing mandate letter, and both Mr Turner and Mr Jilek were also involved in the financing engagement by UBS.[246] Each declined repeated invitations to give evidence.

21.5 It is noted that clause 9(b) of the advisory mandate letter contained an acknowledgement on behalf of the State that UBS may engage in various activities notwithstanding that a conflict of interest exists or may arise. Clause 9(c) referred to the creation of "permanent or ad hoc arrangements/information barriers … for the purposes of managing conflicts of interest … where appropriate". However, there does not appear to be any evidence of such arrangements or information barriers being used in the circumstances of UBS's engagement by the State. Finally, clause 12 provided, in effect, that it was not the intention of the parties to create a fiduciary relationship between them.

21.6 There were similar provisions in the financing mandate letter, including an acknowledgement by the State that UBS may provide financial advisory services to the State and that conflicts of interest may arise (and a consent by the State to such activity), and an exclusion of any fiduciary relationship.

21.7 Both engagement letters were governed by the law of New South Wales. In New South Wales, a party in the position of an investment bank such as UBS may, by contract, exclude or modify the operation of any fiduciary duties: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; (2007) 160 FCR 35, 77 [278]-[281], 82 [323].

21.8 However, regardless of whether UBS effectively excluded any fiduciary duties it had to the Independent State, it is clear from UBS's involvement as both advisor and financier and the involvement of key UBS personnel on both engagements that the State's was not receiving proper and independent advice and representation in relation to the UBS loan. This no doubt lead to the poor financial outcome to the State from the loan.

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[246] See, for example, WIT.0099.0007.0034; WIT.0099.0007.0037; WIT.0099.0007.1196; ASH.002.003.7510; ASH.002.001.5327.

NRFA

21.9 On 6 March 2014, NRFA was retained to advise the State on the UBS Loan. Despite requests from its former client for the production of all relevant documents including retainers, NRFA did not produce the relevant retainer to the Commission.

21.10 No evidence has been provided to the Commission that a public tender process was utilised before the awarding of work to NRFA under any of the above identified retainers.

21.11 No evidence has been provided to the Commission about the amount paid to NRFA for its work under the various retainers. The UBS Loan documentation[247] indicates that a payment of AUD600,000 was made to NRFA from the total amount borrowed for the Bridge Facility.

Anthony Latimer

21.12 Mr Anthony Latimer was a key advisor to the State and the NRFA partner responsible for much of the legal work in respect of UBS Loan transaction.

21.13 In his appearance before the Commission, Mr Jimmy Maladina outlined Mr Latimer's history in the Independent State:

> *… The family, we have known him for a longer period of time because his parents used to run a plantation up in Goroka, Eastern Highlands Province early in the '50s and the '60s. And my dad used to operate in Goroka and I was born in Goroka so that family connections were there. They used to run a Latimer Plantation in the Bena Bena region of Goroka, Eastern Highlands. So, that connection – I do know the family longer than that but professionally about 10 years from 2014.'*[248]

[247] Bridge Facility Agreement – Drawdown Notice, WIT.0015.0002.1265 at 1266.

[248] TS2506.8-14 (2 August 2021).

21.14 Mr Latimer had also previously been a Partner with Corrs Chambers Westgarth and had advised on a number of transactions in the State.[249]

21.15 Mr O'Neill when pressed on the role played by Mr Latimer in the UBS Loan transaction commented that:

> *He would have been advising some of our departments and of course our SoE's but not directly to government.*[250]

21.16 This is a very limited articulation of Mr Latimer's role. As will be established Mr Latimer's involvement with the UBS Loan was extensive.

21.17 Mr Latimer is no longer a partner with NRFA. Mr Latimer is based in Australia and is not a compellable witness. Given Mr Latimer's integral role in the UBS Loan the Commission made a number of requests for Mr Latimer to appear on a voluntary basis to give evidence. Mr Latimer through his lawyer Mr Yeldham of KWM confirmed receipt of those requests but did not appear before the Commission.

Involvement of NRFA following MEN

21.18 While NRFA was formally retained on 6 March, evidence before the Commission indicates that it was involved in the UBS Loan transaction immediately following the issuance of the Mandatory Exchange Notice on 14 February 2014.[251]

21.19 Mr Latimer accompanied representatives of the State including Governor of BPNG Loi Bakani, Mr Vele and Mr Botten and Mr Aopi of Oil Search to Abu Dhabi in February 2014 to meet with IPIC and discuss the Exchangeable Bonds.[252]

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[249] TS1906.22-25 (24 June 2021).

[250] TS1447 (17 June 2021).

[251] Mandatory Exchange Notice, 13 February 2014, OSL.0002.0007.2678.

[252] Affidavit of Dairi Vele dated 26 April 2021, WIT.0014.0007.0001 [276].

21.20 From 22 February 2014, Mr Latimer engaged with Mr Vele and other representatives of the State regarding the below:

(a) providing advice on a briefing paper prepared for Mr Vele by UBS[253] in advance of Prime Minister O'Neill's meeting with Mr Botten including:

(i) that UBS recommended the State appoint NRFA as its legal advisors;

(ii) the State should obtain a term sheet from UBS to ensure terms of funding were clear;

(iii) the State should not commit to a deal with Oil Search until funding was in place;

(iv) the need to identify possible funding risks flowing from other financing arrangements;

(v) querying whether the State would be able to obtain the required approvals in the following week.[254]

(b) corresponding with Mr Vele noting the urgency of transaction completion;[255]

(c) preparing draft NEC submissions regarding the appointment of UBS as financial advisor and NRF as legal advisor;[256]

(d) engaging KPMG to provide advice on the UBS financial modelling;[257]

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[253] Email M Turner to D Vele, 22 February 2014, RE PM Briefing Paper, NRF.001.001.5054.

[254] Email A Latimer to D Vele, 22 February 2014, RE: PM Briefing Paper, NRF.001.001.5052.

[255] Email A Latimer to D Vele, 26 February 2014, RE: PNG – letter and announcement attached URGENT, NRF.001.001.5334.

[256] NRF.001.001.4090.

[257] Email A Latimer to M Blake KPMG, 26 February 2014, PNG State – Proposed scope of work, NRF.001.001.5248.

(e) advising the State on the draft term sheet;[258]

(f) advising on draft transaction documents;[259]

(g) together with PLG, Mr Maladina and Mr Chang co-ordinating steps required for the State to execute the agreements;

(h) coordinating meetings between Mr Mortensen, UBS and KPMG.[260]

21.21 On 26 February 2014, NRFA sent an email to Mr Vele and Mr Mortensen providing initial advice on the Term Sheet for the Collar financing transaction.[261] Subsequent to this other NRFA solicitors took a larger role in the drafting of transaction documents and coordination of execution.

NRFA engagement with the Commission

21.22 It is necessary at this stage to address the conduct of NRFA and their legal representatives King Wood Mallesons (**KWM**) with regard to their interaction with this Commission.

21.23 The Terms of Reference made it very clear that all SoE's were duty bound to cooperate with the Commission.

21.24 Those Terms of Reference were made available to KWM on 15 March 2021.[262]

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[258] Email A Latimer to D Vele, 24 February 2014, RE: Bridge facility term sheet, NRF.001.001.5087.

[259] NRF.001.002.7597.

[260] Email A Latimer to C Roberts, 28 February 2014, KPMG Meeting, NRF.001.001.6565.

[261] Email T Hoser to D Vele and L Mortensen, 26 February 2014, Project Kumul – Bridge and Collar Financing Transaction – Norton Rose Fulbright comments, NRF.001.001.5225.

[262] Letter Solicitors Assisting to A Dietz of NRFA, 15 March 2021, COU.0001.0001.0001.

21.25 Despite initially indicating their willingness to assist, NRFA through KWM consistently stalled and delayed the work of this Commission. NRFA had been retained under a number of retainers between 5 December 2012 and 6 March 2014.[263]

21.26 It became apparent that:

(a) the records held by NRFA were not kept in an appropriate matter with documents from all three retainers becoming intermingled;[264] and

(b) the records held by NRFA did not adequately identify their client.[265]

21.27 KWM requested that a client authority be provided for each retainer. The Commission attended to same and provided copies to the KWM. Even so, KWM continued to withhold disclosure despite instructions to the contrary. KWM then wrote to the signatories seeking to confirm that they had indeed signed the client authorities.[266]

21.28 In August 2021, after 5 months of the Commission seeking the production of the documents, NRFA through their solicitors KWM produced the relevant documents. It is worth noting however, that these documents:

(a) were provided during the August 2021 hearings of this Commission (which at the time were scheduled to be its last);

(b) were not provided in accordance with the Commission's document production protocol; and

(c) failed to include key metadata significantly complicating the review processes.

Pertusio

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[263] Letter T Toemoe to D Kavanamur, 14 April 2021, COU.0001.0001.0033.

[264] Letter T Toemoe to Solicitors Assisting, 3 June 2021, COU.0001.0001.0168.

[265] Letter T Toemoe to Solicitors Assisting, 30 April 2021, COU.0001.0001.0115.

[266] Letter T Toemoe to D Manau, 19 May 2021, COU.0001.0001.0153.

21.29 Pertusio Capital Partners Limited (**Pertusio Capital**) is a company incorporated in the Independent State.[267] Pertusio Capital was formed "as an investment advisory business and investment holding company".[268]

21.30 The company was incorporated on 1 July 2009, with Lars Mortensen as its sole Director and Shareholder.[269] Mr Mortensen is presently based in Australia and is not a compellable witness. At the request of the Commission he appeared before the Commission to give evidence.

21.31 In March 2010, Nathan Chang became a Director of Pertusio Capital, and on 16 November 2011 became a Shareholder.[270] Mr Chang is presently based in Australia and is not a compellable witness. At the request of the Commission he appeared before the Commission to give evidence.

21.32 Mr Vele, following work on the establishment of Kroton No. 2 Limited which later became Kumul Petroleum Holdings Limited (the Independent State's holding company for its participating interest in the PNG LNG Project)[271], left the public service to join Pertusio Capital with the goal of building "a strong investment advisory business".[272] From November 2011 until 31 March 2012, Mr Vele was a Director and Shareholder of Pertusio Capital.[273]

21.33 However, emails provided to the Commission by NRF indicate that Mr Vele, despite supposedly leaving Pertusio Capital, continued to use his Pertusio Capital email address

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[267] Statement of Nathan Chang dated 21 June 2021, WIT.0095.0004.0001 at 0002, [2].

[268] Statement of Lars Rune Mortensen dated 21 June 2021, WIT.0100.0002.0001 at 0003, [9].

