

PART A

Executive Summary

- 1.1 This Commission of Inquiry was established under the *Commissions of Inquiry Act 1951* by Instrument dated 30 August 2019 and, as amended in October 2021, it required a report to be delivered to the Prime Minister, the Honourable James Marape MP, by 31 March 2022. This is that Report.
- 1.2 This Executive Summary gives an overview of the Commission's work, and of some key conclusions and recommendations. It must be read with the Report as a whole, noting that individual chapters contain a comprehensive analysis of the often complex issues and evidence they each cover. Each generally concludes with relevant findings and recommendations. The Commission's key conclusions and recommendations follow this summary.
- 1.3 The rationale for this Commission is explicitly stated in the establishing Instrument as follows:
- The decision of the Government of Papua New Guinea made in 2014 to obtain an off-shore loan from the Union Bank of Switzerland (UBS) has become controversial following the tabling of the Ombudsman Commission Investigation Report in Parliament in May 2019. The Prime Minister upon assuming office undertook to convene a Commission of Inquiry to establish facts surrounding the whole transaction, including all persons and entities involved in the deal and whether or not the deal followed proper and legal process and procedures.*
- In order to appreciate the public concerns on improprieties in regard to the whole deal it is necessary and important that the Commission of Inquiry commences inquiry with the cause which brought about the need for the Government of the day to seek funding from an off-shore loan facility. This necessitates the Inquiry to commence its investigation with the States participation in the PNG LNG Project, including the purchase of shares and the disposal of the same.*
- 1.4 The Ombudsman Commission Report is titled:
- An Investigation Into The Alleged Improper Borrowing Of [An] Au\$1.239 Billion Loan From The Union Bank Of Switzerland ... (Australia Branch) To Purchase 149,390,244 Share[s] In Oil Search Limited ...*
- 1.5 This is a reference to what this Report calls the UBS Loan. It is one of the key financial transactions examined by the Commission, the other being the Exchangeable Bond Transaction that IPBC entered into with IPIC in 2008.
- 1.6 The Ombudsman Commission Report made serious findings of illegality and failure to follow proper procedures, but its jurisdiction was limited to investigating complaints concerning actions of governmental bodies and agencies, and the actions of 'Leaders' as defined in the Leadership Code. Unlike this Commission, the Ombudsman Commission could not investigate private citizens or entities, even those who had been paid to advise or perform other services for the State, such as lawyers NRFA and UBS itself.
- 1.7 It might have been expected that such well-paid former advisers would unstintingly assist the Commission, even though they are located overseas and beyond the reach of the Commission's

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

- 1.8 Although the public concern generated by the Ombudsman Commission Report clearly led to this Commission, this Commission is not a review of the Ombudsman Commission's work, nor can this Commission decide legal controversies as a court can.
- 1.9 Nonetheless, despite the well-known difficulties caused by the COVID-19 pandemic, the Commission has been able to examine thoroughly a great many witnesses, entirely in live-streamed hearings which were held in public, and much documentary evidence, and to answer the Terms of Reference by the due date. The Commission acknowledges with gratitude the work of all those who made this significant achievement possible.
- 1.10 Papua New Guinea is blessed with abundant natural resources, which were largely unexploited before independence was attained in 1975. The need for wise and sustainable exploitation of natural resources focused the minds of the founders of the newly independent State and was reflected in the terms of the *Constitution* which, for example, declares in National Goal 4 that '*natural resources and the environment are to be conserved and used for the collective benefit of all and be replenished for the benefit of future generations*'. Equally, evidence to this Commission from founders such as Sir Julius Chan and the late Grand Chief Sir Michael Somare emphasised that governments should be wary of becoming involved in private business investments and, when doing so, must carefully manage risks in order to avoid losses: overall, the Commission concludes that risks were well managed in the case of the Exchangeable Bond Transaction but were not in the case of the disastrous UBS Loan.
- 1.11 Among the most valuable and internationally marketable resource located in this country is liquefied natural gas (LNG). Perhaps the most significant current resources project for many years is the PNG LNG Project. Since its first LNG export in 2014, the PNG LNG Project has exported approximately 7 million tonnes of LNG per year. It is a vast and complex project which has been necessarily undertaken with the involvement of multinational companies and overseas finance. To illustrate the scale of the PNG LNG Project: on 8 December 2009 the Final Investment Decision for the PNG LNG Project was made, and this immediately resulted in the commencement of comprehensive construction activities in the construction and commissioning period from 2010 to 2014 costing more than USD 19 billion (approximately PGK 67 billion).ⁱ
- 1.12 There are direct economic benefits to the country from such projects, especially employment and investment in infrastructure. And, like anyone else, the State can become a shareholder in the companies holding the licences or undertaking the work, receiving such dividends as those companies may choose to declare. But the State also has uniquely valuable 'back-in' rights under ss. 184 and 185 of the *Oil and Gas Act* which allowed it to pay to become an equity participant in the PNG LNG Project.
- 1.13 In 2009 the State decided to exercise those back-in rights, acquiring 19.4%. In return for acquiring 'back-in' rights then worth between USD 3-5 billion (approximately PGK 10.6-17.7 billion), the State needed to pay USD 300 million (approximately PGK 1.06 billion) upfront, and then USD 1 billion (approximately PGK 3.5 billion) between 2009 and 2014 in order to share in the future profits of the PNG LNG Project. The State did not have those funds, so it needed to raise them. At the time, it was the largest fundraising that the State had ever attempted. This significant need for finance directly led to the Exchangeable Bond Transaction.

