



**THE COMMISSION OF INQUIRY
GENERALLY INTO
THE DEPARTMENT OF FINANCE**

FINAL REPORT

JUSTICE CATHY DAVANI
COMMISSIONER

MAURICE SHEEHAN, CMG
CHIEF COMMISSIONER

DON MANOA
COMMISSIONER

29 OCTOBER 2009

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into the Department of Finance**

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Foreword

Commissions of Inquiry are appointed to inquire into those matters of public interest controversy or debate where the Minister is of the opinion that in the interests of public welfare, the facts and circumstance of such matters should be publicly established and brought to light.

The Right Honourable, Grand Chief Sir Michael T Somare GCL GCMG CH CF K St J appointed the Commission of Inquiry into the Department of Finance on concerns as to the disposition of public monies described in the Statement of case that accompanies the Instrument of Appointment.

The Commission has throughout its inquiry been conscious of the serious duty entrusted to them and have endeavoured to honour that trust

In so doing, the Commission acknowledges the support of the Prime Minister throughout the Inquiry and the manner in which he has honoured its independence.



Justice Cathy Davani
Commissioner

A large, flowing cursive signature in black ink.

Maurice Sheehan, CMG
Chief Commissioner

A signature in black ink, appearing to be 'Don Manoa' with a flourish at the end.

Don Manoa
Commissioner

29 October, 2009

I. ESTABLISHMENT

The Commission of Inquiry was established under Instrument executed by the Prime Minister on 12 May 2008:

"Commission of Inquiry Act (Chapter 31)

COMMISSION OF INQUIRY

Into

THE MANAGEMENT GENERALLY OF PUBLIC MONIES BY THE DEPARTMENT OF FINANCE

To: MAURICE SHEEHAN (Chief Commissioner),
CATHY DAVANI (Commissioner), and
DON MANOA (Commissioner).

STATEMENT OF CASE

STATEMENT OF CASE ON WHICH THE COMMISSION OF INQUIRY IS ORDERED INTO THE MANAGEMENT OF PUBLIC MONIES BY THE DEPARTMENT OF FINANCE

- A. The management of the Department of Finance, in particular in relation to the disbursement of public monies, has received considerable publicity in recent months with the arrest and prosecution by the police of senior officers of the Department for various offences under the *Criminal Code Act* (Chapter 262). During this time, the expenditure of public monies has given rise to considerable public disquiet and debate. Disquiet has principally been in the manner in which claims for payment of public funds have been made to the Department, the method used to quantify such claims and the authorisation for such payments, the method used to quantify such claims and the authorisation for such payments to be made particularly in relation to consent and default judgments and out-of-court settlements entered against the State.

- B. The Department of Finance (the Department) was established under the *Public Services (Management) Act 1995*. By notice published in *National Gazette* No. G65 of 26th August, 1977, the Head of State, acting on advice of the National Executive Council, determined in accordance with Section 21 of the *Public Services (Management) Act 1995* that the Department shall have the following functions:-
- (a) To be responsible for the management of policies, regulations and laws pertaining to the collection and disbursement of public monies;
 - (b) To administer and provide advice on debt management and foreign aid;
 - (c) To formulate and administer the annual estimates of revenue and expenditure;
 - (d) To control and administer Government revenues.
- C. In the exercise of its functions, the Department manages and disburses public funds in accordance with the *Public Finances (Management) Act 1995* and the Regulations and Financial Instructions made thereunder.
- D. The offices of Attorney-General and Solicitor General are established under the *Attorney-General Act 1989*. Under Section 7 of the *Act*, the Attorney-General is the principal legal adviser to the National Executive Council and, as principal legal advisor, is required to tender legal advice and opinion to the National Executive in accordance with Section 8. Under Section 9 of the *Act*, the Attorney-General appoints the Solicitor-General whose primary function is to appear as an advocate for the State in matters coming before the courts in Papua New Guinea. As part of his function, the Solicitor-General recommends to the Department matters before the courts that are to be settled out of court or by consent judgment.
- E. The controversies surrounding the Department, in particular in relation to payments made in satisfaction of out-of-court settlements, default or consent judgments or other claims against the State, have given rise to concerns that the management of the Department particularly since 2000 was not done transparently and in accordance with good management and accounting practices, and that public monies have been made falsely, fraudulently, improperly or in a manner not authorised by law.
- F. The Commission of Inquiry into the Management of Public Monies by the Department of Finance is hereby established pursuant to Section 2(1) of the *Commissions of Inquiry Act* (Chapter 31).

COMMISSION OF INQUIRY

TERMS OF REFERENCE

KNOW you that I, Grand Chief Sir Michael Somare, Prime Minister of Papua New Guinea, reposing confidence in your integrity and ability do, by virtue of the powers conferred by Section 2 of the *Commission of Inquiry Act* (Chapter 31) and all other powers me enabling, hereby:-

(a) Require you as Commissioners and the Commission to enquire into and report on the following matters:-

1. to inquire into the existence and extent of illegal, false or improper claims for payment made to the State and approved or paid by the Department of Finance in the period 2000 - 1st July, 2006 and to establish:-

- (i) the extent of illegal and improper claims; Judgments or out-of court settlements against the State; and
- (ii) the identity(s) of those persons who have made or been paid such claims; and
- (iii) the value of such claims for each year in the period 2000-1st July, 2006; and
- (iv) the number of illegal, false or improper claims, Judgments or out-of-court settlements, approved for payment by the Department of Finance in the period 2000 - 1st July, 2006; and
- (v) the number of illegal claims that have been paid by or from the Department of Finance in the period 2000 - 1st July 2006; and
- (vi) the amount so paid in each year during the period 2000 - 1st July 2006; and
- (vii) whether, in the opinion of the Commission, the Department of Finance failed to detect and disallow illegal, false or improper claims and if so, how and why those failures occurred; and

- (viii) the degree to which the *bona fides* of each illegal, false or improper claim was investigated by the Department of Finance before approval and/or payment; and
- (ix) the involvement (if any) of officers of the State in the making approval and payment of illegal, false or improper claims against the State; and
- (x) how and by whom such illegal, false or improper claims were approved; and
- (xi) the degree and extent of involvement of legal firms in the making and payment of illegal claims against the State; and
- (xii) whether all tax or other imposts arising from the payment of illegal, false or improper claims, Judgments or out-of-court settlements by the State during the period 2000 - 1st July, 2006, were paid either by the State or payees from the State; and

in compliance with these Terms of Reference the Commission is to consider all payments by the Department of Finance in excess of K300,000.00 during the period 2000 - 1st July, 2006 and identify those payments that are illegal, fraudulent or otherwise improper; and

2. The Commission is to inquire into all Consent and Default Judgments entered against the State in the period 2000 - 1st July, 2006 and conclude as to the number and value of these judgments and the circumstances in which they came to be entered against the State; and
3. The Commission is to inquire and conduct whether the entry of any Default Judgment was the result of negligence or failure by any Officer of the State and to make recommendations for action against those Officers; and
4. The Commission is to make recommendations for action by the State in respect of Consent and Default Judgments made against it and the liabilities therefrom; and
5. The Commission is to examine each out-of-court settlement made against or entered into by the State in the period 2000 - 1st July, 2006 and conclude as to:-

- (9) The facts and circumstances in and by which each out-of-court settlement made; and
 - (i) The legality of each out-of-court settlement; and
 - i) Whether liability should have been admitted by the State; and
 - (i) The involvement of the Offices of the Attorney-General and the Solicitor-General in each out-of-court settlement; and
 - ii
 -) The quantum accepted and agreed by the State and the propriety and legality of that agreement; and
 - (iv) Whether the interests of the State have been prejudiced in respect of any out-of-court settlement entered into by the State; and
 - (vii) What changes should be made to protect the State and public monies from the making or payment of improper out-of-court settlements; and
6. To inquire into the systems that protect public monies from illegal claims, to identify the core failures that have exposed the State to improper liability and allowed public monies to be applied to payment of illegal, false or improper claims Judgments and out-of-court settlements and make recommendations to secure or further protect public monies from such misapplication; and
7. To inquire into the role of the Department of Finance in screening all claims for payment by the State and detecting and rejecting illegal, false or improper claims to establish the extent of Department responsibility in this regard and conclude whether the Department of Finance has complied with these obligations; and
8. To inquire into the involvement of the Office of the Attorney-General, the Solicitor-General, the Department of Finance and the Registry of the National Court of Justice in the making and payment of illegal, false or improper claims or judgments against the State in the period 2000 - 1st July, 2006; and

9. To inquire into and identify the source of monies used to pay all identified illegal, false and improper claims and conclude as to the legality of the use of those sources; and
10. To inquire into and conclude as to the involvement of legal firms in the making and paying of illegal, false or improper claims, Judgments or out-of-court settlements against the State; and
11. Inquire into and identify any improper or illegal involvement in or benefit or payment to any State Officer made for or in any way arising from false, illegal or improper claims, Judgments or out-of-court settlements against the State in the period 2000 - 1st July, 2006; and
12. To inquire and conclude as to whether the relevant Attorneys-General and Solicitors-General in the period 2000 - 1st July, 2006 have advised and protected the State to an acceptable and competent standard in negotiating, entering and processing for payment Consent Judgments and out-of-court settlements; and
13. Make any further recommendations arising from the inquiry; and
14. Make such referrals for prosecution as the Commission deems appropriate; and

AND I FURTHER direct that the inquiry be held in the National Capital District, or at such other place or 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 **Commissions of Inquiry Act**;

AND I FURTHER direct that you shall commence the inquiry without delay and proceed therein with all dispatch and render to me your final report within nine (9) months from the date of commencement of hearing.

AND I FURTHER direct that this Instrument relating to the Terms of Reference of Commission of Inquiry into Department of Finance supersedes any previous Instrument issued under my hand.

Dated this 12th day of May 2008.

M.T. SOMARE
Prime Minister"

The Commission is required by its Terms of Reference to enquire and report on the legality or propriety of claims against the State made and settled through the Department of Finance during the period 1st January 2000 to 1st July 2006. That inquiry includes examining the source of funds expended in settlement and the conduct of parties, in particular State officers involved in the settlement and payment of those claims.

II. HISTORY OF COMMISSION

When first established in August 2006 the period of inquiry to 1 July of that year was recent and current. However, the life of the Commission since first gazettal has been uneven and fragile. Delays and interruption have caused the inquiry period to lapse into a now three year past.

In the two years to September 2008, the Commission was suspended and reestablished five times. This was substantially because of active opposition to the work of the Commission, controversy as to over expenditure in set up costs in 2006 by the departments then administering the Commission funds, and failure by those Departments to provide any or adequate budgeted funds for 2007 and 2008. In that period the Commission was unable to function except briefly between February and May 2007, and March 2008.

The reinstatement of the Commission by the Prime Minister on 12 May 2008, together with the provision for the Commission to control its own funds under a separate trust account, finally enabled the Inquiry to undertake the task set by its Terms of Reference. Even so, full promulgation of the Inquiry was not possible till funding and Ministerial authority for a separate trust account occurred in September 2008. Since then time consuming court challenges to Commission jurisdiction have hampered but not prevented the inquiry process.

Accordingly, of the three years the Commission has been established it has in fact only been operational for approximately one of those years.

III. CONDUCT OF INQUIRIES

Pursuant to the directions of the Terms of Reference, the Commission inquiries have all been conducted in public. While supporting documentation and files have been supplied by agencies and individuals voluntarily or upon request, there has been no hearing of evidence in private. Commission hearings have been all conducted in Port Moresby except that evidence in 38 claims originating in the Highlands was taken in Mt Hagen during 17-22 May 2009.

All proceedings have been recorded in a publicly daily transcript and posted to the Commission web page on the internet (www.coifinance.org.pg)

As at date of this report the Commission has completed full inquiry of 45 claims while 212 more are under way and have been progressed such that while essential basic facts have been established in these matters, opportunity for response by parties involved in them is still required before conclusions can be lawfully drawn and reported.

The Commissions' investigations have been directed to testing all claims against the requirements of the statutory code and examining the conduct of the public officers dealing with them in accordance with the duties outlined under the Act. Those duties include the obligations of all public officers in dealing with public funds to comply with the *Public finances (Management) Act 1995*, Financial Regulations and Instructions.

Importantly there must be compliance also by all public officers with the obligations imposed by the Government through Directions of the National Executive Council, dealing with settlement of claims against the State and or the disposition of public funds.

This entails examination of the documentation of all claims, the Court files, the files of the department which is claimed to be liable in an action (eg., Police, Lands, Defence, Works Departments etc), the files of the Attorney General's Office and the financial records and authorisations of the Finance Department for each of the claims under investigation.

Retrieving basic documents from the Courts and the departments concerned has been and remains time consuming. Access to the Department of Finance and its records has been at all times difficult. Even when cooperation has been forthcoming, the production of files, or the lack or loss of files has delayed the Commissions task. Where there has been lack of cooperation or even apparent obstruction, delays have been prolonged. Persistence nevertheless has brought measurable success. On the other hand, other than those taking court action contesting the Commission of Inquiry jurisdiction, the great majority of witnesses have responded readily to Commission Inquiries. In the process, a total of 517 summons to witnesses have been issued.

A. Natural Justice: Right of Parties to be Heard

Fundamental to the Inquiry process has been strict adherence to principles of natural justice by affording all person or bodies having an interest in matters before the Commission an opportunity to be heard.

For this purpose all persons or bodies with an interest in a matter who was or might be affected by findings of the Commission, particularly findings that might be or had potential to be adverse to them or their interests have been given opportunity to respond, refute or comment on a reasonable summary of facts supplied to them before any conclusions have been drawn by the Commission. Most have taken such opportunity, by oral or written evidence or both. In regard

to the few who have declined opportunity, the Commission has been obliged to reach its conclusions on the facts before it.

**. CLAIMS PAID AND AWAITING PAYMENT BY DEPARTMENT
OF FINANCE**

The Commission has ascertained that between 1st January 2000 and 1st July 2006 not less than K572,591,348.70 was paid out by the Department of Finance in satisfaction of some 539 claims against the State in sums of K300,000.00 or over.

That total was made up by payments in the years:

> 2000	K38.646.701.44
> 2001	K44.835.549.77
> 2002	K89.462.673.55
> 2003	K70.666.461.76
> 2004	K152.428.905.38
> 2005	<u>K121.716.446.76</u>
> 2006 to July	<u>K54.834.610.34</u>
	K572,591,348.70

All of those claimants have been identified but the Commission has been unable in the term of its inquiry to examine each and everyone of those claims to determine exhaustively the legitimacy or propriety of them all. Inquiry does show however that except for a very small number they comprise payments on liability incurred under default judgments or out of court settlement.

A. Additional Claims Notified to Commission

Late in the Commission's term, the Commission was advised that Department of Finance had, by direction of the Minister returned a further 244 outstanding claims files already certified by the Solicitor General for payment by the State but as yet unpaid, to the office of the Attorney General for his reconsideration and later

resubmission for settlement. The sum of these as yet unpaid outstanding judgment debts of the State amount to K211 million. The Commission has yet to examine these in detail.

While some may fall outside of the Commission inquiry period and or scope, the total of as many as 783 claims amounting to some K780 millions, paid or certified for payment, not only demonstrates the massive losses of public funds that untested claims against the State have generated, but also emphasises the need for ongoing inquiry and for action that will halt such losses.

v. CONSTITUTIONAL BASIS FOR CLAIMS AGAINST THE STATE

The Constitution provides that the State of Papua New Guinea "may sue and be sued in accordance with an Act of the Parliament" [Section 247(2) Constitution]. That Act is the *Claims By and Against The State Act 1996*. It provides a mandatory code of procedure for each and every claim against the State.

A. Claims By & Against the State Act 1996

The key procedures under the Act provide:

- ⑧ Formal notice of a claim against the State to be made within 6 months of events giving rise to the cause of action, o Determination by the Court of the liability of the State and an award of proven damages. This is evidenced by the Court issuing a Certificate of Judgment.
- The Solicitor General within 60 days to endorse the Court Certificate, confirming the judgment may be satisfied (or that the State will take further action)
- The Secretary of Finance on receipt of a Certificate endorsed for satisfaction of the judgment is authorised to meet the judgment from legally available funds.

The process of claim commences with Section 5 which provides that failure to give notice of a claim to the State within six (6) months of events giving rise to the claim renders it unenforceable at law. The requirement for notice of claim not only sets up a defence against late or delayed claims, it also reflects measures for good governance, providing a current notice of potential liabilities of the State in its management of public funds. This is a key provision establishing a statutory time bar to claims not compliant with the Section. It states:

"5. Notice of claims against the State.

- (1) *No action to enforce any claim against the State lies against the State unless notice in writing of intention to make a claim is given in accordance with this section by the claimant to —*
- (a) *the Departmental Head of the Department responsible for justice matters; or*
 - (b) *the Solicitor-General*
- (2) *A notice under this section shall be given —*
- (a) *within a period of six months after the occurrence out of which the claim arose; or*
 - (b) *where the claim is for breach of a contract, within a period of six months after the claimant became aware of the alleged breach; or*
 - (c) *within such further period as —*
 - (i) *the Principal Legal Adviser; or*
 - (ii) *the court before which the action is instituted, on sufficient cause being shown, allows—."*

For any claim based on a cause of action originating before the Act became law, but not commenced till after the Act came into operation on 20 February 1997, notice had to be given within six (6) months of the commencement of the Act (Section 21(2)).

The Commission's inquiries have found that time and again files of the Solicitor General's office disclose that failure by claimants to give proper or adequate notice of claim within time has passed unnoticed or ignored preventing a vital first defence to unlawful claims.

Since amendment to the Act in 2002, Section 2A provides a specific defence to any claim not complying with finance procedures under the *Public Finances (management) Act 1996*. The importance of this provision is confirmed by the incorporation of the same provision in the *Public Finances (Management) Act 1996* in Section 47D.

There has been no evidence of compliance being required by public officers nor has non compliance been challenged in any settlement inquired into by the Commission.

B. Public Finances (Management) Act 1995

The Act and the Regulations and Financial instructions issued under the Act, detail in statutory form the process for administration of public funds. This includes the authority and duties of the appointed Minister and officers of the Department of Finance. Essentially, failure to comply with the Act is to act unlawfully.

This Act provides (Section 61) that no one may without the approval of the Minister of Finance enter into any contract on behalf of the State for goods or services involving payment exceeding Id 00,000. That restriction includes and applies to any contracts and or deeds of settlement of claims against the State. It applies not just to the Secretary and officers of the Department of Finance but all Departments including the Attorney General and Solicitor General.

Because out-of-court settlements to resolve a claim, are voluntary contracts regarding disposition of public funds, the State officers can only lawfully act within the authority given to them when they act in compliance with this Act. Before committing the State to settle with payment of sums caught by Section 61 there must be authority granted pursuant with the Act, and, "*moneys lawfully available*" to do so.

Thus, any contract of settlement, agreement or deed of release entered without ministerial approval are invalid and unenforceable. The Supreme Court has confirmed this in *NCDC - v- Yama Security Services* [SC 835] following *Fly River Provincial Government -v- Pioneer Health Services Ltd* [SC 705].

Thus the Secretary has no authority to settle claims for goods and services that do not have the pre-committal documentation that must issue under his authority prior to such contracts being undertaken.

The Secretary of Finance has no authority himself to settle Claims Against the State. He has the authority to make payments of the judgments lawfully incurred by the State from legally available funds but can only ever act in accordance with the terms of the *Public Finances (Management) Act*.

In addition *The Public Finances (Management) Act* specifically states that any settlement of claim for the price of supply of goods or services is unenforceable in any court unless authorised by pre-committal documentation issued under Financial Instructions.

Section 47D(2) states -

"A claim for the price arising from the sale of property or stores or for the supply of goods or services to the State shall not be enforceable, through the courts or otherwise, unless the seller of the property or stores or the supplier of the goods or services produces —

(a) an Integrated Local Purchase Order or Claim (ILPOC); or

(b) an Authority to Pre-commit Expenditure."

It is patently clear that this section is included to provide a defence for the State against unlawfully manufactured claims as it is repeated verbatim as Section 2A of the *Claims By and Against the State Act 1996*.

There has been no evidence before the Commission that this provision has ever been raised or referred to as a prerequisite of claims settled by either the Department of Justice and Attorney General or the Department of Finance which Departments surely must have been the proponents of these prerequisites to the State being contractually bound to any contract for procurements of goods and services. And likewise, obliged to monitor compliance with this provision.

C. National Executive Council Decisions

"The Government has been aware that claims against the State were a cause of serious loss of public funds though it would appear from NEC records of the Inquiry period examined by the Commission, not aware of the actual extent of them because there had been no records kept of such. It did make specific directions for their control.

NEC Directions are the orders or instructions for the implementation of the decisions of Government they issue to the heads of all Government agencies. They have the force and authority of law.

Under Directions NG07/2002, 150/2003 and 21/2006 the NEC gave specific notice to the Finance Secretary and the offices of the Attorney General and Solicitor General detailing the course that these offices were to take in the conduct of claims against the State.

In NG07/2002 (22 August 2002) the NEC directed that to ensure achievement of the 2002 Supplementary Budget:

"That there be no more out-of-court settlements by any State body or authority, including the Attorney General and the Solicitor General, without the approval of the NEC, acting on advise from the CACC."

This Order remained in force for the year following.

In 2003 the NEC substituted NG7/2002 with Direction 150 of 2003 (25 July 2005) which stated;

"That all out-of-court settlements including consent orders are to be reviewed and cleared by the Attorney General or his nominee.

".Directed the Solicitor General in consultation with the Attorney General to settle any future claims for amounts only up to K1 million provided that they are satisfied subject to legal principles and court precedent following production of evidence."

That all out of court settlement in excess of K1,000,000 are to be approved by the NEC prior to any payments by the Department of Finance;

That the Attorney-General immediately apply to the Court for Judicial Review of any questionable claims or out of court settlements in excess of K500,000.00;

That the Attorney-General review the relevant legislation with the view for amendments to ensure claims against the State are better managed and defended and State liability is minimised;

Directed the Attorney-General to ensure an injunction is sought to prevent the Secretary for Department of Finance from paying those claims certified as fraudulent or questionable."

Examination by the Commission of the settlements and the deeds recording them have been shown to be, in large, directly in defiance of NEC Directions NG07 of 2002; NG150 of 2003 and 21/2006.

D. National Executive Council Directions Ignored

Every public officer is given the authority to carry out the duties necessary for their posts, but any discretion they have cannot be decided on personal whim, it must be exercised within the law. That does not include authority or discretion to ignore direct orders of the National Executive Council, particularly regarding the disposition of public funds.

In evidence before the Commission current and past Secretaries of Finance, and former Attorneys General and Solicitors General have all acknowledged they were fully aware and conversant with the directions but incredibly, each stated that they were "**mere policy**" statements that need not be followed. Those directions, they said, did not restrict their authority to settle claims coming to them and they had accordingly continued to settle claims as they saw fit. One result of this was some **K60 million** was signed off in deeds of settlement in claims against the State in a period of **twelve (12) months** (August 2002 to July 2003).

The Commission finds:

- **In all settlements so far examined by the Commission, not one has been conducted in compliance or in accordance with any NEC direction. The officials involved simply disobeyed direct orders of the government.**
- **This is the most significant breach of duty by public officers that the Commission has found in its inquiries.**

Simply stated the directions of the National Executive Council, the government with the authority to administer the State and to control the funds budgeted by Parliament have been ignored by key officers. Public funds have accordingly been disposed of without lawful authority.

E. Procedure for claims

Each claim within the Commission's Terms of Reference constitutes a separate inquiry as to both the lawfulness of the claim and the propriety of its settlement, to be measured against the statutory process set out in the *Claims By and Against the State Act 1996*.

Under the statutory process it is the Courts role to determine both claim and compensation. It is the State's role to determine when and how a judgment is to be met from lawfully available funds. Where the Courts have tried and decided the liability and damages to be paid in a claim against the State, there have been few adverse consequences. But the Commission's inquiries show that in the great majority of cases the Court has not arbitrated, rather it has too often been the unwitting instrument legitimising by consent orders, settlements of wholly untested claims without factual or lawful substance concluded unlawfully by officers of the Departments of Finance and Justice and Attorney General.

Of the matters investigated, the Commission has found that less than five (5) of all claims were decided on trial and assessment by the National Court; all others were determined, on failure to defend by default judgment, out of court settlement and consent orders sealed by the National Court in the claimants' favour.

The Act stipulates the processes from first notice of claim, through to trial, judgment and how settlement by the State is to be carried out. Essentially, the Courts have the authority to decide the liability of the State and determine the

damages that should be awarded. The State decides when and how that award should be paid.