[269] View Local Company (ipa.gov.pg).

[270] Statement of Nathan Chang dated 21 June 2021, WIT.0095.0004.0001 at 0002, [2].

[271] Statement of Nathan Chang dated 21 June 2021, WIT.0095.0004.0001 at 0002, [3].

[272] TS.1674.5 (21 June 2021)

[273] Affidavit of Dairi Vele sworn 29 April 2021, WIT WIT.0014.0009.0011 at 0018, [42].

in August 2013 in correspondence with Mr Latimer, NRF and Mr Mortensen.[274] Further, the necessary documents reflecting Mr Vele's cessation as shareholder and director were not lodged until April 2014.[275]

21.34 In August 2013, Mr Vele, as a member of the recently formed IPIC Bond Committee, requested that Mr Mortensen accompany him to meetings in Sydney with several international investment banks to discuss proposals to act as advisors and arrangers to the State in its endeavours to retain a significant shareholding in Oil Search.[276] Mr Mortensen stated that following his involvement with the bank meetings in August 2013 his role was limited to providing *ad hoc* advice to Mr Vele until February 2014, when he was brought back in to advise on the UBS Loan.

21.35 Mr Chang was absent from the Independent State in 2013 and was generally aware of but had limited involvement in the work performed by Mr Mortensen.[277] Mr Chang returned to the State in early 2014. Mr Chang described his role between February and March of 2014 as "assistance with transaction management in Port Moresby in support of the Treasury and under instructions from Acting Secretary for Treasury, Mr. Dairi Vele" in relation to the UBS Loan.[278]

21.36 However, there was no evidence of a formal contract ever being entered into between the State and Pertusio Capital.

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[274] NRF.001.001.2761; NRF.001.001.3597; NRF.001.001.3664; NRF.001.001.3683; NRF.001.001.3740; NRF.001.001.3794; NRF.001.001.3797; NRF.001.001.3808; NRF.001.001.3824; NRF.001.001.3840; NRF.001.001.3848; NRF.001.001.3858; NRF.001.001.3861; NRF.001.001.3877; NRF.001.001.3883; NRF.001.001.3886; NRF.001.001.3886; NRF.001.001.4040; NRF.001.001.4087; NRF.001.004.2455; NRF.001.004.2616; NRF.001.004.2995; NRF.001.004.3093; NRF.001.004.3098; NRF.001.004.3115.

[275] WIT.0155.0001.2966; WIT.0155.0001.2979.

[276] Statement of Lars Rune Mortensen dated 21 June 2021, WIT.0100.0002.0001 at 0005 [18], Exhibit II.

[277] Statement of Nathan Chang dated 21 June 2021, WIT.0095.0004.0001 at 0002, [7].

[278] Statement of Nathan Chang dated 21 June 2021, WIT.0095.0004.0001 at 0002, [10].

21.37 Pertusio Capital were included in the certificate of inexpediency, but when this was revoked were ultimately paid K1.25 million based on Mr Vele's quantum meruit assessment. This payment was paid directly by Pacific Legal Group to Pertusio Capital.[279]

21.38 There is a question about whether Mr Vele as a former director and shareholder should ever have been involved in approving Pertusio Capital's fees when he became a public official.

Pacific Legal Group

21.39 Pacific Legal Group Lawyers ('**PLG**') is a law firm based in Port Moresby, Papua New Guinea.

21.40 Mr John Beattie, the managing partner of PLG, appears to have been the primary point of contact with Mr Latimer and Mr Maladina, holding discussions with both to discuss the nature of the transaction and the role that PLG was to play in regard to same.[280] This was a pattern that was continued when it came to determining amounts to be paid to the relevant advisors and how invoices were to be issued to the Independent State. Mr Maladina testified that the three discussed an appropriate amount to be charged by Mr Maladina and how that would be presented to the Department of Treasury.

21.41 On 26 February 2014, Mr Moe of NRF sent an email to Mr Beattie, the Managing Partner of PLG and requested PLG provide an opinion, from a Papua New Guinea law perspective, on the proposed UBS Loan under the *Loans (Overseas Borrowings) (No. 2) Act*.[281] The email from Mr Moe contained a thread of emails including an advice offered by Mr Frecker of Ashurst. The understanding of Mr Beattie was that "*PLG was requested to review the advice from Ashurst and advice NRFA if the advice was in*

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[279] Letter from Nathan Chang to the Commission dated 19 January 2022, pp 2-3, WIT.0095.0006.0006.

[280] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0003 [13]).

[281] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0002 [7]) **[Exhibit RR]**; Affidavit in Response to Summons of Emmanuel Asigau sworn 9 June 2021 (WIT.0099.0006.0001 at 0002 [8]); NRF.001.001.5206.

order".[282] On 27 February 2014, Mr Beattie responded to Mr Moe and confirmed the advice from Ashurst was in order.[283]

21.42 Shortly after 26 February 2014, PLG was engaged by NRF following discussions between Mr Beattie, Mr Latimer and Mr Maladina.[284]

21.43 Messrs Beattie and Asigau identified two relationships that were key to PLG being engaged in the matter. The first was:

> *… a long standing association with Anthony Latimer and NRF. PLG has acted as agents for NRFA on various transactions and matters prior to and after the UBS loan transaction.*[285]

21.44 The second key relationship was with Mr Maladina, who is variously referred to as a Consultant with and client of PLG.

21.45 As PLG was engaged by NRF, and not the Independent State directly, a formal tender process under the PFMA was not required. No formal retainer or letter of engagement has been provided to the Commission. Mr Beattie in his sworn statement noted:

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[282] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0003 [9]) **[Exhibit RR]**.

[283] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0003 [12]) **[Exhibit RR]**; Affidavit in Response to Summons of Emmanuel Asigau sworn 9 June 2021 (WIT.0099.0006.0001 at 0003 [13]); NRF.001.001.5925.

[284] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0003 [14]) **[Exhibit RR]**.

[285] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0003 [15]) **[Exhibit RR]**.

I do not recall any formal retainer being signed with NRFA in respect of the transaction. The instructions were issued and accepted on the basis of the existing association between PLG and NRFA.[286]

21.46 Without a formal letter of engagement the scope of PLG's engagement is unclear. Mr Asigau understood that PLG was engaged to act as NRF's "*PNG legal advisors on the transaction*".[287] Mr Beattie, characterised the role played by PLG as "*town agents in certain aspects of the transaction …* ".[288] Records of correspondence provided to the Commission indicate that PLG took a more active role than town agents, liaising with lawyers for UBS, and advising NRF on compliance with laws of the Independent State.

21.47 By reference to the contemporaneous documents, PLG's role in the transaction included:

(a) between 1 and 6 March 2014, reviewing and providing commentary and advice from a Papua New Guinea law perspective transaction documents including but not limited to:

(i) Bridge Facility Agreement;

(ii) Security Trust Deed;

(iii) Specific Security Deed;

(iv) Participant Sponsorship Agreement;

(v) Payment Direction Deed;

(vi) Subscription Agreement; and

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[286] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0004 [17]) **[Exhibit RR]**.

[287] Affidavit in Response to Summons of Emmanuel Asigau sworn 9 June 2021 (WIT.0099.0006.0001 at 0003, [18]). **[EXHIBIT M]**

[288] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0003 [16]) **[Exhibit RR]**.

(vii) Board Resolutions.[289]

(b) liaising generally with NRF regarding same;[290]

(c) attending meetings with Secretary Vele, Mr Mortensen, Mr Chang, Mr Maladina, Mr Latimer and Mr Jilek, at the PLG offices to discuss same;[291] and

(d) on 5 March 2014, Mr Asigau delivering a letter dated 4 March 2014, enclosing copies of transaction documents to State Solicitor.[292]

21.48 Secretary Vele understood PLG to be local counsel for NRF. However, as NRF did not have an office in the Independent State at that time "*our dealings with them were both as external counsel – foreign counsel and domestic counsel*".[293]

21.49 On 20 March 2014, despite being engaged by NRF, PLG issued an invoice in the amount of K1,600,000.00 to Secretary Vele.[294] The invoice did not set out specific hours worked by individual lawyers, although it is unclear whether this was required by the Department of Treasury prior to making payment. When examined on the reasoning behind the decision to issue invoices to the Independent State for payment rather than NRF, Mr Asigau observed:

> *"It would be a little bit impractical for the client to pay our fees to Norton Rose in Australia and then for Norton Rose Australia to then send the money back to us. It*

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[289] Affidavit in Response to Summons of Emmanuel Asigau sworn 9 June 2021 (WIT.0099.0006.0001 at 0004, [22]). [EXHIBIT M]

[290] Affidavit in Response to Summons of Emmanuel Asigau sworn 9 June 2021 (WIT.0099.0006.0001 at 0004, [24]). [EXHIBIT M]

[291] Affidavit in Response to Summons of Emmanuel Asigau sworn 9 June 2021 (WIT.0099.0006.0001 at 0004, [24]). [EXHIBIT M]

[292] Affidavit in Response to Summons of Emmanuel Asigau sworn 9 June 2021 (WIT.0099.0006.0001 at 0005, [28]). [EXHIBIT M]

[293] TS254.1-4 (30 April 2021).

[294] WIT.0014.0015.0056.

would not make much sense to do that based on the effect issues that we would have."[295]

21.50 Of the K1.6 million paid to PLG by the Independent State, K1 million was paid directly to Mr Maladina[296] for his role in referring work to the firm. PLG was paid K600,000 for approximately 3 weeks work.

Mr Maladina

21.51 Mr Maladina was a consultant lawyer with PLG during the relevant period of the UBS Loan.[297] In his capacity as consultant, Mr Maladina was billed by PLG for use of office space, employed his own staff and paid for his own overheads.[298] Mr Maladina was also a source of referrals for and, at times, a client of PLG:

PLG has also had an association with Jimmy Maladina, who from time to time, has acted as a source of referred matters for various clients and as a consultant on transactions in which the firm was involved. Mr Maladina was at the time and is currently a client of PLG.[299]

21.52 Mr Maladina's involvement in the UBS transaction stemmed from a pre-existing professional relationship with Mr Latimer of NRFA. Mr Maladina described himself as Mr Latimer's "*point man*" and "*his contact in Port Moresby*".[300]

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[295] TS1572.21 (18 June 2021).

[296] TS2270.21 (28 July 2021).

[297] Affidavit in Response to Summons of Jimmy Maladina sworn 22 June 2021 (WIT.0101.0003.0002 at 0003 [3]) [EXHIBIT III]

[298] TS2501.26-30 (2 August 2021).