- 1.14 In 2014, Oil Search was Papua New Guinea's largest company and an important partner with the State in many projects. The State had first acquired 196 million shares in Oil Search when it had merged in 2002 with Orogen Minerals, a company in which the State then held a bare majority of the shares. The merger gave Oil Search access to cash it did not otherwise have. The Oil Search shares the State then acquired gave the State between 17.65% (in 2004) and 13.17% (by 2013) of the issued share capital of Oil Search. Although Oil Search usually paid modest dividends, the shares tended to appreciate in value.
- 1.15 The Global Financial Crisis which began in 2007 was still being felt in Papua New Guinea in 2008/9 and it greatly affected the State's capacity to raise funds. At this time the late Sir Michael Somare was Prime Minister and Mr Peter O'Neill was in the NEC (Cabinet). The State decided to use a significant asset, namely its ownership, through IPBC, of the 196 million Oil Search shares to raise the funds needed for it to participate in the PNG LNG Project. The State (through IPBC) decided to raise AUD 1.681 billion (approximately PGK 4.46 billion) by issuing 5-year Exchangeable Bonds to IPIC, an Abu Dhabi sovereign wealth fund. Under that transaction, IPIC would receive 5% per annum interest for the duration of the Exchangeable Bonds. On maturity, the Exchangeable Bonds would be exchanged for the shares that IPBC held in Oil Search. The reference price for the exchange was AUD 8.55 per share. If (as was the case in 2014) the share price was below the reference price, IPBC would have to make a top-up payment to IPIC. If the share price was greater, IPIC would only receive shares up to the value of the bonds.
- 1.16 The Report closely considers the Exchangeable Bond Transaction: its terms and rationale, the processes leading to its adoption and the work done by advisers. The Commission, assisted by detailed expert reports from The Brattle Group, concludes that the lack of controversy historically attaching to the Exchangeable Bond Transaction is justified. While it involved some risks (which largely turned out not to be realised), it served a valuable purpose for the State by enabling it to acquire at an attractive price the back-in rights and share in the profits of the largest resource project in the country. Further (and in contrast with the UBS Loan) it:
- (a) was on the whole the best available option
 - (b) was quite carefully and methodically examined by Government and its advisers before the NEC decided to proceed with it
 - (c) was fairly priced
 - (d) achieved its stated purpose
- 1.17 From 2011-2019 the Prime Minister was Mr O'Neill. The Exchangeable Bonds were to mature in March 2014 and, unless IPIC otherwise agreed, the result would be that:
- (a) IPBC had used the funds borrowed to share in the future profits of the PNG LNG project, for the ultimate benefit of the State and the people
 - (b) IPIC would take ownership of the Oil Search shares, through the exchange provisions of the Exchangeable Bonds, leaving IPBC and the State with no Oil Search shares
 - (c) IPBC would, according to a formula based on the market value of the shares, most likely make a relatively modest payment to IPIC thereby bringing the Exchangeable Bond Transaction to an end (the amount actually paid was about AUD 74 million (approximately PGK 196 million), and, critically
 - (d) IPBC would not have any further monies to pay, and the significant amounts they were due to receive as early as 2014 from the PNG LNG Project could be put into the legislated

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

- 1.18 The first three matters came to pass. The fourth - the road not taken - did not, fundamentally because of the decision by Mr O'Neill, principally aided by then Secretary for the Department of Treasury, Mr Dairi Vele, to persuade the NEC to enter into the disastrous UBS Loan arrangement.
- 1.19 These matters are at the core of the Commission's work. As its establishing Instrument stated:
- The ultimate objective of the Commission of Inquiry is to establish whether there were breaches of Papua New Guinea laws and Constitutional requirements in the process of negotiation and approval of the UBS Loan, and also establish whether Papua New Guinea as a country had suffered as a result of this off-shore deal, and whether the persons involved in the deal can be held accountable for their conduct.*
- 1.20 The period between mid-2013 and the entering into the UBS Loan in March 2014 can be seen as a series of stages, at each one of which serious errors were made.
- 1.21 The first stage covered the unsuccessful attempts by the State or State entities to persuade IPIC to give up its contractual rights to retain the Oil Search shares which were the subject of the Exchangeable Bonds. While there were some limited signs that IPIC was prepared to do so, in the end it relied upon its rights to keep the shares. Although it was always clear the Exchangeable Bonds gave those rights to IPIC, and Mr O'Neill was in the Somare Cabinet which approved the Exchangeable Bond Transaction, in his evidence before the Commission he unhelpfully persisted with the notion that Papua New Guinea was well positioned to persuade IPIC to give up its rights. It never was. The NEC, the IPIC Exchangeable Bond Review Committee it established, IPBC and the Department of Public Enterprises and State Investments had their time wasted on what was likely to be a futile exercise.
- 1.22 The second stage was the growing realisation that the Oil Search shares formerly held were going to be lost and that, if even an approximately equivalent quantity was again to be held by the State, they would need to be newly acquired. From later in 2013 it became clear to Mr Vele, who was leading the State's search for a financial adviser in relation to refinancing the Exchangeable Bonds that an opportunity might exist to persuade Oil Search to issue new shares in itself to the State because Oil Search was seeking a significant amount of finance to buy into a valuable gas resource known as Elk-Antelope or PRL 15, and Oil Search might find it attractive to raise funds in a single transaction with the State.
- 1.23 The third stage was the formal but unsurprising advice from IPIC that it was keeping the Oil Search shares, which led to a series of urgent meetings between Oil Search executives, Prime Minister O'Neill and Mr Vele, which in turn led to the agreement with Oil Search. This created a need for the State to urgently obtain finance, although the urgency was because of Oil Search's timetable.
- 1.24 The fourth stage was a hurried and inadequate process over a period of 15 days whereby the State's financial adviser and arranger, UBS, and many lawyers, including from NRFA and PLG, put together a complex series of documents and largely drafted the NEC paperwork. Mr O'Neill and Mr Vele drove the process to the exclusion of others with key interests. Remarkably, even the Treasurer was excluded from drafting or commenting on a vital submission which recommended very large expenditure on behalf of the State. Nonetheless the UBS Loan was approved by the NEC and documentation executed.

- 1.25 The final stage of the UBS Loan was that, to avoid breaching the State's debt ratios, the Collar Loan (one of two parts of the UBS Loan) was novated to the SoE eventually known as Kumul Petroleum Holdings Limited (KPHL). In view of the controversy which resulted when the UBS Loan was announced, parliamentary disapproval of the UBS Loan could well have occurred. Importantly, KPHL never wanted either the Oil Search shares or the significant financing debts that came with the UBS Loan. But from 2015 the choice was not theirs alone, as the KPHL Trustee was the Prime Minister of the day and approval of the NEC was needed for many of its decisions. So the KPHL Board extended the loan in 2016 and, with its Trustee Mr O'Neill's permission, sold the shares at a significant loss in 2017. The Managing Director of KPHL, Mr Wapu Sonk, with some justification, felt the Trustee's permission was deferred for purely political reasons which, if established, would be a clear breach of duty by a trustee.
- 1.26 In the end, the State's entirely unnecessary UBS Loan to buy Oil Search shares resulted in:
- (a) the loss of those same shares
 - (b) significant financial losses to the State of in excess of AUD 340 million (approximately PGK 902 million)
 - (c) lost opportunities, including to establish the Sovereign Wealth Fund as intended and endow it properly
 - (d) diversion of the significant revenues expected from the PNG LNG Project once the exports of LNG began in 2014
- 1.27 As the Report concludes in relation to the UBS Loan:
- (a) Unlike the Exchangeable Bond Transaction which was justified by the purchase of significant and financially beneficial rights in the PNG LNG Project, the UBS Loan had no satisfactory justification or rationale. It made no economic sense for the State to pay large sums to multiple advisers as well as high interest payments on a loan to purchase shares in a publicly listed company. If the State wanted to be involved in further oil and gas exploration projects, waiting instead for the back-in rights to PRL 15 was a more prudent course. The Commission rejects Mr O'Neill's stated 'strategic interest' justification for obtaining new Oil Search shares in 2014. On analysis, it amounts, at its highest, to no more than the habit of such ownership over the preceding dozen years, and access to modest dividends in common with any other shareholder. If there were other reasons they have not been revealed to the Commission. The State had powers to block takeovers on national interest grounds if that became a concern. Further, any interest in share ownership was short lived: the UBS Loan was swiftly novated to KPHL, which never wanted the UBS Loan obligations and wished to sell the shares at the earliest opportunity
 - (b) The failure to follow proper processes, coupled with the speed with which complex documentation was produced had the disastrous consequence that no-one within the public service – including the Secretary for Treasury, Mr Vele – understood the overcharging of the State by UBS, and the risks inherent in the UBS Loans, and no adviser retained by or on behalf of the State identified these matters, either in themselves or as risks to be further investigated
 - (c) In addition to its sizeable disclosed fee of AUD 28.4 million (approximately PGK 75.4 million), UBS also benefited from the refinancing of the Collar Loan in December 2014 and February 2016 as well as from the ultimate sale of the shares in September 2017. Its total over-charging amounts to AUD 175 million (approximately PGK 464 million), which should be repaid, with interest. The Commission considers UBS' failure to provide