Provisions of the Act also define the limits of Court's jurisdiction in claims against the State. Specifically the Courts are restricted to determining liability and or the award of damages only, and the issue of a certificate of judgement of its award.

F. Settlement of Claims from Legally Available Funds

By the Claims Act, settlement of all claims against the State must be met from legally available funds. That is from funds authorised by Parliament. The annual National Budget appropriations for settlement of claims against the State and court orders for the years 2000 to 2006 totalled K300 million, pointing to an expenditure of some K270 million beyond budget in claims of I<300,000 and over. The Commission has sought to inquire into the source of those funds in excess of the budget.

G. Time for Payment of Judgment at Discretion of State

Specific provisions of the Act state that no judgment or successful claim becomes a debt that is immediately due and payable forthwith, or on demand. Settlement, that is actual payment out of a judgment or claim lies, at the discretion of the State through the Secretary of Finance. He is to make payment in "reasonable time" from "moneys legally available," - that means budgeted funds. As part of the Secretary's discretion, the Act provides he may decide on payment by instalments. That covers situations where there may be no funds currently available, or may not be available till further budget provision is made by Parliament.

It is left to the State to make payment of such awards as and when the State through the Secretary of Finance decides, albeit in a reasonable time.

H. Excluded From Orders for Payment of Awards

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The Act specifically excludes the Courts from making any order of execution against the State to enforce payments. Similarly, no orders of contempt or mandamus may issue to enforce execution of a judgment.

"A Court giving judgment against the State may not include any order as to time or method of payment for satisfaction of the judgement." (Section 12(2)) "In any suit, execution or attachment or process in the nature of attachment may not be issued against the property or revenue of the State (Section 13(1))"

These provisions have been overlooked in several actions in the National Court where the Courts, contrary to the provisions of the Act, have issued Orders directing the State to make payment of awards immediately or within specified times. There have also been contempt orders issued to departmental heads when Court ordered payments have not been forthcoming.

These issues are presently before the Supreme Court in *SCA No. 53 of 2008 Yama ~vs- Yer} Louma, The Commission of Inquiry and The State*. This is a matter in which the Commission was joined as a party and where it supported the provisions of the Claims Act. The ruling of the Court will hold great significance for the integrity of the Claims Act and the statutory process of claims against the State.

I. Summary of Commission's findings

The plain conclusion is that in all but a handful of claims the statutory process has been grossly abused, allowing illegitimate and improper claims and excess payments and excessive payouts to be legitimised.

Worse is the ease with which this has been allowed to occur. As well, the granting of "priority" or "urgency" to one claim over another, clearly demonstrates how the offices of the Attorney-General and the Department of Finance have succumbed too easily to the demands or pressures of claimants. There has been evidence too of officers benefiting in these too prompt settlements.

(a) Statutory Process Appropriate

The Commission is satisfied that the process of claim prescribed by the Act is not flawed. It is only non compliance, particularly by public officers that has enabled it to be subverted. The process required by the Act has been short circuited by unwarranted default judgments, out-of-court settlements and or consent judgments before or during the court process.

The Commission does however recommend amendments to the Act that can add to its clarity and effectiveness.

(b) Failure of State Agencies

In answer to the question in paragraphs 6 and 12 of the Terms of Reference, it must be concluded that in the great majority of cases examined, the Department of Finance did not meet its obligations to protect the funds of the State and the offices of the Attorney General and the Solicitor General have not advised and protected the State to an acceptable and competent standard.

(c) Reasons for Failure by State to Defend Claims

Typically where a claim lodged in the National Court has not been defended the reasons most commonly advanced in evidence by the Justice and Attorney General's Department before the Commission have been;

- The department concerned having being given notice of claim has failed to instruct the Solicitor General to defend the matter.
- The department the subject of a claim concerned has failed to respond to the Solicitor General's request for instructions on the receipt *of* a Notice of Claim. The Solicitor General as a result has been unable to respond to Court action and advises the Court accordingly - more often, takes no action at all.
- The Solicitor General because of error, or inadequate staff failed to respond to the notice of claim or court action within the time allowed by the Court rules.

The Commission is satisfied that failure by State agencies to react to notices of court action has been and continues to be a breakdown that compromises the States Law officers' ability to respond to such claims. At the same time totally inadequate legal staff numbers of the Department of Justice and Attorney General continues to compound the failure of State response.

But notwithstanding these enormous operating difficulties the failure to respond at all has been exacerbated by the failure of the State law officers, Attorney General and Solicitor General, to ensure that conceded liability did not also result in unchallenged assessment of damages. That is, even though obliged to concede judgment on liability no action or adequate measures were taken to record or report the lack of response to a claim or offer even token representation to ensure a diligent assessment of damages as provided by the court rules, and as the Government by Directions required.

(d) Breach of Duty

The failure or inability to provide a defence to a claim does not end the obligation of State lawyers to protect the interests of the State. With liability conceded, the obligation to prove actual damage shifts to the claimant and there remained the duty of the State lawyers to protect the interests of the State by ensuring that any award be strictly proved. The failure to do this demonstrates the fundamental breach of duty on the part of those State lawyers who undertook such settlements on an assumption of their own authority. Having failed to defend a claim, whether for lack of instructions or otherwise, they nonetheless took upon themselves the settlement of those claims without instruction, knowledge or detail of the claim from the agency concerned.

No credible reasons were advanced by State lawyers for negotiating settlement of loss without actual evidence and without complying with the *Public Finances (Management) Act* and or NEC directions or consultation with or instructions from Agencies concerned.

The assumption by the State lawyers of the role of determining the extent of damages payable by the State was not only unlawful but a fundamental breach of duty of lawyer to 'client'. Lawyers advise, they do not decide the fate of the client.

(e) Default Judgments

Claims not defended by the State have resulted in the Court granting judgment by default. A Default Judgment - converts any writ from an untested claim that should have been proved in Court by cogent evidence, into a judgment debt against the State with only the amount of the damages to be ascertained.

Default judgments are granted to a claimant under Court Rules of procedure. If no action is taken to defend within the set time for defence the right to defend is lost.

The rationale of the default rules of the National Courts is that in failing to defend an action in time or according to the rules, the defendant (and that includes the State) is conceding that it has no defence or that it has no interest in testing its liability to a claim. With default judgment there is no court assessment or decision on the facts of the claim.

In a recent National court decision in WS 1232/98 in Kapil -vs- Police & The State (13 July 2007) Justice Lay said:

"The effect of the entry of judgment for liability, is that it resolves all questions of liability for the matters pleaded in the statement of claim. Once default judgement is entered the facts as pleaded and their legal consequences in terms of establishing the cause of action as pleaded must be regarded as proven. The role of the trial judge on an assessment of damages is simply to peruse the statement of claim and be satisfied that the facts and cause of action are pleaded with reasonable clarity. If he is so satisfied, then liability should be regarded as proven."

Claims have thus been legitimised, without any challenge or question as to whether they were founded on fact or fiction.

But once the orders by default have been obtained, - even with orders for damages to be assessed as required by the National Court Rules, - control of the further proceedings does not rest exclusively with the Court, because it is open to the parties to determine those damages themselves. Accordingly the orders for assessment of damages by the Court, have most often been by-passed where the claimant and State officials agree to a compensation figure themselves. They thus



avoid a court assessment yet obtain the court seal of **authority** by filing a consent order for endorsement of the negotiated sum.

It is not surprising therefore that such procedure has been used or misused to enable claims that should have failed, to succeed simply by lack of opposition by the State and the officers representing the State. Failing to even contest claims has led to massive losses of public funds.

(f) Court and Out-of-Court Settlements

While there is no legal barrier to the resolution of claims outside of the court process, the settlement of them nonetheless requires compliance with the *Claims by and Against the State Act*, the Public Finance (Management) Act and Directions of Government, settlement also demands close attention to the statutory authority of the officers delegated to commit the State to liability, the proper exercise of authority for the commitment and disposition of public funds, and the settlement of these matters in a transparent manner.

With the National Court now advocating alternate dispute resolution where inter party negotiation is essential, clear lines of authority and protocols will be needed if State officers are to be engaged in those processes in future.

From the Commission's inquiries it is clear default judgments followed by consent orders on damages settled by State officers out of Court constitute the majority of claims resulting in loss to the State. The essential fact is that it is impossible to know whether the claims made were genuine or not because the great bulk of them were never tested or defended in the Courts to ascertain validity or merit.

The resolution of claims against the State by the Courts is the public and statutorily intended procedure. When the Courts acting upon evidence, decides liability and

on proven loss, assesses damages, the resolution of a dispute is publicly and transparently determined. As this Inquiry has shown too often claims have been settled out of court without due process or transparency. The facts of claims and the liability of the State under them has been conceded either by inaction in failing to defend, or by officers of the Attorney General or Solicitor General accepting unproven assertions as fact and claims of damages without examination or proof.

This is exemplified in concession of liability for claims of loss and damage from police raids being accepted as fact on the assertion alone, without input from the RPNGPC. Defended Court action if any has mostly centred on proceeding for enforcement of the 'negotiated settlements' by successful claimants.

(g) Brief Outs

The Attorney General is empowered to brief private lawyers/counsel to act for the State. This occurs when there is need for particular expertise or the Attorney General is unable to undertake the work itself.

From Finance Department records the Commission has found that over the period 2000 to 2006 the State incurred liability in payouts of approximately K100 million. Inquiry shows there has been no compliance with the Public Finances (Management) Act procedures of expenditure for approval prior to engaging in those brief outs.

The Commission has already made extensive examination of these payments with ready assistance from all the law firms concerned except Paul Paraka Lawyers which has been the recipient of at least the K41 million in brief out fees for January 2003 to August 2006 noted in NEC records.

' That firm declined to cooperate in the Commission's inquiries inter alia, on the grounds of a National Court interim injunction it had obtained in February 2007 prohibiting the publication of the report of a Ministerial Inquiry into the propriety of brief outs by the Attorney General pending the firm's substantial application for Judicial Review. Two (2) years later no action has been taken to progress to that Review. It is a sad commentary on the Attorney General's office that it has taken no steps to set aside that temporary order for any number of lawful reasons, but at the least for want of prosecution.

The Commission makes further recommendation on brief outs below. The first of these must be that the Attorney General forthwith take steps to protect the State's interest by action to set aside an order blocking the report and publication to the NEC of its own Ministerial Inquiry.

VI. DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL

Terms of Reference No. 8 requires the Commission:

"8. To inquire into the involvement of the Office of the Attorney-General, the Solicitor-General, the Department of Finance and the Registry of the National Court of Justice in the making and payment of illegal, false or improper claims or Judgements against the State in the period 2000 - V July, 2006."

Over the period 2000 to 2006 the representation of the State in litigation has been wholly inadequate.

A major single cause is clearly that the State over this time has failed to maintain its law office with a staff even remotely adequate for the enormous workload the legal advisor of the nation has to undertake.

The present caseload of the Attorney General is reported at 11,000 claims against the State. That represents some two thirds of the whole National Court workload.

A litigation staff of not more than the present 11 lawyers over the period has been quite unable to cope with such numbers.

The resulting failure to provide proper, timely representation of the State has led to castigation of officers by the Courts and loss of reputation for the Department.

Lack of ability to respond has also caused the briefing out of substantial numbers of cases to the private bar — notably without compliance with the Public Finances (Management) Act - to do the job that the Department was unable to perform.

During the 2000 to 2006 period, Department of Finance figures show and NEC records confirm that the State incurred some K10 million each year in excess of the Department of Justice and Attorney General budget in payments of costs to law firms. Application of even a fraction of such expenditure on Department of Justice infrastructure could have done much to ensure an effective and operational government law office.

Lack of competent and effective professional leadership throughout the period has also been a significant factor in the failure of the Department to perform.

There has been confusion and dispute over the roles and authority of Attorney- General, Secretary, and Solicitor General as to who holds these positions and when.

The provision that a Minister of Justice with a legal qualification assumes the position of Attorney General and Principal Legal Adviser to National Executive Council has only added to the confusion as to whether he/she is acting in a political, administrative or professional capacity.

The confusion amongst these officers is shown in the litigation that has occurred between Attorney General and Solicitor General, and recently between the Minister Attorney General and the Secretary.

This has been detrimental to the reputation of the Department of Justice and Attorney General and more particularly the morale of officers concerned.

It has been in this climate of confusion and inadequate supervision that the capacity and integrity of the Department has deteriorated such that error and breach of duty has been able to flourish without restraint.

The Commission considers that the assumption of the professional and administrative roles with the political duties of the Minister diverts the Department from its core function of providing competent professional legal advice and protection of the interests of the legal interests of the State. It also raises a conflict with Section 148 of the Constitution which states that a Ministers political responsibility does not extend to direction or control of the Department of his portfolio.

The Commission therefore recommends that the Attorney General Act be amended to provide for a competent experienced professional lawyer appointed on recommendation of the Judicial and Legal Services Commission.

A. Department Restructure

The Commission is aware that the planned restructuring of the Department detailed in the White paper of 2007 endorsed by the Government deals comprehensively with needed reform to overcome the issues raised here. The Commission, with respect, also endorses such plans.

But two years later the needed restructure is significantly incomplete with staffing still inadequate and the response to legal challenge to the State spasmodic.

The Commission recommends that urgent inquiry be made into the failure of implementation of these reforms to the Department.

B. Attorney General

The office of *Attorney-General* is established under the *Attorney-General Act* 1989. Under Section 7 of the *Act*, the Attorney-General is the principal legal adviser to the National Executive Council and head of the Department of Justice and

Attorney General. As principal legal advisor, he is required to tender legal advice and opinion to the National Executive Council in accordance with Section 8.

The Attorney General is the sole representative of the State in legal matters and is the nominal defendant for all Claims Against the State. He has such authority as is delegated to him by the NEC. This authority does not extend to grant him sole independent authority to decide liability or the extent of compensation that the State may be responsible for. He is governed by the *Attorney General Act* which requires him to act on instructions of the NEC, the government of the day. He has no authority to commit unbudgeted funds. He is also like everyone dealing in disposition of public funds, or dealings for goods or services, subject to the requirements of the *Public Finances (Management) Act*.

This is highlighted in his authority to brief private law firms/counsels to act for the State. Inquiry shows no compliance with the PFMA as to the determination of fees. During the 2000-2006 period this has resulted in the State incurring payments of some K10 million each year over and above the Department of Justice and Attorney General annual budget. There has been no provision for such brief outs in budgets over the period. Those sums have provided a sure income for small law firms which have now grown on State business to 5 and 10 times the staffing of the Justice Department.

C. Solicitor General

The Solicitor General by the *Attorney Generals Act* is appointed the advocate of the State, no more than that. He is not given any authority beyond that of an advocate. The Solicitor General is certainly not authorised to decide the State's liability and damages under any claim. He is the lawyer appointed to represent the State in litigation, tasked to promote and protect its interests. Like any lawyer representing a client he must act only on instructions and his instructions can only

be given to him by the Attorney General who in turn must act on instructions of Government.

In fact inquiries in the matters examined by the Commission show that Solicitors General over the period have in fact assumed to themselves, the authority to decide liability and compensation, to the detriment of the State. And quite apart from the propriety of those determinations, the decisions themselves demonstrate fundamental lack of professionalism, competency and appreciation of applicable law.

In all the cases examined so far, it has been clear that quite apart from effective, technical or procedural defences such as time bars or breach of statutory process, which of themselves would have precluded a claim, most cases examined have demonstrated an obvious defence on the merits that was never pursued. It demonstrates an urgent need for senior experienced litigator to hold such a pivotal position.

The office of the Solicitor General requires a practising lawyer of experience and recognised ability. The qualifications are similar to that of a Judicial officer and certainly his role involves knowledge and practise of law comparable to judicial officers. There is a need for such a qualified Solicitor General today. To ensure appointment of such an office-holder the Commission will recommend that the Solicitor General be appointed on the recommendation of the Judicial and Legal Services Commission.

D. State Solicitor

There is no statutory provision determining the powers and functions of the State Solicitor who has nonetheless functions as solicitor advising on non-litigation matters. As head of the civil and commercial section of the department of the

Principal Legal Adviser, it is appropriate that the State Solicitor's functions be authorised by statute. Recommendations for this appear below.

VII. DEPARTMENT OF FINANCE

A. Introduction

Terras of Reference number 7 requires the Commission:

"7. To inquire into the role of the Department of Finance in screening all claims for payment by the State and detecting and rejecting illegal, false or improper claims, to establish the Extent of Department responsibility in this regard and conclude whether the Department of Finance has complied with these obligations

The Department of Finance is the Department of State responsible for the management of the finances of the State. The Department is responsible for the administration of, and is itself regulated by *the Public Finances (Management) Act 1996* (PFMA). Section 117 makes provision for the issue of Financial Instructions to achieve desirable budgetary and financial controls and enforce prudent financial management procedures.

The Inquiry has found that the Department has failed those responsibilities, instead showing scant respect for the processes of the Public Finances (Management) Act by constant breaches of the Act, Regulations and Financial Instruction.

Inadequate accounting systems and controls which prevent proper recording of financial transactions, are compounded by inadequate filing and storage of financial records. These errors have been recorded annually by the Auditor General but never addressed by the Secretary or Senior management. Most importantly the Department has ignored specific directions of government instead, disposing of funds budgeted by Parliament as if the State was not there

B. History

The Department over the years has had several restructures under different departmental heads. The Department was re-structured and its name changed from Department of Finance to Department of Finance & Corporate Affairs, Department of Finance & Planning and Department of Finance & Treasury.

In 2002, the department was divided forming two individual departments, the Department of Finance and the Department of Treasury managed by two separate departmental heads. The Department of Finance is currently headed by Mr. Gabriel Yer while Mr. Simon Tosali is the Department head for Treasury. Both Departments operate under the Public Finances (Management) Act (PFMA).

The Department of Finance is tasked to ensure the enforcement and implementation of financial control measures especially on revenue and expenditure so as to avoid any spending decisions that may result in wasteful and extravagant expenditure.

The Department of Treasury on the other hand ensures that the annual appropriation by Parliament provided for under the Annual Appropriation Act remains intact, and provides the budgetary framework which public funds are collected and disbursed.

C. Inquiries

(a) The Department Structure & Responsibilities

There are two divisions within the Department - Operations and Strategy - headed by Deputy Secretaries who report to the Secretary. Below the two Deputy

Secretaries are line managers known as First Assistant Secretaries (FAS) who have various divisions within their area of responsibilities. The various divisions are controlled by divisional managers known as Assistant Secretaries (AS).

The Operations Division has the following sub-divisions:

- > Corporate Services - this includes Human Resource, Financial Training and Administration Services.
- > Non-Tax Revenue — this includes Social Law & Order, General & Administration and Economic Infrastructure
- > Cash Management & Expenditure - this includes Cash Management, Expenditure and Accounts Payable.
- > Provincial & District Treasury Financial - this includes Highlands, Southern, New Guinea Islands and Momase.

The sub-division of interest to the Inquiry is Cash Management and Expenditure. This sub-division has the responsibility of processing the settlement of lawful claims of claims against the State. The Strategy Division comprises of the following sub-divisions:

- > Accounting and Frameworks - this includes Public Accounting, Trust Accounting, Accounting F/W, and Payroll Accounting.
- > Internal Audit, and Compliance - this comprises of Audit, Investigation, Compliance and System Development.
- > FMIP Program - this comprises of IFMS Coordinator, Financial Management ADB, Provincial FMIP Ausaid and Provincial Capacity.
- > Information and Communication Technology - this comprises of Technical Services, Core Systems Support, PGAS Support and Payroll Support.

Here the sub-divisions of interest to the Inquiry are the Accounting & Framework and Internal Audit & Compliance Divisions. These sub-divisions are responsible for ensuring that the claims against the State are processed in compliance with the PFMA and the established procedures in financial instructions issued by the National Executive Council and Finance Secretary from time to time. Since 2002, the organizational structure/functions may have varied from time to time.

(b) Public Finances (Management) Act 1995 ("PFMA")

The PFMA is the legislative authority for the management of all Government monies including those relating to Provincial Governments and Local Level Governments as required under the Organic Law. In general, receipts of monies by Government are dealt with through the Consolidated Revenue Fund (CRF), and Payments are made from this Fund, unless there is specific approval by the Minister under circumstances provided for in the Act to use a Trust Account. The PFMA also deals with all aspects of fund management including record keeping. The main points of the PFMA are as follows:-

- > Defines the responsibilities of those responsible for financial management including the Minister, Secretary and other Departmental Heads as well as Accountable Officers.
- > Defines the Public Accounts Trust Fund and CRP for handling of all public monies.
- > Provides for the annual National Budget, allows for transfers between budget head within limits set by the annual budget.
- > Provides for warranting of expenditure in accordance with parliamentary appropriations.
- > Provides for issuance of Financial Regulations.

> Regulates tender procedures for procurement of goods and services by- public bodies.

Part II of the PFMA defines the responsibilities of the Minister and the Department Head.

The Minister is responsible for—

- (a) the supervision of the finances of the State so as to ensure that a full account is made to the Parliament of all transactions involving public monies; and
- (b) the supervision of the finances of public bodies; and
- (c) the formulation of the National Budget and overseeing its implementation on behalf of the National Government.

The Act further states that as soon as practicable after the end of the first, second and third quarters of each fiscal year, the Minister shall publish in the National Gazette a summarized statement of the receipts and expenditure of the Public Account during the fiscal year up to the end of that quarter. The Minister is further tasked after the end of each fiscal year to prepare a detailed statement of the receipts and expenditure of the Public Account and send it to the Auditor-General for audit.

The Act states that the Departmental Head has control and direction of all matters relating to the management of the financial affairs of the State, subject to specific directions given to him by the Minister.

Both Department of Finance and Department of Treasury are expected to fulfil their missions in the context of the PFMA, Financial Instructions, Finance Regulations, the Appropriation Act, and all laws relevant to their function.

The common gazetted functions are to:

- > Exercise responsibility in managing all policies, regulations and laws pertaining to the collection and disbursement of public monies;
- > Administer and provide advice on debt management and foreign aid;
- > Formulate and administer Government's annual estimates of revenue and expenditure.

The payment procedures for the Department of Finance are stipulated under Financial Instructions Part 5 and Public Finance Management Manual Section 28 to 33.

The Commission notes that the PFMA does not have any specific provision for claims against the State. The Commission recommends that the Financial Instructions and Finance Management Manual be reviewed to incorporate the requirements of Section 47D of PFMA and Section 2A of the Claims By & Against the State Act.

(c) Budget Process

All State entities are funded annually through a budget. The process of budget formulation is by way of consultation between State entities entitled to funding and the Treasury Department. The budget processes for the Department of Finance are issued under Financial Instruction Part 4 & 5, Section 22 to 25 of the PFMA.

Like all government departments and agencies, Department of Finance budget is determined by each divisional budget requirement being submitted to the Top Management and Administrative Services Division to compile the departmental annual budget. Divisional budget estimates for the next fiscal year (1 January - 31 December) are based on the estimates being appropriated in aggregate by Department of Treasury prior to compilation of the National Budget, which takes place annually between July and November of each fiscal year.

The Budget Division of Department of Treasury consolidates all government departments and agencies budget estimates into the National Budget, which is appropriated against the Consolidated Revenue Fund and incorporated into the Appropriation Bill. The final National Budget is submitted to the National Parliament by the Treasurer as an Appropriation Bill for Parliament to consider in November session of Parliament each year. Once the National Budget is passed by the Parliament as an Appropriation Act, the Minister for Finance endorses a Minister's Warrant authorizing the Secretary for Treasurer to issue Warrant Authorities signifying availability of funds to all government departments/ agencies as stated in the schedule of estimated expenditure for the fiscal year of the Appropriation Act.

Warrant Authorities are then endorsed by the Secretary for the Department of Treasury and issued to heads of government departments and agencies to commit or pay out funds pertaining to their appropriation.

Warrant Authorities are issued usually on a monthly basis, and the amount on Warrant Authorities are based on the availability of cash. All Warrant Authorities issued by the Budget Division are in triplicate as follows:

- > The Original is sent to the head of the department/agency
- y The duplicate is sent to Public Accounts Division (Cash Management Division) to liaise with Bank of PNG to transfer the cash equivalent on the Warrant Authority to the stated beneficiary.
- > The triplicate is retained by Department of Treasury to update the warrant control registers kept by the Budget Division.

The Department of Finance administers and maintains only two expenditure allocations:

- > Division 206 - recurrent expenditure items involving the department's operational costs except for personnel emoluments.

> Division 207 - Miscellaneous Vote consists of miscellaneous government expenditure items.