[299] Affidavit in Response to Summons of John Donald Beattie sworn 13 June 2021 (WIT.0110.0003.0001 at 0003 [15]) [Exhibit RR].

[300] TS2507.35 (2 August 2021).

In or around late [September][301] 2013 Mr Latimer approach[ed] me to see if we could work together if his firm North Rose Lawyers was successful in getting the mandate to work for the State of PNG on matters generally regarding the refinancing of the IPIC bonds from the Arabs.

During these discussions I recommended that his firm, North Rose Lawyers engage the legal services of PLG as the local firm to advice on PNG Laws.[302]

21.53 In his statement to the Commission, Mr Maladina described his role in the transaction:

As a consultant with PLG I attended meetings and reviewed documents on the UBS transaction in consultation with Norton Rose Lawyers before these advices were provided to the State of PNG.

… I verily believe that my role was purely providing legal advice in conjunction with PLG on the local laws and presenting the transaction documents before the State Solicitor for his advice and legal clearance.

This is the extent of the role I played as a consultant in the UBS transaction.[303]

21.54 Mr Beattie, appearing before the Commission described Mr Maladina's role " … as a consultant in a liaison type arrangement between the State agencies, UBS team, lawyers involved and other parties".[304]

21.55 Contemporaneous records of correspondence provided by PLG and NRF indicate that Mr Maladina's role included:

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[301] TS2510.4-6 (2 August 2021).

[302] Affidavit in Response to Summons of Jimmy Maladina sworn 22 June 2021 (WIT.0101.0003.0002 at 0004 [9-10]) [EXHIBIT III]

[303] Affidavit in Response to Summons of Jimmy Maladina sworn 22 June 2021 (WIT.0101.0003.0002 at 0004 [12-14]) [EXHIBIT III]

[304] TS.2461.17-18 (30 July 2021).

(a) reviewing and providing commentary on transaction documents to NRF through Messrs Beattie and Asigau[305] and providing approvals of draft transaction documents;[306]

(b) providing internal PLG advice on general transaction requirements;[307]

(c) coordination with Secretary Vele and others in relation to the State's conditions precedent;[308]

(d) briefing Prime Minister O'Neill on progress of the UBS loan together with Secretary Vele;[309]

(e) correspondence with and delivery of documents to the State Solicitor for his legal clearance;[310]

(f) correspondence with Ashurst and UBS regarding requirements for contract completion;[311]

(g) together with Nathan Chang attending to the logistics of the signing of various transaction documents by representatives of the Independent State;[312] and

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[305] NRF.001.001.7065; NRF.001.001.6871

[306] NRF.001.003.2935.

[307] NRF.001.001.7064.

[308] ASH.002.009.2313; NRF.001.001.6615.

[309] NRF.001.001.7070;

[310] NRF.001.004.3085; WIT.0099.0007.1100;

[311] ASH.002.009.2930.

[312] ASH.002.002.7438 at 7439; NRF.001.003.2932; NRF.001.003.4739

(h) notifying Prime Minister O'Neill that payments under the UBS Loan would be made monthly, requesting use of Oil Search dividends for use as first payment.[313]

21.56 While it might be the case that Mr Maladina was not formally employed as a lawyer he was still exerting some control over the advice issued by PLG. Mr Maladina's own evidence indicates that prior to PLG issuing a legal opinion or correspondence relating to "*other practical issues … as to matters on UBS transaction either John or Emmanuel always consults me before they move things or release them from the office, yes*".[314] However, as Messrs Beattie and Asigau were the lawyers on record, all correspondence was issued in their names.

21.57 Between 10 May 2013 and 31 December 2014, Mr Maladina was the holder of a restricted practicing certificate under the *Lawyers Act 1986*.[315] Mr Maladina gave evidence he was nominally employed by Twivey Lawyers for the purposes of his unrestricted practising certificate.[316] Mr Maladina does not appear to have provided any legal advice directly to NRF, rather issuing advice to a Partner of PLG who then provided it to NRF.

21.58 Evidence before the Commission indicates that in April or May of 2014, upon payment of its K1.6million invoice, PLG paid K1 million to Mr Maladina. Mr Maladina gave evidence that the payment from PLG would have been paid to either Flavalea Limited or Property and Investment Consultant Limited.[317] Mr Maladina is the sole Director and

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[313] NRF.001.004.3145.

[314] TS2517.37-39 (2 August 2021).

[315] Exhibit III.2 (WIT.0101.0004.0003); Exhibit III.3 (WIT.0101.0004.0004).

[316] TS2677.1-10 (6 August 2021).

[317] TS2503.27 (4 August 2021).

Shareholder of Flavalea Limited[318] and a director and shareholder of Property and Investment Consultants Ltd.[319]

21.59 This payment has been described as being both a referral fee and a fee for services. Mr Maladina in his appearance before the Commission noted that the figure was arrived at following discussions with Messrs Latimer and Beattie. Mr Maladina estimates his fees were between K900,000 and K1.2 million: " … *we agreed on a fixed figure, a ball park figure of a million kina and that is why I rendered that fee to Pacific Legal Group. I have no problems I believe I earned that money*."[320]

21.60 Mr Maladina gave evidence that his hourly rate in 2013/2014 was between K1,000 and K,1500 per hour.[321] Mr Maladina stated that he no longer holds records of the time spent on the matter. However, it appears accurate time records were not kept as Mr Maladina indicated " … *I do estimations sometimes and I put it on a weekly basis into the record …* ".[322]

KPMG

21.61 KPMG was initially contacted on 26 February 2014 by Mr Latimer of NRFA with a proposed scope of work. Mr Latimer noted:

> *"In essence the State is requesting KPMG to advise the State on a monetised collar currently being contemplated by the State."*[323]

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[318] View Local Company (ipa.gov.pg).

[319] View Local Company (ipa.gov.pg).

[320] TS2511.35-40 (4 August 2021).

[321] TS2550 (4 August 2021).

[322] TS2513.23-24 (4 August 2021).

[323] Email A Latimer to M Blake (part of broader internal KPMG email chain), 26 February 2014, PNG State – Proposed scope of work, KPM.0001.0001.0804 at 0806.

21.62 Later that day Mr Blake advised Mr Latimer that Mr David Heathcote the Head of KPMG's Transaction Services business would lead the KPMG team on this matter.[324]

21.63 Mr Mortensen of Pertusio Capital was also involved in instructing KPMG and gave evidence that KPMG was engaged because of:

> *… the need to have the financial modelling of the collar loans validated from the logic and accuracy plus also validating some of the work that had been done in relation to pay-off diagrams. Pay-off diagrams being what happens in the Oil Search share price become XYZ during the tenure. So, KPMG's involvement there was to provide that sign off or as to logic and accuracy of the modelling as well as some analysis of the consequences of various collars as well as various exposed outcomes.*[325]

21.64 On 28 February 2014, representatives of KPMG, Mr Mortensen and Mr Latimer attended the UBS offices in Sydney to review the collar loan facility.[326]

21.65 On 4 March 2014, KPMG issued a formal engagement letter to Secretary Vele, later executed on 6 March 2014.[327] The engagement letter identified KPMG's scope of work as:

(a) reviewing the terms of the Collar and associated bridge loan to provide a summary to the Department of Treasury; and

(b) providing analysis of:

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[324] Email M Blake to A Latimer (part of broader internal KPMG email chain), 26 February 2014, RE: PNG State – Proposed scope of work, KPM.0001.0001.0804 at 0806.

[325] TS2662.42-TS2663.7 (3 August 2021).

[326] Email C Roberts to A Latimer, 28 February 2014, RE: KPMG meeting, NRF.001.001.6562; Email V Casamento to J Ng, 28 February 2014, RE: Finance docs – UBS Bridge Facility NRF.001.001.6609; KPMG engagement letter executed by Mr Vele, 6 March 2014, KPM.0001.0001.0087; TS2662.42 – TS2663.7.

[327] KPMG engagement letter executed by Mr Vele, 6 March 2014, KPM.0001.0001.0087.

(i) any downside price protection imbedded in the Collar;

(ii) any potential value foregone imbedded in the Collar under various agree scenarios;

(iii) commercial and economic risks associated with the Collar;

(iv) the effective cost of financing for the Department of Treasury implied through the Collar under various agreed scenarios; and

(v) the pricing mechanics of the Collar and comment on the comparison to "fair market value" (taking into account notional size and market liquidity).

21.66 KPMG was required to complete the above scope of work between 28 February 2014,[328] when they were notified they would be engaged, and 6 March 2014 when they provided their final advice.[329] Internal KPMG correspondence indicates that, given the short time frame, their advice was limited to a high level commentary of the UBS Loan.[330]

21.67 The Independent State paid KPMG AUD166,221.00 for the work completed.[331] These funds were paid out under the Bridge Facility Agreement – Drawdown Notice.[332]

21.68 No public tender took place as required by the PFMA. The Commission has not been provided with evidence of the criteria on which KPMG was evaluated prior to their engagement. No evidence has been provided to the Commission that inquiries were made with any other financial advisory firm.

22. TOR 1(s): Which individuals or organisations benefitted from the UBS Loan or related transactions.

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[328] KPM.0001.0001.0800.

[329] KPM.0001.0001.0197; KPM.0001.0001.0198.

[330] NRF.001.002.5425.

[331] KPM.0001.0001.0071; NRF.001.002.7826.

[332] Bridge Facility Agreement – Drawdown Notice, WIT.0015.0002.1265 at 1266.

22.1 The following parties benefited in the ways set out below. The notion of 'benefit' does not connote inappropriateness unless otherwise stated.

22.2 **Oil Search.** The transaction enabled it to buy the PAC LNG companies. However, it had alternative plans to raise the finance necessary for these acquisitions. The UBS Loan and associated placement of shares with the State was therefore not its only route into PRL-15.

22.3 **UBS**. UBS amply benefited from the UBS Loan through fees charged to the State, the payment of interest and inappropriately from the unfair pricing of the loan and the misleading *nil premium* representations. Its fees for the March 2014 transactions amounted to AUD28.4 million. UBS also benefited from the refinancings in December 2014 and February 2016 (although it did not charge fees for those transactions) as well as from the ultimate sale of the shares in September 2017. Its excessive or overcharging amounts to AUD180 million as explained in detail by Brattle which should be repaid.

22.4 **The State's advisers.** The State's advisers received significant fees for their work on the transaction. Some of these fees appear to be out of proportion to the work done by the advisers concerned:

22.5 **KPMG** were paid AUD166,221.

22.6 **NRFA** were paid AUD600,000.