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

- (d) The State's lawyers, including NRFA, failed to advise the State of UBS' at least potential conflicts of interest and how to manage them. Like UBS, NRFA declined to provide witnesses to the Commission. NRFA did not provide any submissions, and their delayed and incomplete production of documents, owned not by them but by their former clients, was inexcusable
- (e) Mr Vele was responsible for the settling of the NEC policy submission recommending the UBS Loan. The submission's inadequacies included its failure to set out any downside to the proposal and the false statement that the Treasurer agreed with the submission's contents when, to Mr Vele's knowledge, he had never seen it prior to the eve of the NEC meeting, and according to Mr Vele himself, then indicated his disagreement with the submission by refusing to sign it
- (f) Mr O'Neill knew the submission was lengthy and complex and needed to be explained to the NEC and yet he provided the NEC with no advance notice of it nor any real opportunity to debate it during a meeting that lasted less than an hour, notwithstanding the Treasurer's outburst against the proposal in the NEC (he being later sacked from that role). The NEC is a valuable democratic method of analysing and discussing difficult matters but Mr O'Neill ensured it could not operate effectively in relation to the UBS Loan. Proper processes in the NEC and Government generally, like keeping adequate records, may appear unimportant or uninteresting, but what happened in relation to the UBS Loan demonstrates why such matters (like the NEC, parliamentary scrutiny and anti-corruption measures) are vital in a democracy. Their absence can cost a nation dearly, as was the case with the UBS Loan

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

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

- (ii) Mitchell Turner
- (iii) Anthony Latimer
- (iv) Steven Moe
- (v) Vittorio Casamento

- 1.29 The Commission makes a number of recommendations to ensure the UBS Loan is not repeated. It also recommends the long promised establishment of the Sovereign Wealth Fund be delayed no longer. Its establishment and endowment is not only vital for the welfare of the State and its people but will be important evidence for foreign investors, along with the new ICAC and the ongoing role of the Ombudsman Commission, that sovereign risk from corruption and failure to follow mandated government processes is now being properly addressed.
- 1.30 During the course of its work, the Commission received information about matters of concern which it pursued as far as its powers allowed. The Commission proposes to provide that information to appropriate authorities with greater investigative powers for them to consider and pursue if they think fit.
- 1.31 The Commission's work is now done. It is a matter for the Government, the Parliament and ultimately the people to decide whether to act on the Report's findings and its nation-building recommendations.

ⁱ Note: all references in this document to the PGK equivalent are approximate, using the exchange rate as at 28 March 2022. Exchange Rates UK website, accessed on 28 March 2022, <https://www.exchangerates.org.uk/currency/exchange-rate-calculator.html>.

PART B

Summary of Chapters, Conclusions and Recommendations

- 1.1 As noted above, the task of this Commission of Inquiry is to inquire into and establish the facts surrounding certain transactions involving the State and SoEs. They are:
 - (a) the merger of Orogen Minerals and Oil Search in 2002
 - (b) the financing of the State's equity participation in the PNG LNG Project known as the IPIC Exchangeable Bond Transaction in 2008
 - (c) the purchase of a 10.1% equity interest in Oil Search through the issue of new shares funded through an AUD 1.681 billion loan (approximately PGK 4.46 billion)¹ from UBS' Australian Branch in 2014
 - (d) the acquisition of an interest in the Elk-Antelope PRL 15 field by Oil Search funded by the placement of new shares with the State
 - (e) the sale of those Oil Search shares in 2017 by KPHL to whom the State had novated the shares in 2014
- 1.2 The ultimate objective of the Commission is to establish:
 - (a) whether there were breaches of PNG laws and constitutional requirements in the negotiation and approval of the UBS Loan
 - (b) whether PNG as a country had suffered as a result of the deal
 - (c) whether the persons involved can be held accountable
- 1.3 In respect of each of the transaction there are questions posed which the Commission attempts to answer.
- 1.4 The composition of the Report and the sequence of its chapters reflects the chronological nature of the Terms of Reference and the links between the transactions under investigation. This Part sets out:
 - (a) a brief overview of the subject matter of each chapter
 - (b) the conclusions reached where conclusions are required
 - (c) the relation of those conclusions to relevant Terms of Reference

Chapter 1 Work of the Commission

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

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

- 1.6 Both difficulties have led the Commission to make the recommendations set out below to resolve the first challenge and to develop improved record-keeping practices.
- 1.7 The Commission recommends that the COI Act be amended to provide for:
- (a) the facilitation of concurrent commissions of inquiry in a foreign country and the recognition of information obtained thereby, modelled generally on the provisions in the *Australian Royal Commissions Act 1902*
 - (b) the power of a commission of inquiry to take evidence in a foreign country, administer an oath or affirmation consistently with the laws of that country, and use any evidence so received
 - (c) the power to administer an affirmation or declaration be inserted into s. 7
- 1.8 The Commission recommends that Papua New Guinea investigate the advantages of becoming a member of the Hague Evidence Convention.
- 1.9 The Commission recommends that:
- (a) training be given to all senior public sector employees with respect to the obligation to prepare an inventory of records held by the department for which they are responsible as required by s. 25 of the *Archives Act*
 - (b) training be given to all public sector employees with respect to record retention and management including but not limited to:
 - (i) protocols for document and file retention and management when installing new computers systems
 - (ii) establishing generic email addresses for all established public sector positions
 - (c) in public service management handbooks emphasise the obligation to record adequately in written form the proceedings of meetings and, if recorded on an electronic device, on an official device
 - (d) ensure that the National Library and Archives Office is resourced adequately to carry out its functions in s. 6 of the *Archives Act* and in particular, s. 6(g), (p) and (q)
 - (e) amend the *COI Act* to provide for the custody and preservation of the records of commissions including:
 - (i) where they should be deposited
 - (ii) who may have access
 - (iii) whether law enforcement and regulatory bodies may take custody of any part of the records of a commission and on what conditions
- 1.10 The Commission recommends that a review be undertaken of the staffing and training needs of the Audit Office with a view to funding the Office adequately to carry out its statutory functions.
- 1.11 The Commission also makes recommendations in respect of some of the key persons involved in the UBS Loan who declined to participate, or participate fully in the Commission, thus:

- (a) by reason of its conduct as established in this Commission and its insufficient participation in this Commission, UBS, whether acting on its own behalf or employed in any capacity, not be retained or engaged by the State or any SoEs for a period of ten years
- (b) by reason of its failure to participate in the Commission, NRFA, whether acting on its own behalf or employed in any capacity, not be retained or engaged by the State or any SoEs for a period of five years
- (c) by reason of their failure to participate in the Commission, the following individuals not be retained by the State or any SoEs for a period of five years:
 - (i) Patrick 'Paddy' Jilek
 - (ii) Mitchell Turner
 - (iii) Anthony Latimer
 - (iv) Steven Moe
 - (v) Vittorio Casamento
- (d) by reason of its conduct as to the delayed or inadequate provision of information to this Commission, despite the direction of its former clients being the State or its SoEs, that NRFA be the subject of a referral by the State and any relevant State entities as former clients to the Legal Services Commission of New South Wales, Australia

Chapter 2 Historical Context

- 1.12 At the outset of its investigations, it was apparent to the Commission that to answer the questions posed in the Terms of Reference comprehensively, required a consideration of the foundations of the State and the approach taken then to the use of the rich and abundant resources of the country for the future. An understanding of some of the transactions examined by the Commission could only be gained in the context of this background.
- 1.13 Giving effect to the Commission's sense that the foundational history of the country was pivotal to its investigations, this chapter discusses the thinking of the designers of the framework for an independent Papua New Guinea, the kind of country they concluded the people wanted, and how that might be realised. Although the Final Report of the Constitutional Planning Committee (1974) is an excellent resource, the Commission was privileged to hear from many of those who were involved in the design of the Constitution and their vision for the country and the political economy under which the people could flourish.

Chapter 3 Legislative provisions about the State's fiscal arrangements

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

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

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

Chapter 5 Constitutional and Legislative Safeguards

- 1.16 Various processes were in place from independence to give the people confidence that they were being governed in a proper and effective way and with integrity. Other initiatives to the same end were added later. An important additional purpose was to assure foreign investors and financial institutions that sovereign risk in Papua New Guinea was acceptable. This chapter outlines many of the constitutional and other legislative safeguards operating in the country at the time of the Exchangeable Bond Transaction and the UBS Loan.
- 1.17 The Commission recommends that the *Leadership Code* and related laws concerning the jurisdiction of the Ombudsman Commission and Leadership Tribunals be amended to ensure that a person (a **Leader**) who was subject to these jurisdictions continues to be subject to them so that they can be investigated and subject to sanction for actions done as Leaders even if they have ceased to hold such positions.
- 1.18 This is because:
- (a) such a person should not be able to escape investigation and sanction by resignation
 - (b) if they did hold such a position they could hold it again
 - (c) of the importance of punishment but also both specific deterrence against future wrongdoing by the individual and general deterrence against anyone else tempted to so transgress

Chapter 6 Exploration and Development of Oil and Gas Resources

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

Chapter 7 Orogen Minerals / Oil Search Merger

- 1.20 The transaction the subject of this part of the Terms of Reference was added to the Commission's Terms of Reference in October 2021. This was largely because it was, by then, clear that this began the formal relationship between the State and Oil Search. This relationship, which hitherto had been close through long investment by Oil Search in the country, was cemented by the State being a significant shareholder. It was advanced by former Prime Minister O'Neill as the reason for the purchase of the new Oil Search shares in 2014 by the UBS Loan after its shareholding from this merger was lost to IPIC.
- 1.21 Through the Orogen Minerals / Oil Search merger, the State and its people lost control of its company that held investments in the mining and petroleum sector, being a profitable and well-performing company. Oil Search and the State (directly or through SoEs) grew ever closer in their dealings, and the large shareholding by the State / SoEs in Oil Search came to be regarded by some at least as the normal course of events.
- 1.22 While it was not unreasonable for Oil Search, the biggest company in the State, to have a close relationship with the State in the ordinary course of its business, that relationship became complicated with the Exchangeable Bond Transaction due to the State's large shareholding in Oil Search, as the State had a direct interest in Oil Search's success.

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

- 1.23 This chapter is divided into three parts. It examines the origin of the agreement by eight exploration licence holders to commercialise the gas in their particular licence areas and the take up by the State of its back-in rights under the *Oil and Gas Act* to participate, for a price, in the project. The PNG LNG Project, as it became known, was, and remains, the largest project of its kind in Papua New Guinea from which huge revenues were expected by the people. A critical examination of how the State funded its equity participation in the project in 2008 was an important addition to the inquiry into the USB Loan.
- 1.24 The chapter traces the introduction of the State to IPIC, an Abu Dhabi sovereign wealth fund, by Oil Search in 2008, which became the lender of the funds needed to participate in the PNG LNG Project. The security was principally the Oil Search shares, which the State had acquired after Orogen Minerals merged with Oil Search in 2002, in the form of Exchangeable Bonds. It was the intention of the Government of Prime Minister Sir Michael Somare, of which Mr O'Neill was a member, that at the expiry of the agreement in 2014 the shares would be forfeited for the more fiscally advantageous benefits of the PNG LNG Project.
- 1.25 There is consideration of whether the Exchangeable Bond Transaction was the best the State could have done at the time.
- 1.26 The Commission concludes that the decision to enter into the Exchangeable Bond Transaction was a well-considered decision in the global financial circumstances then prevailing which was designed, over the long term, to generate greater revenues for Papua New Guinea than the shareholding in Oil Search, and to meet the ambitions of the *Constitution* in providing the State with an equity interest in its most significant resource project. The State took a calculated risk that the Oil Search share price would rise over time to eliminate or reduce any shortfall that it might have to pay to IPIC at maturity, but the prevailing view at the time was that the share price would rise, not least as a result of Oil Search's involvement in the PNG LNG Project. It did. Alternative ways of raising the funds were put to the State but rejected.
- 1.27 A criticism that might be made is the level of confusion about the State's financing of its equity interest in the PNG LNG Project and the apparent disagreement and competition between IPBC, the Treasury and Petromin. The Commission finds that the failure of the State to make an early, clear and final decision about the State's nominee was a major factor in creating a measure of dysfunction, duplication and inefficiency, leading, in particular, to additional but unnecessary significant expenditure on advisers. While the dysfunction created inefficiencies, it may nonetheless have provided a degree of market-testing beyond what IPBC itself was considering. It also provided an incentive to all of the agencies involved to seek to obtain the best deals available. The Commission recognises that IPBC never saw itself as having a role in the financing and had no mandate to look for funding. It was Oil Search which approached IPBC with the suggestion to use its holding in Oil Search shares to raise the funds through the Exchangeable Bonds.
- 1.28 It is clear from the PwC report that ultimately the key reasons why acceptable alternatives were not found was the desire of the State, in accordance with its policies, to maintain its full equity stake in the PNG LNG Project and the decision to secure the funding at an earlier stage than needed for the reasons mentioned above. These were matters for the judgement of the Government at the time. They were not irrational. Whilst there can be different views about the decisions made, they do not by themselves give rise to a concern that would fall within the Commission's Terms of Reference.