The single biggest budget appropriation made annually is the Miscellaneous Vote 207 out of which payments are made for a wide range of government expenditure items. Given the cash basis of accounting, this account is specially maintained to cater for unpaid liabilities of the State in respect of goods and services rendered in prior year.

(d) Accounting Principle

The Government accounts are maintained on a Cash Basis. Receipts and expenditure are brought to account only when money is actually received or when a payment is made. Costs of goods and services received in one year are brought to account in the year of payment and not spread over the following years when they may be used. Similarly, if revenue receivable in a year are not actually received in that year, its accounting will be deferred to the year it is received.

A distinguishing feature of the Government financial system is the concept of fund entities, which is derived from the fact that the legislature controls public finances. According to the fund entities concept, Government revenues and loans are paid into a fund known as the Consolidated Revenue Fund from which payments made.

If an obligation incurred during a year is not met during or before the close of the year, it must be carried forward and met from the following year's Parliamentary authorization (Appropriation Act). It must not be met from unspent revenues of the year in which the obligation was incurred.

Appropriations Acts are passed by Parliament annually. There are special dispensations that allow for revolving fund operations of a quasi-commercial nature, usually under trustee arrangements. Under these arrangements, the

Parliamentary Appropriations, either for start-up assistance in the form of initial working capital or budget subsidies for operations, are paid into a separate fund known as Trust Fund and the balances under this fund are carried forward from year to year. These also include monies for third parties held in trust that will be repaid at a later date. The monies raised by such activities get paid into the Trust Fund and are subject to vigorous control and expended for the purpose as intended.

The Government accounts are prepared on a Cash Basis as compared to the Accrual Basis of Accounting practiced in the Commercial Sector. Cash basis of accounting is based on actual cash received and actual cash paid. This system does not make provision to capture outstanding revenues, liabilities and commitments as and when they occur.

(e) Accounting Information System

All State owned entities use an accounting information system called Papua New Guinea Government Accounting System (PGAS). PGAS is used by all Government Departments and State entities to record all transactions involving public funds. The PGAS has in total twenty one modules which are programmed in line with PFMA and Financial Management Manual.

Most State entities control their finances and maintain records by operating only four ledgers, namely, Revenue Ledger, Expenditure Ledger, Trust Ledger and Cash Book Ledger. These four ledgers will be able to produce monthly bank reconciliations and cashbook detailing receipts and payments for any given period. The transfer of funds from one vote another vote is prohibited under Section 27 of PFMA.

A key feature of PGAS is that a cheque will not be printed unless there are funds available in the relevant vote. This suggests there is an inbuilt control mechanism

however the system is open to manual journals which can be posted to process cheques.

(f) Payment Procedures

In evidence to the Commission from Secretary Gabriel Yer and former Secretary Thaddeus Kambanei, they described the processes and procedures as follows;

- > The claim is forwarded by the Attorney General under cover of a letter to the Finance Secretary requesting settlement of the claim.
- > The Finance Secretary would then make appropriate footnote on the letter and pass it onto Deputy Secretary Operations for the amount to be included in the schedule of Court Ordered payment.
- > FF3 & FF4 is raised by Commitment Clerk based on availability of funds,
- > FF3 signed by Commitment Clerk,
- > FF3 & FF4 is signed by Financial Delegate,
- > FF3 signed by Section 32 Officer,
- > FF3 & FF4 are pre-audited by the Internal Auditor,
- > FF4 examined by Examiner to ensure FF4 is fully completed and signs to verify that,
- > FF4 is verified by Certifying Officer and also signs FF3,
- > FF3 & FF4 is verified by the Paying Officer known as Audiorising Officer just prior to cheque print,
- > Pay Office cheque machinist draws cheque,
- > Cheque printed verified against the FF3 & FF4 by Paying Officer,

- > Cheque distributed to authorised personnel for distribution - in case of claims against State, the cheques are given to the Solicitor General.
- > If there is any query, then the FF3 & FF4 with the supporting documents are sent to the relevant officer to address the issue raised or reject the claim totally.

(g) Filing and Storage of Records

The Finance Department being responsible for State's finances is expected to produce and maintain a filing and storage system that is accurate and secure (both in electronic form and hard copy).

Payment vouchers were filed in cheque number sequence with ten (10) in a batch or one arch file. Each batch would start with the lowest number at the bottom and ends with the highest at the top of the file.

Payment vouchers which all originate from the Finance Cashier Branch are stored initially on the first floor and are then moved to storage in a make-shift Storage Room located in the carpark on the lower ground floor of Vulupindi Haus. After a period of 2 years, the files are moved over to a rented building in the Gordons industrial area for the remainder of the statutory period. That building is not fenced, there are no security grills on the front entrance and all windows. Files are stored loosely on top of each other in arch lever files in no organised manner. The building has no lighting, air conditioning and proper ventilation. There was no electricity connection.

There was no register of the documents kept at each location. Whenever officers of the Department request documents, files are removed and taken to the Vulupindi Haus. There was no register or logbook that recorded the movement of files and documents.

The Commission in its own searches found that many payment vouchers were either removed or misplaced.

The Commission noted the following;

- The files were not numbered in any numerical order to correspond to the cheque sequence number.
- No register was kept on site to record movement of files or vouchers within that file.
- No staff permanently allocated to maintain and monitor the movement of documents.

This deplorable filing and storage system appears to have been in existence for many years and there was no indication as to whether steps were being taken to remedy the situation.

(h) Integrity of the Accounting System

The Commission notes that the PGAS Accounting System is inadequate to accurately record transactions involving public funds. We have not been given access to establish the adequacy of this information system however from the available evidence and review of Auditor General's Report in the period covered by the Terms of Reference we can confirm that the information produced from this system is inaccurate and unreliable. The major single cause of this has been insufficient and inaccurate input of data. This effectively means that the Finance Department has not maintained proper accounting records of the funds it administers and therefore has not during the period produced to the Government accurate financial statements for future planning and assessment of programmes implemented.

The Commission's requests for hard copies of the financial statements have not been met. The Department explained that to print these statements would be cumbersome. Instead an electronic copy of the cash book was produced to the Commission.

The electronic cashbook contained data obtained from PGAS exported to a spreadsheet. The Commission was unable to ascertain the completeness and accuracy of the electronic cashbook.

The cashbook was meant to record all payments out of the Finance Department however the Commission notes there are some significant errors and inappropriate entries noted in the cashbook. These include;

- ^ Cancelled cheques being credited into wrong votes,
- > Cheques raised were denoted in the Cashbook as being cancelled and replacement cheques issued were presented for payment yet the original cheque was also presented for payment,
- > Refund cheques being credited into wrong votes, y Stale
cheque being carried as yet to be presented,- •
- y Journal entries entered into cash book for the purpose of balancing the books at year end with no basis in accounting.

The Auditor General's Audit Report for the relevant periods covered by the Terms of Reference has in each year raised significant issues with respect to how the Department accounts for Public Funds. Some of the main issues raised by the Auditor General over the years include;

- ^ Late preparation of Public Accounts for Audit by the Auditor General;

- > Numerous manual journals were processed at year end, most of which had no accounting basis for the journal to be raised
- > Non-reconciliation of key accounts including non-clearance of un-presented cheque which have built-up over the years,
- > No records of Trust Accounts and their reconciling balances at year end,
- > Transfer of Appropriation in direct violation of Section 25 of PFMA,
- > Lack of proper accounting resulting in various overdrawn accounts,

These audit issues were raised by the Auditor General over many years but were continuously ignored by the Secretary.

The Commission finds that the Secretary and the senior officers of the Department have failed miserably to maintain proper accounting records.

(i) Improper and Illegal Sourcing of Funds to Settle Claims

The Commission has noted that in the period 2000 to 2006, funds for settlement of claims against the State were drawn from various sources including;

- > Court Order Appropriation - lawfully available
- > Trust Accounts - not lawfully available; and
- > Other votes - not lawfully available.

The table below shows budgeted appropriations for Court Orders (Column B), the actual amounts paid (Column C) and the amounts sourced from votes containing funds appropriated for other purposes.

A-Year	B - Amount Appropriated	C - Amount Paid to Settle Claims	D - Funds Illegally Sourced to Settle Claims
2000	0	K38,646,701	K38,646,701
2001	0	K44,835,549	K44,835,549
2002	K14,100,600	K89,462,673	K75,362,073
2003	K24,174,200	K70,666,401	K46,492,201

2004	K90,031,200	K152,428,905	K62,397,705
2005	K56,986/700	K121,716,446	K64,729,746
2006	**K37,352,750	K54,834,610	K17,481,860
Total	K222,645,450	K572,591,289	K349,945,839

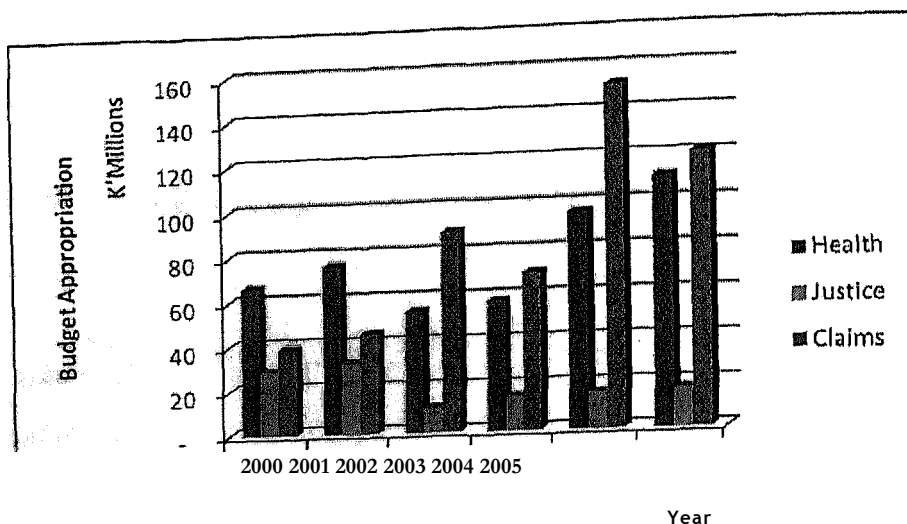
** Half year appropriation used in this analysis.

The above analysis clearly shows that the Finance Secretary illegally sourced funds over and above the amounts appropriate in the annual budgets to settle claims. For the period covered by our Terms of Reference, just under K350 million was sourced votes not provided for in the annual budget.

In 2000 and 2001 there were no allocations under the Appropriation Act for settlement of claims against the State. However, the Secretary illegally sourced well over K83 million to settle claims against the State.

We have not been able to establish any genuine reason why excessive claims for subsequent periods were not reported to Government or properly factored into budget projections to be brought to the attention of the Parliament. The Finance Secretary would have been well aware of the magnitude of claims that were being settled or awaiting settlement and it would not only have been prudent but necessary in seeking realistic estimates to be included in the ensuing budget. The Commission finds that the reporting of realistic provision for claims would have prompted NEC and Parliament to demand explanations as to why such large appropriation was necessary particularly when the amount if appropriated would have been well over the amounts being allocated for service Departments such as Health and Justice.

The graph below is an illustration of the disparity in annual budgetary allocation of funds for the Health and Justice sectors as against actual payments for claims and court judgements against the State.



| Because of this failure to report, it can be concluded that over the period discussed above, the NEC and Parliament have been authorising annual budgets without being aware that such budgets did not capture the actual liability for payment of claims against the State.

The various accounts from which funds were illegally sourced during the period covered by the Terms of Reference are as follows;

Account Code	Description	Amounts Paid
207	Miscellaneous	K205,930,732
460	Trust Suspense Account No.2	K130,608,570
410	Cash Adjustment Account	K6,986,017
216	Internal Revenue Commission	K5,200,025
577	SH Provincial Government	K2,239,915
589	WNB Provincial Government	K684.636
573	Central Provincial Government	K334,370
221	Public Service Commission	K111,054
258	State Enterprises	K210,000
252	Dept of Lands & Physical Planning	I<211,003
299	Debt Servicing Vote	K260.581
571	Fly River Provincial Government	K420,760
579	WH Provincial Government	K49,031
	Total	K353,246,698

The Commission has learnt that the Department has an undetermined number of trust accounts which are unaccounted for and it is expected that funds may have been sourced from there to settle claims as well. From our review it can be seen that the Secretary has deliberately set out to pool funds from sources other than the designated budgeted appropriation. Former Secretary Kambanei offered the explanation that since the settlements were related to claims against the State, there was no need to comply with PFMA.

The actions of the Secretary breached Section 5 Subsection (1) (d) of the PFMA.

A "Suspense" account or a "Cash Adjustment" account are by accounting definition only temporary accounts holding reconciling items to be cleared at year end. An example would be the holding of funds from third parties temporarily such as court bail, child maintenance etc.

There were five (5) types of book entries made by the Secretary to accumulate the *funds in* the TFS Account No. 2 as well as the Cash Adjustment Account. Funds were sourced to build up balances in these accounts as described below:

Repaid Cheques

Repaid cheques were credited to TFS Account No. 2 instead of being credited back to the respective votes.

Cancelled Cheques

Cancelled cheques from other votes were incorrectly credited to TFS Account No. 2.

Stale Cheques

Stale cheques credited to TFS Account No. 2 instead of being credited to Revenue.

Journal Entries.

Unspent funds at year end were transferred to TFS Account No.2 by means of Journal entries instead of funds being transferred to consolidated revenue.

District & Provincial Support Grants

Cheques raised for District Support Grants and Provincial Support Grant were cancelled and credited to TFS Account No. 2 instead of being credited back to the respective Votes from which the cheques were originally drawn.

The financial implications are:

- that total expenditure under the respective Votes were overstated to the extent of the amount transferred to TFS Account No. 2.
- If such amount transferred to TFS Account No. 2 had remained in their respective Votes, those amounts would have been automatically taken to Consolidated Revenue at year end.
- Further, the revenue for the following year is understated to that extent,

(j) Establishment of Trust Fund Suspense Account No.2

This account was established by a Trust Instrument signed by Hon. Andrew Kumbakor, then Minister for Finance, Planning and Rural Development on 29th May 2002.

Eleven (11) days later (i, on 10th June 2002), Mr. Thaddeus Kambanei, then Secretary for Finance, Planning and Rural Development sought legal clearance on the establishment of the account.

Four (4) days later (i.e. on 14th June 2002), Mr. Francis Damem, then Attorney General & Secretary for Justice advised the Mr Kambanei "...In my view, the Trust Deed dated 29th May 2002 was lawfully established pursuant to section 15 of the Public Finances (Management) Act, 1996".

Mr. Kambanei in his evidence before the Commission stated that it did not matter whether he obtained legal clearance prior to or after the Minister had signed the Trust Instrument establishing the account. In a rather carefree manner, Mr Kambanei said he was "comforted" by the fact that the Attorney General Mr Francis Damem had given clearance to the establishment and operation of the account.

The Commission heard evidence from Mr. George Minjihau, State Solicitor as to the establishment of this account. He expressed surprise when told the account was established without prior legal clearance. Mr. Minjihau confirmed that the process for consultation was important and he referred to Financial Instructions Manual Part 4.5 which requires prior clearance of the "State Solicitor".

Further, Mr Minjihau also reaffirmed the requirement that such "Trust Instrument" must clearly state the purpose for which it is established and the source of funding for the account.

These are serious instances of non-compliance by Mr Kambanei. Further, Mr Damem was wrong in giving legal clearance to Mr Kambanei's unlawful actions.

Part 1 Report of the Auditor General for 2005 on the Public Accounts of PNG has addressed its concerns on the creation of the account. The Auditor General makes the following conclusion at page 141 of the Report:

. The operation of Trust Account No, 2 has not been in accordance with the Trust Instrument that has facilitated the payment of irregular and unbudgeted payments.

® Prudent accounting practices has been ignored in the manner that cheques have been banked and cancelled resulting in Appropriation for former years being understated by K13.4 million and recurrent expenditure and trust accounts expenditure being overstated by K65.4 million.

• The inability to reconcile the balance is an indication of poor record keeping by the Department.

The response by the Department to that conclusion was, "The Minister notes the conclusion. As stated the Trust has now been revoked by the Minister in response to concerns about the way the trust was being used."

The Commission has examined the Finance Cash Book which confirms that the sum total of K130 million was paid out of the Account during the period 2002 to 2006 despite the ministerial assurance to the Auditor General that the Trust Deed was revoked.

(k) Mr. Thaddeus Kambanei's Evidence

Mr. Thaddeus Kambanei served as acting Secretary from 2001 to 2002 and appointed Secretary in 2002 and terminated in 2006. In his evidence (Transcript page 1802) he stated that he started his career with Bureau of Management Services in Wewak in 1977 as a registration clerk. He progressed through the Department to become Secretary. In his evidence Mr. Kambanei disclaimed any responsibility for processing of payments for settlement of claims. He stated that he had Officers below him who were responsible for processing of claims within the requirements of PFMA. He had stated in his evidence (Transcript page 1810)

that even if he wrote a notation such as "approved, please process" did not mean that it was a directive from him for Officers to process the payments.

The Inquiry found that Mr. Kambanei tried his level best to disassociate himself from many questionable and fraudulent payments processed during his tenure in office. He stated that Deputy Secretary Gabriel Yer would have been responsible for these claims. The Commission finds Mr. Kambanei's evidence to be misleading, evasive and not credible. At all material times he was responsible for directing his staff to process settlement of claims against State.

The Commission further noted that he pooled funds improperly and illegally to settle these claims and it was evident that he was in control and knew exactly what he was doing contrary to the PFMA and the Appropriation Act.

(1) Conduct of Inquiries

The Inquiry has had limited success in obtaining information and explanations from the Finance Department. This lack of co-operation commenced with Secretary Gabriel Yer and continued with his senior Department officers. The lack of co-operation clearly indicated the department was aware of its failure to maintain and produce accurate and authentic accounting records. Further, the Department was unable to explain and account (adequately or at all) for its management or indeed mismanagement of vast amounts of public monies.

Senior officers of the Finance Department have at all times been difficult even combative with the Commission. This was a major disruption to the work of the Commission.

- Letters sent to Mr. Gabriel Yer for specific information or data were either not attended to on a timely basis or at all.

The Commission then held numerous meetings with Mr Yer and his senior officers to establish a process of document retrieval useful to the Commission and with minimal disruption to the Department. During these meetings Mr Yer gave undertakings to co-operate and provide the required data promptly but there was no follow through.

The Commission then summonsed Mr Yer the Secretary and expressed disappointment with the lack of co-operation by him and his Department. Once again, Mr. Yer repeated his personal undertakings and assured the Commission he would take personal responsibility and ensure full compliance with requests of the Commission. This was all in vain.

A total of eight summons requiring 1,325 documents relevant to particular claim transactions were served on the Secretary. As at the date of this Report, the Finance Department has failed to provide 714 of these required documents.

The Department advised the Commission that the documents not produced were either missing from records or were never in existence at the time of raising cheque for claims against the State.

Investigators attending on the Department were continually told nothing could be produced or released without specific authority of the Secretary or his authorised officer who were never available to assist in this regard.

The bulk of the information requested from the Department was obtained in the last months of the Inquiry when Commission staff attended at the Department to search the files and locate the documents required.

- Attempts to work with the Department staff were largely ineffective as staff would turn up late for work and or disappear during the day drastically hampering the effectiveness of Commission searches.
- Significant payments vouchers in relation to suspicious payments had gone missing.
- There was no acceptable system of filing and archiving of documents.

(m) Auditor General's Reports

The Commission also notes the Auditor General chose not to provide a disclaimer of opinion on the financial statements despite having raised serious qualification matters. Clearly the expressed opinion of the Auditor General was not reflective of the serious matters he himself raised.

D. Common Findings in respect of Claims

The Commission identified over 500 claims being settled by the Finance Department within the timeframe covered by our Terms of Reference from 1 January 2000 to 1 July 2006. The Commission's review revealed common anomalies with respect to illegal, fraudulent and improper payments. The findings in respect of individual matters are detailed in their respective files together with the recommendation for appropriate action to be taken against persons involved. The common findings in respect of most matters are as follows:

(a) Funds illegally sourced from other Appropriation

Funds to process settlement payments of claims against the State on numerous instances were illegally sourced from other appropriation such as the Trust Fund Suspense Account No. 2, the Cash Adjustment Account, Arrears Vote, etc. instead

to the Court Order Vote. The sourcing of funds from other appropriations to process settlement of claims against the State clearly in breach of the Appropriation Act and Public Finance (Management) Act and illegal

The Commission recommends that strict protocols be introduced to ensure payment of claims against the State being made only from die funds appropriated under the Court Order Vote.

(b) Failure to comply with NEC Decisions

As stated above, claims against the State were processed without compliance with the NEC Decisions No. NG07/2002, No. 150/2003 and No. 21/2006.

(c) Preferential basis of settlement of Claims

The Commission finds that there was no properly established method for the processing of payments to claimants. A ad-hoc or "on demand" preferential practice appears to have been the norm. This suggests that officers of the Finance Department may have collaborated with claimants in securing priority over other claimants.

The Commission recommends that the Department provide a fair and reasonable method for the processing of payments. There should be Register of claims lodged for payment which should be updated on a timely basis.

(d) Non-completion of FF3s and FF4s

The completion of FF3s and FF4s is an essential aspect of internal control in processing of payments ki accordance with the Financial Instructions. Non-completion or improper completion of FF3s and FF4s is evidence of lack of

proper internal controls. The Commission firmly recommends that systems be applied to ensure that FF3s and FF4s are fully completed for all payments.

(e) Overpayment of Claims

Several claims were noted to have been over paid when claims were settled in instalments. This indicated a lack of proper internal controls to monitor and manage all claims from inception to full payment.

As recommended above, a register of claims and payments reconciled on a timely basis will eliminate this error.

(f) Overpayment of Interest

Incorrect calculation of interest has resulted in the overpayment of claims. The Commission recommends that appropriate measures be taken to ensure interest is accurately assessed.

(g) Cancelled Cheques being Presented

Some cheques being denoted as cancelled in the cashbooks have actually been presented at the bank. The Commission recommends that cancelled cheques be crossed out and attached to the journal entry form.

(h) Incorrect narration of Cashbook

Details of some cheques raised were incorrectly described in the cashbook. As a result, there was difficulty identifying payments of claims and in performing proper reconciliation of the cashbook transactions.

(i) Non compliance of Income Tax Act

All claims for payment were never assessed for tax payable. The Commission recommends that processes be established to ensure that IRC is immediately informed to assess any tax liability prior to processing payments. The release of payment must be subject to clearance from IRC.

(j) Release of cheques direct to Claimants

The Solicitor General has the conduct of all claims on behalf of the State. As such, cheques raised in payment of claims should be forwarded by the Finance Department to the Solicitor-General for recording and release to the claimant or their legal representative. The current irregular and unco-ordinated procedure gives rise to overpayments and the wrongful collection of cheques.

(k) Department's lack of consultation with other State agencies

Several claims against other State bodies such as Provincial Governments were settled by Finance Department without consultation. This lack of consultation has resulted in possible duplication of payments.

(l) Cheque Clearance

Many cheques raised were cleared on the same day by the commercial bank and Bank of PNG. The same day clearance of cheques creates the opportunity for fraudulent payments to be cleared swiftly thus avoiding detection of such impropriety which would possibly occur if cleared in the ordinary course (i.e. seven (7) working days).

(m) Payment of Legal Fees without Certificate of Taxation

Some legal fees claimed by the lawyers of the claimants were settled without certificate of taxation.

(n) Dysfunction of Internal Audit

Internal Audit Department failed to take appropriate action to prevent fraudulent claims from being processed. Internal Audit Department is vital internal control measure to an organisation dealing with substantial monies. Its functions are to monitor and detect fraudulent transactions to protect public funds.

The Commission recommends that Internal Audit Department be adequately staffed and properly equipped to perform its functions diligently. All claims against the State should be pre-audited by the Audit Department prior to cheques being raised.

E. Recommendations

National Executive Council

- National Executive Council ('NEC') establish a team of professionals comprising of accountants, lawyers and others to immediately conduct a review of the Department and make recommendations for appropriate remedial actions to be implemented.

Audit Issues

> NEC to direct the Department of Finance to immediately address all issues raised by the Auditor General in the Reports on the Public Accounts of PNG tabled in Parliament since the year 2000.

y Auditor General to review and report to Parliament on all outstanding audit issues raised since the year 2000.

