



**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**

OPENING BY COUNSEL ASSISTING

TUESDAY 30 MARCH 2021

Introduction

May it please the Commission, we formally announce our appearances as the Counsel Assisting this important Commission of Inquiry.¹

To sum it up in a sentence: the objective of this Inquiry is to establish whether there were breaches of laws and constitutional requirements in the process of negotiation and approval of key Papua New Guinea LNG (PNG LNG) transactions in 2009 and 2014, whether the Independent State suffered foreseeable losses as a result, including in 2016, and, if so, who can be held accountable.

In this opening we:

- (a) set out the Terms of Reference;
- (b) note the background to the Inquiry, including the Ombudsman Commission report;

¹ Embargoed until delivery. Check against delivery.

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- (c) introduce the key participants and transactions and some key documents;
- (d) open the evidence – at least in a documentary sense – in this preliminary phase of the Inquiry; and
- (e) foreshadow the future progress of the Inquiry, including what we designate as the substantive hearings concerning key events in 2009, 2014 and 2016.

The Terms of Reference

As with all statutory Inquiries, the Terms of Reference define and explain the task.

As they are so fundamental, we now set them out:

“STATEMENT OF CASE

Introduction

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

Objective

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

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1. The decision by the Government to obtain the loan funding of US\$1.3 billion [4.6 billion Kina];
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 they were paid as fees for their services as brokers and negotiators;
4. Whether breaches of mandatory Constitutional requirements have occurred and whether there [was] negligence 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 negligence.

TERMS OF REFERENCE

...

1. The Commission shall inquire into, make findings and report on the following matters:

PNG LNG Project

- a) How the State financed its equity participation in the PNG LNG project.
- b) Whether due and proper legal and administrative processes were followed to obtain the loan to finance the State's equity participation in 2009, including but not limited to:-
 - i) How was the process commenced?
 - ii) How was IPIC selected?
 - iii) What process was utilized?
 - iv) What were the terms of the Loan from IPIC?

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- c) 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.
- d) What was the rationale for allowing the mortgaged Oil Search shares to be used in payment of the loan.
- e) Whether IPIC had the sole election as to method of payment in satisfaction of the State Loan from IPIC, and if so, what was the rationale for giving IPIC the right of sole election to either accept cash, the mortgage Oil Search shares or a combination of both.
- f) When and what decision did IPIC make on the repayment of the loan?

UBS LOAN

- g) Why and when did the State commence the procedures to obtain a loan regarding the debt to IPIC and/or purchase Oil Search shares.
- h) Whether legal and administrative processes were followed regarding the loan from UBS, including not limited to:-
 - i) How was the process commenced?
 - ii) How was UBS selected?
 - iii) What process was utilized?
 - iv) What were the terms of the loan?
- i) What processes have been utilized in the past to obtain loans?

PURCHASE OIL SEARCH SHARES

- j) The rationale as to why the State determined to buy shares in Oil Search in 2014.
- k) When the decision was made to purchase Oil Search shares.
- l) The rationale as to why the State determined to utilize the UBS Loan to purchase Oil Search shares.

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

SALE OF OIL SEARCH SHARES

(n) The rationale as to why the State sold the Oil Search shares in 2016.

(o) Whether legal and administrative processes were followed in the sale of the Oil Search shares?

2. These Terms of Reference may be added to, varied and amended from time to time.
3. The Commission shall use its best efforts to conclude its inquiry within three months after it commences, and shall make a full and faithful report on and recommendations concerning the aforesaid matters, and transmit the same to the Prime Minister after concluding its inquiry.
4. The provisions of [the] *Commission[s] of Inquiry Act, 1951 Chapter 31* shall be applicable for purposes of this inquiry.
5. The Commission may hold public and private hearings, in such manner and in such locations, as may be necessary and convenient.
6. All organs of state, institutions and stakeholders are required to cooperate fully with the Commission.

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

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

AND I FURTHER direct that you shall commence with the inquiry without delay and proceed therein with all dispatch and render to me your final report within three months from the date of commencement of hearing.”

So we can see there are a number of key events and concepts there mentioned including:

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- the PNG LNG project;
- IPIC;
- Oil Search;
- UBS;
- **2009** – the Abu Dhabi based IPIC transactions;
- **2014** – the UBS/Oil Search transactions; and
- **2016** – the sale of the Oil Search shares.