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

Chapter 9 Attempt to redeem the Exchangeable Bonds

- 1.30 As the term of the five-year Exchangeable Bonds was approaching in 2014, from early 2012 there were signs that the Government, or some of its members and their advisers, contrary to the intention of the Somare Government in 2008 when it entered into the transaction with IPIC, began to explore ways of redeeming the bonds and financing the redemption. This chapter follows the often-tortuous attempts to find the funds, including identifying UBS as a possible financier, and to persuade IPIC to permit the State to redeem the bonds and thus retain the shares in Oil Search. This was ultimately unsuccessful, but not before much energy and many resources had been spent in the attempt.
- 1.31 From early 2012 until early 2014 considerations as to refinancing the Exchangeable Bonds continued. There was limited interaction, if any, between the various persons and entities looking at options regarding financing of the exchangeable bonds. To the contrary, there appeared to be competition between the various persons and institutions involved in considering financial proposals.
- 1.32 It is clear that the NEC mandated orderly process of evaluating and selecting a suitable entity to finance the then proposed redemption of the Exchangeable Bonds foundered, not least because Mr Vele sidelined the IPIC Exchangeable Bond Review Committee which he was meant to chair, instead conducting his own inquiries and reporting directly to Prime Minister O'Neill. Mr Vele soon favoured UBS which meant they were in pole position when the redemption failed to provide finance for the acquisition of new Oil Search shares in March 2014.
- 1.33 Further, the integrity of the processes as to the refinancing of the Exchangeable Bonds was compromised by those communicating on behalf of various financial institutions: certainly, Dr Waine considered, with some justification, that UBS should be disqualified from consideration because of this, and also behaviour he regarded as threatening.

Chapter 10 Elk-Antelope Gas Fields – PRL 15

- 1.34 Circumstances surrounding the sale of the PAC LNG companies and their interest in what is known as the Elk-Antelope gas field (PRL 15) to Oil Search financed by issuing new shares to the State were added to the Terms of Reference in October 2021. The close link between Oil Search's desire to own an interest in PRL 15 and the State's desire to have an interest in Oil Search is an essential part of the narrative of the UBS Loan. This involved the Commission inquiring into the often internecine web of ownership interests in PRL 15, over time, understanding the scale and quality of the resource, how those interests were priced, and whether the State might have fared better had it saved its borrowing capacity for a direct equity in PRL 15. This chapter discusses those issues.
- 1.35 The Commission concludes that:
- (a) PRL 15 appears likely to be a viable resource
 - (b) the amount that Oil Search paid to participate in PRL 15 was comparable to Total's. It was not uncommercial but likely reflected the strong negotiating position of the PAC LNG companies
 - (c) the project is proceeding

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

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

- 1.36 After IPIC issued the Mandatory Exchange Notice to the State electing to retain the Oil Search shares and seeking a monetary 'top-up' from the State under the terms of the agreement, the State, primarily through Prime Minister O'Neill and Secretary to the Treasury, Dairi Vele, sought to maintain a shareholding in Oil Search. This had not been contemplated under various NEC decisions regarding the attempt to refinance the Exchangeable Bonds through 2012 and 2013. This chapter examines the various strands of decision making and the involvement of many individuals, who, with the notable exceptions of Mr O'Neill and Mr Vele, were outside Government. Thus, Oil Search and UBS together worked to achieve an outcome desired by them and at least Mr O'Neill and Mr Vele. That hurried outcome was the purchase of newly issued shares – about 10% of the issued share capital – which would allow Oil Search to fund the purchase of the PAC LNG companies and thus an interest in PRL 15.
- 1.37 The evidence available to the Commission indicates that the dominant driver of the State's purchase for Oil Search shares was to assist in ensuring that the PAC LNG companies were bought out of PRL 15 and to facilitate Oil Search taking over their interests in the resource. A decision (albeit unofficial) to issue a new placement of Oil Search shares had been made before February 2014, and before the Mandatory Exchange Notice was issued on 14 February 2014.
- 1.38 By August 2013, parties acting on behalf of the State, including Mr Vele, were considering an acquisition of new Oil Search shares and Mr Vele then preferred this option over the refinancing of the Exchangeable Bonds.
- 1.39 The decision to purchase the Oil Search shares was made on either 23 February 2014 or 27 February 2014, before the NEC meeting on 6 March 2104.
- 1.40 The evidence available to the Commission indicates that the State determined to utilise the UBS Loan as follows:
- (a) from 16 August 2013, parties acting on behalf of the State, including Mr Vele, Mr Latimer and potentially Mr O'Neill, considered UBS to be the favoured financier for refinancing the Exchangeable Bonds
 - (b) the State did not engage in a tender process to evaluate proposals from prospective financiers in relation to the purchase of 149.39 million shares in Oil Search
 - (c) UBS' conduct throughout the tender process for refinancing the Exchangeable Bonds whilst not an overriding consideration by parties acting on behalf of the State may have featured in the decision-making process
 - (d) the State determined to use the UBS Loan, where UBS, following the issuance of the Mandatory Exchange Notice, encouraged and facilitated parties acting on behalf of the State to engage with Oil Search regarding an on-market purchase of shares

Chapter 12 Chronology of the UBS Loan

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

Investments, who held the State's business assets, as well as the SoE with its legislated independence mandate and to whom the shares were to be novated within 6 months, and bypassed all governmental checks on financial policy and expenditure. This analysis reveals that many outside government managed the deal, and, as the Commission has found, not to the benefit of the State.

- 1.42 The entire process of the UBS Loan and the subsequent acquisition of the Oil Search shares took place over a 15-day period: from 25 February 2014 when UBS was formally engaged to 12 March 2014 when the transaction was completed.
- 1.43 The transaction was undertaken with a great deal of urgency, with serious adverse consequences for the State.
- 1.44 The short timeframe was ultimately a product of the fact that Oil Search needed the funds from the share placement by 12 March 2014 in order to meet its own deadlines from its transaction with the PAC LNG companies to acquire an interest in PRL 15. The urgency was entirely avoidable.
- 1.45 The Commission recommends that:
- (a) the question of whether NRFA breached its duty of care to the State be referred to the Attorney-General for further investigation and advice
 - (b) the apparent failure of UBS to use any arrangements for managing its conflict of interest be referred to the appropriate authorities, including the Australian Securities and Investments Commission, for further investigation