22.7 **Pacific Legal Group** were paid K1.6 million. At the time, this was about AUD678,000 and therefore more than NRFA was paid for a lesser role in the transaction. Of this sum K1 million was paid to Jimmy Maladina. There is no evidence of work by him that would justify a fee of this amount although he sought to explain it by saying that it reflected a longer period of work that just work on the transaction. He said that he agreed his fee with Mr Latimer of NRFA and Mr Beattie of Pacific Legal Group.

22.8 **Pertusio Capital** was paid K1.25 million.

22.9 Mr Vele was authorised by the State to pay these fees using a quantum meruit assessment. Mr Vele admitted in his evidence that he did not understand what this required and simply paid the advisers the fees that they had requested. For Pacific Legal Group, there was no

fee agreement and no information provided with the invoice to explain how it was calculated yet Mr Vele approved it without question. In our submission, the fees seem to have been agreed without reference to time spent on the matter. Mr Vele failed to assess them on a proper quantum meruit basis. In any event we repeat our earlier submission about the unfortunate perception of Mr Vele, as a public official, personally authorising payment to his former business partners, when others could have done so.

22.10 **Ashurst**. Ashurst provided legal advice to UBS but their fees were paid by the State by being included in the Bridge Loan. Ashurst were paid AUD812,500.

23. TOR: 1(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?

23.1 Brattle have assessed the total loss to the State as AUD340.3 million. This is made up of the AUD336.3 million that they identified in their third report and a further AUD4 million of professional fees incurred by KPHL of which Brattle was unaware until Mr Sonk gave evidence of this.

23.2 The principal loss of AUD336.3 million arises as follows, with numbers in brackets showing payments to the State:

Item	AUD million
Bridge Loan interest payments	22.0
Dividends	(23.2)
March 2014 Bridge Loan extension fee	5.0
Funds from Letter of Credit	270.3
Front Collar Additional Consideration Amount	97.4
Unwind payment from February 2016 Collar Loan	(35.1)

Total	**336.3**

23.3 The loss can also be shown in another way, looking at what it would have cost the State to hold the Oil Search shares if the transactions with UBS had been fairly priced. In Brattle's opinion, the State actually paid a net AUD80.9 million to UBS, but if the transactions had been fairly priced the State would have received AUD94.0 million from UBS. Thus the transactions in aggregate transferred AUD174.8 million of value from the State to UBS.

Item	AUD million
Purchase Oil Search shares at AUD8.20	1,225
Fair value of the UBS transactions	(94.0)
Value transferred to UBS	174.8
UBS Bridge Loan fee	11.7
UBS advisory fees	16.5
Other fees	3.1
Sell Oil Search shares at AUD6.70	(1000.9)
Total	**336.3**

23.4 If the State had not sought to refinance the loans in February 2016, and simply allowed them to expire according to their terms, the State's loss would have reduced by between AUD74.4 and AUD75.1 million, giving a total loss of between AUD261.2 million and 261.9 million plus whatever proportion the AUD4 million of KPHL professional fees would still have been incurred.

23.5 If the State had allowed the February 2016 loan to expire according to its terms rather than closing it out in September 2017, the loss to the State would have been AUD51 million less, giving a total loss of between AUD285.3 million plus whatever proportion the AUD4 million of KPHL professional fees would still have been incurred.

23.6 If the State had not entered into the UBS loan and avoided these losses, and those funds could have been put into an operational sovereign wealth fund, from Brattle's fourth report, it would appear that they would have generated a return of between 2% and 9%.

Sovereign Wealth Fund

23.7 Evidence before the Commission indicates that the establishing legislation for a Papua New Guinea Sovereign Wealth Fund has already been passed by Parliament. However, few steps have been taken in the past 7 years to implement that legislation and get a Sovereign Wealth Fund operational.

23.8 The Prime Minister, the Honourable James Marape MP gave evidence before the Commission that it is his Government's policy to make the Sovereign Wealth Fund operational when possible. [333] The Prime Minister noted however that administrative requirements for the establishment of the Trust and the appointment of the Sovereign Wealth Fund Board have not yet been attended to. A priority for the State was ensuring that it "set up a solid structure for the Sovereign Wealth Fund". [334]

23.9 The Prime Minister's predecessor, Mr O'Neill, in his evidence to the Commission also endorsed the State taking steps to implement the Organic Law on Sovereign Wealth Funds. [335]

23.10 In this regard, the Commission received important evidence from Professor Sir Tim Besley and Mr David Murray AO. Professor Besley is presently a Professor at the London School of Economics with expertise in economic policy formulation. Mr Murray has had a significant career in the Australian banking industry culminating in 13 years as the CEO of Commonwealth Bank of Australia and being later appointed the inaugural Chair of the Australian Sovereign Wealth Fund (called the Future Fund) and he also served as Chair of the International Forum of Sovereign Wealth Funds.

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[333] Transcript 31 January 2022 of the Prime Minister the Hon James Marape MP, TS3539.18.

[334] Transcript 31 January 2022 of the Prime Minister the Hon James Marape MP, TS3541.37-38. .

[335] Transcript, Peter O'Neill, 7 February 2022, p 3752.

23.11 Professor Besley and Mr Murray agreed that the Sovereign Wealth Fund did present an opportunity for the State. However, they did note some potential challenges.

23.12 Mr Murray noted that significant amount of time had passed since the Organic Law on the Sovereign Wealth Fund was first approved by Parliament and that the position of the State had changed. In 2015, it was customary for countries in the position of Papua New Guinea for money to flow into a stabilisation fund which would smooth the budget due to the fluctuating nature of commodity prices. Then money would flow from that fund into a savings fund. [336]

23.13 Since that time a number of complicating factors have arisen in Papua New Guinea including:

(a) Government debt as a proportion of GDP has risen significantly;

(b) it has a B- credit rating implying a very high interest rate premium; and

(c) it has a real bond rate of 6%.[337]

23.14 Each of these factors, Mr Murray, noted would necessitate the Government first prioritising fiscal consolidation, repayment of debt and restating fiscal policy. [338]

23.15 Both Professor Besley and Mr Murray observed that the position of the State's institutional framework on the corruption index needed to be addressed to ensure international credibility.

23.16 Professor Besley also noted that to improve overall condition it would be key for the State to prioritise developing a strong private sector to develop the economy across the board but that this could not be achieved in the absence of effective management of public

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[336] Transcript 10 February 2022, TS3990.5-10.

[337] Transcript 10 February 2022, TS3990-3991.

[338] Transcript 10 February 2022, TS3991.6-7.

resources. Merely creating a SWF will not fix these problems. [339] Professor Besley also noted the need to determine whether the establishment of a SWF would result in the best return on assets compared to improving the fiscal position by using the resources in the State's possession more wisely.

23.17 Speaking more broadly on the topic of corruption Professor Besley said the State's place on the corruption index is a reflection of the inadequate structures in place for transparency. Professor Besley, while emphasising the need for the State to develop a bespoke and responsive approach to corruption[340] best suited to address its needs, noted that properly functioning Parliamentary Committees had an important role to play in providing oversight and scrutiny. [341]

23.18 To negative perceptions of corruption Mr Murray suggested the appointment of a panel of experts under the auspices of the IMF, World Bank or Asian Development Bank to review the formula under which funds would flow from the State's budget to the SWF's stabilisation fund or savings fund. This panel could be charged with recommending:

(a) how funds flow from the budget into normal budgetary expenditure;

(b) defining how SoE's should operate in terms of returns, dividend payments, new investments and indebtedness; and

(c) how given all of that funds would flow into the stabilisations funds or savings funds. [342]

Conclusion

23.19 Ultimately, the question of whether the Commission recommends the establishment of the Sovereign Wealth Fund is a matter for you Commissioners. It is the view of Counsel

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[339] Transcript 10 February 2022, TS3991-3992.

[340] Transcript 10 February 2022, TS3993.

[341] Transcript 10 February 2022, TS3994.16-17.

[342] Transcript 10 February 2022, TS3996.

Assisting the Commission that the State is best served from the Sovereign Wealth Fund becoming operational as soon as practicable. But we do rate the impact of perception of official corruption on the capacity of the State to obtain investment and loans.

24. TOR: 1(u) The history of the Elk/Antelope PDL and PRL; (v) The approvals process for PRL-15; and (x) Which entities have interests in Elk-Antelope PRL-15 since its inception

24.1 Before setting out the history of PRL 15, it is relevant to refer to the entities and people involved in the companies that held interests in it.

24.2 Mr Carlo Civelli is a Swiss citizen,[343] residing at the material time in Singapore and later Monaco.[344] Mr Civelli founded Clarion Finanz AG, an asset management services firm incorporated in Switzerland.[345]

24.3 Mr Philippe Mulacek is a US citizen[346], who considers himself a resident of Singapore.[347] Mr Mulacek founded InterOil and was its CEO until around 6 May 2013.[348] InterOil was a Yukon Territory, Canadian corporation.

24.4 The nature of the business relationship between Mr Civelli and Mr Mulacek was the subject of a decision of the High Court of Singapore.[349] The relevance of the Singapore proceeding is that on either party's case, Mr Civelli had *de facto* control of InterOil shares and money from 2002 to 2014.[350] Through subsidiaries, InterOil applied to be granted the full title to PRL 15 in 2009. It later divested its interest in PRL 15. At the same time that

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[343] *Civelli v Mulacek* [2019] SGHC 182, [4].

[344] Ibid [4].

[345] WIT.0030.0004.0010 at 5.

[346] *Civelli v Mulacek* [2019] SGHC 182, [4].

[347] *Civelli v Mulacek* [2019] SGHC 182, [4].

[348] Cf Form 6-K filed with the SEC dated 6 May 2013 (link) and Form 6-K filed with the SEC dated 7 May 2013 (link).

[349] *Civelli v Mulacek* [2019] SGHC 182. Note that appeals were dismissed by the Court of Appeal of Singapore in *Mulacek v Civelli* [2020] SGCA 59.

[350] *Civelli v Mulacek* [2019] SGHC 182, [4]–[7].

Mr Civelli had *de facto* control of InterOil shares, he also controlled a group of companies which became known as the PAC LNG companies. The PAC LNG companies held interests in PRL 15 from 2009 until mid-2014 when those interests were sold.

24.5 Given that Mr Civelli had control of InterOil shares and the PAC LNG companies, much of the proceeds of sale of PRL 15 interests held by InterOil and the PAC LNG companies would have been received by entities under Mr Civelli's control.