Systems & Procedures

- Immediately install and implement a proper accounting and information management system that is able to accurately capture and maintain all financial transactions of the State and produce reports and records on a timely basis.
- A Section is created within the Cash Management and Expenditure Division to cater for all filings and record management of the Department,
- A appropriately skilled person is appointed with additional staff to take stock take of al existing files and establishment of proper filing system,
- An appropriate building with proper lighting, ventilation, shelving and security is secured to store files for the minimum statutory period of seven years.
- Immediately cease the operations of the Trust Fund Suspense Account and Cash Adjustment Account.
- Immediately stop all payments, out of the Arrears Vote for settlement of claims against the State.
- Immediately establish a proper recording system of all claims against the State.

Settlements

b «pec< to settlement, Ae M,,TMg should take pkce pdor to ^ ^

drawn to settie claim;

- > Finance Department keep a proper register of all claims received for settlement,
- > Check and verify with external parties such as Solicitor General, Registrar of Courts to ensure that the documents submitted in respect of any claim are genuine and there has been compliance with the *Public Finances (Management) Act* ('PFMA') and the *Claims By against the State Act 1996*.
- > All claims approved by be forwarded to the Minister for approval as required under the PFMA.
- > Further claims of K1.0 million and above, the Minister should seek NEC approval for settlement.
- > the Financial Instructions and Finance Management Manual be reviewed to incorporate the requirements of Section 47D of PFMA and Section 2A of the Claims By & Against the State Act.

Referrals

- Finance Secretary Gabriel Yer be referred under Parts 6 and 14 of the Public Service Management Act to the Public Services Commission be referred for further investigation in respect of the matters raised above and throughout this Report.
- Former Finance Secretary Thaddeus Kambanei be referred for further investigation in respect of the matters raised above and throughout this Report.

Review of current management

- The Departmental head shall immediately review the performance and competence levels of all officers of the Department

Recruitment

- The Department shall recruit qualified and experienced officers to perform competently in all functions as required.
- All officers, particularly management, should have the following:
 - o undergraduate degree in accounting
 - o Associate membership of Certified Practising Accountants of PNG (CPA PNG)
 - o Clearance from CPA PNG that he/she is fit and proper person for the to be employed by the Department
 - o Obtain clearance from Police Fraud and Criminal Divisions stating the persons considered for employment has no record of conviction and is not subject to investigation for possible fraud or other criminal offence
 - o Subject all candidates considered for the position of the Secretary to a • Interview Committee comprising of accounting (from international accounting firms) and legal experts for assessment of their knowledge of the accounting standards and relevant laws such as the PFMA.

VIII. INVESTIGATION REPORTS

A. Land

The Commission has examined twelve (12) land related matters and reported on four (4), which concern the acquisition of customary land by the State and the management of State land through the Department of Lands & Physical Planning.

With regard to the acquisition of customary land by the State, the Commission has not fully investigated the matters to make conclusive findings. On the limited information available, the Commission notes all the claims were dealt with by the National Lands Commission and were the subject of judicial review by the State before Injia, DCJ (as he then was) in which his Honour delivered a ruling on 30 November 2006. Essentially, the Court set-aside the assessments made by the National Land Commission as being outside the payment scale as prescribed by Schedule 2 of the *National Land Registration Act (Chapter 357)*.

The identification of lawful claimants and the processes by which such claims were pursued, heard and determined are issues that require further investigation. Further, the involvement of lawyers and representatives of the claimants needs to be examined.

As regards the management of State land through the Department of Lands & Physical Planning, the matters investigated clearly highlighted the gross incompetence of State officers generally, and lawyers within the Solicitor General's office in particular. This highly undesirable state of affairs was exacerbated by

extremely irresponsible and dishonest State officers in the performance of their statutory functions.

Three (3) claims examined by the Commission, which covered all the Terms of Reference involved the claims by Andrew Maid, Peter Yama and Toka Enterprises Ltd, respectively. These claimants essentially sought compensation for the economic losses they allegedly suffered as a result of the State's alleged maladministration of their asserted proprietary interests.

Despite obvious defences available to the State, die Solicitor General, owing to a combination of factors, including incompetence and lack of due diligence, simply failed to take all steps necessary to protect the interests of the State adequately or at all. The common and critical defences recurring in all these claims were lack of mandatory notice under Section 5 of the CBAAS Act, no reasonable cause of action disclosed and the actions were statutory time-barred. As a direct result of the Solicitor General's gross negligence in settling two (2) and failing to defend one (1) of the three (3) claims, the State's liability exceeds K47 million.

In accordance with the Commission's recommendations there are excellent prospects of setting aside the judgment debt [Toka Enterprises Ltd - K27 million] and the said deeds of settlement [Peter Yama - K15 million and Andrew Maid - K5.2 million paid but which is recoverable].

As for the Department itself, the Commission recommends a Commission of Inquiry be established to inquire into the management generally of the Department of Lands & Physical Planning to identify and rectify the systematic failings and misconduct in respect of the following:

I. Acquisition of customary land by the State-

- (a) Lack of proper records as to original acquisition;
- (b) Lack of instructions to the State Solicitor and Solicitor General to protect the interests of the State;
- (c) Gross disregard of Schedule 2 of the *National Land Registration Act* on assessment of claims;

Mismanagement of State land -

- (i)** Operations of the PNG Land Board;
- (ii)** Non-compliance with requirements of Land Act and related legislation and lease covenants (UDL and all other leases);
- (iii)** Abuse and misapplication of the laws;
- (d) Missing land files;
- (e) Missing documents;
- (f) Ad-hoc creation of supplementary files;
- (g) Unreliable filing system;
- (h) Unreliable Registers;
- (i) Lack of co-ordination within department;
- (j) Fraudulent creation of files and documents;
- (k) Forgery of signatures of officers;
- (l) Failure to notify interested persons;
- (m) Uncertainty with appointments for meetings generally;
- (n) Lack of supervision of all staff;
- (o) Failure to observe business opening hours;
- (p) Inefficient service;
- (q) Unreliable recording of information on files;
- (r) Unreliable custody and movement of files;
- (s) Incompetence;
- (t) Lack of effective communication with Solicitor General, State Solicitor and related state agencies in protecting State's interests;

Further, the Commission's immediate recommendations are that:

> officers implicated or involved to be suspended pending further investigation; and

y Creation of manual for processes and procedures of the Department.

(a) Toka Enterprises Ltd

PARTIES:

(i) For the State:

1. Department of Lands & Physical Planning ('DLPP')
2. Department of Justice and Attorney General ('DJAG')
3. Department of Finance ('DoF')
4. National Broadcasting Corporation ('NBC')

(ii) Claimant:

1. Toka Enterprises Limited (TEL⁵)

B. NATURE OF CLAIM:

1. TEL alleged that between 1989 and 2007 the Minister and Secretary for Lands & Physical Planning breached their statutory duties by not issuing title for a State lease granted to TEL.
2. TEL successfully applied to the Court to compel performance of the statutory duties and also obtained damages against the State for the losses it suffered.

C. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

1. In or about June 2009, the Attorney General referred to this Commission the Solicitor General file (SG 185/07) on the National Court proceedings referenced OS 240 of 2007 involving TEL -v- Dr

Puka Temu, Minister for Lands & Physical Planning; Pepi Kimas, Secretary for Lands & Physical Planning; and The State.

The court claim was commenced by TEL on 3 May 2007 and various orders were made against the State on 7 June 2007 (leave), 27 June 2008 (mandamus) and 27 November 2008 (damages) against the Minister, Secretary for Lands & Physical Planning and State.

3. The statutory breaches asserted between 1989 and 2007 formed the basis of the court action and orders, including the K27,784,S36 award of damages, which spanned 14 years from 1995 to 2008, falling within I" the period under inquiry 2000 to 1st July 2006.

No payment has been made by the Department of Finance ('DoF').

5. In the circumstances, this matter falls within Terms of Reference No. 1, 8, 10, 11, 13 and 14. This was confirmed by the decision of the National Court on 14 August 2009 presided over Justice Gavarananu in OS (JR) No. 352 of 2009. The Court refused TEL's application for leave to apply for judicial review of the Commission's decision to inquire into OS No. 240 of 2007. The Commission's costs were also awarded against TEL on a solicitor-client basis. Counsel Assisting was initially removed as party on 4 August 2009 and TEL was ordered to meet his party/party costs.

^^gESOFINFQRMATION^^

!• Tfte brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

National Court Registry — original Court file referenced OS
No. 240 of 2007

Office of Solicitor General -

- (i) Original file SG 185/07
- (ii) Evidence of -
 - o Neville Devete, Solicitor General o Gaure

Odu, lawyer Department of Lands & Physical

Planning -

- (i) Land files for ~
 - o Lots 9-11, Section 136, Hohola, NCD o Part Portion 1455
(later 2126), Granville, Moresby, NCD
 - o Portion 109 (later 2251), Granville, Moresby, NCD o Lots 10-16,
Section 496, Hohola, Gordon, NCD
- (ii) Evidence of—
 - o Pepi Kimas, Secretary o John Ofoi, Chief
Physical Planner o Samuel Kodawara,
Surveyor General o Raga Kavana, Registrar
of Titles

National Broadcasting Corporation -

- (i) Evidence of Joseph Ealadona, Managing Director

Evangelical Church of Manus - (i) Evidence of -

- o Joseph Pokawin, Chairman o Sku Kuyei, Treasurer

The Church of Jesus Christ of Latter-Day Saints - (i) Evidence
of -

(g) Toka Enterprises Ltd - (i)

Evidence of-

o Mahuru Dadi Toka, Sole Director o John S Goava, lawyer, Sannel Lawyers

2. The relevant transcripts of proceedings, particularly for Tuesday, 22 September 2009 and Wednesday, 23 September 2009, are provided with this Brief.
3. The critical evidence given by each of **these** witnesses is discussed where relevant in the course of the findings (F) of this Brief.

CHRONOLOGY OF EVENTS

Prior to Independence 16 September 1975

1. The Australian Broadcasting Commission ('ABC') erected transmitter aerials and a number of residential and office buildings on part Portion 1455.
2. The National Broadcasting Commission ('NBC') acquired ABC's interests including part Portion 1455.

1982

3. Lots 9, 11 and 12, Section 136 were zoned 'Residential' in the Waigani City Centre Master Plan 1982.

1987

4. On 2 July 1987, the Evangelical Church of Manus ('ECM') was registered as proprietor of Mission Lease, Volume 109, Folio 83, over land described as Lot 9, Section 136, Hohola, NCD, containing an area of 0.837 hectares. The Lease period is 99 years expiring on or about 2 July 2086.

5. On 29 September 1987, the PNG Town Planning Board at its meeting no. 20/87 granted approval in principle to TEL's proposed residential TSL subject to a number of conditions. TEL was notified by letter dated 2 October 1987 from the Chairman, PNG Town Planning Board.

1989

6. On 10 February 1989, the PNG Land Board (meeting no. 1745, item 18) recommended that TEL be granted a Town Sub-division Lease over Allotments 9, 11 and 12 (Consolidated), Section 136, and part Portion 1455, (Waigani City Centre) Milinch Granville, Fourmil Moresby, National Capital District ('TEL 1989 TSL').

7. On 16 February 1989, TEL was gazetted in National Gazette No. G12 at page 167 as the successful applicant for the TEL 1989 TSL, an area of 8.81 hectares.

8. In relation to Section 136, Lot 9 had an area of 0.837 hectares; Lot 11, 0.558 hectares; and Lot 12, 0.100 hectare. Part Portion 1455 had an area of 7.32 hectares.

9. By letter dated 30 June 1989, Secretary, DLPP informed NBC on the grant of the TSL to TEL and urged NBC to either (a) remove the improvements or (b) negotiate with TEL on the use or disposal of the improvements.
10. On 3 July 1989, TEL formally accepted the TSL under a Letter of Grant by execution of the Lease Acceptance Form, and payment of all the prescribed fees.
11. By letter dated 12 October 1989, the State Solicitor advised the Secretary, DLPP to resolve the dispute between NBC and TEL in respect of Portion 2126 (formerly part Portion 1455) in favour of TEL on the basis that NBC did not appeal against the grant of the TSL by the PNG Land Board.
12. By letter dated 10 November 1989 to TEL, DLPP Assistant Secretary Southern Region, Silas Peril confirmed three (3) options offered to TEL to compensate for wrongly including Lot 9, Section 136, Hohola in the TSL. The compensation options were to grant TEL:
 - (a) Northern part of Portion 2127;
 - (b) Lot 102, Section 51, Granville; or
 - (c) Any Business (Light Industrial) block available in NCD.

On 21 November 1989, TEL applied for a Business (Light Industrial) Lease over Portion 109, Granville, Moresby, NCD, as compensation for Lot 9, **Section 136 of TEL's TSL (Portion 109[^]. Mahuru Dadi Toka lodged the application for TEL. 1**

1990

14. On 1 June 1990, NBC Chairman Kedeia Uru, Deputy Secretary Lands John Yauwi, Minister for Lands Hon. Kala Swokin, Minister for Lands' Secretary Tau Po'o, and Dadi Toka, TEL had a meeting concerning Portion 2126, Waigani in which it was resolved that:-

- (a) DLPP will compensate TEL by granting a parcel of land equivalent to the area occupied by two (2) NBC houses;
- (b) Minister for Lands to support NBC's NEC Submission for K12 million to relocate its aerial farm to Lae to allow TEL to proceed with development under terms of TSL;
- (c) TEL to proceed with Stage 1 of TSL, and implement Stage 2 immediately after NBC aerial farm is relocated; and
- (d) DLPP immediately implement decision (a) and consult TEL.

15. By letter dated 6 September 1990 to the Southern Region Manager, DLPP, the Minister for LPP, Hon. Kala Swokin, directed that Portion 109, Hohola be granted to TEL, as identified by TEL, as adequate compensatory land for Lot 9, Section 136.

16. On 6 September 1990, TEL applied again for a Business (Light Industrial) Lease over Portion 109, Granville, Moresby, NCD, as compensation for Lot 9, Section 136 of TEL's TSL, containing an area of 2.8746 hectares (Portion 1090-

17. By Notice of Land Board Meeting dated 19 September 1990, TEL was advised that the PNG Land Board was scheduled to hear TEL's application for Portion 109.

18. On 27 September 1990, PNG Land Board (Land Board Meeting No. 1832, Item 37) recommended to grant TEL's application for Portion 109 in replacement of Lot 9, Section 136, Hohola wrongly allocated to TEL as part of the TEL 1989 TSL.
19. On 13 November 1990, the Chairman, PNG Land Board notified TEL of its successful application for Portion 109.

1991

20. On 14 March 1991, TEL was gazetted in National Gazette No. G27 at page 48 as the successful applicant for Portion 109.
21. On 5 May 1991, a Letter of Grant and Lease Acceptance Form in respect of Portion 109 were issued to TEL.
22. On 26 September 1991 a corrigendum was published in the National Gazette G85 advising that Portion 109, Milinch, Granville, Fourmil Moresby was listed in error as it should have read as 109 Rem which should now be described as portion 2251, Milinch Granville, Fourmil Moresby, NCD.
23. On 27 September 1991, TEL was registered as proprietor of Business Lease Volume 1 Folio 185 over Portion 2251, Granville, Moresby, NCD, containing an area of 2.8746 hectares. The Lease period was 99 years commencing on 14 March 1991 and expiring on 13 March 2090.

1992

24. On 28 October 1992, TEL applied to the Minister for Lands & Physical Planning seeking consent to conditionally surrender Portion 2251 for issuance of seven (7) individual leases ('Conditional Surrender')

25. On 9 November 1992, the Minister for Lands & Physical Planning's Delegate, Paul Bengo, accepted TEL's Conditional Surrender.

1993

26. On 8 February 1993, TEL lodged an application with the NCD Physical Planning Board for planning permission (PPP04 649/93) to subdivide Portion 2251 (Portion 2251 Subdivision PW).
27. On 2 March 1993, the NCD Physical Planning Board (Meeting No. 2/93) approved TEL's Portion 2251 Subdivision Plan.
28. By Notice dated 26 May 1993, the Minister for Lands & Physical Planning approved TEL's application to conditionally surrender Portion 2251 for sub-division into seven (7) allotments and issuance of separate leases on registered survey plan 49/2082.
29. TEL was registered as proprietor of seven (7) separate Business Leases Volume 7 Folio 232-238 (inclusive) over Section 496 Lots 10-16 (inclusive) respectively. The Leases were each for a period of 98 years 206 days commencing on 28 April 1993.

1994

30. By letter dated 27 January 1994 to Secretary, DLPP, Beresford Love, lawyers for TEL followed up on the meeting concerning the non-issuance of title over the TEL 1989 TSL, noting the impending expiration of the TEL 1989 TSL on 16 February 1994.
31. On 16 February 1994, TEL's 1989 TSL expired by operation of law: Sections 38 and 66C of the then *Land Act (Cb 185)*.

32. By Notice published in the National Gazette No. G28 dated 21 April 2004 the DLPP advertised Tenders No. 56/94 and 57/94 comprising Business (Commercial) Leases over Lots 11 and 12 respectively, Section 136, Hohola, NCD.
33. On 28 July 1994, PNG Land Board No. 1927 (Item 102) recommended that Tatabai No. 24 Pty Ltd be granted a Business (Commercial) Lease over Lot 11, Section 136, Hohola.
34. By letter dated 2 August 1994 to the Secretary, DLPP, Beresford Love, lawyers for TEL informed the Secretary, DLPP that TEL proposed to surrender the TSL in consideration for the grant of a lease over Portion 1437.

1995

35. By letter dated 13 February 1995, Henaos, lawyers for TEL requested a meeting with the Secretary, DLPP to resolve issues relating to the non- issuance of title over the TEL 1989 TSL.

1996

36. By Notice published in the National Gazette No. G9 dated 26 January 1996 at page 55 Tatabai No. 24 Pty Ltd was advertised as the successful applicant for a Business (Commercial) Lease over Lot 11, Section 136, Hohola.
37. On 23 February 1996, Tatabai No. 24 Pty Ltd was registered as proprietor of Business (Commercial) Lease, Volume 17, Folio 85, over land described as Lot 11, Section 136, Hohola, NCD. The Lease period is 99 years commencing on 26 January 1995 and expiring on or about 25 January 2094.

2002

38. By letter dated 6 December 2002, Warner Shand, lawyers for TEL requested the Minister for Lands & Physical Planning to investigate and advise on its position on the issues relating to the non-issuance of the title over the TEL 1989 TSL.

2003

39. After a review of the Waigani City Centre Plan on 27 February 2003, Portion 2126 (formerly 1455) was sub-divided and described as Portions 2538 and 2539.
40. The Waigani City Centre zoning plan was approved by the NCD Physical Planning Board and was subsequently published in the National Gazette No. G681 dated 26 June 2003. Portion 2126 ceased to exist as of this event.
41. On 26 August 2003, the approval of the Waigani City Centre zoning plan was advertised in the Post Courier as Public Notice.
42. On 19 September 2003, T. M. Rei Lawyers objected on behalf of TEL against the Waigani City Centre zoning plan to the NCD Physical Planning Board.
43. On 13 November 2003, T. M. Rei Lawyers appealed on behalf of TEL to the PNG Physical Planning Appeals Tribunal. The Tribunal then made recommendation to the Minister for rejection of the appeal.
44. On 23 December 2003, the Minister for Lands & Physical Planning accepted the recommendation of the PNG Physical Planning Appeals Tribunal and rejected the appeal.

2004

45. On 9 February 2004, Tatabai No. 24 Ltd transferred Business (Commercial) Lease, Volume 17, Folio 85, over land described as Lot 11, Section 136, Hohola, NCD, to The Church of Jesus Christ of Latter-Day Saints under a contract of sale.

2005

46. By letter dated 26 July 2005, M. S. Wagambie, lawyers for TEL again followed up with the Minister for Lands & Physical Planning to investigate and advise on its position on the issues relating to the non-issuance of the title over TEL 1989 TSL.

2007

47. By letter dated 27 January 2007, Sannel Consulting Services Inc, requested a meeting with the Minister of Lands & Physical Planning on the issues relating to the non-issuance of the title over TEL 1989 TSL, failing which legal proceedings would be instituted.
48. On 27 February 2007, by letter dated 26 February 2007, Sannel Consulting Services Inc. gave notice to the Solicitor General of TEL's intention to make a claim against the State for non-issuance of title in respect of the TEL 1989 TSL and also for damages.
49. On 3 May 2007 (18 years after grant), TEL brought proceedings under *OS 240 of 2007* by way of judicial review against the Minister for Lands, the Secretary for Lands and the State out of its successful application on 10 February 1989 to be granted the TEL 1989 TSL.
50. On 15 May 2007, the National Court presided over by Justice Salika (as he then was) adjourned the proceedings to 22 May 2007. John Goava appeared for TEL and Gaure Odu appeared for the Minister for Lands, the Secretary for Lands and the State ('State parties').

51. On 22 May 2007, the National Court presided over by Justice Salika (as he then was) further adjourned the proceedings to 7 June 2007 with costs to TEL. John Goava appeared for TEL. Gaure Odu appeared for State parties and applied for the adjournment.
52. On 5 June 2007, Mr Neville Devete, Acting Solicitor General filed a Notice of Appearance in OS No. 240 of 2007 for all the defendants i.e., Pepi Kimas, Secretary, DLPP, Dr Puka Temu, Minister for LPP and the State.
53. On 7 June 2007, leave to apply for judicial review was granted by the National Court in OS No. 240 of 2007. Mr Tauvasa Tanuvasa of the Solicitor General's Office appeared for the State and unsuccessfully applied for an adjournment of the hearing due to the unavailability of Mr Gaure Odu, lawyer in carriage of the matter. Mr John Goava appeared for TEL. Mr Goava submitted to the Court that there were no competing grounds or interests in respect of the land subject of the TSL.
54. 17 July 2007 was the 40th day on which the State was required to file an appeal against the decision of 7 June 2007: Section 17 of *Supreme Court Act*.
55. By letter dated 10 August 2007, the Solicitor General provided the Secretary, DLPP with copies of the court documents in OS No. 240 of 2007, and sought instructions.
56. By letter dated 16 August 2007, the Secretary, DLPP instructed the Solicitor General to seek adjournment of OS No. 240 of 2007 as relevant files had yet to be located and reviewed to provide full and proper instructions.

2008

57. Ten (10) months later, on 27 June 2008, the National Court granted TEL an order in the nature of mandamus requiring the defendants to issue TEL

with title to the TEL 1989 TSL. TEL was also directed to file evidence of damages suffered with submissions within 7 days. Costs were awarded to TEL. Mr Gaure Odu of the Solicitor General's Office appeared for the State. No evidence or submissions were provided to the Court by the State for its consideration and determination prior to the issuance of those orders.

58. 6 August 2008 was the 40th day on which the State was required to file an appeal against the decision of 27 June 2007: Section 17 of *Supreme Court Act*.
59. On 7 July 2008, Sannel Consulting Services Inc served on the office of Solicitor General, a copy of sealed Court Order dated 27 June 2008 under cover of letter dated 30 June 2008 addressed to the Solicitor General and circulated to the Minister and Secretary, DLPP ('SCS' letter').
60. On 14 July 2008, Secretary, DLPP made a notation on SCS' letter seeking Manager Manager, Legal Services, Ian Kundin's advice and expressing his understanding that the Court Order would be challenged.
61. On 14 October 2008, Neville Devete, Acting Solicitor General caused a letter dated 1 September 2008 to be faxed to DLPP's Manager, Legal Services, Ian Kundin in which the Court Order of 27 June 2008 was enclosed with advice to issue title over Portion 2126, Granville and Lots 9, 11, 12 (Consolidated), Section 136, Hohola, NCD as soon as possible to avoid possible contempt.
62. In a separate hearing on 27 November 2008, the National Court awarded TEL damages in the sum of K27,784,536.00, consisting substantially of past and future economic losses spanning 14 years from 1995 to 2008. Mr Goava appeared for TEL. No appearance was made on behalf of the State.

1990

63. 6 January 2009 was the 40th day on which the State was required to file an appeal against the decision of 27 November 2008: Section 17 of *Supreme Court Act*.
64. On 16 March 2009 (20 years after grant), TEL was registered as proprietor of Urban Development Lease, Volume 34, Folio 49, over land described as Portion 2538, 2539 (19), Milinch Granville, (Section 136 Hohola)(Cons), Moresby, NCD, containing an area of 3.950 hectares ("TEL UDL March 2009").
65. By letter dated 26 May 2009, Sannel Lawyers proposed to the Legal Officer, DLPP that TEL be compensated with parcels of land under a new title in consideration of the following:
 - (a) TEL surrender TEL UDL March 2009 on 26 May 2009.
 - (b) The new title be prepared for TEL as "one title" replacing the TEL UDL March 2009.
 - (c) TEL be allocated with new land covering area of 0.8670 hectares as compensation for loss of Lot 9, Section 136
 - (d) TEL be allocated with new land covering area of 2.833 hectares as compensation for loss of road severance or slightly greater size based on economic value of road land.
 - (e) TEL has identified Lot 3, Section 439, Waigani City Centre as an appropriate compensatory package.
 - (f) TEL considered Portion 2537, Waigani City Centre as compensatory land.
66. On 4 June 2009, TEL applied for the surrender of the TEL UDL March 2009.