Chapter 13 The Loan Agreements

- 1.46 By any measure, the volumes of documents constituting the UBS Loan were complex and opaque. To assist in appreciating the complexity and unravelling the import of the two agreements – the Bridge Loan and the Collar Loan – the Commission retained The Brattle Group. This chapter opens the UBS Loan to detailed scrutiny to reveal, with the assistance of Brattle's expertise, the wholly disadvantageous nature of the deal to the State and the corresponding benefits to UBS.
- 1.47 The Commission accepts Brattle's analysis of the UBS Loan and its calculations and concludes as follows.
- 1.48 The March 2014 Collar Loan was unfairly priced against the State. This was deliberate on the part of UBS.
- 1.49 It was beyond the abilities of borrowers to be able to fully understand the risks involved in the option structure unless they have the assistance of a highly sophisticated financial adviser who can conduct their own modelling to test the fairness involved in the options structure proposed; as UBS would have, and as the Commission has done through the work of Brattle. In particular, this modelling is necessary in order to check that the pricing of the collar loan was fair.
- 1.50 The State did not have the ability to do this and was vulnerable to being overcharged as a result. In the Commission's view, it is clear that the State personnel, including Mr Vele and Mr O'Neill, did not appreciate this risk. Nor did the State's principal advisers, Mr Mortensen and NRFA. And Mr Jilek of UBS made it clear to Mr Mortensen that the State should not get advice from another investment bank.

- 1.51 The State also considered that it was being advised on the terms of the loans by UBS. UBS disputes this but did not proffer a witness to explain its position, relying instead on its engagement letters. Those are not the end of the matter. As one of these included an advisory mandate in relation to the purchase of the Oil Search shares, which could easily be understood to include the financing for that purchase, it is understandable why the State considered that UBS, or at least Mr Jilek and Mr Turner, were on their side. Further, UBS did indeed provide advice on the loans to the State and took no steps to inform the State that they were not providing advice in relation to the UBS Loan.
- 1.52 The March 2014 Collar Loan was unfair in the following ways:
- (a) It was not *nil premium* as UBS represented. The normal meaning of 'nil premium' in this context (and there was no suggestion it was not being used in its normal meaning by UBS) means that nothing was payable to UBS for providing the collar option structure and that the value of the downside protection that the State received from all of the put options was equal to the value of the upside protection that UBS received from all of the call options. That is, nil premium in this context was a clear representation by UBS that it was not separately profiting from the pricing of the option structure over and above its declared fees and interest charges. As mentioned, the State had no ability to verify this. This matters because, far from being nil-premium, the premium or excessive profit that UBS made in this regard was substantial at about AUD 25 million (approximately PGK 66 million), but it never informed the State of this
 - (b) UBS charged an excessive interest rate. It was excessive in two respects:
 - (i) UBS knew that the State wanted an interest rate of less than 5%. This was so that the loan could be compared favourably to the IPIC Exchangeable Bond Transaction, where the interest rate on the bonds generated a yield for IPIC of 5.1%. However, the State appears not to have appreciated that because the entire two years' interest was paid at the outset of the loan, this had the effect of increasing the benefit of the interest to UBS through the accelerated receipt of the money rather than it being spread out over the two year period. The yield on the loan for UBS was in fact 5.34%, not the 4.95% that the State thought that it was paying
 - (ii) As UBS did not face a credit risk from the State from the Collar Loan and faced a market risk in relation to the Oil Search shares which they could minimise through hedging, the Collar Loan was close to risk-free for UBS
 - (iii) Brattle consider that the interest rate charged was unfairly high and that the State transferred about AUD 56 million (approximately PGK 149 million) in value to UBS as a result
- 1.53 Brattle also concluded that the interest rate on the Bridge Loan was excessive and resulted in an unwarranted additional AUD 6.2 million (approximately PGK 16.45 million) of interest being paid by the State to UBS.
- 1.54 Finally, Brattle concluded that the fees paid to UBS for the Collar and Bridge Loans were unreasonably high. They amounted to some 2.3% of the sums lent. In Brattle's view, 1.35% would have been more reasonable. The difference between the two amounts is approximately AUD 11.9 million (approximately PGK 31.56 million). However, the fact UBS did not charge new

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

Chapter 14 Approval of the UBS Loan

- 1.55 This chapter documents and analyses the passage of the UBS Loan through the necessary legislated and governmental administrative approvals which were pre-conditions to its completion. At each point the process was flawed, dictated as it was by a sense of urgency, confected as far as the State's needs were concerned, but required by Oil Search to settle its contract to purchase the PAC LNG companies.
- 1.56 The chapter covers the execution of the documents by the necessary parties on the State side, which, again, was characterised by urgency which gave no or little time for other advice on the desirability or otherwise of signing. It was a mark of the (wholly avoidable) urgency with which the UBS Loan documents were assembled that, in less than a working day, the State Solicitor was asked to advise on a large quantity of commercial documents – often still in draft form – that were to be placed before the NEC the next morning. Faced with this almost impossible task, the State Solicitor considered the documents and communicated his views to the NEC, despite the extraordinary haste. The State Solicitor or his nominee should have been involved in this process from the beginning.
- 1.57 Finally, it deals with the way in which the procurement requirements of the State were bypassed by the legally wrongful issue of a certificate of inexpediency concerning the payment of fees to the external advisers – solicitors and accountants - to the State and State entities. After the certificate was withdrawn, the Secretary for the Treasury, Mr Vele, was advised that a quantum meruit was the appropriate process. There was no evidence, oral or documentary to indicate that this ever occurred, and a single line figure, as under the certificate, was paid by the State.
- 1.58 The NEC Policy Submission 67/2014 was exceptionally large in volume and complex in content, and, most unusually it had been largely drafted by persons other than public officials. The then Treasurer Mr Polye had no substantive (if any) forewarning as to the policy submission, which was central to his Ministerial responsibility – at the Prime Minister's direction Mr Vele had limited the Treasurer from policy formulation of and knowledge concerning the UBS Loan. Other Ministers at the NEC meeting had no sufficient (if any) forewarning as to the policy submission.
- 1.59 Mr Vele presented the policy submission to the NEC and took ultimate responsibility for its contents although large parts were drafted by external advisors. It was seriously deficient at least in so far as it:
- (a) falsely stated the Treasurer supported its recommendations, when Mr Vele knew he did not and stated that two other Ministers whose portfolios were closely affected by the subject-matter of the submission supported it with no basis for doing so
 - (b) failed to set out any potential problems with, or downside to, the UBS Loan
 - (c) failed to canvass at all the financial risks (beyond those inherent in a collar loan) for the State in borrowing such a very large sum for a speculative purpose
 - (d) otherwise offered no contestability, which is the traditional role of the Treasury, to what was proposed
 - (e) did not explain that the urgency to approve the many processes in the submission originated in Oil Search's need to complete a time-bound contract using the State's funds