At the heart of it all, the Commission must find:

- the ‘*why*’: the *rationale* for these transactions; which includes whether the decisions were financially sound, one measure of that being any financial losses; and
- the ‘*how*’: the *legal and administrative processes followed*; and
- *its corollary*: was what happened compliant with the *Constitution* and Laws of the Independent State, and if not,
- what should *now happen* both to obtain redress and what reforms should be implemented to prevent repetition of errors and illegalities?

COVID-19 – the conduct of the Inquiry and the way forward

Let me immediately acknowledge the effect of COVID-19 on the work of the Commission, including before our appointment this year and the appointment of Minter Ellison as International Lawyers and Technical Assistants assisting the Commission of Inquiry last year. As the Chief Commissioner has already noted, a great deal of work has taken place, despite the COVID-19 related delays.

We are now in a position to begin the preliminary public hearings of the Commission, albeit that some of us must participate remotely. That, however, is now common-place in hearings around the world and the Terms of Reference expressly permit it.

While the Terms of Reference state the Commission’s final report should be finalised within three months from the date of commencement of hearing, various events, especially the ongoing pandemic, but also the ill health leading to the untimely death

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of former Commissioner, the Honourable John Gilmour QC, the difficulties with our predecessors, and the International Lawyers obtaining admission as legal practitioners (current Counsel Assisting were already admitted and all of us hold current practising certificates), and the unexpected time taken in identifying and obtaining key documents in the midst of the pandemic and associated restrictions, makes it appropriate to count the *commencement of hearings* from the next stage, at which point we would submit all oral evidence should be received and examination of witnesses to occur, with the aim of written final submissions (which will provide all necessary procedural fairness if it has not already been provided) and responses being received in a timeframe which will allow the final report to be written, at least substantially, within three months of the next hearings.

But meeting such deadlines requires full cooperation from those who say their interests – including reputational interests – are potentially affected.

The Terms of Reference contain the requirement as clearly stated by the Prime Minister that: “All organs of state, institutions and stakeholders are required to cooperate fully with the Commission”. That of course means timely as well as complete cooperation.

For those located in the Independent State, the Inquiry has the full range of legal compulsions and protections, including criminal offences for failure to comply with summonses to appear or give evidence. And we strongly encourage whistle blowers, including officials or representatives directly involved in the events we are examining, to come forward and offer evidence to the Inquiry. If you do so, providing your evidence is truthful, you have the strong protection of s 13 of the *Commissions of Inquiry Act* which states:

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

So the time for whistle blowers to come forward is now.

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Some listening to this may be thinking along these lines: we are not located physically in this country; we are not subject to compulsion by this Inquiry; so we choose not to participate or assist in any way.

Our answer is that, even if the first two matters are correct, the Commission remains free to proceed in your absence and you may come to regret your lack of participation and assistance if and when adverse findings are made, for example, any conclusion that relevant findings and material be provided to Australian or Swiss authorities. So to those offshore we also say, now is the time to fully cooperate and provide information and we encourage you to do so.

The contact details are on the Commission's website: www.coiubsl.com

For those who are potentially affected, we draw attention to the second Practice Note issued by the Commission on 22 March 2021. It follows an approach, now familiar to those appearing in inquiries in other Commonwealth jurisdictions, of requiring those who assert an interest to back that up by providing evidence: both statements and relevant documents. Again, now is the time to do this.

As already noted, as soon as practicable once the evidence is assembled, we can then have a single set of hearings for all oral evidence, followed by written final submissions from Counsel Assisting and on behalf of affected persons. We cannot fix a date for that now, but we will do this as soon as we reasonably can.

We now commence a hearing preliminary to the main issues, setting out the historic background to the Independent State's investment in commercial projects relating to its:

- (a) investment in state-owned enterprises;
- (b) participation in private enterprise; and
- (c) methods of financing such investment or participation,

including what the constitutional framers had in mind in that regard.

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These preliminary hearings will also set the stage for the main hearings which will consider the three key events: the 2009 IPIC loan, the 2014 dealings with UBS and the sale of Oil Search shares in 2016.

As we proceed with this opening, we will mention certain documents and suggest exhibit numbers, but we will defer the formal tender of documents until the end of the opening. In addition to the opening, we have a list of key people, defined terms (especially for financial concepts) and entities. Our colleagues will display suitable diagrams by PowerPoint as we proceed. Both the opening and the PowerPoint will be available on the Commission's website immediately after the opening.