24.6 A notable feature of the evidence in this Commisison is that Mr O'Neill and to a lesser extent Mr Vele wished to distance themselves from any dealings with Mr Civelli. In the case of Mr O'Neill this involved false statements to the commission that he had never met or spoken to Mr Civelli in 2012/3 when Mr Maladina said he had done so. Critically the Commission can find that *Mr O'Neill had spoken with Mr Civelli about Elk-Antelope.* If Mr O'Neill's denials were false as we submit they were, the question is why Mr O'Neill went to such lengths to deny it: a the very least it raises suspicions that such conversations may not have involved legitimate business dealings.

Issue of PRL 15 by the State in 2010

24.7 A Petroleum Retention Licence (**PRL**) allows the licence holder(s) to carry out work to evaluate the commercial and technical options for developing the underlying resource (including whether it is worth developing at all).[351] Essentially a PRL will be granted where an oil or gas field is known to exist, but its commercial viability is not yet established.[352]

24.8 PRL 15 covers a gas field in the Gulf Province called Elk-Antelope. Commercial development of the Elk-Antelope field has been called the Papua LNG Project (not to be confused with the PNG LNG Project).

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[351] Department of Petroleum and Energy, *Petroleum Policy Handbook* (November 2005, <https://petroleum.gov.pg/wp-content/uploads/2020/02/PNG-Petroleum-Policy-Handbook.pdf>) page 11 [2.6].

[352] *Oil and Gas Act 1998*, s 39(1); Department of Petroleum and Energy, *Petroleum Policy Handbook* (November 2005, <https://petroleum.gov.pg/wp-content/uploads/2020/02/PNG-Petroleum-Policy-Handbook.pdf>).

24.9 In 2005, InterOil entered an indirect participation agreement (and amendments of the same) (**IPI**) with various investors. The purpose of the IPI was for InterOil to raise funds for its exploration drilling program in the State. Under the IPI, the investors paid money to InterOil in return for InterOil granting the investors a right to convert their share in the IPI into a direct interest in the licences covered by the IPI (including what is now PRL 15 which was ultimately issued out of Petroleum Prospecting Licences (**PPL**) 237 and PPL 238). Clarion Finanz AG was a party to the IPI as an investor.[353]

24.10 On 5 August 2009, SPI (208) Limited (a PNG incorporated subsidiary of InterOil) (**SPI 208**) lodged an application to be granted the title to PRL 15.[354]

24.11 In August 2009, SPI (208) and SPI (220) Limited (another PNG incorporated subsidiary of InterOil) agreed to sell to Pacific LNG Operations Limited BVI, a British Virgin Islands Company, (**PAC LNG Operations**) a 2.5% interest in PRL 15.[355] The transfer was subject to Papua New Guinea Ministerial approval.[356]

24.12 The State subsequently issued PRL 15 to SPI 208 on 30 November 2010.[357]

24.13 In June 2011, SPI (208) agreed to transfer a 2.5% interest in PRL 15 to Pac LNG Operations. Approval of the transfer pursuant to the *Oil and Gas Act 1998* was approved on 14 December 2011 and the transfer was entered into the register the following day.[358]

24.14 On 21 May 2012, PAC LNG Operations transferred its 2.5% interest to its subsidiary, PAC LNG Investments Limited (**PAC LNG Investments**), a company incorporated in Papua New Guinea.[359]

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[353] WIT.0042.0007.0766, page 37.

[354] WIT.0042.0005.0009, page 3.

[355] Referred to in Instrument of Transfer of PRL 15 dated 11 June 2011, WIT.0042.0003.0542, page 12.

[356] WIT.0042.0003.0542, page 13.

[357] Referred to in Amendment No. 2 to Amended and Restated Indirect Participation Interest Agreement dated 24 July 2012, WIT.0042.0007.0875, page 3, Recital B.

[358] WIT.0042.0003.0542, page 9.

[359] WIT.0042.0007.0043.

24.15 The IPI was amended and restated on 24 July 2012.[360] The list of investors is different from the IPI explained above. Relevantly, PAC LNG Operations is listed as an investor in the amended and restated IPI.[361]

24.16 On 26 September 2012, SPI 208 and PAC LNG Operations entered into an agreement entitled Elk/Antelope Joint Venture Operating Agreement (**PRL 15 JVOA**). The PRL 15 JVOA provided for the rights and obligations between the PRL 15 JVOA parties in developing PRL 15, including the sharing of costs and profits. It provided for SPI (208) to be the operator at the date of the agreement.

24.17 On 25 March 2013, SPI (208) transferred further interests totalling 20.33% to PAC LNG companies.[362]

History of Oil Search's negotiations regarding PAC LNG and PRL 15

24.18 Mr Botten's evidence was that during most of 2011 and early 2012, the State and Minister Duma publicly admonished InterOil for its recalcitrance in moving the PRL 15 development ahead. In May 2012, Minister Duma formally issued a 120 day notice to InterOil in respect of breaches of the project agreement.[363] Mr O'Neill's evidence was similarly that the government was concerned that the project was not being developed.[364]

24.19 Mr Botten's said that, in mid-May 2012, against the backdrop of a rapidly deteriorating relationship between InterOil and the PNG Government, Oil Search was made aware that InterOil was running a competitive bidding process for the sale of its interest in PRL 15.[365]

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[360] WIT.0042.0007.0875.

[361] WIT.0042.0007.0875, pages 3–4.

[362] (a) 6.75% interest in PRL 15 to PAC LNG Assets Limited; (b) 5.1% interest in PRL 15 to PAC LNG International Limited; (c) 5% interest in PRL 15 to PAC LNG Overseas Limited; and (d) 3.485% interest in PRL 15 to PAC LNG Holdings Limited.

[363] Further statement of Peter Botten dated 27 January 2022 at [51] PNG government still aims to deliver InterOil project - Keith Jackson & Friends: PNG ATTITUDE

[364] Transcript of evidence of Peter O'Neill at [3763] (7 February 2022).

[365] Further statement of Peter Botten dated 27 January 2022 at [51] (WIT.0021.0006.0001).

24.20 During the period from 2012 to 2014 Oil Search engaged in negotiations with several parties, including InterOil and the Pac LNG companies, concerning a possible acquisition of an interest in PRL 15.[366]

24.21 The negotiations culminated in a joint bid made by Oil Search and Total for either 100% or 85% interest in PRL 15 in August 2012, with revised joint bids made throughout 2013 until the announcement in early December 2013 by InterOil that Total were the successful bidder of PRL-15, which resulted in the Total SPA. In accordance with agreements that were already in place, Oil Search proceeded with negotiations to acquire a 5% (net) interest in PRL 15 from InterOil and a 10% (net) interest in PRL 15 from Total. Mr Botten says negotiations between InterOil and Oil Search stalled in January 2014 because InterOil insisted on increased consideration terms.[367]

24.22 In early February 2014 negotiations between Oil Search and the Pac LNG companies regarding PRL-15 recommenced when Mr Civelli, on behalf of the PAC LNG Companies, approached Oil Search in early February 2014.[368] These negotiations led to the transaction by which Oil Search acquired those companies. Mr Botten's evidence was:[369]

> *During these negotiations Mr Civelli said to me words to the effect that the Prime Minister and PNG Government supported the transaction. By this I understood Mr Civelli to mean that the Prime Minister and the PNG Government had no objection to Oil Search acquiring a stake in PRL 15 by acquiring the Pac LNG companies if such a transaction were to eventuate. This was consistent with discussions I had with Prime Minister O'Neill in which he supported the engagement of Oil Search with the Pac LNG companies as a means to address an impasse that had arisen between the Pac LNG companies and InterOil as a result of a reluctance on Mr Civelli's part to sell the Pac LNG companies to InterOil*

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[366] Further statement of Peter Botten dated 27 January 2022 at [55] (WIT.0021.0006.0001).

[367] Further statement of Peter Botten dated 27 January 2022 at [55] (WIT.0021.0006.0001).

[368] Further statement of Peter Botten dated 27 January 2022 at [69] ,WIT.0021.0006.0001.

[369] Further statement of Peter Botten dated 27 January 2022 at [56], WIT.0021.0006.0001.

24.23 Mr Botten says there would have been many discussions between representatives of Oil Search and representatives of the PNG Government about PRL 15 prior to 22 February 2014. A common subject in those discussions was concern about the lack of progress and Oil Search's interest in acquiring an interest in PRL 15.[370]

24.24 Mr O'Neill denied any knowledge that Oil Search wished to raise money in issuing shares to the State to acquire interest in PRL15 or that he had any dealings with Mr Civelli.[371] Mr O'Neill said the basic knowledge that the government or the leaders had was that Mr Mulacek was the principal behind InterOil.[372] But Mr Maladina subsequently gave evidence that Mr O'Neill and Mr Civelli, in the company of Mr Mulacek, had met on at least two occasions.[373]

24.25 On 25 February 2014, Oil Search agreed to purchase the PAC LNG companies that together held 22.835% in PRL 15 for USD 900 million.[374] In its 2014 annual report, Oil Search explained that it funded this purchase by the sale of shares to the State.[375] Mr O'Neill's evidence is that there was never any discussion about Oil Search using the funds raised from the issue of the shares to purchase the PAC LNG Companies or an interest in PRL 15 and that he that he never discussed with Mr Botten the purchase price for the shares which were purchased as part of the UBS deal.[376] You would reject this evidence.

24.26 Mr Botten says Oil Search acquired the Pac LNG companies, rather than a direct participating interests in PRL 15, as this provided the owners of the Pac LNG companies with a complete exit (which was something that all parties wanted), meaning that any pre–emption rights were not triggered. It also allowed Oil Search, through its ownership of the Pac LNG companies, to became a party to the existing PRL 15 JVOA.[377]

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[370] Further statement of Peter Botten dated 27 January 2022 at [51] - [52], WIT.0021.0006.0001.

[371] Transcript at 3770 - 3771 (7 February 2022)

[372] Transcript of evidence of Peter O'Neill at [3763] (7 February 2022)

[373] Affidavit of Jimmy Maladina dated 9 February 2022, WIT.0101.0005.0001.

[374] Oil Search ASX release 'Oil Search to acquire interest in PRL 15' (27 February 2014, link).

[375] Oil Search Annual Report 2014 (link), page 73.

[376] Transcript of evidence of Peter O'Neill at [3764] (7 February 2021)

[377] Further statement of Peter Botten dated 27 January 2022 at [59], WIT.0021.0006.0001.