- 1.60 There was no sufficient time at the NEC meeting for the Ministers to consider the documentation presented to them, before the NEC decision was made and the opportunity was lost to properly debate and question the proposal. The Treasurer refused to carry out the NEC decision requiring his approval of the loan documentation and he was dismissed by the Head of State, on the advice of the Prime Minister.
- 1.61 This was an exceptional policy proposal that should have been promulgated to the NEC well before the meeting, to allow proper consideration by those who were to attend. It was very complex and lengthy. The Treasurer should have put the proposal to the NEC, on notice. The Attorney-General should have been provided with the policy proposal prior to the meeting, so as to be able to confirm the legality or otherwise of what was proposed. The benefits of debate and consideration by the NEC were undermined by Mr O'Neill's decision to put to the NEC a transaction of enormous complexity, based on a submission of which no other NEC member, including the Treasurer, had prior sight, and which did not fairly set out the arguments against as well as for the proposal.
- 1.62 The 2017 NEC handbook sets out processes designed to ensure model practice by the NEC. However, no handbook can ensure that a similar circumstance to that which occurred in March 2014 will not occur again. The Commission recommends amendment of the legislation on overseas commercial loans by the Government, requiring prior parliamentary approval above a defined level, in order to make less likely the procedural failures in 2014 in the NEC.
- 1.63 The Commission recommends amendment of the legislation on overseas commercial loans by the Government: requiring prior parliamentary approval above a certain level will potentially alleviate the procedural failures on 2014 in the NEC.
- 1.64 The Commission concludes that the certificate of inexpediency should not have been issued, the contracts for this work should not have been made without public tender, and fees for this work should not have been paid until they had been properly assessed according to law, which they never were. The Commission accordingly concludes that the CSTB failed to discharge its duties. As such, one of the checks and balances on government expenditure failed.
- 1.65 The Commission also finds that Ashurst and Pacific Legal Group should have appreciated that the certificate of inexpediency could not lawfully be issued and advised their clients accordingly.
- 1.66 The Commission recommends a review by the Attorney-General of the circumstances in which work done in breach of the *Public Finances (Management) Act 1995* and the Financial Instructions made under it can be paid on a quantum meruit basis.

Chapter 15 The lawfulness of the UBS Loan

- 1.67 The Terms of Reference require the Commission to consider the lawfulness of the UBS Loan. The particular focus in this chapter is on the constitutional framework for the State to enter into loans for governmental purposes. This entails a consideration of s. 209 of the *Constitution*, particularly s. 209 (1), the *Loans (Overseas Borrowings) No 2 Act* and allied legislation dealing with financial management.
- 1.68 The key question is whether, where s. 209 (1) provides that the raising of loans is subject to the authorisation and control by the Parliament, that authorisation must be prior to entry into the loan. The section further provides that the borrowing must be regulated by an Act of Parliament. If prior parliamentary authorisation for the particular loan is not required, the further question is whether the *Loans (Overseas Borrowings) No 2 Act* is such an Act. The State Solicitor 's advice to the

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

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

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

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

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

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

1.71 The Commission recommends that:

- (a) the *Constitution* be amended in accordance with Part II Division 2 Subdivision B of the *Constitution* to enable an Organic Law to be made concerning overseas loans and borrowings which will include provisions requiring the prior consent of the Parliament before a loan from an overseas source is executed and has binding effect above an amount of money determined by reference to a stated formula
- (b) the Parliament should establish a Working Party or refer to a Parliamentary Committee to investigate and recommend an appropriate model for carrying into effect the last recommendation

Chapter 16 The Oil Search shares held from 2014 until sold in 2017

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

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

- opportunity by KPHL to let the loans expire according to their terms, and used Brattle's work to validated the conclusion to which KPHL had come about the losses sustained.
- 1.74 KPHL disposed of the shares in September 2017, not 2016 as the Terms of Reference suggest. The Commission finds that it did so because, in its view:
- (a) the Oil Search shares were not generating significant revenue
 - (b) it was not KPHL's role to hold shares solely for investment purposes. Indeed it had never wished to do so but had been directed to do so by Mr O'Neill and the NEC
 - (c) the burden of the collar loan was preventing KPHL from investing in other resource development projects that did fall within its objects
 - (d) at the time that it sold the shares, it would receive intrinsic value under the put options and a refund of prepaid interest
 - (e) it misunderstood the option structure in the collar loan and placed too much emphasis on intrinsic value in the options as opposed to the real value of the shares in the market
 - (f) Prime Minister O'Neill as Trustee and the NEC had agreed to the sale
- 1.75 Brattle's expert evidence, which the Commission accepts, is that if KPHL had simply allowed the collar loans to expire according to their terms, this would have reduced the losses suffered by the State/KPHL. The fact and circumstances of the sale undermine both the objective and subjective credibility of the strategic interest argument put by Mr O'Neill to justify the UBS Loan.
- 1.76 In the Commission's view, KPHL complied with legal and administrative processes in selling the shares, albeit that it would have been financially better to allow the collar loan to expire.

Chapter 17 The State's Sovereign Wealth Fund

- 1.77 It had been anticipated in 2008 that the receipts from the PNG LNG Project would be such that a sovereign wealth fund ought to be established to assist in economic planning and for the benefit of future generations of citizens to share in the exploitation of finite resources. Much was expected. This chapter investigates the genesis, nature and future of the State's Sovereign Wealth Fund which was established by an amendment to the *Constitution* and secured by an Organic Law. The source of its revenue stream is provided for in the Kumul Authorisation Acts but no funds have ever been allocated to it because the machinery of the fund has not been established. The Commission heard evidence from experts, Professor Sir Tim Besley of the London School of Economics and Mr David Murray AO, foundation chair of Australia's Future Fund, about the way forward for the State.
- 1.78 The Commission concludes that the failure to establish the Sovereign Wealth Fund in 2015 or since represents a significant lost opportunity for the country. However, the Commission also notes the stated intention of both Mr Marape and Mr O'Neill to do so at an early opportunity.
- 1.79 The Commission recommends that the Government:
- (a) immediately move to expedite the implementation of those parts of the SWF Organic Law which have not been implemented
 - (b) move to appoint appropriately qualified and experienced persons of good reputation and professional independence as members of the SWF Board of Trustees

- (c) seek assistance from multilateral partners including the International Forum of Sovereign Wealth Funds, the World Bank and/or the Asian Development Bank in attending to such matters as:
- (i) how SWF funds flow from the budget into normal budgetary expenditure
 - (ii) defining how SoEs should operate in terms of returns, dividend payments, new investments and indebtedness
 - (iii) how all SWF funds would flow into the stabilisation and/or savings funds
- (d) report annually to Parliament on progress

Chapter 18 The Facilitators and the Intermediaries

- 1.80 Between 2012 and 2014 various individuals were authorised by the NEC and the Department of Public Enterprises and State Investments to negotiate the refinancing of the Exchangeable Bonds. There were also other individuals and entities who were instrumental in that negotiation and the subsequent negotiation of the UBS Loan who were not, on the evidence before the Commission, properly authorised.
- 1.81 The Terms of Reference require identification of the roles and remuneration of these persons and this chapter does so.