Constitutional provisions

The Independent State is rich in many natural resources, among them liquified natural gas: LNG. At the heart of this Inquiry is the so-called *PNG LNG project*. The PNG LNG project has been described as “by far the most significant natural resources project ever proposed or undertaken in Papua New Guinea”.² Capital expenditure on it exceeded US\$19 billion, and it has employed large numbers of people, both citizens and foreigners.

The *Constitution of the Independent State of Papua New Guinea* contains a number of key declarations and provisions. Independence was intended to unify a richly diverse country and lead to peace and prosperity for all. The *Constitution* has some provisions which are to be found in other constitutions from common law countries which are also independent members of the Commonwealth of Nations.³

Thus, there is the familiar separation of government powers into three branches: so that Parliament makes the laws, the Government (also called the Executive) administers them, and the Judiciary declares their meaning and enforces them. Parliament raises taxes and must authorise government expenditure. (One of the important issues in this

² Statement from Dairi Vele, Secretary for Department of Treasury, para 1.

³ Formerly the British Commonwealth.

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Inquiry is whether such provisions were complied with, and if not, what follows from that.)

But there are also constitutional provisions unique to the Independent State. For example, the Ombudsman has constitutional status. The Ombudsman Commission can investigate and report (with recommendations) on conduct by Ministers and other public officials which are or may be *wrong* – a notion defined to include actions which are contrary to law, unjust, oppressive, or based wholly or partly on improper motives. Its report in relation to the 2014 PNG LNG transactions led to this Inquiry, as we shall come to.

Again, the principles underlying the *Constitution* and guiding its interpretation and functioning explicitly recognise the need to protect natural resources for future generations.

The Papua New Guinea Constitutional Planning Committee Report in 1974 is a document vital for interpreting the *Constitution* and it was critical in leading to the inclusion of the National Goals and Directive Principles in Preamble. As has been held in terms later cited with approval:⁴

“During a prolonged process of community consultation the Constitutional Planning Committee endeavoured to tap the will and spirit of the people. It then set out detailed recommendations for constitutional drafting in its report. With the intention of giving effect to this will or spirit of the people, it recommended the inclusion of the National Goals and Directive Principles in the Preamble to the *Constitution*. After much discussion in party briefing sessions and open debate in the Constituent Assembly these provisions were finally enacted in the *Constitution*.”⁵

And again:

“When interpreting the details of a provision in a constitutional law therefore it is an essential pre-requisite for the judicial mind to be enlightened by the spirit of the *Constitution* itself. This enlightenment comes from developing a thorough

⁴ *Reference by the Ombudsman Commission of Papua New Guinea* [2010] PGSC 10 at [211] per Gavara-Nanu J.

⁵ *In Reference by Simbu Provincial Executive* [1987] PNGLR 151 per Barnett J.

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understanding of the National Goals and Directive Principles, by taking an overview which will place the particular provision in the context of the total legislative scheme of which it forms a part and by seeking to understand the intention of the founding fathers as they expressed it on behalf of the people, when enacting the *Constitution* and subsequent amendments.”⁶

The 1974 report included the following:

“Natural Resources and the Environment ...

92. We believe that the people of Papua New Guinea, both of today and tomorrow, should be continually aware that in striving to improve their human lot they should not make the mistake of blindly destroying their rich natural environment – the land, the rivers, the sea, the fish, the animals, and the birds. Use of these resources should be weighed carefully against the real cost to the country in terms of the damage which will be caused to the whole way of life of the people living in the vicinity of a particular project, the destruction of land, rivers and wildlife in the course of the operations of, for instance, a large mining or timber enterprise, the need for the integral development of man which also concerns spiritual, psychological, cultural and social development.

...

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

...

Papua New Guinean Equity

149. We recommend that the equity of the Government and of citizens should be maximized in the case of all large-scale enterprises for the exploitation of natural resources; that this equity should normally be as great as possible and should constitute at least a majority shareholding.”

The Commission received three statements on these matters from the late Grand Chief Sir Michael Somare. His statement of 23 February 2021 says this:

⁶ *The State v Independent Tribunal; Ex parte Sasakila* (1976) PNGLR 491 at 506, 507 per Kearney J.