67. On 10 June 2009, the Registrar of Titles cancelled the TEL UDL March 2009.
68. On 16 June 2009, TEL was registered as proprietor of Urban Development Lease, Volume 34, Folio 173, over lands described as Portion 2534, 2535, 2538,2539 & (DC/136/019)(CONS), Granville, Moresby, NCD, containing an area of 6.227 hectares (TEL UDL June 20090-
69. The TEL UDL June 2009 is for a term of five (5) years commencing 11 June 2009, but erroneously records the expiration date as 10 June 2104 (a term of 95 years).
70. No appeal was filed against any of the National Court decisions within the statutory time limit. However, on 11 September 2009 the Solicitor General endorsed the Certificate of Judgment stating that "*the State proposes to take further action in this matter and satisfaction of judgement cannot take place*".

Land area granted to TEL

71. The TEL 1989 TSL originally granted to TEL contained an area of 8.81 hectares.
72. The compensatory land of Portion 109 granted to TEL as replacement for Lot 9, Section 136, contained an area of 2.8746 hectares. Lot 9 contained an area of 0.8670 hectares.
73. TEL's TEL UDL June 2009 contains an area of 6.227 hectares.
74. In sum, TEL has received a total land area of 9.10 hectares, an excess of 0.29 hectares from the TEL 1989 TSL.

F. FINDINGS

I. Liability In Issue

(i) Non-compliance with Sections 5 and 21 - *Claims By and Against the State Act 1996*

1. On 27 February 2007, Sannel Consulting Service Inc served on the Office of the Solicitor General a letter dated 26 February 2007 addressed to the Office of the Solicitor General, giving notice of TEL's intention to make a claim against the State ("Notice of claim").
2. On 16 February 1994, TEL's 1989 TSL expired by operation of law. That is, after five years from 16 February 1989, being the date on which notice of such grant was published in the National Gazette: Sections 38 and 66C of the then *Land Act (Ch 185)*.
3. To the extent TEL sought damages, TEL's cause of action accrued during the currency of the TEL 1989 TSL between 16 February 1989 and 16 February 1994, being the last date on which TEL was entitled to be issued with title to the TEL 1989 TSL. This was prior to the commencement of the *Claims By and Against the State Act 1996* ('Claims Act') on 27 February 1997.
4. As TEL's cause of action accrued prior to the commencement of the Claims Act, TEL was required to give notice of its intention to make a claim against the State within six (6) months thereafter i.e., by 20 August 1997: Section 21(2) of the Claims Act.
5. TEL did not give notice of its intention to make a claim against the State until 27 February 2007. This was over 9 years and 5 months after the mandatory time period.

6. Further, the Notice of claim was given without an extension of time to do so by either the Principal Legal Adviser or the National Court: Section 21 (2) (a) and (b) of the *Claims By and Against the State Act 1996*.

1. A number of discrepancies are also evident:

(a) The Notice of claim is not a request for extension of time to give notice. Clearly it is actual notice of intention to enforce a claim.

Without extension of time being granted by the Principal Legal Officer or the National Court, TEL was not at liberty to lodge his Section 5 notice.

(b) Any suggestion by TEL that the Notice of claim can be deemed to be a request for extension of time, is again flawed as it is addressed to the Office of the Solicitor-General when it should have been addressed to the Principal Legal Officer which is the Attorney-General: Section 3 of the *Attorney-General Act 1989*.

(c) TEL's position is further compounded by no letter "accepting" the Notice of claim as notice under Section 5 of the *Claims By and Against the State Act 1996*.

pb It is found that TEL's Notice of claim breached the mandatory requirements of Sections 5 and 21(2) of the Claims Act and was, therefore, invalid.

p3 It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies.

pb It is recommended John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence ft) It is further recommended that Neville Devete and Gaure Odu should be referred to the Departmental Head of Department of Justice & Attorney General on a charge of being negligent or careless in the discharge of their duties

(ii) No merits in claim

There were significant issues of fact and law not disclosed to the National Court that substantially affected the assertions and relief sought in the Statement filed in support of the Originating Summons No. 240 of 2007.

(a) Invalid grant of TEL 1989 TSL

The grant of the TEL 1989 TSL was invalid *ab initio* (from the beginning) on six (6) grounds.

Firstly, part Portion 1455 (later Portion 2126) was not vacant land. NBC had existing improvements on that parcel of land subject of the TEL 1989 TSL and was, therefore, not suitable or available for a TSL: Section 66(1) of the *Land Act (Chapter 185)*.

Secondly, the TEL 1989 TSL was not offered for lease by public tender. This was in breach of the mandatory requirements of Sections 31(2) and 66 of the *Land Act (Chapter 185)*. At the material time, a TSL could only be exempted from advertisement for tender in the event of a disaster occurring as defined in the *Disaster Management Act (Chapter 402)* necessarily

requiring the relocating of persons displaced as a result of such disaster onto the TSL. There was no evidence that such disaster had occurred justifying exemption from advertisement for tender of the TEL 1989 TSL.

12. Thirdly, despite NBC's interest in part Portion 1455, the PNG Land Board did not notify NBC by post of the date on which TEL's application for a TSL would be considered in breach of this mandatory requirement under Section 9(2) of the *Land Act (C185)*.
13. Fourthly, despite NBC's interest in part Portion 1455, the PNG Land Board did not forward to NBC notice of the PNG Land Board's recommendations. This was in breach of the mandatory requirement under Section 9(9) of *Land Act (C185)*.
14. Fifthly, despite ECM's registered title over Lot 9, Section 136, the PNG Land Board did not notify ECM by post of the date on which TEL's application for a TSL would be considered. This was in breach of Section 9(2) of the *Land Act (C185)*.
15. Sixthly, despite ECM's registered title over Lot 9, Section 136, the PNG Land Board did not forward to ECM notice of the PNG Land Board's recommendations. This was in breach of the mandatory requirement under Section 9(9) of *Land Act (C185)*.
16. Mahuru Dadi Toka, and Pepi Kimas agreed in evidence that Lot 9, Section 136 was granted in error by DLPP.

R3 It is found that TEL's 1989 TSL was granted in error and invalid from the beginning

It is recommended the State challenge the National Court Orders made on 27 June 2008 (mandamus) and 27 November2008 (damages)

\b It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies.

p3 It is recommended that John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence

(b) Expired TEL 1989 TSL

17. TEL's 1989 TSL had expired on 16 February 1994 by operation of law- after five years from 16 February 1989, being the date on which notice of such grant was published in the National Gazette: Sections 38 and 66C of the *Land Act (Cb 185)*.
18. As TEL's 1989 TSL had extinguished on 16 February 1994, there was no such right or interest existing as at 17 February 1994 capable of registration or enforcement, including orders for mandamus.
19. Therefore, when TEL filed OS No. 240 of 2007 on 3 May 2007 there was no reasonable cause of action available.

R} It is recommended the State challenge the National Court Orders made on 27 June 2008 (mandamus) and 27 November2008 (damages)

fb It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies and failed in their duty to assist the Court.

\b It is recommended that John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence

(c) Portion 2126 Non-existent 20. Portion 2126 (formerly part Portion 1455) ceased to exist upon subdivision into Portions 2538 and 2539 pursuant to a review of the Waigani City Centre Plan on or about 27 February 2003. The change in the legal description, and physical metes and bounds of the subject parcel of land extinguished any unregistered proprietary interest that TEL may have had in Portion 2126.

21. There was no land described as Portion 2126 as at 27 February 2003, so there was no such right or interest capable of registration or enforcement, including orders for mandamus.
22. Therefore, when TEL filed OS No. 240 of 2007 on 3 May 2007 there was no reasonable cause of action available. However, the Department of Lands & Physical Planning files and records were not readily available for providing full and proper instructions to the Solicitor General.

R} It is recommended the State challenge the National Court Orders made on 27 June 2008 (mandamus) and 27 November 2008 (damages)

*pD It is recommended that an inquiry be conducted into Department of
Lands & Physical Planning*

(d) Action time barred

23. Section 16 of the *Frauds & Limitations Act 1988* required TEL to commence its action within six (6) years from the date on which each cause of action arose.
24. From perusal of the statement of facts pleaded by TEL to give rise to the cause of action, TEL asserted that after being granted the TEL 1989 TSL, its attempts to obtain title between 1989 and 2007 was unsuccessful.
25. The time for TEL to commence legal action for damages accrued during the currency of the TEL 1989 TSL between 16 February 1989 and 16 February 1994. Thus, the last date on which TEL's cause of action for damages accrued was on 16 February 1994. Six (6) years from that time falls on 16 February 2000. Therefore, TEL was required to commence legal proceedings for a claim in damages no later than 16 February 2000.
26. On 3 May 2007, TEL filed OS No. 240 of 2007 in the National Court. That is, over 7 years and 2 months after the time had expired for TEL to bring such an action.
27. Therefore, the court action by TEL was clearly time barred and liable to be dismissed on that basis.

*R} It is recommended the State challenge the National Court
Orders made on 27 June 2008 (mandamus) and 27
November 2008 (damages)*

It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies and failed in their duty to assist the Court.

Fb It is recommended that John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence

(e) Non-service on interested parties

28. The judgment on 27 June 2008 in OS No. 240 of 2007 was given without affording the opportunity to four (4) persons with proprietary interests in parcels of land within the TEL 1989 TSL to be heard. Those persons were the:
- (a) National Broadcasting Corporation (Portion 2126);
 - (b) The Evangelical Lutheran Church of Manus (Lot 9, Section 136);
 - (c) The Church of Jesus Christ of Latter Day Saints (Lot 11, Section 136);
 - (d) The Department of Foreign Affairs (Lot 12, Section 136).
29. Despite their clear legal interests, the interested persons were not served with the Notice of Motion for judicial review. This was in breach of Order 16 Rule 5(2) of the *National Court Rules*.
30. Further, TEL did not file an affidavit setting out why the interested persons were not served with the Notice of Motion for judicial review. This was in breach of Order 16 Rule 5(5) of the *National Court Rules*.

Fb It is recommended the State challenge the National Court Orders made on 27 June 2008 (mandamus) and 27 November 2008 (damages)

Fb It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies and failed in their duty to assist the Court.

fb It is recommended that John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence

Rj It is further recommended that Neville Devete and Gaure Odu should be referred to the Departmental Head of Department of Justice & Attorney General on a charge of being negligent or careless in the discharge of their duties

(f) Non-disclosure

31. In OS No. 240 of 2007, TEL sought and obtained orders relating to a Town Sub-division Lease over Allotments 9, 11 and 12 (Consolidated), Section 136, and part Portion 1455, (Waigani City Centre) Milinch Granville, Fourmil Moresby, National Capital District (TEL 1989 TSL⁵). There were a number of relevant and material facts not disclosed to the Court by Mahuru Dadi Toka and John Goava in pursuit of TEL's claim in OS No. 240 of 2007.

i. Mahuru Dadi Toka - compensation for Lot 9

32. TEL's Director, Mahuru Dadi Toka, was dishonest in TEL's pursuit of OS No. 240 of 2007 in that he did not disclose at all to his lawyer, Mr John

Goava of Sannel Consulting Inc., that TEL was given Portion 109 (later 2251) [area of 2.8746 hectares] as compensation for Lot 9, Section 136 [area of 0.837 hectares].

Relevant excerpts of the transcript of 23 September 2009 containing Mahuru Dadi Toka's answers are reproduced hereunder:

[At page 4421]

"MR KASSMAN: After it was found that there was an error, were you compensated for that error in giving you lot 9 when all along it was owned by Evangelical Church? A: Yes, I was compensated portion 2251. It is 109."

[At page 4426]

'jQ: Do you have a copy of the originating summons'? Basically I will just read, in your proceedings you filed in the National Court, you sought an order directing the Secretary for Lands and the Minister for Lands to issue title to you meaning to Toka Enterprise Limited over land described as portion 2126 and lots 9,11 and 12 of section 136 Hobola. That was one of the order you sought? A: Yes.

j2-" And yet you had already been compensated for lot 9." [At page 4427-4429]:

'MR KASSMAN: You applied for it, you were given orders by the National Court in 2008. In the course of the hearing was it disclosed to the Court that lot 9 was in fact owned by the Evangelical Church of Manus? Was that ever disclosed to the Court? A: I never attend to those until the last one, perhaps if my lawyer would—

Q: Were you ever advised by your lawyer that you could not seek such an order?

A: Please, I will refer to my lawyer.

Q: You were not advised as such? Did your lawyer advise you that you could not seek title to lot 9?

A: No.

Q: But you were aware that your proceedings, the proceedings by Toka Enterprises sought title to lot 9 and also sought compensation for the fact that you had not been issued title to not only lot 9 but all other parcels?

A: Yes.

Q: You are saying you were aware of your claim.

A: I am aware of my claim.

Q: So you would admit that that was an error on your part or error on the part of your lawyer in claiming title over lot 9, would you admit to that?

A: What I did was, even though as you said, you look at from your angle that I was compensated but I was just as a package; part and parcel of the land I was granted and gazetted and the whole thing goes into the Court. And it would have been — there is always ways.

Q: But you never disclosed to the Court that you had been compensated for part of the error, lot 9. You were given portion 109 which is now portion 2251.

A: Are you talking from the damages angle or title?

Q: In Court, when you went into Court that was not disclosed, the fact that you were compensated already by the Department of Lands for that area. In fact, I think you were given a block of land that is much larger than what you actually lost in lot 9.

A: So what would you say if I am given a larger block than block 9?

Q: You have done well.

A: Good luck to me, thank you.

Q: But that was not disclosed."

TEL continued to assert to the DLPP its entitlement to compensation for the loss of Lot 9, Section 136. John Goava of Sannel Lawyers was not aware of this baseless assertion until the Commission informed him that TEL had already received compensation for Lot 9, Section 136.

Mahuru Dadi Toka eventually acknowledged this was wrong when pressed by Counsel Assisting, as shown in relevant excerpts of the transcript of 23 September 2009 containing his answers, which are reproduced hereunder:

[At page 4433]

"Q: You mentioned you are no longer pursuing lot 9 or compensation for lot 9. I will just show you a copy of a letter that was sent to the Department of Lands by your lawyer. It is a letter dated 26 May 2009 from Sannel Consulting Services addressed to the Department of Lands and Physical Planning, addressed to Ms Sheila Sukwianomb, legal officer, Department of Lands and Physical Planning. Mr Toka, in this - the letter is dated 26 May 2009, you are still claiming compensation for the loss of lot 9, section 136. As you can see, paragraph No 3, you are still claiming compensation for the loss of lot 9.

A: I did ask my lawyer to write this because Lands Department failed to issue titles and I had to hit them to comply with the Court decision. But when it would come to Court decision, I think it was a letter written from Kimas, Secretary that—

Q: Mr Toka, you have been compensated for the loss of lot 9. You have been given portion 109 which is now portion 2251, the Gordon industrial area block which you say you developed and you sold. So you have been compensated for that and you are still pursuing compensation. That is wrong. You do not see that as being wrong?

A: I am just playing the kind of a game from Lands Department to come forward with my title because —

Q: So you admit that that is wrong.

A: I admit that is wrong.

j2' YOU should not do it. Chief if I could for the record have that marked as Toka —

THE CHAIRMAN: 4.

MR KASSMAN: Toka 4, thank you.

[EXHIBIT TENDERED - TOKA 4 - LETTER FROM SANNEL CONSULTING SERVICES DA TED 26MA Y2009] "

ii. Mahuru Dadi Toka - competing interests in Lot 9\ 11 and Portion 2126

Mahuru Dadi Toka also gave evidence that despite having knowledge of the competing interests in Lots 9 & 11 of Section 136 and Portion 2126 he deliberately made no such disclosure. No reasonable explanation was given for taking this position. This is shown in relevant excerpts of the transcript of 23 September 2009 containing his answers to questions raised by the Chief Commissioner and Counsel Assisting, which are reproduced hereunder:

[At page 4430 - 4432]

"Q: Do I understand what you are saying there is that, T was allocated 9, 1 1, 12, part 4145 so one side got it, nobody had any right, the Land Department had no right to allocate it, let it out or sell it to anybody else." That is the basis of you making the claim?

A: Yes.

Q: I understand that. Whether in fact it is a valid position to have is another matter. But I understand what you are saying. So you were aware then that lot 11 was also, had changed hands or was in the title to someone else at the time you filed the proceeding?

A: I am aware of that.

Q: Yes, alright.

MR KASSMAN: Was that disclosed to the Court?

A: Sony?

Q: Was that disclosed to the Court? Did you advise or your lawyer advise the Court at the—

A: No.

Q: At the time you commenced the action or prior to you obtaining judgment?

A: No, I did not disclose my knowledge of lot 11 had a title because I know there is a legal battle on my part on lot 11.

Q: So before orders were issued by the Court directing Lands to issue your title that you asked for and before you obtained your judgment for damages of 28 million, did you disclose to the Court or did your lawyer disclose to the Court that lot 11 was owned by the Church of Latter Day Saints? Did you disclose that?

A: No.

Q: And neither did your lawyer?

A: No.

Q: But you were aware of it; you were aware of it?

A: I was aware of it. I had no intention of telling my lawyer.

Q: Why was that?

A: But I know there was a great error from Lands Department and I know.

Q: But you are asking for fairness on the part of the State but you yourself are not exercising that fairness by truthfully disclosing information that is relevant for the Court's consideration. You still felt that you were not obliged to disclose that information?

A: No.

Q: So that is both in relation to lot 9 which is owned by Church of Manus and lot 11 owned by the Church of Latter Day Saints, and also the NBC? A: Sony? Q: The NBC? A: NBC, yes.

Q: The aerial towers on 2126, that was not disclosed to the Court? A: No, that was not disclosed."

Hi. John Goava - misled by Maburu Dadi Toka and misled Court

As a result of the foregoing John Goava of Sannel Consulting Services Inc did not assist the Court on the following:

- (a) There was no cause of action as TEL's 1989 TSL had expired on 16 February 1994 by operation of law after five years from 16 February 1989.
- (b) TEL had not made any application afresh for a TSL.
- (c) The time for commencement of legal action by TEL for damages expired on or about 16 February 2000. OS No. 240 of 2007 was filed by TEL on 3 May 2007. That is, over 7 years and 2 months out of time.
- (d) TEL was given Portion 109 (later 2251 - 2.8746) as compensation for Lot 9, Section 136 (0.8670 hectares).

- (e) The interests that National Broadcasting Corporation (Portion 2126); The Evangelical Lutheran Church of Manus (Lot 9 Section 136); The Church of Jesus Christ of Latter Day Saints (Lot 11, Section 136); and Department of Foreign Affairs (Lot 12,136) had in parcels of land within the TEL 1989 TSL.
- (f) As at 27 February 2003, Portion 2126 (formerly part Portion 1455) no longer existed as it was sub-divided and described as Portions 2538 and 2539.
- (g) TEL has received a total land area of 9.10 hectares from the DLPP and State, being in excess of 0.29 hectares from the original area granted under the TEL 1989 TSL (8.81 hectares),

Consequently, John Goava of Sannel Consulting Services Inc. misled the National Court in granting Orders on 7 June 2007 (Leave), 27 June 2008 (mandamus) and 27 November 2008 (damages). This concession was made by John Goava as shown in relevant excerpts of the transcript of 23 September 2009 containing his answers, which are reproduced hereunder:

[At page 4463 - 4466]

'MR KASSMAN: Yes, we do have the transcript. Mr Goava, I will just maybe just read from the transcript on the application for leave, which was conducted on 7 June 2007. At page 4 of the transcript, His Honour Justice Lay asked, 'Has there been any to your client's knowledge, have there been any competing grounds made in respect of this land?' In response, you said, 'Your Honour, according to our client he has made - there are no competing issues.' Now, I interpret to be saying, the Court asking you, is there any other competing interest, is there any other party with an interest in the land, the subject of your action, and you advise the Court that there were no competing interests.

A: Counsel, the reason why I said that was because we were not too sure about the boundary.
THE CHAIRMAN: No, but just those words. That is what you said?

A: Yes.

Q: But you said that you knew about the Tatter Day Saints, that they held the title?

A: That is —

Q: You knew the NBC had an interest?

A: Commissioner, to answer your question there was — when you raised the issue of title there was no title issued to NBC at that time.

j2- No, not to NBC but the title was already issued to the Tatter Day Saints, was it not?

A: As I said earlier I was not aware of that title over Tot 9 and Tot 11.

fj: You had no knowledge of Tatter Day Saints?

A: No. So I could not assist the Court in that aspect as far as my —

MR KASSMAN: Do you concede that you misled the Court?

A: I mean at that time I did not have that information so —

Q: So you misled the Court?

A: But I should not say it because it is something that I did not know, how would I say the opposite.

fj: Well?

A: It would be contradictory.

Q: I am suggesting that you should have said, "I cannot conclusively say your Honour, I might need to conduct a title search." That would have been in my respectful view, that would have been the appropriate course rather than saying ^ "Your Honour, they are no competing interests."

A: Because at that point in time, my instructions as well as I was aware that there was no competing interests.

THE CHAIRMAN: *But then was. There was no resolution regarding the NBC. You knew that the -you did not know about the boundaries. There was an enormous amount of information that you did have to answer that question of the Judge.*

A: Chief Commissioner, in respect of Allotment 9 and 11, I never had that

information regarding the new proprietorships. MR KASSMAN: That is the point I am saying. You have said that you had not obtained results of a title search in respect of lots 9 and 11. Whereas if you had, and if that had disclosed that there was no title or it was not owned by anyone else, then you would have been correct. In this instance you had not done a title search and as such you could not assist the Court one way or another. Your disclosure was misleading that is what I am putting to you. You misled the Court to believe that there was no other interest other than your client's interest in lot 9, lot 11, lot 12 and Portion 2126. You have misled the Court into believing that it was only your client that had an interest in those lands and as such the Court thought, obviously considered that it was not necessary to hear from anyone else, that it was safe to rely on your word and as such the Court proceeded to grant leave for judicial review to your client.

A: I think to use the word 'misleading', I think it is not appropriate because

I had no intentions of misleading the Court at that time. Q: So it would be proper now for you to say, I was wrong? A: Given the evidence that is now before this Commission, I would say I am wrong.

Q: So I am correct in saying that, at that time you misled the Court? A: If you may, I will concede to that.

THE CHAIRMAN: *What would your duty be as a lawyer now? A: I would try and correct that anomaly; discrepancy."*

Fb It is recommended the State challenge the National Court Orders made on 7 June 2007 (leave), 27 June 2008 (mandamus) and 27 November 2008 (damages)

Fb it is found that John Goava misled the National Court by not disclosing that his knowledge of the proprietary status of the parcels of land in question was not conclusive.

Fb It is recommended that John Goava should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence

pb It is found that Maburu Dadi Toka was dishonest in failing to disclose to his lawyer and the National Court in OS No. 240 of 2007 his knowledge of the compensation TEL received in respect of Lot 9, Section 136, Hobola, NCD.

pb It is recommended that Maburu Dadi Toka should be referred to the Royal PNG Constabulary for fraud investigation.

II. Assessment of damages 39. On or about 21 November 2007, National Court conducted an ex parte hearing on assessment of damages due to non-appearance by the Solicitor General.

40. Further, no evidence or proper submissions were filed or made by the Solicitor General for the State parties in response to TEL's claim for damages.
41. On 27 November 2007, the National Court entered judgment in the sum of K27,784,536.00 in favour of TEL, consisting substantially of past and future economic losses spanning 14 years from 1995 to 2008.
42. The non-disclosure by Mahuru Dadi Toka, Toka Enterprises Ltd and John Goava of Sannel Lawyers of the findings discussed above were relevant to the hearing on the assessment of damages.

fb It is recommended the State challenge the National Court Orders made on 7 June 2007 (leave), 27 June 2008 (mandamus) and 27November2008 (damages)

Fb It is found that Maburu Dadi Toka was dishonest in that he did not disclose to his lawyer and the National Court his knowledge of the compensation received in respect of Lot 9, Section 136, Hobola, NCD.

pb It is recommended that Maburu Dadi Toka should be referred to the Royal PNG Constabulary for fraud investigation.

fb It is found that Neville Devete and Gaure Odu were negligent in not preparing adequately nor appearing at all for the hearing on assessment of damages.

pb It is recommended that Neville Devete and Game Odu should be referred to the -

o Lawyers Statutory Committee for unprofessional conduct and incompetence o Departmental Head of Department of Justice & Attorney General on a charge of being negligent or careless in the discharge of their duties

III. Steps taken (or not taken) by Solicitor General in defence of the claim

i

As examined above, clearly there is ample evidence of serious failures on the part of the Solicitor-General, Mr Neville Devete and the action officer Mr Gaure Odu in the performance of their respective professional duties as lawyers for the State because they did not:

- (a) raise the obvious flaws in TEL's Notice of claim in respect of the *Claims By and Against the State Act 1996*;
- (b) seek instructions from the relevant DLPP officers -
 - (i.) prior to TEL's application for leave to apply for judicial review despite having appeared as early as 25 May 2007 for all the defendants;
 - (ii.) between 17 August 2007 and 27 June 2008 for the
judicial review hearing; (iii.) between 28 June 2008 and 21 November 2008 for the hearing on assessment of TEL's damages.