24.27 On 28 February 2014, SPI (208) Limited agreed to transfer 40.127529% of its interest in PRL 15 to SPI (200) Limited.[378] The sale price was a nominal price of PGK 10. The agreement was approved by the Honourable Nixon Duban MP (then-Minister for Petroleum and Energy) on 6 March 2014 and entered into the register on 7 March 2014.[379]

24.28 Accordingly, the Commission understands that PRL 15-ownership as at 7 March 2014 was as follows:[380]

(a) 77.165% held by InterOil subsidiaries:

(i) SPI (208) Limited – 35.483871%;

(ii) SPI (200) Limited – 40.127529%;

(iii) SPI Security Holdings Limited – 1.5536%;

(b) 22.835% held by Oil Search through the PAC LNG Companies.

24.29 As a result of Oil Search acquiring the PAC LNG companies' interest on 25 February 2014, the Total SPA could not be completed because the Total SPA was contingent on InterOil acquiring the minority interests in PRL 15 from the PAC LNG companies. InterOil and Total subsequently entered into another transaction, announced on 26 March 2014, whereby a subsidiary of the Total SA Group agreed to purchase an InterOil subsidiary that held a 40.1% participating interest in PRL 15 for USD 540.1 million.

24.30 While Oil Search disputed the validity of Total acquiring 40.1% of PRL 15 through purchasing SPI (200) Limited and the dispute was referred to an arbitration sitting in London before the International Court of Arbitration of the International Chamber of Commerce, the Total SPA was subsequently given effect by instrument of transfer and registration with the State.

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[378] WIT.0042.0003.0542, page 3.

[379] WIT.0042.0003.0542, page 1.

[380] WIT.0042.0003.0542, page 6.

25. TOR (w): The scale and quantity of the PRL 15 resource

25.1 The scale and quantity of the PRL 15 resource has been queried.

25.2 For example, the Commission was provided with a report known as the "Sarkal report" which concluded that the Elk-Antelope gas field, contained within PRL 15, may contain no more than 0.52TCF[381] of recoverable gas.[382]

25.3 The Commission summonsed various relevant reports and engaged an independent expert, Dr John Hornbrook from DeGolyer and MacNaughton, to give his opinion on the reasonableness of the evaluations of the gas resource in the reports and provide a review of the Sarkal report.

25.4 Dr Hornbrook concluded that, in general, the various estimates of raw gas resources associated with the Elk-Antelope gas field are consistent and that variations in estimates over time are in line with variation that should be expected with additional data and / or additional analysis. Dr Hornbrook noted that the "best estimate" of gross raw gas resources had ranged from 9.08TCF (31 December 2009), to 6.60TCF (31 December 2011), to 7.00TCF (31 December 2013), to 6.80TCF (30 June 2016), to 6.35TCF (31 October 2021). Dr Hornbrook noted that, while he did not have sufficient data to independently review the specific calculations, the evaluations followed industry standard procedures.[383]

25.5 In relation to the Sarkal report, Dr Hornbrook disagreed with the report's conclusion of a "gas initially-in place" of 0.52TCF. In Dr Hornbrook's view, this was likely to be a significant underestimate.[384]

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[381] TCF or TSCF = trillion cubic feet.

[382] WIT.0148.0001.1068, page 1.

[383] WIT.0148.0001.0001 at .0002, pages 1-2.

[384] WIT.0148.0001.0001 at .0002, pages 2-5.

25.6 Oil Search also engaged an expert, Gaffney Cline & Associates (**Gaffney Cline**), to comment on the Sarkal report. The Gaffney Cline report also concluded that the Sarkal report's gas initially-in place estimate of 0.52TCF was unrealistically low.[385] The Gaffney Cline report concluded that there was nothing in the Sarkal report which caused it to change Gaffney Cline's opinion that the best estimate of recoverable raw gas of the Elk-Antelope field is 6.8TCF as of 30 June 2016.[386]

25.7 It is accordingly submitted that there has been no mis-representation of the size of the PRL 15 gas resource estimated in the various reports (other than the Sarkal report).

26. TOR (y): Which individuals or organisations benefitted from the 2014 sale of PAC LNG Group of companies to Oil Search Limited and related transactions

26.1 The State borrowed more than AUD 1.2 billion to fund its purchase of 149.39 million Oil Search shares at AUD 8.20 per share. Oil Search paid USD 900 million of that to various entities. In effect, the State's purchase of Oil Search shares funded Oil Search's purchase of PAC LNG companies, which in turn went to the beneficial owners of the entities listed below, which includes the PAC LNG companies.

26.2 Shortly after 12 March 2014, Oil Search made the following payments from a USD account it held with Westpac Bank PNG Limited:[387]

Payment to	Beneficiary	Amount (USD)	%of total
IPWI Partners LP	IPWI Partners LP	AUD 6,099,283.82	0.677698
John Mack	John J Mack	AUD 39,175,352.87	4.352817

[385] Gaffney Cline, 'Comments on Sarkal Energy Report', 1 February 2022, p 4 [12], OSL.5030.0001.0001 [12].

[386] Gaffney Cline, 'Comments on Sarkal Energy Report', 1 February 2022, p 4 [12], OSL.5030.0001.0001 [7].

[387] OSL.0019.0006.0243; OSL.0019.0006.0515.

Bruce Hendry	Sawmill Trust	AUD 39,175,352.87	4.352817
Pacific LNG Operations Limited	Pacific LNG Operations Ltd	AUD 582,425,889.33	64.7139
Aton Select Fun Ltd	Aton Select Fund Limited	AUD 186,026,644.12	20.66963
Papua's Crude Investment	Papua's Crude Investment	AUD 15,665,401.61	1.740600
Polygon PNG LP	Polygon PNG LP	AUD 30,385,988.50	3.376220
King & Spalding LLP	King & Spalding LLP	AUD 498,653.36	0.055406
Baker Botts	Baker Botts	AUD 335,000.00	0.037222
Maples and Calder	Maples and Calder	AUD 96,087.37	0.010676
Leahy Lewin Nutley Sullivan Lawyers	Pacific LNG Operations Ltd	AUD 116,346.15	0.01293
TOTAL		**AUD 900,000,000.00**	**100**

Brattle's Opinion

26.3 Brattle considered whether the price paid by Oil Search for the interest in PRL 15 was objectively justifiable, assuming an arm's length transaction between the buyer and seller. Brattle noted that the temporal proximity of the Total SPA and Oil Search purchase

indicated that they might expect the two transactions to have a similar price, having taken account of the differing sizes of the interests acquired.[388]

26.4 Brattle noted that the sums paid were structured differently. Both had a fixed payment and then a variable component depending on the scale of the resource. Oil Search's fixed payment was greater than Total's but its variable payment less.

26.5 Which price would ultimately be best would depend on the scale of the resource. If it were 7Tcf, then the prices paid were about the same. If the resource were smaller than that figure, Oil Search would have paid more. The position would reverse if the resource was greater than 7Tcf.

26.6 Brattle concluded that they had not seen any evidence to suggest that the price paid by Oil Search was not justified and that the prices paid by Oil Search and Total were similar.[389]

26.7 In February 2014, Oil Search estimated that the Elk/Antelope gas field contained 5.3Tcf. If that estimate was accurate, Oil Search would pay more than Total. According to Brattle 1, at that volume, Oil Search would pay USD0.74 per mcfe whereas Total would pay USD0.47.

26.8 The strengths of Total and Oil Search's negotiating positions would have been different. This is also likely to have been reflected in the prices ultimately agreed.

27. TOR (aa) the rationale as to why the State/Kumul Petroleum Holdings Limited sold the Oil Search shares in 2017 and (bb) whether legal and administrative processes were followed in the sale of the Oil Search shares?

The December 2014 Novation

27.1 After the State entered into the UBS loan to acquire the Oil Search shares on 12 Mach 2014, various other associated transactions occurred in the intervening period leading to the ultimate disposal of the shares in September 2017.

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[388] Brattle 1, page 67, Exhibit VV, WIT.0132.0001.0002.

[389] Brattle 1, page 71, Exhibit VV, WIT.0132.0001.0002.

27.2 The State was never able or intended to be the long term borrower from UBS, although it needed to be the initial borrower and shareholder in Oil Search. It could not have done so without breaching its debt to GDP ratio and it always intended to transfer the loan to another entity to remove the loan from the State's balance sheet. As the loan was connected with the purchase of the Oil Search shares, it followed that the State's rights in relation to the Oil Search shares should be transferred to the same entity.

27.3 On 2 September 2014, the NEC issued decision 264/2014,[390] pursuant to which the NEC acknowledged the establishment of NPCP Holdings Limited (which later changed its name to KPHL) as a wholly owned subsidiary of IPBC. It directed that all petroleum assets of the State, including the Oil Search shares held by the Department of Treasury, be consolidated into NPCP Holdings Limited and NPCP Kroton.

27.4 By December 2014:

(a) the UBS Bridge Facility component of the UBS loan had been novated from the State (NPCP Kroton) to KPHL;

(b) the Bridge Facility component of the UBS loan had been discharged by repaying most of it through letters of credit and converting the remainder of the loan into a collar loan;

(c) the Oil Search shares held by NPCP (Kroton) had been transferred to NPCP Holdings (which became KPHL).

27.5 In short, both the asset (the shares) and the debt became the concern of NPCP (KPHL).

NPCP/KPHL are reluctant shareholders

27.6 Simply put KPHL never had an appetite to hold the Oil Search shares. Mr Sonk was quite definite about this. He said:

(a) the Board of KPHL did not consider it part of their mandate — which was pursuant to section 7 of Kumul Petroleum Holdings Limited Authorisation Act

[390] Affidavit of Wapu Sonk dated 21 June 2021, Exhibit FF, Annexure WRS-21, WIT.0036.0001.0321.

2015 to hold and develop gas and oil interests, including participation in the exploration, development, production, processing, transportation and marketing of oil and gas products391 — to include holding shares for investment on behalf of the State, whether in Oil Search or any other company;[392]

(b) from the outset, the board "never wanted KPHL to hold the Oil Search shares" and wished to dispose of them as the shares and their associated debt was a burden on KPHL;[393]

(c) as a result the board of KPHL commenced looking for ways to dispose of the Oil Search shares almost as soon as they were novated to KPHL.[394]

27.7 The evidence of Frank Kramer, the chair of NPCP Kroton, was to the same effect.[395]

Structure of KPHL

27.8 NPCP Holdings had originally been a subsidiary of IPBC which later changed its name to KPHL. In September 2015, this structure was changed as a result of the *Kumul Petroleum Holdings Limited Authorisation Act 201*5 (**KPHL Act**).