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“Looking back, it may be possible to see that by not focusing greater efforts on growth of the economy rather than redistribution of wealth, PNG lost some potential towards the goal of building a more robust and dynamic economy.”⁷

and ...

“ ... the essential role of government is to lay down, and administer, good laws that benefit a wide array of people in our society. This includes creating a conducive climate for small and big business to operate, grow and prosper, while the government focuses on provision of quality public services, particularly for education, health and law and order throughout the length and breadth of this nation.”⁸

Constitution

The preamble to the *Constitution* declares:

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

(a) to respect, and to act in the spirit of, this *Constitution*; and

...

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

and additionally declares that:

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

⁷ Statement from the late Grand Chief Sir Michael Somare, Former Prime Minister, made on 15 February 2021, page 4.

⁸ Statement from the late Grand Chief Sir Michael Somare, Former Prime Minister, made on 15 February 2021, page 5.

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The third National Goal in the *Constitution* is “for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant”.

And, thus there is a call for:

“ ...

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

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

The fourth National Goal is “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”.

So it can be seen that the concepts and principles of ownership, protection, replenishment and moderating of foreign investment in natural resources have deep constitutional roots.

These notions find an expression in the *Oil and Gas Act 1998* which relevantly states in ss 165 and 167:

“STATE EQUITY ENTITLEMENT.

165 (1) 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. ...

EQUITY BENEFIT.

167 (1) Out of the State equity entitlement referred to in Section 165, there is reserved an equity benefit to be dealt with in accordance with this section.

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(2) The cost of—

(a) acquiring the participating interest in the petroleum project for the purposes of the equity benefit; and

(b) development attributable to that participating interest up until the commencement of commercial production of petroleum from that petroleum project,

shall be borne by the State.

(3) Subject to this section and Section 169, the State grants to the project area landowners and the affected Local-level Governments of a petroleum project, if any, an equity benefit in that petroleum project.

(4) The equity benefit granted under this section shall be shared between the project area landowners and affected Local-level Governments of the project in proportions agreed by them in a development agreement, but in default of such agreement in the proportions determined by the Minister, by instrument.

(5) The equity benefit granted under this section shall be held on trust for the grantees in accordance with Section 176.”

The PNG LNG project



The PNG LNG project is an integrated development that includes gas production and processing facilities in the Southern Highlands, Hela and Western Provinces of Papua New Guinea, with a transmission pipeline through the Gulf Province to liquefaction and storage facilities (located northwest of Port Moresby on the Gulf of Papua) and a

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capacity of 6.9 million tons per year. There are over 700 kilometers (450 miles) of pipelines connecting the facilities.

The vast PNG LNG project evolved from a recognised potential of three large gas discoveries in the southern and western highlands of the country: Hides, Angore and Juha.

Overview of what happened in 2009, 2014 & 2016

As will be explained, in the last decade or so, the PNG LNG Project (operated by ExxonMobil) has been a highly significant development in and for Papua New Guinea. One of the capital investors in the PNG LNG Project is and has been the Independent State through various corporate entities.⁹ The history of that investing, its financial wisdom and the legality of key financing decisions and actions, are at the centre of this Inquiry. There are two series of decisions and agreements, one in 2009 and the other in 2014, and then a sale of shares in 2016. What follows is our present, necessarily tentative, understanding of what happened. As more evidence emerges, that understanding may change.

2009

In 2009, the late Grand Chief Sir Michael Somare, the first Prime Minister of the Independent State, was again Prime Minister. The late Grand Chief's government,

⁹ In <https://www.pnglng.com/About/Co-venturers> it is stated:

[Kumul Petroleum Holdings Limited](#) (formerly NPCP Holdings Limited) is a company incorporated under the laws of Papua New Guinea with all of its issued shares beneficially owned by the Independent State of Papua New Guinea through Kumul Consolidated Holdings (KCH) (formerly, Independent Public Business Corporation of PNG). Kumul Petroleum Holdings Limited, through its wholly owned subsidiary Kumul Petroleum (Kroton) Limited, holds the State's equity interest in the PNG LNG Project. KCH was given the mandate by the National Executive Council in October 2008 to be the State's nominee with respect to the State's equity interest in the PNG LNG Project. KCH established Kroton No. 2 Ltd as a special purpose vehicle through which the State's participation was effected. The Kroton No.2 Limited's name was changed in November 2010 to National Petroleum Company of PNG (Kroton) Limited. In December 2014, all the issued shares in National Petroleum Company of PNG (Kroton) Limited were transferred to Kumul Petroleum Holdings Limited. In September 2015, the National Petroleum Company of PNG (Kroton) Limited's name was changed to Kumul Petroleum (PNG LNG) Limited and subsequently changed in January 2016 to Kumul Petroleum (Kroton) Limited. Kumul Petroleum holds a 16.8 percent participating equity interest in the PNG LNG Project, making Kumul Petroleum the third largest participant in the Project.