- (c) raise various discrepancies of there being no liability or grounds available for judicial review against the named defendants, including the State;
- (d) ensure the file was transferred to and conducted by another lawyer when the lawyer in carriage was on circuit or unavailable for any reason;
- (e) prepare adequately or at all for any of the hearings nor appear for the hearing on assessment of damages
- (f) providing any advice to the Secretary, DLPP and Registrar of Tides in respect of discrepancies of mandamus orders obtained by TEL and parcels available for tide to be issued to TEL
- (g) consider the prospects of challenging the National Court orders in the nature of mandamus and the subsequent award of K27 million in damages before the time limited to do so expired.
- (h) brief the Attorney General on the prospects of an appeal or setting aside the order in the nature of mandamus and the subsequent award of K27 million in damages before the time limited to do so expired.

Further, no evidence or submissions were filed in response to TEL's claim for damages.

*fb It is recommended that Neville Devete and Gaure Odu
should be referred to the:*

*o Lawyers Statutory Committee for unprofessional
conduct and incompetence
o Secretary, Department of Justice & Attorney General on
a charge of being negligent or careless in the discharge
of their duties*

*Rj It is recommended that an inquiry be conducted into the
Office of the Solicitor General*

IV. Lack of Jurisdiction to issue TEL's UDL June 2009

i

45. The National Court made orders for mandamus (27 June 2008) for DLPP to issue title to parcels of land that-
- (a) no longer existed (Portion 2126);
 - (b) had existing registered proprietors (Lots 9 and 11); and
 - (c) had one land parcel (lot 9 - 0.8670 hectares) previously replaced by way of compensation for another larger parcel of land (Portion 2125 - 2.8746 hectares).
46. Thus, the decision by the DLPP to issue parcels of land over the same area irrespective of the change in its legal description and area was a breach of the Court Orders.
47. Further, TEL's UDL June 2009 is invalid as it was obtained in breach of the procedures under Division X of the *band Act 1996*.
48. Moreover, the term of TEL's UDL June 2009 is for a term of five (5) years commencing 11 June 2009, but erroneously records the expiration date as

51. 10 June 2104 (a term of 95 years). This was an error as acknowledged by the Secretary, DLPP, Registrar of Titles, Mahuru Dadi Toka and

pb It is recommended that the Registrar of Titles take all steps necessary to cancel TEL's UDL June 2009 for breach of the Court Orders made 27 June 2008 (mandamus) and Division 10 of the Land Act 1996

Fb It is recommended that the Registrar of Titles take all steps necessary to correct the year on which TEL's TEL UDL June 2009 will expire to read "2014"

pb It is recommended that an inquiry be conducted into the Department of Lands & Physical Planning

V. Processing of claim and Pay-out

49. There has been no payment in respect of this matter. At this stage, this aspect does not arise for consideration.
50. The Commission notes that on 11 September 2009 Neville Devete, Solicitor General has endorsed the Certificate of Judgment stating that "*the State proposes to take further action in this matter and satisfaction of judgment cannot take place*".

G. RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

Referral to the Attorney General

1. Challenge the National Court orders made on 7 June 2007 (leave); 27 June 2008 (mandamus); and 27 November 2008 (K27 million in damages) on the following basis -
 - a. TEL's notice of intention to make a claim against the State was invalid;
 - b. PNG Land Board's grant of the TEL 1989 TSL to TEL was invalid from the beginning;
 - c. TEL had no existing right to a TSL or UDL as at 16 February 1994 because its TEL 1989 TSL had expired on 16 February 1994;
 - d. There was no land described as Portion 2126 as at 27 February 2003
 - e. OS No. 240 of 2007 filed on 3 May 2007 by TEL was statutory time barred by seven (7) years and two (2) months;
 - f. NBC, ECM and LDS were three (3) persons with proprietary interests in parcels of land within the TEL 1989 TSL, but they had no knowledge of TEL's claim and were never afforded an opportunity to be heard;
 - g. TEL and its lawyer did not give disclosure of TEL receiving Portion 109 (later 2251) as compensation for Lot 9, Section 136

2. Appropriate investigative and disciplinary action against Neville Devete and Gaure Odu for their gross negligence in protecting the interests of the State

*Referral to the Registrar of Titles through the office of
Secretary, Department of Lands & Physical Planning*

3. Issuance of summons to TEL to deliver the instrument in respect of Urban Development Lease, Volume 34, Folio 173, over lands described as Portion 2534, 2535, 2538, 2539 & (DC/136/019)(CONS), Granville, Moresby, NCD, containing an area of 6.227 hectares (TEL UDL June 2009) to:
 - a. Amend the year of expiry to read "2014"
 - b. Cancel the TEL UDL June 2009 for being issued in error (inconsistent with Court Order made 27 June 2008 and breach of Division X of *Land Act 1996*)

Referrals to the Lawyers Statutory Committee

4. Neville Devete, Solicitor General for unprofessional conduct and failing to be competent in all his professional activities in ensuring the State interests were protected
5. Gaure Odu, action officer for unprofessional conduct and failing to be competent in all his professional activities in ensuring the State interests were protected
6. John Goava of Sannel Lawyers for dishonest, dishonourable, improper and unprofessional behaviour, and for failing to be competent in all his professional activities in assisting the Court

Referrals to the Royal PNG Constabulary

7. Mahuru Dadi Toka for investigation on possible fraud

Referrals to the Prime Minister

8. Appoint a Commission of Inquiry into the Department of Lands &

Physical Planning

9. Appoint a Commission of Inquiry into the Office of Solicitor General

Consequential legislative or other reform

10. *Attorney General's Act 1989* be amended to the following effect:

- a. the Solicitor General must be a lawyer of high standing and at least with 10 years litigation experience
- b. the Solicitor General to be appointed by Judicial Legal Services Commission

11. *Claims By & Against the State Act 1996* be amended to the following effect:

- a. Notice of intention to make a claim against the State under Section 5 to be given to the extent damages is sought
- b. Section 5 notice to be given to all State agents named as defendants
- c. Section 5 notice to be given to IRC to assess arrears in tax payable, if any
- d. Originating process (including statement of claim or in support) to be served on all the State agents named as defendants before any hearing

12. *Land Act 1996*, related legislation and instruments be amended to the following effect:
- a. All Urban Development Leases shall not be exempted from advertisement for application or public tender
 - b. Exemption of all State land from advertisement for application or public tender shall be determined by a Land Exemption Committee consisting of the Minister, Secretary, DLPP and State Solicitor who must all agree;
 - c. Register of all leases, licenses and interests granted by the State to be created, kept and maintained by an officer appointed by the Secretary, which shall detail:
 - i. The name of the proprietor and date of acquisition;
 - ii. Nature of interest/type of lease/license;
 - iii. Zoning status of parcel of land;
 - iv. Status of covenants and caveats registered, if any.
 - d. PNG Land Board shall consult Register of all leases, licenses and interests granted by the State before considering application for a particular State lease
13. *Public Services (Management) Act 1995*, related legislation and instruments be amended to the following effect:
- a. Prescribe "serious disciplinary offence" is committed where:
 - i. State line agency named as defendant fails to provide full and proper instructions to SG

ii. State suffers loss as a result of negligence or failure to exercise due care in performance of duties

b. On a finding of "serious disciplinary offence" -

- i. Ground for termination
- ii. Ineligible for appointment to any public office

"Peter Yama

PARTIES:

- (i) **For the State:**
 - (a) Department of Lands & Physical Planning ("DLPP")
 - (b) Department of Justice and Attorney General ("DJAG")
 - (c) Department of Finance ("DoF")

- (ii) Claimant:
 - (i) Mr. Peter Yama

NATURE OF CLAIM:

Peter Yama alleged that between 1990 and 1999 the Secretary for Lands Physical Planning and The State breached their duties to him as a registered proprietor of a State lease in Madang when third parties asserted competing interests and prevented him access.

Peter Yama commenced proceedings seeking damages against the Secretary for Lands & Physical Planning and The State, which were purportedly settled by Deed of Settlement.

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

In or about July 2008, the Secretary for Justice & Attorney General, Hitelai Kiele-Polume referred to this Commission the Solicitor General file (SG 392/2008) on the National Court proceedings referenced OS 371 of 2008

involving Peter Yama -v- Gabriel Yer, Secretary for Finance; Leonard Louma, Chief of Staff, Department of Prime Minister; and The State.

OS 371 of 2008 concerned a Deed of Settlement executed on 28 November 2002 between Zacchary Gelu as Solicitor General on behalf of the State and Peter Yama. The Deed of Settlement was for the amount of K15.5 million and purported to settle an earlier proceedings WS 1315 of 2002 filed by Peter Yama against the Secretary for Lands & Physical Planning and The State in which he sought damages in the sum of K38,690,000.00.

Peter Yama collected a cheque from the Department of Finance in the sum of K7.75 million pursuant to the Deed of Settlement, and obtained orders in OS 371 of 2008 enforcing the Deed of Settlement when clearance for payment of the cheque was stopped. Those orders were appealed against in Supreme Court proceedings styled SCA 53 of 2008 in which interim stay orders have since been granted pending determination of the appeal. The Supreme Court heard the substantive appeal on Friday, 4 September 2009 and has reserved for decision. The Commission is a party (fourth appellant) in the appeal.

In the circumstances, this matter falls within Terms of Reference No. 1, 5, 8, 10,12,13 and 14.

D. SOURCES OF INFORMATION AND DOCUMENTATION

1. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

(a) National Court Registry -

- (i) Supplementary file referenced WS 1315 of 2002
- (ii) Original Court file referenced OS No. 317 of 2008

(ii) Office of Attorney General & Solicitor General -

- (i) Original file SG 392/2008
- (i) Evidence of -
 - (c) Dr Allan Marat, Minister for Justice & Attorney General
 - (d) Neville Devete, Acting Solicitor General
 - (e) Laias Kandi, Deputy Solicitor General (Courts)
 - (f) Hitelai Kiele-Polome, Secretary for Justice & Attorney General

(iii) Department of Lands & Physical Planning -

- (ii) Land files for -
 - o Lot 38, Section 68, Madang
 - o Lot 39, Section 68, Madang
- (i) Evidence of Pepi Kimas, Secretary

(iv) Department of Finance —

- (i) Gabriel Yer, Secretary for Finance
- (i) Melton Bogege - Senior Accountant - Accounts Payable
- (ii) Robert Saplos, Commitment Clerk - Accounts Payable
- (iii) Yeme Kaivila, Certifying Officer - Accounts Payable

(v) John Kumuro, former Acting Solicitor General

(vi) Zacchary Gelu, former Solicitor General

(vii) Francis Damem, former Attorney General

2. The relevant transcripts of proceedings are provided with this Brief.
3. The following critical witnesses were provided an opportunity to assist the Commission with its inquiries but did not do so:

(a) Department of Finance —

(i) Doriga Henry, Acting Deputy Secretary — Operations

(ii) Josephine Dinnie, Acting Assistant Secretary - Financial
Controller

(iii) Pauline Nuau, Acting First Assistant Secretary - Cash
Management & Expenditure Control Division

(iv) Loretta Kila, Accountant — Expenditure

(b) Peter Yama

4. The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

E. BRIEF FACTS

1987

- 1 On 8 October 1987, Section 68 Allotment 38, Madang was subdivided into two
(2) separate allotments namely, Allotments 39

and 40 upon registration by the Surveyor General of the Survey Plan No. 12/245 completed on 9 November 1970 by Allen James Brown. [Annexure "D" to Affidavit of Pepi Kimas marked "LD 1".]

1989

2 On 28 June 1988, Peter Yama was registered as the proprietor of the land described as Section 68 Allotment 39, Madang in State Lease Volume 110 Folio 86. The Lease was for 99 years commencing from 27 June 1988. The improvement covenant was to a minimum value of K100,000.00 by 27 June 1989.

2002

3 By letter dated 15 July 2002 to the Acting Solicitor General, Poro Lawyers gave notice of Peter Yama's intention to make a claim against the State *"for damages and economic loss and breaches of Terms and Conditions of a Business Lease granted to him"* in respect of Allotment 39 Section 68, Madang. That notice was based on the alleged failure of the State through the Department of Lands and Physical Planning to address the landowner issues and disturbances caused to Peter Yama by the landowners of Yabob village in respect of Section 68, Lot 39, Madang.

4 By letter dated 25 July 2002 to Poro Lawyers, Mr Zacchary Gelu, Solicitor General accepted their letter dated 15 July 2002 notice under Section 5 of the *Claims By & Against the State Act 1996*, and stated that he would seek appropriate instructions from the Department of Lands and Physical Planning.

On 9 August 2002, Poro Lawyers filed a Writ of Summons No. 1315 of 2002 endorsed with a Statement of Claim on behalf of Peter Yama.

The State was named as the First Defendant and Pepi Kimas, Secretary for Lands & Physical Planning was named as the Second Defendant. Essentially, the claim was for liquidated damages in the sum of K38,690,000.00 for business income and economic loss suffered resulting from the Secretary, Department of Lands & Physical Planning's failure - for which the State was alleged to be vicariously liable - in resolving traditional landowner issues in respect to Section 68 Lot 38 in the town of Madang.

By letter 4 September 2002 to Poro Lawyers, the Solicitor General Zacchary Gelu stated that having (1) been served with the Writ of Summons No 1315 of 2002 on behalf of the State and the Secretary for Lands and Physical Planning and (2) the opportunity to study the pleadings *"and other relevant information and the negotiations we had"* he formed the view that the matter *"can be appropriately settled out of court"*.

Zacchary Gelu relied on 4 grounds in support of his position and offered K15.5m as settlement. In respect of the first ground, Zacchary Gelu found that Peter Yama had indefeasible title. As to the second ground, the State through the Minister for Lands & Physical Planning granted Peter Yama the lease *"without due regard to the landowner issues which have affected your clients (sic) ability to carry out commercial activities on Lot 39 Section 68, Town of Madang"*

With regard to the third ground, Zacchary Gelu noted Peter Yama's claim for "interest, damages, economic losses, future economic opportunities, stress and hardship" arising from the State's failure in ensuring that Peter Yama has "access to quiet possession of the property in order to comply with the Terms and Conditions of the Lease."

10 In relation to the fourth ground, Zacchary Gelu stated that in light of the claim being for K38,690,000.00 he considered that the parties can negotiate and reach agreement.

11 A Deed of Settlement dated 28 November 2002 was then executed between Peter Yama and the Solicitor General, Mr Zacchary Gelu on behalf of the State, in the sum of K15.5 million ("The Deed"). The Deed recited WS 1315 of 2002, but referred to Lot 39 of Section 68, being a different portion of land to that pleaded in the said proceedings.

2008

12 By letter dated 5 May 2008 to Secretary for Finance, Poro Lawyers essentially made demand for payment of K15.5 million pursuant to the Deed of Settlement dated 28 November 2002. A copy was circulated to the Solicitor General.

13 By letter dated 29 May 2008, the Acting Solicitor General, Neville Devete, gave clearance for payment of K15.5 million pursuant to the Deed of Settlement dated 22 November 2002.

14 On 24 June 2008, Department of Finance drew a cheque no. 880355 in the sum of K7.75 million payable to Peter Yama. On the same day, Peter Yama collected the said cheque from Ms Kila, Expenditure Control Branch from the Pay Office at Vulupindi Haus on the second floor.

15 On 25 June 2008, Doriga Henry, Caretaker Secretary placed a stop payment on Cheque No. 880355 for K7.75 million payable to Peter Yama, until further notice.

- 16 On 26 June 2008, Doriga Henry, Caretaker Secretary uplifted the stop payment issued on 25 June 2008 in respect of cheque number 880355 for K7.75 million payable to Peter Yama.
- 17 On 26 June 2008, Leonard Louma, Acting Chief of Staff, Office of Prime Minister conveyed written direction on behalf of the Minister for Finance and Treasury to put a stop payment to the cheque issued to Peter Yama.
- 18 On 27 June 2008, Peter Yama deposited cheque number 880355 for K7.75 million into his personal account at ANZ (PNG) Ltd, but funds were not cleared by Bank of PNG due to the stop-payment on the said cheque.
- 19 On 2 July 2008, Peter Yama filed Originating Summons styled number 371 of 2008 in the National Court seeking Orders to declare the liability of the State under the deed of settlement, and compelling the State to pay the sum of K15.5 million.
- 20 The very next day after filing of the proceedings (i.e., on 3 July 2008) Peter Yama obtained an Order in the National Court compelling the State to clear the cheque in the sum of K7.75 million, forthwith.
- 21 The next consecutive day on 4 July 2008, after entry of the Order, payment not having been made, Peter Yama brought contempt proceedings against Gabriel Yer, Secretary for Finance for contempt of the Order for payment. Those proceedings are part heard before the National Court.

- 22 On 8 July 2008, the Secretary, Department of Finance; Chief of Staff, Prime Minister's Department and the State filed an appeal (SCA No. 53 of 2008) against the National Court Order of 3 July 2008. The Supreme Court stayed that Order, the contempt proceedings and OS 371 of 2008 in the National Court since 9 July 2008 pending determination of the appeal.
- 23 On 26 August 2008, the Chief Commissioner was joined as the Fourth Appellant in SCA 53 of 2008.
- 24 On 24 October 2008, the State filed Originating Summons styled 658 of 2008 challenging the validity of the Deed of Settlement dated 28 November 2002. This action is pending determination.

2009

- 25 The Supreme Court heard the substantive appeal on Friday, 4 September 2009 and has reserved for decision. The Commission is a party (fourth appellant) in the appeal.

FINDINGS

I. Liability In Issue

(i) Non-compliance with Sections 5 and 21 - *Claims By and Against the State Act 1996*

- 1 Poro Lawyers wrote a letter dated 15 July 2002 addressed to the Acting Solicitor General, Mr John Kumora, giving notice of Peter Yama's intention to make a claim against the State (Notice of claim').

Upon examination of the Notice of claim the Commission notes Peter Yama gave "notice of his intention to sue the State for damages and economic loss and breaches of Terms and Conditions of a Business Lease granted to him" in respect of property described as Lot 39, Section 68, Madang.

Peter Yama's claim was against the State and the Secretary, Department of Lands and Physical Planning. He was required by Section 5 of the *Claims By & Against the State Act 1996 (Claims Act)* to give notice of his claim to either the Attorney-General or the Solicitor-General. He gave notice in writing on or about 15 July 2002 by hand-delivering the Notice of claim setting out the nature of his claim to the secretary to the Office of Solicitor-General. Therefore, he complied with Sections 5(1) and 5(3) of the *Claims Act*.

As to the cause of action, the Notice of claim is not immediately clear. The Notice of claim essentially states that Peter Yama has suffered economic loss and damages from non-compliance with the terms and conditions of the lease as a result of the Department of Lands & Physical Planning's failure to address and resolve the land owner issues despite Peter Yama's requests to that Department to do so. The only condition of the lease referred to was the covenant obligating Peter Yama to erect improvement to a minimum value of K100,000.00. At best the claim, it seems, was in the nature of breach of contract: see Section 5(2)(b) of the *Claims Act*.

No further period for giving notice of intention to make a claim has been allowed by the Principal Legal Adviser or the National Court (see Sections 5(2)(c) and 21(2)(a) and (b)). Therefore, the question is whether he gave notice of his intention to make a claim within six

months after the occurrence out of which the claim arose (if the occurrence took place after the coming into operation of the *Act*) or within six months after the coming into operation of the *Act* (if the occurrence took place before *the Act* coming into operation).

6 The only date referred to in the Notice of claim is 27 June 1988, being the commencement of the lease. To that extent, Peter Yama should have given notice of his intention to make a claim against the State by 20 August 1997 pursuant to Section 21(2) of the *Claims Act*. He did not give notice until five years and nine months after that, in May 2003.

7 Peter Yama's Notice of claim breached the *Claims Act* and was, therefore, invalid. He failed to comply with a mandatory procedural requirement.

8 By reference to the statement of claim in WS 1315 of 2002 for purposes of giving notice under the *Claims Act*, there are three alleged instances that gave rise to Peter Yama's cause of action, the first in 1990, the second in 1992 and the third in 1999. Peter Yama had six months from those "dates" to give notice under the *Claims Act*.

9 In relation to the first and second instances, they accrued prior to the commencement of the *Claims Act*. Thus, Peter Yama had to give notice no later than 20 August 1997, being six months after commencement of the *Claims Act* on 20 February 1997: Section 21(2) of the *Claims Act*.

10 Peter Yama did not give notice of his intention to make a claim against the State until 15 July 2002. This was over 4 years and 11 months after the mandatory time period.

11 For the third instance in 1999, Peter Yama needed to give notice of his intention to make a claim against the State by (at the latest) a date in the year 2000. Peter Yama failed in this regard and was out of time by at least eight (8) years.

12 Most importantly, what Peter Yama needed was extension of time to give notice. This is required by Section 5(2)(c) of the *Claims Act*, which provides

"a notice under this section shall be given within such further period as the Principal Legal Advisor or the Court before which the action is instituted, on sufficient cause being shown, allows."

13 A number of discrepancies are evident:

(a) The Notice of claim is not a request for extension of time to give notice. Clearly it is actual notice of intention to enforce a claim. Without extension of time being granted by the Attorney General or the National Court, Peter Yama could not lodge a valid notice of his intention to make a claim against the State.

(b) Further, any suggestion by Peter Yama that the Notice of claim can be deemed to be a request for extension of time is again flawed as it is addressed to the Acting Solicitor-General when it should have been addressed to the Principal Legal Adviser,

which is the Attorney-General (section 3 *Attorney-General Act* 1989).

(c) Peter Yama's position is further compounded by the fact that the letter from the Acting Solicitor General "accepting" his Notice of claim:

- (i) does not grant an extension of time; and further
- (ii) was signed by Zacchary Gelu as the Solicitor-General when it should have been issued by the Attorney- General as Principal Legal Adviser.

14 The Solicitor General, Zacchary Gelu, wrote a letter dated 25 July 2002 to Poro Lawyers in which he acknowledged receipt of their Notice Letter and stated *"the notice is accepted to enable your client to proceed. I will seek appropriate instructions from the Department of Lands & Physical Planning.* We note in passing Zacchary Gelu never sought nor obtained instructions from the Department of Lands & Physical Planning. That issue is further analyzed later in detail.

(ii) No cause of action

15. The Statement of Claim endorsed to the Writ of Summons No. 1315 of 2002 pleaded Allotment 38 however, as at the date of filing of the Writ, Mr Kimas has confirmed that there was:

- (a) no allotment 38 at all (it had been subdivided to form Allotments 39 and 40)
- (b) no allotment 38 owned by Peter Yama.

16. The statement of claim as pleaded does not disclose a cause of action as against the Secretary for Lands & Physical Planning and or The State. It is patently clear that the remedies available in law are for Peter Yama (as the tide owner) to assert his title and claim orders (among others) for eviction, trespass and the like, and restrain any further harassment or impediment to his legal right to undisturbed occupation and development of his land. Further, to the extent that the pleadings related to the alleged breaches by the Secretary for Lands & Physical Planning there is no specific reference to the relevant clauses of the Lease or the provisions of any legislation.
17. In addition, Peter Yama alleges the Land Titles Commission issued a restraining order. We note the Land Titles Commission has no such jurisdiction only the Land Court. Further, the area of land seems generalized which is unusual.
18. If anything, Peter Yama's cause of action is purely against the "customary landowners" whom he alleges prevented him from access to his land.

(iii) Action time barred

19. The statement of facts pleaded to give rise to Peter Yama's causes of action render his action time-barred. Section 16 of the *Frauds & Limitations Act 1988* required Peter Yama to commence his action within six (6) years from the date his cause of action arose.
20. Peter Yama states that after being issued title to Allotment 38 on 28 November 1988, he attempted to move in and develop his land but was prevented from doing so by disgruntled traditional landowners on two occasions, firstly in the year 1990 (time for commencement of

legal action expired 1996) and again in the year 1992 (time for commencement of legal action expired 1998).