27.9 By section 5 of the KPHL Act, the shares of NPCP Holdings (and its subsidiaries) were transferred to the Kumul Petroleum Trustee (Kumul Trustee) and NPCP Holdings' name was changed to KPHL.

27.10 The Kumul Trustee is the then current Prime Minister who holds the shares on trust for the benefit of the State.

27.11 The KPHL Act limits the authority of the board of KPHL. Section 13 of the KPHL Act requires KPHL to prepare an annual plan which must then be approved by the Kumul

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[391] 10 August 2021 statement [26-27], WIT.0132.0001.0002.

[392] 10 August 2021 statement [28], WIT.0132.0001.0002.

[393] 10 August 2021 statement [28], [32], WIT.0132.0001.0002.

[394] 10 August 2021 statement [34], WIT.0132.0001.0002.

[395] Exhibit CCC, statement of Francis Kramer, 5 November 2020 [32], WIT.0037.0003.0002.

Trustee and the NEC. Section 13 also prohibits the board of KPHL from effecting transactions that total more than K10 million in any accounting period unless they are in accordance with the annual plan. The Kumul Trustee has the power to increase this amount to K25 million in any accounting period but that power has never been exercised.[396]

27.12 To effect a transaction above the K10 million threshold, the board of KPHL must refer the matter to the Kumul Trustee (that is, the Prime Minister). The trustee then refers it to the NEC for approval. As Mr Wapu Sonk put it in his statement, the "*effect of Section 13 of the Act is therefore that any significant decision must involve the Prime Minister. Without the involvement of Trustee (PM), no major decisions of [KPHL] can be made.*"[397]

27.13 The Prime Minister is the trustee of the Kumul Petroleum Share Trust. The property of the Trust is broadly defined but essentially includes the entire share capital of KPHL and all rights and benefits attached to it, including dividend and other property.[398] The beneficiary of the Trust is the State.

27.14 Clause 7 and 8 of the Trust Deed provide for limitations on the liability of the trustee and an indemnities for any such liability. Importantly, the limitations and indemnities expressly do not apply in the event of "fraud, gross negligence, breach of trust or wilful default of the Trustee including as a result of breach of fiduciary duties".

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[396] Evidence of Mr Sonk, T3101 (12 August 2021).

[397] Exhibit NNN, Witness Statement of Mr Wapu Sonk dated 10 August 2021 [23] WIT.0036.0006.0004

[398] KPHL Trust Deed (dated 26 May 2016) is at 10 August 2021 statement [15], WRS2-1, WIT.0132.0001.0002 (Affidavit), WIT.0132.0001.0002 (WRS2-1).

The February 2016 refinancing

27.15 On 27 October 2015, NEC decision 308/2015 authorised KPHL to deal with the collar loans, including terminating the loans and disposing of the associated Oil Search shares.[399]

27.16 Whilst KPHL was, pursuant to that decision, authorised to deal with the collar loans as it pleased, any such course required the approval of the Trustee, which, for the time being, was not forthcoming.

27.17 In January 2016, the board of KPHL resolved to seek Mr O'Neill's consent to unwinding the collar loans.[400]

27.18 It is evident that Mr O'Neill refused this request because in February 2016, the March and December 2014 collar loans were refinanced again,[401] with the new collar loan provided by UBS, but with JP Morgan providing some of the loan funds to UBS.

27.19 It is unclear why KPHL elected to refinance the March 2014 and December 2014 collar loans rather than simply allowing them to mature.

27.20 In their fourth report, Brattle assessed that if KPHL had done this, the loss that the State suffered as a result of the entire transaction, which Brattle assessed at AUD 336.3 million, would have been reduced by between AUD 74.4 and AUD 75.2 million, giving a reduced total loss to the State of AUD 261.2 to AUD261.9 million for the State. It is therefore clear that KPHL lost money by deciding to refinance. The principal components of this difference are that:

(a) the State would have avoided paying UBS to unwind the March 2014 and December 2014 collar loans and, later, the February 2016 collar loan;

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[399] Bundle of Documents comprising 22 pages provided by Grace So-On, page 1 and see amendment dated 30 October 2015 at pages 13-14 WIT.0016.0001.0747.

[400] WIT.0036.0012.0003

[401] Statement of Wapu Sonk 10 August 2021, Exhibit NNN [51] WIT.0036.0006.0004

(b) the State would have received different amounts in dividends. The dividend policy under the March 2014 and December 2014 collar loans was more generous to the State that the policy under the February 2016 collar loan, and

(c) the State would have received payments from UBS as the March 2014 and December 2014 collar loans matured and the Oil Search shares were disposed of between March and July 2016.

27.21 In addition to reduced losses, KPHL would have been freed of the loans and the shares, an objective that it wanted to achieve so that it could undertake other projects that fell more clearly within its mandate (in its view, holding Oil Search shares did not).

27.22 The February 2016 refinancing was not fairly priced, according to Brattle, and favoured UBS. Whilst the interest rate in the February 2016 loan was reduced, it was still above a fair rate and the State received less than fair value when unwinding the March 2014 and December 2014 collar loans. Brattle estimated in their third report that a fair payment to unwind the March 2014 Collar Loan and December 2014 Collar Loan would have been AUD 127.9 million paid to KPHL as the rights that KPHL was releasing had value. A fair payment to refinance with the February 2016 Collar Loan would have been AUD 191.0 million paid to UBS. On net, therefore, a fair payment would have been AUD 63.0 million from KPHL to UBS. KPHL in fact paid AUD 101.8 million. Thus, in aggregate, these transactions transferred AUD 38.8 million of value from KPHL to UBS

Attitude of the Trustee

27.23 Throughout 2016, the Board of KPHL maintained their view of exiting the collar loans as soon as possible. For example, at a Board meeting on 28 January 2016 it resolved: "that the Managing Director should return to the Shareholder to seek endorsement for KPHL to unwind and not replace the existing equity collar on the basis that it is not commercially viable."[402]

[402] Kumul Petroleum Holdings Limited, Extract of Meeting Minutes – 28 January 2016, WIT.0036.0012.0003.

27.24 According to Mr Sonk's written evidence, KPHL received advice about the sale of the shareholding from a number of sources:[403]

(a) From January 2015, it had received advice from Tony Kelly.

(b) From about March 2017 to the sale of the shares in September 2017, KPHL's primary adviser was Mr Robert Acevski, KPHL's CFO.

(c) From time to time, Mr Sonk would talk with Mr Jilek and Mr Turner of UBS. They would discuss the market, the performance of the options and when the right time to sell might be, amongst other matters.

(d) By a letter dated 10 October 2015, Mr O'Neill had exercised his powers as trustee of KPHL to appoint Dr Jacob Weiss as economic and financial advisor to himself as trustee. The letter of appointment stated that Dr Weis was to be invited to all KPHL board meetings and have the right to express his views and advice to the board on economic and financial matters.[404]

27.25 As mentioned above, KPHL required, in effect, Mr O'Neill's approval as trustee to sell the Oil Search shares. Mr Sonk said that he had discussed the sale with Mr O'Neill over a lengthy period of time. His written evidence was:[405]

(a) At the time of the 2016 refinancing of the collar loans, Mr Sonk and Mr O'Neill had several discussions in which Mr O'Neill had agreed that KPHL should unwind the collar loans if it was unable to refinance the loans with a cheaper and more traditional style of loan.

(b) From those discussions, Mr Sonk was also aware that Mr O'Neill wanted the State to get out of the Oil Search shareholding because the collar loans were expensive

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[403] Statement of Wapu Sonk dated 10 August 2021 [42-46] Exhibit NNN, WIT.0036.0006.0004

[404] Statement of Wapu Sonk dated 10 August 2021, Annexure 2-4, Exhibit NNN WIT.0036.0006.0063

[405] Statement of Wapu Sonk dated 10 August 2021, [35]ff, [64]ff and [70]Exhibit NNN WIT.0036.0006.0063

for KPHL to maintain in comparison to the minimal returns on dividends and Mr O'Neill wanted KPHL to invest in the Papua LNG project.

(c) Whilst there was no disagreement between Mr Sonk and Mr O'Neill about whether the shares should be sold, Mr O'Neill (in Mr Sonk's estimation) saw a difficulty in managing this politically. This was not a concern of KPHL but because of Mr O'Neill's dual roles as Prime Minister and Kumul Trustee and the scale of the transaction, KPHL had to wait for Mr O'Neill to give his approval to sell the shares.

(d) KPHL was therefore seemingly waiting for the politics, share price and other factors to align before the shares could be sold. Mr Sonk noted that whilst the timing had to be right for KPHL, the primary consideration of Mr O'Neill, as Mr Sonk understood it, was a politically acceptable narrative.[406]

27.26 Mr Sonk further explained in oral evidence:[407]

> *Q. Well, the obvious question then, Mr Sonk, is if you already had approval – final approval from the NEC at the end of October 2015 to finally exit this transaction, why did it take until 2017 for you to actually exit the transaction?*
>
> *A: There were two in this transaction – there is two trigger points that we looked at. One was where is the share price and in relation to the put of $7.38. If it came below $7.38, we would exit without paying any more money; that was our target and also the political sensitivity around this decision because the same trustee made the decision to go in and the same trustee has made the decision to come out. So we were sensitive to something like that so we would be sensitive about making such a decision.*
>
> …

[406]Statement of Wapu Sonk dated 10 August 2021 [35-39] Exhibit NNN, WIT.0036.0006.0004

[407] Evidence of Mr Sonk, T3108-3110 (12 August 2021).

Q. … So, let us just clarify this. The NEC decision that we were looking at was dated October 2015 so is your evidence that from somewhere even a little bit before October 2015, you had discussions with Prime Minister O'Neill that he wanted to get out of the Oil Search shareholding?

A: He was prepared to get out hence these decisions, yes.

Q: And that is only what 18 months after the transaction was entered into in the first place?

A: Correct.

Q: And why – so you have told us that one of the things that you were keeping an eye on was the share price but also you referred to the politics of it. Now, can I take you to paragraph 37. You say that what you understood from the discussions you had with Prime Minister O'Neill was that the issue was not disagreement about whether KPHL should dispose of the Oil Search shares but the difficulty the then Prime Minister saw in managing this politically. What did he say to you about the politics of this decision to sell Oil Search shares?

A: It is just 2016 – he did not say, I am just – politics is around the corner in 2017. He did not say that but I am just saying that we saw it as him thinking about the consequences of 2017 politics when making these decisions in 2016.

Q: You had regular discussions with the Prime Minister about this topic?

A: Not about his politics and how to manage these things [but] about the shares, yes.