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seeking to finance the 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: AUD\$1.7 billion.¹⁰ However, the Oil Search shares were not worth AUD\$1.7 billion and so they were pledged against their future projected value in a deal with the International Petroleum Investment Company (IPIC).

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.

2013/14

Four years later, in 2013, the Honourable Peter O'Neill was Prime Minister. The Government may not have been able to secure a loan to buy back the Oil Search shares and in any event IPIC wished to retain the shares. The Government appears to have decided that it should purchase a further stake in Oil Search. It may also have been thought that any acquisition of Oil Search shares needed to be completed urgently as it was expected that Oil Search would soon be announcing that it would be acquiring an interest in the Elk/Antelope gas field and its share price would rise as a result. We will examine what happened next in great detail, but in the result, on 23 February 2014, Prime Minister O'Neill and Mr Vele met with then Oil Search CEO, Peter Botten, and Chairman Mr Aopi at a hotel in Port Moresby and they agreed that the Independent State should buy a portion of new shares in Oil Search. The Government decided to do this by taking out a loan worth AUD\$1.239 billion from UBS Australia to finance the purchase.

This 2014 loan did not involve a public tender, nor did it obtain endorsement from Parliament. The legality of the 2014 loan endorsement by the National Executive Council is in question, and key issues for this Commission include whether the *Constitution* and various laws were thereby broken.

¹⁰ UBS, *Oil Search and the Forgotten Middle Report*, 2019.

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2016

Important, even vital, as those issues are, in the result the Independent State's Oil Search shares decreased in value, and were eventually sold in 2016.

There are media reports estimating that the 2014 deal cost the Independent State AUD\$420 million or K\$1 billion,¹¹ while UBS is estimated to have made AUD\$120 million from fees and interest from the loan, and other advisers received substantial remuneration.¹² We will examine those matters minutely but let us unpack them a little more now.

Some Key Parties

The Independent State exercises its rights in relation to investment and shareholding through a number of corporations, some created by statute.

The Mineral Resources Development Company Limited (**MRDC**) was created at independence to hold the Independent State's equity interests in mineral resources projects. MRDC was partially privatised in 1996, through the creation of Orogen Minerals Limited, specifically mentioned in the *Oil and Gas Act*, in which MRDC held a 51% shareholding.

In 2002, Orogen merged with Oil Search Limited (**Oil Search**), with MRDC retaining an 18.1% stake in the new company.

Oil Search is a company with a long history in Papua New Guinea of over 90 years. It is accepted to be the Independent State's largest company and has been a very large investor. Oil Search is listed on the PNGX and was first listed on 19 December 2001, about 2 years after the PNGX was opened on 28 April 1999. Oil Search is also listed on the Australian Stock Exchange (**ASX**).

¹¹ 'UBS may be examined by PNG commission', Grigg, Murray and Shaprio, *Australian Financial Review*, 2019.

¹² *UBS, Oil Search and the Forgotten Middle Report*, 2019.

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In 2007:

- Petromin PNG Holdings Limited was created and took over MRDC's stake in Oil Search; and
- IPBC was established as a statutory corporation under the *IPBC Act*. It was trustee of the general business trust, in which the ownership of many of the Independent State's major state-owned enterprises is vested.

The MRDC now manages the interests of provincial governments and project area landowners in oil and gas projects.

By 2007 discussions with ExxonMobil were progressing. According to the evidence we expect to hear from Mr Dairi Vele, now Secretary for Department of Treasury, there developed three proposals, each with different financial and legal advisers, for the Independent State to be involved in what was recognised as a large and vital project.