Summary answers to the Terms of Reference

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

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

Terms of Reference		Answer
		Conversely, Oil Search was deeply interested in the State's plans for its shareholding.
PNG LNG Project		
(e)	How the State financed its equity participation in the PNG LNG Project	The Exchangeable Bond Transaction.
(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?	Yes Chapter 8 sets out the detail of the processes followed.
(g)	Who were the legal and financial advisors engaged in the IPIC exchangeable bond transaction	IPBC received legal advice from Freehills and financial advice from Goldman Sachs.
(h)	Were legal and administrative processes followed to engage in any legal and financial advisors	Yes. Chapter 8 sets out the detail of the processes followed.
(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	The Exchangeable Bond Transaction did not permit payment to be made by an election of cash or shares or a combination of the two. The principal way in which the Exchangeable Bonds were to be redeemed was by being exchanged for IPBC's shares in Oil Search up to the reference price of AUD 8.55 with a cash payment required if the share price was lower than that price. The rationale behind IPBC's agreement to IPIC's rights of early redemption appears to be an acceptance that IPBC would never have the funds to be able to redeem the Exchangeable Bonds in cash.
(j)	What was the rationale for allowing the mortgaged Oil Search shares to be used in payment of the Loan	It was considered to be the best way of leveraging IPBC's most significant asset, namely the Oil Search shares.
(k)	Whether IPIC has the sole election as to method of payment in satisfaction of the State Loan from IPIC, 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	See above. 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 with IPBC being obliged to make up any shortfall between the actual price of the shares at that date and the reference price.

Terms of Reference		Answer
UBS Loan		
(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	The State first decided to initiate discussion with IPIC and to investigate options for refinancing the Exchangeable Bonds on 14 March 2012. It was thought important to the State to remain a shareholder of Oil Search.
(m)	Whether legal and administrative processes were followed regarding the loan from UBS including but not limited to: (i) how was the process commenced (ii) how was UBS selected (iii) what process was utilised (iv) what were the terms of the loan What processes have been utilised in the past to obtain loans	No. Chapter 9 sets out the detail of the processes followed in respect of consideration of refinancing the Exchangeable Bonds. UBS was selected as the financier for the purchase of new Oil Search shares by Mr Vele and Mr O'Neill as it had been chosen as the preferred financier for refinancing the Exchangeable Bonds. No process was utilised. The UBS Loan comprised two loans: the Collar Loan and the Bridge Loan. Chapter 13 and the Brattle reports set out the detail of each loan. Chapter 14 sets out the detail of processes that have historically been used to obtain loans.
(n)	The rationale as to why the State determined to buy shares in Oil Search in 2014	The stated rationale was the so-called 'strategic interest' in owning Oil Search shares but the Commission does not accept that. The balance of the evidence suggests that a significant driver of the State's purchase of new Oil Search shares in 2014 was to assist in ensuring that the PAC LNG companies were bought out of PRL 15 and that Oil Search could take over their interests in the resource.
(o)	When the decision was made to purchase Oil Search shares	The decision to purchase the Oil Search shares was made on either 23 February 2014 or 27 February 2014 before the NEC meeting on 6 March.
(p)	The rationale as to why the State determined to utilise the UBS Loan to purchase Oil Search shares	The State determined to use the UBS Loan to acquire the Oil Search shares because UBS, following the issuance of the Mandatory Exchange Notice by IPIC, encouraged parties acting on behalf of the State to engage with Oil Search regarding an on-market purchase of shares.
(q)	Whether legal and administrative processes were followed to buy Oil Search shares in 2014	No. Chapter 14 sets out the detail of the processes followed.

Terms of Reference		Answer
(r)	What role did Papua New Guinean and international legal and financial advisors play in relation to the UBS Loan	<p>UBS was the State's sole financial advisor and sole lead arranger in relation to management of the State's investment in Oil Search and associated matters flowing from the Exchangeable Bonds, and exclusive arranger of the UBS Loan.</p> <p>NRFA advised the State on the UBS Loan (excluding matters of Papua New Guinean law).</p> <p>Pacific Legal Group (PLG) advised the State on matters of Papua New Guinean law relevant to the UBS Loan.</p> <p>Pertusio Capital acted as advisor to Mr Vele, then Secretary for Treasury.</p> <p>Mr Jimmy Maladina was a consultant lawyer to PLG.</p> <p>KPMG advised the State on the collar loan.</p>
(s)	Which individuals or organisations benefitted from the UBS Loan or related transactions	Oil Search, UBS, the State's advisers as set out above, Ashurst (legal advisors to UBS on the UBS Loan paid for by the State).
(t)	What would the State's (and its government owned enterprises) financial positions have been had the UBS loan to purchase Oil search shares and the purchase of Oil Search had not been entered into	There would have been an amount of AUD 340 million (approximately PGK 902 million).
Elk / Antelope PRL 15 Transaction		
(u)	The history of the Elk/Antelope PDL and PRL	Chapter 10 sets out the history of Elk-Antelope and PRL 15.
(v)	The approvals process for PRL-15	Chapter 10 sets out the approval process for PRL 15.
(w)	The scale and quantity of the PRL 15 resource	PRL 15 appears likely to be a viable resource. Chapter 10 and the report of Dr Hornbrook sets out details of the scale and quantity of the PRL 15 resource.
(x)	Which entities have interests in Elk-Antelope PRL-15 since its inception	Chapter 10 sets out the history of ownership of Elk-Antelope and PRL 15.
(y)	Which individuals or organisations benefitted from the 2014 sale of PAC LNG Group of companies to Oil Search Limited and related transactions	<p>The beneficial owners of shares in the PAC LNG companies.</p> <p>Chapter 10 identifies the individuals and organisations and the quantum.</p> <p>Oil Search also benefited.</p>
(z)	What opportunities did the State have to acquire an interest in Elk/Antelope PRL-15 other than indirectly through a shareholding in Oil Search? Were there	The State can acquire an interest in PRL 15 through its back-in rights.

Terms of Reference		Answer
	alternative means of Oil Search financing the PRL-15 transaction, other than obtaining funds from the Independent State?	Yes. Oil Search had alternative means of financing the PRL 15 transaction, other than obtaining funds from the State and was already considering them when the State expressed an interest in purchasing shares.
Sale Of Oil Search Shares		
(aa)	The rationale as to why the State/Kumul Petroleum Holdings Limited sold the Oil Search shares in 2017	KPHL sold the Oil Search shares because: a) they were not generating significant revenue (b) it was not KPHL's role to hold shares solely for investment purposes. (c) the burden of the collar loan was preventing KPHL from investing in other resource development projects that did fall within its objects (d) at the time that it sold the shares, it would receive value under the put options and a refund of prepaid interest (e) Mr O'Neill as Trustee and the NEC had agreed to the sale
(bb)	Whether legal and administrative processes were followed in the sale of the Oil Search shares?	Yes. Chapter 16 sets out the details of the processes followed.

¹ Note: all references in this document to the PGK equivalent are approximate, using the exchange rate as at 28 March 2022. Exchange Rates UK website, accessed on 28 March 2022, <https://www.exchangerates.org.uk/currency/exchange-rate-calculator.html>.