21. Peter Yama then alleges that some seven (7) years later in 1999, restraining orders were taken out against him by a named tribe. No actual dates are stated. In our view, this third instance is designed to circumvent the 6 year time limitation as the Writ was filed on 9 August 2002.

(iv) Lease Rental Arrears

22. At the time of filing of the Writ of Summons (9 August 2002), Peter Yama had a sum of K41,214.86 in outstanding annual rentals to the State in respect of his lease over Section 68 Lot 39, Madang.
23. The outstanding arrears would have been relevant for purposes of pleading a cross-claim and even a ground for setting in motion the forfeiture provisions under section 122 of the *Land Act 1996*.
24. As at 2008, Peter Yama's arrears stand at K61,014.86, which equates to approximately 18 years of unpaid rent i.e., since 1990.

(v) Stale Writ

25. The Secretary for Lands & Physical Planning Mr Pepi Kimas, who is named as the Second Defendant in National Court proceedings WS 1315 of 2002, has given evidence orally and in writing by his letter of 1 August 2008 that the records in his Office confirm that the Office of Secretary for Lands & Physical Planning was never served with a sealed copy of the Writ of Summons.

26. Further, Mr Kimas has no recollection whatsoever of the said proceedings or of being personally served with the Writ. In addition, he only came to know of the existence of the proceedings through a letter dated 16th July 2008 from the Chief Commissioner.
27. In this regard, we note that there is no affidavit deposing to service of the originating process in the WS 1315 of 2002 supplementary Court file. Consequently, the Writ of Summons became stale as of 9 August 2004.
28. In these circumstances, it is our strong view that liability should have been disputed by the State on that basis in WS 1315 of 2002.

II. Assessment of damages

29. As the matter was settled out of Court, the Court did not make findings on the amount of damages to award Peter Yama. Nevertheless, the issue on the out of court settlement and the related processes is examined further under clause 4 below.

III. Steps taken (or not taken) by Solicitor General in defence of the claim

(i) Zacchary Gelu

30. Clearly, there is ample evidence of serious failures on the part of the Solicitor-General, Zacchary Gelu, in the performance of his professional duties as lawyer for the State because: (a) there was no liability on the part of the State or the Secretary, Department of Lands & Physical Planning, as we have found above; and

(b) there was no actual or proper assessment of damages, if any, to justify K15.5 million as the settlement figure.

31. Zacchary Gelu breached his duty of care to his clients (Secretary for Lands & Physical Planning and the State) as a lawyer. He failed to perform (or properly perform) due diligence as to the claim by Peter Yama by not seeking instructions from the Secretary, Department of Lands & Physical Planning when the purported Notice of claim was initially given, and then again upon service of the originating process until execution of the Deed of Settlement dated 28 November 2002.

32. As a result, Zacchary Gelu failed to take all steps necessary to defend the State and the Secretary, Department of Lands & Physical Planning by NOT:-

(a) seeking any instructions from-

- (i) Secretary, DLPP;
- (ii) Registrar of Titles;
- (iii) Attorney General;
- (iv) Land Titles Commission;

(b) conducting any due diligence, including searches or making relevant inquiries with the above offices;

(c) filing a notice of intention to defend;

(d) filing a defence for the State parties on the following merits:

- (i) Lack of mandatory notice under Section 5 of the *Claim Act*,
- (ii) Peter Yama's claim did not disclose a reasonable cause of action against the State nor Secretary, DLPP, as his claim

was against the landowners for committing the unlawful acts complained of;

- (iii) Peter Yama did not have a claim because-
 - o he was not the proprietor of Lot 38 Section 68 Madang; o no such lot existed since 1987;
- (iv) Peter Yama's claim was time barred by *Frauds & limitations Act 1988*;
- (v) At the time of filing of his claim, Peter Yama had a sum of K41,214.86 in outstanding annual rentals owed to the State in respect of Section 68 Lot 39, Madang
- (vi) " Peter Yama had not complied with the improvement covenant of the State lease in respect of Section 68 Lot 39, Madang
- (vii) The outstanding arrears would have been relevant for purposes of bringing a cross-claim against Peter Yama and even a ground for setting in motion the forfeiture provisions under section 122 of the *ljindAct 1996*

filing an appropriate application to dismiss the entire claim for-

- (i) lack of notice under Section 5 of the *Claims Act*
- (ii) disclosing no reasonable cause of action against The State and Secretary, DLPP
- (iii) being time barred under Section 16 of the *Frauds & Umitations Act 1988*;

providing any advice to the State parties on the veracity of Peter Yama's claim and any recommendations on the way forward to defend the claim;

seeking any independent advice on the professional reports and material relied upon by Peter Yama in support of his claim; and

(h) providing any advice to the Secretary, DLPP to take steps to seek forfeiture of Peter Yama's title in respect of Lot 39, Section 68, Madang.

(ii) Neville Devete & Laias Kandi

31. Both Neville Devete and Laias Kandi conceded that their clearance letter dated 29 May 2009 issued to the Department of Finance for payment of the Deed of Settlement dated 28 November 2002 was given in error for the reasons set out above.

IV. Settlement

32. As a result of the finding that liability should have been disputed based on the foregoing reasons, it follows in our view that this case was not an appropriate matter for settlement out of Court.

I Furthermore, Zacchary Gelu as Solicitor General clearly failed in his / professional duty to seek and obtain instructions from the Secretary, I Department of Lands & Physical Planning in order to properly evaluate the relative strengths and weaknesses of Peter Yama's claim and the State's defence before entering into any settlement negotiations with Peter Yama.

33. In addition, no such instructions were provided by DLPP to Zacchary Gelu to commit the State by signing the Deed of Release.

34. Moreover, the Commission has not sighted any quantum submissions made by or on behalf of Peter Yama to the Solicitor General.

1 35. In the circumstances, the 4 grounds relied upon by Zacchary Gelu in offering settlement was baseless and patently flawed.

36. In respect of the execution of the Deed of Settlement dated 28 November 2002, the Commission notes that there was lack of compliance with:

(a) *Section 61 of the Public Finances (Management) Act 1995*

contracts involving the payment of an amount exceeding K100,000 require the approval of the Minister for Finance. No approval was sought nor obtained from the Minister for Finance through the Secretary for Finance prior to the signing of the Deed by Zacchary Gelu.

(b) *NEC Decision NG07 22 August 2002, Clause 10 - The National executive Council at its meeting on 22 August 2002 (some 4 months prior to signing of the Deed of Settlement) - " directed that there be no more out of court settlements by any State body or authority, including by the Attorney-General and Solicitor-General, without the approval of the NEC, acting on advice of CACC."*

37. The Secretary to NEC, Department of Prime Minister, Ms Winnie Kiap, gave oral evidence that no approval was sought nor obtained in accordance with that NEC Decision. Therefore, no such approval was given prior to the signing of the Deed by Zacchary Gelu.

V. Processing of claim and Pay-out

38. Based on the *Department of Finance Internal Audit and Compliance Division Report dated 11 August 2008*, produced to the Commission by the Secretary for Finance, Gabriel Yer, we note the following procedures were not followed:

No clearance letter from Attorney General as required by NEC Decision 21/2006, Item 7(e)®. Instead, clearance letter dated 29 May 2008 by Acting Solicitor General (Mr Devete) to the Secretary for Finance, which states on page 5 that he enclosed Peter Yama's notice under Section 5 of the *Claims Act* dated 15 July 2002. This is clearly an error.

The purported clearance letter was hand delivered to Department of Finance's Cash Management and Expenditure Control Branch on 30th May 2008. However, that letter did not have a "batch number" and was registered as having been delivered to the Secretary for Finance's office three days earlier, 26 May 2008. This is inconsistent with the established processes and controls put in place by both departments. Any legal clearance made on court orders or any claim against the State is given batch numbers as a control mechanism.

The FF3 and FF4 were signed well after the cheque (number 88055 in the amount of IC7,750,000.00 payable to Peter Yama) was printed on 24 June 2008. The cheque was raised without signatures of Commitment Clerk, Section 32 Officer, Certifying Officer, Examiner, and Financial Delegate on the FF3 and FF4.

The Section 32 Officer "approved" the expenditure in breach of NEC Decision No. 150/2003, Items 4 and 6, and NEC Decision No. 21/2006, Item 5(b) & (e)(ii).

The cheque was collected on the same day (24 June 2008) by Peter Yama from the Department of Finance and not the Solicitor General based on verbal instructions from Mr Kaindi

of Solicitor General's office. There are no financial instructions that deal with collection of cheques. However, internal control systems in place by Cash Management and Expenditure Control Division and Office of the Solicitor General is that all cheques are to be collected by representative of Solicitor General.

- (vi) Peter Yama's claim was processed expeditiously with special interest by Department of Finance and possibly the Solicitor General's Office.
- (vii) The cheque payment was made out of legally available funds.

G. RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

Referral to the Attorney General

1. Continue pursuing current action (OS 658 of 2008) against Peter Yama challenging the legality of the Deed of Settlement dated 28 November 2002 on the following basis:-
 - (a) Peter Yama's notice of intention to make a claim against the State was invalid;
 - (b) There was no land described as Lot 38 as at 8 October 1987 as pleaded in WS 1315 of 2002

- (c) Peter Yama's cause of action is purely against the "customary landowners" whom he alleges prevented him from access to his land
 - (d) Part of the claim in WS 1315 of 2002 filed on 9 August 2002 by Peter Yama was statutory time barred by four (4) years
 - (e) the Writ of Summons No. 1315 of 2002 became stale as of 9 August 2004 as against the Secretary, DLPP due to non-service at all
 - (f) *lack of Ministerial approval prior to executing the Deed under Section 61 of the Public Finance (Management) Act 1995, and by reason of the Supreme Court decision in Fly River Provincial Government v Pioneer Health Services (2003) SC705 and followed in NCD Commission v Yama Security Services Fid (2005) SC835*
2. Immediate commencement of civil action against Peter Yama to recover K61,014.86 in outstanding annual land rentals
 3. Appropriate investigative and disciplinary action against Messrs Kandi and Devete for their gross negligence in erroneously clearing Peter Yama's claim for payment

Referral to the Minister for Department of Lands & Physical Planning through office of the Secretary

4. In respect of Section 68 Lot 39 Madang, issuance of a forfeiture notice to Peter Yama on the grounds that:

- (a) the improvement covenant imposed by the *Land Act 1996* has not been fulfilled
- (b) as at 2008, the annual land rental K61,014.86 remains outstanding, due and unpaid for a period of well in excess of six months

Referrals to the Lawyers Statutory Committee

- 5. Zacchary Gelu for unprofessional conduct and failing to be competent in all his professional activities in ensuring the State interests were protected
- 6. Neville Devete of Solicitor General's office for failing to be competent in all his professional activities in ensuring the State interests were protected
- 7. Lais P Kandi of Solicitor General's office for failing to be competent in all his professional activities in ensuring the State interests were protected

Referrals to the Royal PNG Constabulary

- 8. Zacchary Gelu for settling Peter Yama's unlawful claim
- 9. Peter Yama for making his unlawful claim
- 10. Neville Devete of Solicitor General's office for clearing an unlawful claim
- 11. Lais P Kandi of Solicitor General's office for clearing an unlawful claim

Referrals to the Secretary, Department of Finance

12. Take appropriate disciplinary action against the officers identified in the *Department of Finance Internal Audit and Compliance Division Report dated 11 August 2008* for gross negligence in protecting the interests of the State

Consequential legislative or other reform

13. *Attorney General's Act 1989* be amended to the following effect:

- a. the Solicitor General can only act on the written instructions of the State departments, agencies or instrumentalities concerned, unless in urgent cases where oral instructions would suffice provided written instructions are subsequently given within a reasonable time to retrospectively confirm the verbal instructions previously given
- b. the Attorney General granted with the exclusive power to settle cases out of court with prior approval from the State departments, agencies or instrumentalities concerned and National Executive Council
- c. the Attorney General shall execute all deeds for settlement on behalf of the State and the Solicitor General shall witness his signature, failing which the deed is unenforceable
- d. all settlements involving the State, including Provincial Governments, departments, agencies or instrumentalities, has no effect unless sanctioned/approved by the National Court

e. Solicitor General maintain register of all such settlements

Financial Instructions made under the Public Finance (Management) Act 1995 be amended to the following effect:

- a. legal clearance for all court related claims for payment shall be in writing from Office of Attorney General upon recommendation by Solicitor General
- b. the payment of court related claims by Department of Finance shall be based on the production of original clearance letter, which shall—
 - (i) where court order for payment -
 - o emanate from person occupying office of Attorney General
 - o bear SG file reference number
 - o recommend payment
 - (ii) where deed of settlement for payment -
 - o original duly signed Deed of Settlement bearing respective signatures of Attorney General on behalf of the State and the Solicitor General as his witness
 - o emanate from person occupying office of Attorney General
 - o bear SG file reference number
 - o contains National Court order sanctioning/approving settlement
 - o recommend payment

Finance Form 3 be revised to-

- i. incorporate as an attachment the internal pre-audit verification report
- ii. cover, when necessary, withholding of tax assessed for remittance to IRC in respect of all claims submitted for payment

all cheques for payment of court related claims to be forwarded to Office of Solicitor General for collection in the following circumstances :-

- where no lawyer on record - collection by the claimant in person provided appropriate identification is produced, such as passport, drivers licence or original statutory declaration;
- where lawyer on record - collection by lawyer on record.

Solicitor General maintain a register of all —

- i. Clearance letters issued to Department of Finance
- ii. Cheques received from Department of Finance pursuant to clearance letter
- iii. Cheques collected from his office by claimant or claimant's lawyer

Secretary for Finance maintain a register of all —

- i. Clearance letters received from Solicitor General
- ii. Cheques sent to Solicitor General pursuant to clearance letter

15. *Claims By & Against the State Act 1996* be amended to the following effect:

- a. Notice of intention to make a claim against the State under Section 5 to be given to the extent damages is sought
- b. Section 5 notice to be given to all State agents named as defendants
- c. Section 5 notice to be given to IRC to assess arrears in tax payable, if any
- d. Originating process (including statement of claim or in support) to be served on all the State agents named as defendants before any hearing
- e. all settlements involving the State, including Provincial Governments, departments, agencies or instrumentalities, has no effect unless sanctioned/approved by the National Court

~*Land Act 1996*, related legislation and instruments be amended to the following effect:

- a. Register of all leases, licenses and interests granted by the State to be created, kept and maintained by an officer appointed by the Secretary, which shall detail:
 - i. The name of the proprietor and date of acquisition;
 - ii. Nature of interest/type of lease/license;
 - iii. Zoning status of parcel of land;
 - iv. Status of covenants and caveats registered, if any.
- b. PNG Land Board shall consult Register of all leases, licenses and interests granted by the State before considering application for a particular State lease

Public Services (Management) Act 1995, related legislation and instruments be amended to the following effect:

- a. Prescribe "serious disciplinary offence" is committed where:
 - i. State line agency named as defendant fails to provide full and proper instructions to SG
 - ii. State suffers loss as a result of negligence or failure to exercise due care in performance of duties

- b. On a finding of "serious disciplinary offence" —
 - i. Ground for termination
 - ii. Ineligible for appointment to any public office

(c) Andrew Maid

A. PARTIES:

(i) For the State:

1. Department of Lands & Physical Planning ('DLPP')
2. Department of Justice and Attorney General (DJAG)
3. Department of Finance ('DoF')

(ii) Claimant:

- (a) Andrew Maid

B. NATURE OF CLAIM:

1. Andrew Maid alleged the PNG Land Board Chairman; Secretary, DLPP; Registrar of Tides and the State ("State parties") wrongfully cancelled his land title in breach of his constitutional rights and their statutory duties.
2. Andrew Maid commenced National Court proceedings against the State parties seeking restoration of his land title, or damages in the alternative. The claim was purportedly settled by Deed of Release.

C. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

1. Andrew Maid lodged separate courts claim in 2001 against the State parties for alleged wrongful cancellation of his land title on 10 August 2000. No determination was made by the National Court as to liability and damages. The claims were purportedly settled by Deed of Release dated 11 October

2002 in the sum of K4.1 million executed between Andrew Maid and the State through Zacchary Gelu, Solicitor General ('Deed').

2. The Department of Finance issued 16 cheques totaling K5,193,538.00 in respect of this matter between 25 January 2003 and 30 June 2005, falling within the period under inquiry 2000 to 1st July 2006.
3. In the circumstances, this matter falls within Terms of Reference No. 1, 5, 6, 7, 8, 9,10,11,12,13 and 14.

SOURCES OF INFORMATION AND DOCUMENTATION

1. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-
 - (a) National Court —
 - (i) Transcription Services Certified Transcripts for — o 21 August 2002-Justice Davani
o 11 September 2002-Justice Kandakasi o 13 September 2002 - Justice Kandakasi
 - (ii) Evidence of-
o Ian Augerea, Registrar
 - (b) Office of Attorney General & Solicitor General -
 - (iii) Original file SG681/01
 - (iv) Evidence of — Zacchary Gelu, former Solicitor General John Kumura, former Acting Solicitor General Francis Damem, former Attorney General
 - (c) Department of Lands & Physical Planning -
 - (i) Land files —

- o Zoning of Section 122, Hohola, NCD
- o State Lease Volume 23, Folio 182 over lot 12 Section 122, Hohola, NCD
- o Minutes of purported PNG Land Board Meeting No. 2017
- (ii) Evidence of -
 - o Pepi Kimas, Secretary
 - o Raga Kavana, Registrar of Titles
 - o Maurice Alaluku, former Secretary
 - O Daniel Katakumb, Acting Director, Land Administration Division
- (d) Government Printing Office —
 - (i) Evidence of—
 - o Ken Kaiah, Government Printer
 - o Samson Luka, Senior Publication Officer
- (e) Claimant —
 - (ii) Evidence of -
 - o Hon. Andrew Maid, MP
 - o Peter Pena, lawyer, Peter Pena & Associates
 - o Jeffrey Abone, lawyer, Parkil Lawyers

2. The relevant transcripts of proceedings are provided with this Brief.
3. The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

CHRONOLOGY OF EVENTS

1992

1. On 23 January 1992, David Rutana, Para Management Agency and Andrew Maid agreed Mr Maid put up a tradestore next to Mr Rutana's property, on the vacant cut-off or reserve land.

1993

2. On 7 January 1993, a Memorandum of Agreement was entered into between Andrew Maid as Piunawuin Trading and J.N. & D.O. Rutana for-
 - (a) Erection of tuckshop
 - (b) "on the land as part and port of adjournment to Section 71, Allotment 1, Henao Drive, Gordon"
 - (c) Subject to review after 5 years from 1 January 1993
 - (d) "this agreement shall not be revoked under any circumstances without consent of the said parts"

1996

3. On 14 February 1996, NCDC granted Andrew Maid Licence to Trade No. 13288-
 - (a) Section 71, Lot 4, Gordon, NCD
 - (b) From 14 February 1996 to 13 June 1997
 - (c) IC100 for licence fee, receipt no. 333091 dated 8 January 1996
 - (d) (Mr Maid occupied reserved land adjacent to Sec 71, Lot 1, Geauta Drive, Gordon, NCD - If so, illegal as reserved land)

4. On 11 July 1996, Kumaraswamy Arasaratnam, City Manager, NCDC wrote to PNT Pty Ltd, attention Andrew "Mond" -
 - (a) Noted his expression of interest in Section 122, Lot 4, Geauta Drive, Gordon
 - (b) no objection to application

(c) shown by Mr "Mond "copy of plan subdividing Section 122 and,
presumably, open to public tender

On 9 August 1996, Peter Vavine, Senior Physical Planner was instructed by Acting Regional Physical Planner to inspect Section 71, Lot 1 Gordon, NCD to confirm whether trade store and fence would affect the Poreporena road development

On 15 August 1996, Andrew Maid lodged an application for business (commercial) lease over Section 71, Lot 4, Gordon, NCD and paid prescribed application fee of K100

On 20 August 1996, Peter Vavine wrote to the Acting Regional Physical Planner reporting on the inspection of Section 71, Lot 1, Gordon, NCD that-

- (a) the trade store would not be affected by the realignment of the drain
- (b) only the fence would be affected
- (c) recommended that Mr Maid —
 - (i) remain on Lot 1 and formally apply for Lot 4 through the normal process;
 - (ii) relocate to Lot 4, if the store is to be removed immediately, until such time he is allocated the land in the normal way; or
 - (iii) remain on Lot 1, if the store is not affected, for not more than 1 ½ years to settle his loan and he is allocated Lot 4 during that period

On 23 August 1996, Kumaraswamy Arasaratnam, City Manager, NCDC wrote to Chairman, NCD Physical Planning Board, attention Gabi Boutau, Physical Planner -

- (a) further supporting letter and made a representation of being informed by Andrew Maid of his urgent request to tender for Section 122, Lot 4, Gordon, NCD because part of Roads and Drainage Reserve he occupies has to be cleared for main drain construction in 1 week
 - (b) of having no objection to application for commercial lease of Lot 4 being rezoned from recreational to commercial
9. On 3 September 1996, Andrew Maid was granted License No. 11/96 by John A Painap, OBE, Delegate of Minister for Lands & Physical Planning -
- (a) Commencing from 3 October 1996 for a period of 6 months (lapse on 6 April 1997)
 - (b) For temporary occupation of Section 122, Lot 4, Gordon (Hohola) for trading purposes due to Geauta Drive expansion affecting the original site
 - (c) Subject to following conditions-
 - K120 licence fee
 - Licence does not confer upon the licensee any right of ownership
10. On 6 September 1996, John Painap, Secretary for Lands -
- (a) granted temporary approval to Andrew Maid to relocate his shop onto Section 122, Lot 4 (now lot 12) Gordon in view of deadline given by Curtain Bros; and
 - (b) directed Andrew Maid to lodge application for occupancy over said piece of land (Lot 12)
11. On 2 October 1996, Andrew Maid paid K120 for temporary License No. 11/96 over Section 122, Lot 4, Hohola, NCD

On 1 September 1997, Andrew Maid was granted License No. 20/97 (Southern) by a Delegate of Minister for Lands & Physical Planning -

- (a) Over Section 122, Lot 12 Hohola (New)(Gordon) formerly Section 122, Lot 4 (Gordon) Hohola, NCD
- (b) Commencing from 1 September 1997
- (c) For temporary occupancy for trading due to Geauta Drive expansion affecting the original site
- (d) . Subject to following conditions -
 - (i) Payment of K240 licence fee;
 - (ii) Land Board hearing on applications for Section 122, Lot 12, Hohola (Gordon) NCD formerly Lot 4;
 - (iii) Forfeiture of Lots 10, 6 & 7, Section 122 currently fenced by Filipino Association Inc;
 - (iv) Granting of leases over Lot 10, 6 & 7, Section 122 Hohola (Gordon) NCD;
 - (v) Licence will cease after formal direct granting of lease by the Minister/PNGLB either before or after the expiration of the current 6 months licence period; and
 - (vi) Licence does not confer upon the licensee any right of ownership

On 3 September 1997, paid K240 for temporary licence fee granted by DLPP over Section 122, Lot 4, Hohola, NCD

On 20 December 1997, Andrew Maid, Manager/Owner, Piu Nauwin Trading Pty Ltd wrote to Hon. Viviso Seravo, MP, Minister for Lands

- (ε Referring to conditions attached to Licence No. 20.97 over Sec 122, Lot 12, Hohola (Gordon)
- († Seeking exemption on Sec 122, Lots 6, 7 and 10

1998

15. On 28 January 1998, John Tokunai, First Secretary, Ministry of Lands responded to Andrew Maid's letter dated 20 December 1997 -
 - (a) apologised for delay in responding
 - (b) stated Hon. Viviso Seravo, Minister for Lands on 19 January 1998 granted approval for exemption from advertisement for Section 122, Lots 6, 7 and 10 Hohola (Gordon) NCD

16. On 19 March 1998, Andrew Maid paid K240 for renewal of temporary licence granted by DLPP over Section 122, Lot 12, Hohola, NCD

17. On 6 April 1998, Licence No. 15/98 (Renewal) was granted to Andrew Maid by a Delegate of the Minister for Lands and Physical Planning —
 - (a) Over Section 122, Lot 12 (4), Hohola (Gordon)
 - (b) Commencing from 18 March 1998 for a 12 month period (18 March 1999)
 - (c) For feasibility studies, ID surveys, fence erection for relocation of business from Geauta Drive affected by the Freeway Construction
 - (d) Subject to the following conditions -
 - (i) Payment of K240 licence fee
 - (ii) Allow access to land to conduct feasibility studies
 - (iii) Engage surveyor to identify land boundary
 - (iv) Erection of proper steel fence around the perimeter

- (v) Licence will cease after formal direct granting of lease by the Minister and PNG Land Board either before or after the expiration of the current 12 months licence period
- (vi) Licence does not confer upon the licensee any right of ownership

18. On 20 December 1998, Andrew Maid, Manager/Owner, Piu Nauwin Trading Pty Ltd wrote to Hon. Viviso Seravo, MP, Minister for Lands

- (a) Referring to conditions attached to Licence No. 20.97 over
Section 122, Lot 12, Hohola (Gordon)
- (b) Seeking exemption on Section 122, Lots 6, 7 and 10.