Mr Vele will say that:

“Given the significance of the LNG Project to the long-term economic well-being of Papua New Guinea, it is recognised that the successful implementation of the Project and the subsequent management of cash flows from the Project is the highest priority to Government as part of its economic development agenda.”¹³

Mr Vele considers Petromin and IPBC were “*waging a battle as to which of the two entities would become the State nominee and thus control the State's participating interest in the project*”.¹⁴

The *Petromin strategy* sponsored by then Prime Minister Grand Chief Sir Michael Somare, envisaged partial divestment of equity in the PNG LNG project, so as to secure funding for the balance of equity taken up.

¹³ Statement from Dairi Vele, Secretary for Department of Treasury, paras 2-7.

¹⁴ Statement from Dairi Vele, Secretary for Department of Treasury, para 89.

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The *IPBC strategy* sponsored by the then Minister for Minerals, the Honourable Arthur Somare, sought to raise capital by leveraging or selling its 17.4% of the issued capital i.e. shares in Oil Search, then worth approximately US\$600 million.

Remarkably, Treasury then retained *its own* financial and legal advisers.

One question for the Commission is whether there was expensive and unnecessary intra-government competition, as Mr Vele states, and if so, whether it was justified, and if not, how such an approach could be avoided in future.

On 22 May 2008, project venture participants and the Independent State formally signed the Gas Agreement. The project began the front-end engineering and design stage. The integrated project included production, processing and liquefaction facilities, as well as off-shore and on-shore pipelines.

One of the issues which arose was which State entity would be the Independent State's nominee to obtain the participating interest under s 165 of the *Oil and Gas Act* (called 'back-in rights'), as well as additional commercially agreed rights.

In the result, the *Liquefied Natural Gas Project (State Participation) Act 2008* was enacted late in 2008. Among other matters it authorised Kroton No. 2 Limited Company (later the National Petroleum Company of PNG (Kroton) Ltd) on behalf of IPBC to be the State nominee.

A final investment decision (FID) was made on 8 December 2009.

The construction and commissioning period was from 2010 to 2014; and the total capital expenditure by project sponsors exceeded USD\$19 billion.

The LNG Project includes gas production and processing facilities from Hela, Southern Highlands, Western and Gulf provinces, to Port Moresby in the Central Province.

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In or about April 2014, the PNG LNG project started production of liquefied natural gas. On 25 May 2014, the first shipment of liquefied natural gas was delivered to the Tokyo Electric Power Co. Inc., TEPCO, in Japan.

Despite that real achievement, in terms of the Independent State's fiscal obligations, it seems that Government revenue for 2014 was expected to be K12.7 billion against a projection of K15 billion leaving a 2014 budget deficit of K2.3 billion. In that context, the Independent State still required funds for its participation under the Gas Agreement, and it raised them by mortgaging its shares in Oil Search to IPIC (not to be confused with PNG's IPBC), a subsidiary of Mubadala, an Abu Dhabi state-owned investment company. Mubadala continues to be a significant shareholder in Oil Search.

There are some real intricacies in the loan agreement with IPIC, which the Terms of Reference require this Inquiry to evaluate. But we must not lose sight of one important question the Commission must answer: *was this a very bad deal for the country?*

Coming forward to the present day, on 12 February 2021, the Government announced it had approved the renewal of the retention lease over the Elk-Antelope gas fields that are part of the PNG LNG project.¹⁵ It seems that the term of the extension of Block PRL15 will start on 30 November 2021 and that during the five-year extension, the joint venture partners, Total, ExxonMobil and Oil Search, will conduct project financing activities. It also seems that Oil Search was able to buy into that project with the AUD\$900 million the Independent State paid for the allocation of new shares in Oil Search.

A question for the Commission is whether the project agreements for oil and gas have been too advantageous to the commercial venturers, many offshore, to the detriment of the country and its citizens, and contrary to at least the aspirations of the *Constitution*.

There are other questions that arise from the Terms of Reference, including:

¹⁵ PNG's second major LNG gas project finally approved, published 10 February 2021, <https://www.rnz.co.nz/international/pacific-news/436133/png-s-second-major-lng-gas-project-finally-approved> accessed 29 March 2021.