Q: And that continued from the latter half of 2015 all the way to September 2017 when the shares were finally sold, is that right?

A: Correct

Q: And you see paragraph 38, you say KPHL had to wait for Prime Minister O'Neill to give his approval to sell the Oil Search shares, without that approval KPHL could simply not sell I take it? So, again despite having the authorization to deal with the

shares, however you please, since October 2015 and the NEC decision, you say that you still needed Peter O'Neill's approval to sell the shares?

A: Yes. And also I do not think a lot of people, even the politicians and even the trustee maybe did not understand that the right time to sell was when the share price was at the put or below so we would not pay anything else and come out. That would look like we are selling at a loss and hard to message that was one of the difficulties.

Q: And the issue of the share prices is something that you regularly kept the Prime Minister informed about?

A: Correct. Well, discussions around that and where it is at.

Q: You say in paragraph 29 that the timing had to be right for KPHL and I will just stop there, that is the share price. So in your mind the timing was timing in relation to share price, is that right?

A: Correct.

Q: And you said the primary concern for Prime Minister O'Neill was a politically accepted narrative, And what narrative is that?

A: Narrative and explaining exactly why we are getting out and putting a positive spin when the share prices are below $8.20 that was announced in 2014 that we are getting into.

27.27 However, Mr Sonk later clarified that he did not recall any actual conversations with Mr O'Neill about his need to manage the issue politically and that the only reasons Mr O'Neill gave for his position were that the collar loans were expensive in comparison to the returns on dividends and Mr O'Neill wanted KPHL to invest in the Papua LNG project.[408]

[408] Statement of Wapu Sonk dated 22 February 2022, pp 5-6.

27.28 When Mr O'Neill was asked whether his primary consideration as to when to sell the shares was a politically acceptable narrative he answered: "That is not quite true. A politically acceptable [*sic*] does not determine share prices. It will depend entirely on shares of value reflected on the stock market for Oil Search and that is for the Board to consider."[409] But the fact remains that the vital strategic need to own Oil Search shares disappeared very quickly – leaving not only large losses but the questions - what did the UBS Loan achieve – and what was it ever intended to achieve.

27.29 On 1 August 2017, Mr O'Neill was formally re-elected as the Prime Minister. This development may have cleared the way for the sale of the Oil Search shares. However, when it was put to Mr O'Neill that he waited until he won the election to approve the sale of the Oil Search shares, he replied: "That is not quite true; no."[410]

27.30 KPHL obtained advice from Mr Tony Kelly on 10 August 2017 that:[411]

(a) an Oil Search closing price of $6.48 was "*in the money*";

(b) KPHL could "*request Early Termination of both Collar Loans" and "the Back Collar Confirmation Agreement… requires that all parties agree to each tranche termination date. In practice, this means that the banks need to be allowed to complete their Delta hedging programme underlying each Collar Loan in an orderly market. … the banks are obliged to notify [KPHL] of the settlement amount within [one] business day of the agreed Termination dates*";

(c) KPHL would "*receive back from UBS and JPM the pro rata amounts of pre-paid interest relating to the unexpired period of the two Collar Loans*"; and

(d) the "*approximate amount of interest to be repaid [at a share price of $6.48] is A$20,878,656*" and "*the approximate net proceeds to KPHL of an early termination given today would be approximately A$155 million*".

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[409] Evidence of Peter O'Neill, T3783.

[410] Evidence of Peter O'Neill, T3785.

[411] WIT.0036.0007.0445.

27.31 In his statement of 10 August 2021, Mr Sonk said that in or about August or September 2017, he was told by his chairman, Sir Moi Avei, who had met with Mr O'Neill that KPHL could now sell the Oil Search shares. Sir Moi said that Mr O'Neill would manage the politics of the situation and defend the decision.[412]

27.32 Sir Moi Avei provided a statement to the Commission dated 5 November 2020. The statement does not mention the meeting with Mr O'Neill or the instruction to Mr Sonk but states that at the 11 August 2017 KPHL board meeting, Mr Sonk recommended that he and Sir Moi should speak to Mr O'Neill as the Kumul Trustee about the risks and strategy KPHL should consider in advance of the maturity date.[413]

27.33 When Sir Moi Avei gave oral evidence to the Commission, he denied that he had met Mr O'Neill to discuss the sale of the Oil Search shares.[414]

27.34 The 19 September 2017 board meeting of KPHL approved the unwinding of the collar and sale of the Oil Search shares.[415]

27.35 Mr Wato recalled that:[416]

> *On 19 September 2019 [sic: 2017], the KPHL Board decided to seek the Prime Minister [sic] consent to the sale of the Oil Search shares, but defer seeking and obtaining the National Executive Counsel's [sic] approval until after first selling the shares. Then subsequently seek the approval and ratification of the National Executive Counsel [sic]. This was necessary to manage share price sensitivities in the market because any leakage of news that KPHL is about to sell the [Oil Search] shares would affect the [Oil Search] share price and have a negative impact on the margin due to KPHL from the sale or*

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[412] Statement of Wapu Sonk dated 10 August 2021 [66] Exhibit NNN, WIT.0036.0006.0004

[413] Statement of Sir Moi Avei dated 5 November 2020, Exhibit DDD, WIT.0074.0003.0002

[414] Evidence of Sir Moi Avei, T2383

[415] 10 August 2021 statement [68], WIT.0036.0006.0004.

[416] Statement of Rogen Wato dated 8 June 2021, Annexure RW-17 WIT.0038.0004.0004

might even result in a total loss. I understood that the Prime Minister's consent to this approach was received prior to the Board's decision to sell the shares in this way.

27.36 Mr Sonk said the following in his statement to the Commission dated 13 November 2020:

(a) Before 19 September 2017, he met with Peter O'Neill to discuss the possible sale of the Oil Search shares.[417]

(b) On 19 September 2017, KPHL had a Special Board Meeting at which multiple options to reduce or cease the shareholding in Oil Search were canvassed.[418] The board resolved to *'authorise a physical unwind of the collar structure to allow the KPHL group to terminate the collar and for KPHL to have "no further exposure to the [shares]'.*[419]

(c) Between 19 September and 21 September 2017, Mr Sonk met with Mr O'Neill as the Kumul Trustee regarding the board's decision to terminate the collar loans and sell the shares.[420] No written approval of the sale was issued by Mr O'Neill.

(d) KPHL announced its decision to sell the shares after the close of trading on 21 September 2017.[421]

(e) KHPL sold the shares held by Kumul Investments on 22 September 2017[422] or 26 September 2017.[423]

27.37 Mr Sonk gave oral evidence to the Commission confirming that:

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[417] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [142]

[418] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [144]

[419] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [146]

[420] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [148]

[421] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [149]

[422] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [125]

[423] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [150]

(a) He met Prime Minister O'Neill on 19 September 2017 to seek his consent to the sale of the Oil Search shares and unwinding the collar loans. He had some PowerPoint slides which he showed to Mr O'Neill that, in Mr Sonk's view, demonstrated that it was the right time to sell the shares. Mr Sonk cannot now locate those slides.[424]

(b) He had a second meeting with Mr O'Neill discussing the sale of the shares.[425] From paragraph 148 of Mr Sonk's statement of 13 November 2020[426], it would seem likely that this meeting took place on about 21 September 2017.

27.38 In his statement of 10 August 2021, Mr Sonk stated that:[427]

From in person discussions I understood that the then Prime Minister Peter O'Neill considered that he would be able to sell a narrative that the sale of the shares at that time was in fact "made money" [sic] because:

(a) The sale was at above market price, being the difference between the market price of AUD$6.70 and the average strike price of the put options at AUD$7.38 creating what is described as a residual profit;[is this the difference between cash and 'value']

(b) the sale generated AUD $35 million to KPHL comprising:

(i) the "residual profit"; and

(ii) refund of the pre-paid interest.

27.39 Of course, far from making money the UBS Loan as a whole created a large loss.

Sale of the Shares and unwinding the collar

27.40 On 12 October 2017 NEC decision NG29/2017 authorised and ratified the sale KPHL's revised operating plan together with a special dividend to the State of $31.5 million.

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[424] Evidence of Wapu Sonk T1613 (21 June 2021).

[425] Evidence of Wapu Sonk T1614 (21 June 2021).

[426] Statement of Wapu Sonk dated 13 November 2020, Exhibit FF, WIT.0036.0003.0002 [148]

[427] Statement of Wapu Sonk dated 10 August 2021 [70] Exhibit NNN, WIT.0036.0006.0004

27.41 Mr O'Neill did not apply to cross-examine Mr Sonk on these (or another other) issues. Further, whilst Mr O'Neill gave further oral evidence to the Commission in February 2022, he did not seek to tender any further statement that might have responded to Mr Sonk's evidence.

27.42 We note the following people involved in the decision:

(a) From January 2015, KPHL retained Anthony (or Tony) Kelly.[428]

(b) From March 2017 until the sale in September 2017, the primary advisor to the KPHL board was Robert Acevski, Chief Financial Officer of KPHL

(c) Mr Sonk had regular contact with Paddy Jilek and Mitch Turner of UBS and sought advice from them including in relation to "when the right time to sell would be".[429]

(d) July 2017, JP Morgan presentation containing the "intrinsic value" idea – an idea that is debunked by both Mr Sonk as well as Brattle.

(e) Mr Sonk said that Mr O'Neill's advisors and "channels of communication" were Isaac Lupari, Chief of Staff, and the Dr Jacob Weiss.[430] Dr Weiss had been appointed by Mr O'Neill to act as "Economic and Financial Advisor" to KPHL, which in effect was Mr O'Neill's eye and ears within KPHL.[431]

27.43 Whilst Mr Sonk and his team were at times slow to produce documents and information, he ultimately gave evidence contrary to KPHL's and his own personal interests – that is to say, evidence which does not put KPHL or himself in a perfect light and he also exposed, in an unfiltered way, some of the internal conduct and thinking inside KPHL. For that

[428] 10 August 2021 statement [44], WIT.0036.0006.0004.

[429] 10 August 2021 statement [46] , WIT.0036.0006.0004.

[430] 10 August 2021 statement [42] , WIT.0036.0006.0004.

[431] 10 August 2021 statement [42]-[43] , WIT.0036.0006.0004.

reason, and because contemporaneous documents support him, it is submitted that he is a witness to be believed.

27.44 Where Mr Sonk's evidence conflicts with O'Neill, Mr Sonk is to be preferred.

27.45 On the other hand, where Mr Sonk's evidence, or more accurately where the views or calculations of his advisors as set out in his evidence conflicts with Brattle, then Brattle is to be preferred.

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