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1. What is the connection, if any, between the IPIC Loan and the UBS Loans?
2. What was the value of the 14.64% of shares in Oil Search held by the State in 2009 and 2014, which IPIC chose to retain under the exchangeable bonds? What was the value of those shares in Oil Search at the time/s of disposal?
3. Who had legal ownership and beneficial ownership of those shares when they were sold or transferred?
4. Was a loss incurred as to the State's 14.6% of shares in Oil Search when IPIC exercised its option to retain the Oil Search shares under the exchangeable bonds?
5. What was Oil Search's use of the proceeds of the sale of shares - some AUD\$900 million - and whether that sum was used to purchase Pacific LNG's (**PacLNG**) shares in PNG LNG?
6. To whom did UBS's dispose of the 149,390,244 shares in Oil Search and at what price?
7. What were the Independent State's loan repayments made to UBS between 2014 and October 2017 and what was the source of those funds. Did they include revenue from PNG LNG?
8. Was the revenue from PNG LNG paid into a Singapore bank account by ExxonMobil?
9. Was there any interest, direct or indirect, held personally by any Government officials involved in the IPIC and UBS Loans in IPBC, Oil Search or any other associated companies, including PacLNG?

Again, we say to those listening, if you have evidence about these matters please provide it to us now.

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The Ombudsman Commission Report

In 2018, the Ombudsman Commission issued a final report which we will call the *Ombudsman Report* or the *UBS/Oil Search report*,¹⁶ which concerned ‘Alleged Improper Borrowing of AUD\$1.239 Billion Loan from the Union Bank of Switzerland (UBS) to purchase shares in Oil Search Ltd’. UBS is a large international bank, with an Australian branch. It provides global financing services, and it offers a variety of financial products, some of which are complex.

There is no doubt that the Ombudsman Commission report led to this Inquiry, but it is important to note that this Inquiry is not reviewing that report, not least because the *Constitution* states in s 217(6) that:

“The proceedings of the Commission are not subject to review in any way, except by the Supreme Court or the National Court on the ground that it has exceeded its jurisdiction.”

Section 218 of the *Constitution* provides the purpose of the Commission as follows:

- a. ensure that all Government Bodies are responsive to the needs and aspirations of the people;
- b. work with Government Bodies to improve their service-delivery mechanisms and ensure services rendered are fair and non-discriminatory;
- c. help eliminate unfair and defective legislation and practices affecting or administered by Government Bodies; and
- d. enforce the *Leadership Code*.

Two of the primary functions of the Commission are to:

¹⁶ AN INVESTIGATION INTO THE ALLEGED IMPROPER BORROWING OF AU\$1.239 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: <https://www.ombudsman.gov.pg/publications/final-investigative-reports/>.

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- a. investigate complaints about the administrative actions of governmental bodies and agencies; and
- b. administer the *Leadership Code* (outlined in the *Constitution*) by conducting investigations into the actions of leaders.

The Ombudsman Commission operates, further to the *Constitution*, under two laws:

- a. *Organic Law on the Ombudsman Commission*; and
- b. *Organic Law on the Duties and Responsibilities of Leadership*.

With the advantage of access to a wider range of documents and witnesses, including witnesses external to the Independent State, and thus outside the Ombudsman Commission's jurisdiction, the Commission should be able to more completely explore these transactions.

However, we acknowledge the valuable work of the Ombudsman Commission, which will greatly assist the Commission's task.

On 14 March 2014, soon after the IPIC loan was made public, the Ombudsman determined that it was necessary to issue a direction under s 27(4) of the *Constitution* to freeze all further progress on the loan and requested cooperation from Prime Minister O'Neill, the members of the National Executive Council (NEC), and other involved Ministers, Secretaries, Governors, businesses and parties.¹⁷

On 22 May 2014, the Commission issued notice of its intention to investigate key public officials, including the Prime Minister and the acting head of the Department of the Treasury, concerning the UBS loan. Prime Minister O'Neill and Mr Vele challenged the jurisdiction of the Ombudsman Inquiry in the National Court of Justice.¹⁸

On 10 June 2014, Gavara-Nanu J reviewed an application by them to restrain the Ombudsman Commission, its servants and agents from taking any actions that might obstruct or jeopardise compliance with the State's obligation under the loan transaction

¹⁷ Final Report on the Investigation into the Alleged Improper Borrowing of A\$1.239 Billion Loan from the Union Bank of Switzerland, "Report" p. xxiii.

¹⁸ *O'Neill v Ombudsman Commission of Papua New Guinea* [2014] PGNC 99 per Gavara-Nanu J.

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with UBS.¹⁹ The main issue was whether the Ombudsman Commission acted beyond its power in issuing the direction.²⁰ His Honour held that the balance of convenience favoured the grant of a stay,²¹ noting that the Ombudsman Commission would continue to carry out its task investigating the loan, and that the grant of a stay would not interfere with the investigation.²²

On 8 December 2014, the Ombudsman Commission issued a Provisional Report to those criticised, most of whom responded.²³

On 15 November 2017, the Supreme Court reviewed Prime Minister O’Neill’s application regarding whether the Ombudsman had jurisdiction to investigate him, and whether or not the issuing of the Provisional Report was beyond the power of the Ombudsman.²⁴ The Supreme Court determined that the Office of the Prime Minister does fall within the functions of the Ombudsman. The Supreme Court dismissed the entire proceedings with costs and discharged all injunctions.²⁵ The Ombudsman was therefore able to issue the final report, which was later made public.

The Commission’s Final Report concluded that there had been a number of illegalities and widespread improper conduct which we now mention, noting of course that the Commission may come to a different view. These included:

- (a) by-passing parliamentary approval of borrowing which breached the *Constitution*, noting that:
 - i. s 209(1) provides that loans must be subject to authorisation and control by the Parliament, and shall be regulated by an Act of the Parliament;²⁶
 - ii. s 211 provides that public money shall be dealt with and properly accounted for in accordance with the law, and none

¹⁹ Ibid [2].

²⁰ Ibid [5i].

²¹ Ibid [5ii]-[5iv].

²² Ibid [6].

²³ Final Report p. xxvi.

²⁴ Final Report p. xxvii.

²⁵ Final Report p. xxvii.

²⁶ Ibid.

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shall be expended except as provided by this *Constitution* or by or under an Act of the Parliament;²⁷

- iii. s 212 provides for situations dealing with revenue and expenditure without prior approval;²⁸
- (b) exposing the Independent State to debt breached the *Papua New Guinea Fiscal Responsibility Act 2016* and the *Loans (Overseas) Borrowing (No 2) Act 1976*;
- (c) engaging private law firms without the Attorney-General's statutory approval breached the *Attorney-General Act 1989*;
- (d) engaging financial and legal consultants without public tendering breached the *Public Finances (Management) Act 2005*;
- (e) the Governor-General signed loan documents without the presence of other parties, witnessed by a person who was not a registered lawyer or Commissioner for Oaths and so breached the *Lawyers Act 1986* and the *Oaths, Affirmations and Statutory Declarations Act 1962*;
- (f) there was improper engagement of both Petromin Holdings Ltd and the National Petroleum Company;
- (g) there was improper engagement of UBS AG as the sole financial advisor and lead arranger regarding the investment in Oil Search;
- (h) the NEC was misled when it approved the UBS loan,²⁹ and meaningful consultation with the relevant authorities and agencies on the loan transaction had not occurred, contrary to s 255 of the *Constitution*;
- (i) improper directions and instructions were given to the IPBC Chairman and its management; and
- (j) the Central Supply and Tender Board issued a 'certificate of inexpediency' for the engagement of financial, legal and technical consultants, without clearance from the State Solicitor and contrary to the *Public Finances (Management) Act 1995* and the *Finance Management Manual* including because it was applied for and issued retrospectively.

The establishment of the Commission

²⁷ Ibid.

²⁸ Ibid.

²⁹ NEC Policy Submission No: 67/2014.

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In 2019, Prime Minister Marape moved that the Parliament take note of the Ombudsman's Final Report on the UBS Loan.³⁰ The Prime Minister acknowledged the findings against him of wrong and improper conduct and reserved the right to seek recourse where his involvement was sanctioned by a legitimate Cabinet decision.³¹ Nevertheless, he established this Commission of Inquiry to verify and validate the claims because, unlike the Ombudsman, the Commission could extend to consider the conduct of, and take evidence from, private persons and entities.³² It does so.

Former Prime Minister O'Neill contended that the Inquiry must extend to the IPIC loan as well.³³ It does so.

May it please the Commission.

30 March 2021

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³⁰ 'DRAFT HANSARD', 26 June 2019, <<http://www.parliament.gov.pg/uploads/hansard/H-10-20190626-M13-D02.pdf>> 18.

³¹ Ibid 21.

³² Ibid.

³³ Ibid 23.