1999

19. On 26 January 1999, Andrew Maid lodged application for commercial lease for —

- (a) Section 122, Lot 12 (Gordon) Hohola, NCD
- (b) a proposed supermarket, including shopping centre, bottle shop, kai bar etc

20. On 26 January 1999, Andrew Maid paid K240 as application fee for commercial lease over Section 122, Lot 12, Hohola, NCD (receipt no. 55963)

21. On 4 February 1999, Andrew Maid paid K40 as fencing fee (NCDC Receipt No. 401209)

22. On 10 February 1999, NCD Building Authority Permit No F004/99 was granted to Andrew Maid to build security fence on Section 122, Lot 12, Gordon, NCD.

23. On 23 February 1999, Certificate of Deemed Planning Permission No. CDP 04 - 44/99 was issued to Andrew Maid for fencing on Section 122, Lot 12, Hohola, NCD
24. On 6 April 1999 *Licence* No. 15/98 (Renewal) was granted to Andrew Maid by Morris Alaluku, Secretary for Lands -
- (a) Over Sec 122, Lot 12 (4), Hohola (Gordons)
 - (b) Commencing from 11 January 1999 for a 12 month period (11 January 2000)
 - (c) For feasibility studies, ID surveys and fencing
 - (d) Subject to the following conditions -
 - (i) Payment of K240 licence fee
 - (ii) Allow access to land for feasibility study, ID surveys and fencing
 - (iii) Engage surveyor to identify land boundary
 - (iv) Erection of proper steel fence around the perimeter
 - (v) Licence will cease after formal direct granting of lease by the Minister and PNG Land Board either before or after the expiration of the current 12 months licence period
 - (vi) Licence does not confer upon the licensee any right of ownership
25. On 15 November 1999, Notice of Exemption from Advertisement -
- (a) Signed by Dr Fabian Pok, PhD, MP, Minister for Lands
 - (b) Issued to Mr Maid under Section 69(2) of the *Land Act 1996*
 - (c) Over Section 122, Lot 12, Hohola (Gordon), NCD
 - (d) Stating that Andrew Maid has a licence over this portion of land. He in fact has met all the requirements/conditions of the Licence to date and spent substantial amount of money to fence the area hence is operating a tuck shop business until the lease is formalised

26. On 10 December 1999, purported Handwritten PNG Land Board Meeting Minutes No. 2017 -
- (a) Item no. 25
 - (b) Recommendations that a 99 year commercial lease in favour of Andrew Maid with a covenant of 3 years and K100,000 of improvements on site
 - (c) Footnote L 12 S 122, Hohola exempted by Govt
 - (d) Approved
 - (e) Signed by Chairman, Ralph Guise and Mrs Morea Taboro
 - (f) Not signed by Deputy Chairman, Mr Tom Horik; Joseph Hau; James Tengen; Michael Maka
27. Undated Land Board Meeting No. 2017 recommendations —
- (a) Item 25, DC/122/012 - Andrew Maid
 - (b) Recommendations: Board recommends lease to Andrew Maid subject to 6 conditions, including -
 - (i) Survey;
 - (ii) Lease shall be used bona fide for a business (commercial) purpose;
 - (iii) Lease shall be a term of 99 years.
 - (c) Foot note: a development covenant valued at K100,000 was noted
 - (d) Approved by the Board (No names or details of members)

2000

28. On 28 January 2000, purported National Gazette No. G9 Land Board Meeting No. 2017 (a) at page 2

- (b) Andrew Maid successful applicant of L.F. DC/122/012 - a business (commercial) lease over Lot 12, Sec 122, Hohola, NCD
 - (c) Dated 25 January 2000
 - (d) Signed by R. Guise, Chairman, PNG Land Board
 - (e) (Only Secretary can publish names of successful applicants: s74 of *Land Act 1996*)
29. On 4 February 2000, Gabriel Donump, Director Provincial Service (Land Admin) wrote to Mr K. Kaiah, Government Printer, attention Samson -
- (a) Referring to earlier telephone conversation with Mr Samson
 - (b) Urgent request to immediately withdraw the gazettal notice under heading of "Land Board No. 2017 items 1-37 and Successful Applicants for State Lease and particulars of land leased" believed to be improperly brought by Chairman of Land Board
 - (c) Land Board Meeting never convened, accordingly no land board recommendations or grants made over the parcels or portions of land referred to in the notice
 - (d) Unprofessional and illegal action of the chairman and requests withdrawal of notice from printing and refer it back to Lands Department
 - (e) Attaching Corrigendum for publication withdrawing such notice published in the National Gazette No.G9 of 28 January 2000.
30. On 5 April 2000 Andrew Maid paid K360 to Department of Lands (receipt no. 81312) for renewal of licence fee and royalty payments over Section 122, Lot 12, Hohola, NCD

31. On 6 April 2000, licence No. 15/98 (Renewal) was granted to Andrew Maid by Guao K Zurenuoc, Secretary for Lands —
- (a) Over Section 122, Lot 12 (4), Hohola (Gordon)
 - (b) Commencing from 10 April 2000 for a 12 month period (10 April 2001)
 - (c) For feasibility studies and engineering designs
 - (d) Subject to the following conditions —
 - (i) Payment of K360 licence fee
 - (ii) Allow access to land for carrying feasibility study and engineering design
 - (iii) Licence does not confer upon the licensee any rights of ownership
 - (iv) Licence is non-transferable or assignable
 - (v) Licence shall cease upon formal grant of the lease by the Land Board
32. On 25 April 2000 Notice under s. 75 of *Land Act 1996* signed by Guo R. Zurenuoc, Secretary for Lands & Physical Planning -
- (a) Was issued to Andrew Maid as successful applicant
 - (b) Over Lot 12, Section 122, Hohola (Gordon)
 - (c) In National Gazette dated 28 January 2000
 - (d) Payment of K4,830 being amount due on proposed lease
33. On 27 April 2000 -
- (a) Notice of Acceptance of a Lease by a Successful Applicant signed by Andrew Maid
 - (b) Department of Lands receipt no. 82787 of K50 from Andrew Maid for survey fees as per LG and LAF over Lot 12, Section 122, Hohola, NCD

- (C) Department of Land receipt no. 82789 of K4,630 from Andrew Maid for land transaction from 20 January 2000 to 31 December 2000 as per LG & LAF
34. On 18 May 2000 the State through delegate of Minister for Lands granted a business (commercial) lease to Andrew Maid for -
- (a) 99 years commencing from 27 January 28 January 2000 to 27 January 2099
 - (b) Section 122, Lot 12, Hohola, NCD
35. On 22 May 2000 Andrew Maid registered as proprietor of State Lease Volume 23, Folio 182 over Section 122, Lot 12, Hohola, NCD.
36. On 8 August 2000 a Statement was issued by Guao K. Zurenuoc, OBE, Secretary for Lands that -
- (a) Section 122 Lot 12 is zoned for public institution/public purpose and not for commercial purpose
 - (b) Andrew Maid's relocation from Lot 1, Sec 71 to Lot 12, Section 122 was to enable him to sell off his stock and vacate
 - (c) The Land Board Meeting recommending Andrew Maid as the successful applicant never convened, was illegal and therefore rendering Andrew Maid's State lease null and void
 - (d) the Registrar of Titles strike out/cancel the title over Lot 12, Section 122, Hohola (Gordon) registered as Volume 23 Folio 182
37. On 10 August 2000, an entry was made by Registrar of Titles, Karo Lavi, in the register of Titles Journal No. S.24356, cancelling State lease Volume 23 Folio 182 under Section 161 of *Land Registration Act*.

38. On 28 September 2000, a Notice of Determination of an Application for Planning Permission was issued -
- (a) To Lamana Development Ltd C/- AKT Associates
 - (b) From Bernard Kipit, Chairman, NCD Physical Planning Board
 - (c) For re-subdivision and Change of zone from public institutional and adjoining land as per content of Plan No. NCD-ZON-OI6
39. On 27 December 2000 NCD Physical Planning Board wrote to Lamana Developments Ltd C/- AKT Associates Ltd -
- (a) Referring to Application for proposed re-subdivision and rezoning and erection of a motel/lodge complex at Section 122, Lot 12, Hohola and adjoining land, considered by NCD Physical Planning Board at its meeting no. 09/00 on 28 September 2000
 - (b) Successfully granted planning permission over Section 122, Lot 12, Hohola and adjoining land
40. On 28 December 2000 National Gazette No.G167 published ~
- (a) Pages 3, 4
 - (b) Notification of Zoning of Physical Planning Area
 - (c) Re-subdivision and change of zone from public institutional to commercial, public utilities to commercial, and public institutional to public utilities
 - (d) Dated 28 September 2000 at meeting no. 9/2000 of NCD Physical Planning Board
 - (e) B. Kipit, Chairman
 - (f) On 10 August 2000, an entry was made in the register of Titles Journal No. S.24356 - cancelling State lease Volume 23 Folio 182 under Section 161 of *band "Registration Act*

2001

41. By letter dated 17 April 2001, Raga Kavana, Registrar of Titles informed Andrew Maid of cancellation of Registration of Lease pursuant to s. 161 of *Land Registration Act* in respect of Lot 12, Section 122, Hohola, NCD
42. On 7 May 2001, Andrew Maid received Registrar of Titles' letter dated 17 April 2001.
43. On 18 May 2001, National Gazette No.G65 published -
 - (a) Tender No. 336/2001
 - (b) Business (Commercial) Motel and Hotel Lease
 - (c) Lot 12, Section 122 (Gordon) Hohola
44. On 13 July 2001, Peter Pena & Associates commenced OS No. 426 of 2001 for Andrew Maid against Ango Wangatau, Chairman PNG Lands Board; Guao Zurenuoc, Secretary for L&PP; Raga Kavana, Registrar of Titles; and the State. Andrew Maid sought the following relief:
 1. *"The Defendants, together, and in particular the First Defendant, be restrained from having the property (Section 122 Allotment 12 Hohola, NCD) listed on the Land Boards list of matters for hearing, or any hearing, pursuant to public tender.*
 2. *The Defendants be restrained from conducting any further dealings in or relation to the Land in question.*
 3. *The injunction shall remain in force and effect until the substantive proceedings which the Plaintiff is in the process of instituting by way of the Writ of Summons against the Defendants is determined in facility.*
 4. *Costs of these proceedings."*

45. On 17 July 2001 Tender Application lodged by Lamana Lodge Ltd-
- (a) Advertisement No. 336/2001
 - (b) Signed and dated 17 July 2001
46. On 17 July 2001 AKT Associates paid K100 to Department of Lands (receipt no. 105577) as application fee for business/commercial lease (Tender NO. 336/2001) on behalf of Lamana Lodge Ltd
47. On 26 July 2001, Peter Pena & Associates filed Orders of Kandakasi, J of 25 July 2001 in the following terms -
- "1. The Defendants, together, and in particular the First Defendant is restrained from having the property (Section 122 Allotment 12 Hobola, NCD) listed on the Tand Boards list of matters for bearing, or any hearing pursuant to public tender.*
 - "2. The Defendants are restrained from conducting any further dealings in or in relation to the Tand in question unless otherwise ordered. "3. The Interim injunction shall remain in force and effect until the substantive proceedings which the Plaintiff is in the process of instituting by way of the Writ of Summons against the Defendants is determined in finality. "4.*
 - "Costs of the proceedings.*
 - "5. "Parties shall be at liberty on 3 days notice to the other party to apply for variation lifting or otherwise of these orders."*
48. By letter dated 19 September 2000 addressed to the Attorney General (Francis Damem) and copied to the Solicitor General, Peter Pena & Associates (Joel Alu) purported to give notice of Andrew Maid's intention to make a claim against the State in the following terms: ***"NOTICE OF INTENTION TO MAKE A CLAIM - ANDREW MAID - V- THE STATE***

We refer to the above matter and advised that we have instructions to sue the State and the Department of Lands for breach of Constitutional Rights and deprivation of ownership of property known as State lease Volume 23, Folio 182, Section 122, lot 12, Hobola, NCD, which hand our client Mr. Andrew Maid was registered proprietor, (State lease Holder).

However the Minister for Lands unlawfully cancelled his Title.

We hereby give Notice pursuant to the Claims by and Against the State Act no. 52 of 1996 of our client's Intention to sue"

49. On 24 October 2001, Peter Pena & Associates filed WS No 1534 of 2001 for Andrew Maid against Ango Wangatau, Chairman PNG Lands Board; Guao Zurenuoc, Secretary for L&PP; Raga Kavana, Registrar of Titles; and the State. Andrew Maid sought the following relief:

1. *"Damages pursuant to section 58 of the Constitution for breach of basic constitutional rights;*
2. *¥5,901,189.00 in damages for.*
 - (i) *the land known as State lease Volume 23 Folio 182, Section 122, lot 12, Hobola;*
 - (ii) *for loss of business and profits;*
 - (iii) *loss of funds expended on the land including land rents and renewal of licence.*
3. *Interest*
4. *Costs"*

50. On 1 November 2001, Maladinas Lawyers filed a Notice of Intention to Defend dated 31 October 2001 for DLPP.

51. By letter dated 13 November 2001 to Peter Pena & Associates, John Kawi, Solicitor General rejected letter of 19 September 2001 as notice under Section 5 of the Claims Act because the letter was received on

52. **30 October 2001 together with WS No. 1534 of 2001 therefore originating process is rendered void requiring rectification immediately prior to taking any further steps in prosecuting Andrew Maid's claim.**
53. By letter dated 6 December 2001 to the Solicitor General, Peter Pena & Associates responded to Solicitor General letter of 13 November 2001-
- (a) asserting service of notice by letter dated 19 September 2001 was effected on Attorney General, copies of which were faxed to Attorney General and circulated to the Solicitor General via mail;
 - (b) alternatively, was giving notice under Section 5 of the *Claims Act* by enclosing letter dated 19 September 2001 and sought Solicitor General's position on any issues on mode of service
54. On 22 November 2001, Peter Pena & Associates filed an Amended Writ of Summons No. 1534 of 2001. Andrew Maid sought the following relief:
- (a) *11 damages pursuant to section 58 of the Constitution for breach of basic constitutional rights;*
 - (b) *K5,901,189.00 in damages for:*
 - the land known as State Lease Volume 23 Folio 182, Section 122, Lot 12, Hobola;*
 - for loss of business and profits;*
 - loss of funds expended on the Land including Land rents and renewal of licence.*
 - (c) *In the alternative. the Title to the property known as State Lease Volume 23 Folio 182. Section 122, Lot 12. Hobola. be re-instated to the Plaintiff together with loss of business and profits from the land aster the Plaintiffs claim in paragraph (b)*

- (d) *Interest*
- (e) *Cost?*

2002

- 55. On 21 May 2002 Peter Pena & Associates submitted a Without Prejudice Quantum Submission to the Solicitor General.

- 56. On 21 August 2002, Justice Davani made Orders -
 - (a) Joining Lamana Lodge Ltd as a party/fifth defendant
 - (b) Directed Mr Jeffrey Abone, Peter Pena & Associates to file affidavit attaching copy of letter giving notice under Section 5 of the *Claims By & Against the State Act 1996* ('Claims Act')
 - (c) Adjourning the matter to 11 September 2002

- 57. On 23 August 2002, Jeffrey Abone, Peter Pena & Associates filed an affidavit attaching letter dated 19 September 2001 (purporting to giving notice), 13 November 2001 (rejecting purported notice) and 6 December 2001 (asserting initial notice given by fax, which was enclosed giving notice again), and deposed in his belief that the mandatory notice requirements were met by Andrew Maid.

- 58. On 11 September 2002, Justice Kandakasi -
 - (a) Did not determine the issue of mandatory notice under Section 5 of the Claims Act, despite Jeffrey Abone informing the Court about Justice Davani's the previous direction of 21 August 2002;
 - (b) Adjourned the matter to 13 September 2002 for parties to:
 - "have a discussion and find out where the clients' position are and what happened. Then if you are not able to settle you will come back.. .You use today and tomorrow to go into discussions and conference mode and find*

out where your rights and positions are. If you are not able to reach some final agreement on that then you come back to court and tell me why you are not able to. I will give a hearing on that basis. Rather than talking about default judgment and all of that I would rather deal with the substantive matter that way."

59. On 13 September 2002, Justice Kandakasi directed Jeffrey Abone, Peter Pena & Associates to take out appropriate draft for his Honour endorsement in the following terms:

"I will decline to make any derision on the application for default judgment, instead direct that the State and the plaintiff and the defendant, that is the State seriously negotiate towards the indicated possible solution of return of the title to the plaintiff and included then in that amount should be appropriate amount of damages if any that was caused by the State's cancellation of the plaintiffs title. And that that has to be quantified and has to be agreed upon, if not comes back to court for assessment on damages."

60. On 19 September 2002, Peter Pena & Associates filed Orders of Kandakasi, J of 13 September 2002 in the following terms -

"1. The Plaintiff and the First, Second, Third and Fourth Defendants are directed to forthwith resolve this matter with the Plaintiff in terms of-

*(a) Reinstate the Title of the property described as **"Volume 23 Folio 182. Section 122Hobola"** to the Plaintiff.*

(b) Settle and pay to the Plaintiff damages incurred and suffered as a result of the decision to unlawfully terminate the Plaintiff's title to the subjectproperty;

"2. The Fifth Defendant shall not interfere with the settlement process in Order 1 above.

"3. The Plaintiff be at liberty to negotiate the sale of the subject property with the Fifth Defendant on commercial terms.

"4. Costs is awarded to the Plaintiff"

61. On 25 September 2002, Registrar of Titles, Raga Kavana, made an entry of cancellation of *"Journal No. S.24356 pursuant to National Court Order WS 1534 of 2001 - Journal No. S.29723"*.

62. On 11 October 2002, Deed of Release was executed between Andrew Maid and State through Solicitor General, Zacchary Gelu for the State *"without any admission of liability* in the following terms:

"The State parties and MAUD agree that actions constituted in W.S. 1534 of 2001 and O.S. No. 426 of 2001 be settled in terms as ordered by the National Court and in particular.

(a) *The title of the land known as Section 122, Allotment 12, Volume 23, Folio 182, Hohola, National Capital District be reinstated to MALD by the State.*

(b) *Damages in the total sum of K4,000,000.00 be paid to MALD as full and final payment.*

(c) *MALD V costs be limited to K100,000.00 only.*

(d) *Statutory Interest only be paid by the State on any outstanding amount."*

2005

63. On 15 December 2005, Andrew Maid transferred State Lease Volume 23 Folio 182 over Section 122, Lot 12, Hohola, NCD to Progress Auto Machinery Ltd.

64. On 15 December 2005, State Lease Volume 23 Folio 182 over Section 122, Lot 12, Hohola, NCD was mortgaged to Westpac Bank PNG Ltd.

FINDINGS I. Liability

In Issue

(a) Non-compliance with Section 5 of *Claims By and Against the State Act 1996 ('Claims Act')*

Andrew Maid became aware on 7 May 2001 that his tide had been cancelled by the Registrar of Tides on 10 August 2000. Thus, his cause of action accrued on 7 May 2001 requiring him to give notice of his intention to make a claim against the State no later than 7 November 2001.

Andrew Maid and Peter Pena & Associates asserted that the letter dated 19 September 2001 addressed to the Attorney General and copied to the Solicitor General ("Notice of claim"), complied with Section 5 of the *Claims Act*.

(b) Inappropriate person given notice

The requirement to give notice to the appropriate person and the method of serving the notice are mandatory: *Bokin v The Independent State of Papua New Guinea (2001) N2111, DammiJ*.

The former Attorney General, Francis Damem, could not "specifically recall" receiving the Notice of claim. The Solicitor General file contained the Notice of claim but there was no notation or mark to indicate service on the former Attorney General. The Affidavit of Service by Jeffrey Abone sworn and filed on 23 August 2002 in WS No. 1534 of 2001 merely deposed to his belief that service of the Notice of claim was effected on the Attorney General by the previous lawyer in carriage of the matter, Mr Joel Alu.

In any event, the Attorney General is not the appropriate person to whom such notice is required to be given. In this regard, the Notice of claim was defective for being served on the Office of the Attorney General.

(c) Notice not served before filing of originating process

It is settled law that a notice of an intention to make a claim is a condition precedent to issuing a writ of summons. Notice under Section 5 must be given first - before the writ is issued - even if the writ is issued within 6 months after the date of the occurrence out of which the claim arises: *Tobian and the State v Tau Liu (1998) SC566, Supreme Court, Kapi DC*, Sheehan J, *Jalina J* ■

The Solicitor General was one of two (2) appropriate persons authorized to receive the Notice of claim but it was still defective. The Notice of claim was received by the Solicitor General on 30 October 2001 together with the originating process, WS No. 1534 of 2001. The Notice of claim was invalid in this regard.

(d) Insufficient details

The notice must give sufficient details of the intended claim, e.g. date, time and place of occurrence. If insufficient details are given, even a notice in writing will not comply with Section 5: *Hewali v Police Force and The State (2002) N2233, National Court, Kandakasi J*.

No date of cancellation was mentioned in the Notice of claim to determine when Andrew Maid's cause of action arose. To that extent, the Notice of claim was defective as well.

Andrew Maid's position is further compounded by no letter "accepting" the Notice of claim as notice under Section 5 of the Claims Act.

(e) No merits in claim

11. There were significant issues of fact and law not disclosed to the National Court that substantially affected the assertions and relief sought in O.S. No. 426 of 2001 and WS No. 1534 of 2001.
12. Raga Kavana, Registrar of Titles - para 4 wrongly pleaded Land Registration Act, 1981 (should be Ch. 191)

(f) Invalid grant of lease

13. The grant of the State Lease over Lot 12, Section 122, Hohola, NCD was invalid *ab initio* (from the beginning) on four (4) grounds.
14. Firstly, there was no application made by Andrew Maid to exempt Lot 12, Section 122, Hohola (Gordon), NCD from advertisement or public tender. Andrew Maid's application for exemption from advertisement was in respect of Lots 6, 7, and 10, Section 122, Hohola (Gordon), NCD. The exemption by the Minister for Lands on 15 November 1999 in respect of Lot 12, Section 122, Hohola (Gordon), NCD was therefore invalid.
15. Secondly, the purported PNG Land Board Meeting No. 2017 in which Andrew Maid was recommended as the successful applicant in respect of Lot 12, Section 122, Hohola, NCD under item 25 was illegal. This was revealed by the Acting Director, Land Administration Division, DLPP (Daniel Katakumb) in response to Summons No. 344 in the following terms:

"PNG Land Board of Meeting 2017

- *It was never convened a Meeting and there was no indication of day, time, location relating to the sitting and deliberation and decisions of the PNG Land Board Meeting Minutes.*

- *The Land Board Meeting Minutes were never been prepared by Officers of Land Administration.*
- *The Property Files were not thoroughly check listed for PNG Land Board consideration.*
- *No checklist were provided by the Land Allocation Officer of each Region.*
- *It was a self centred Board by the then late Chairman, Mr Ralph Guise"*

Thirdly, the purported National Gazette No. G9 dated 28 January 2000 recommending Andrew Maid as the successful applicant of a Business (Commercial) Lease over Allotment 12, Section 122, Hohola, City of Port Moresby, NCD was merely typeset or draft for publication. This is shown in relevant excerpts of the transcript of 16 April 2009 containing the Government Printer, Ken Kaiab's, answers to questions raised by the Commission, which are reproduced hereunder:

[At pages 3041 - 3042]

MR GERORO: Yes, thank you Mr Kaiab. Mr Kaiab, I refer you to paragraph 2 of your statement, particularly sub paragraph (a)(ii) of the 21st page where you say, "Sir, on Gazette No G9, you will note that there is no record of section 122 and allotment 12 published", and you referred us to exhibit 1. Exhibit 1 is ga^ettal notice No G9 Port Moresby Thursday 3 February 2000. So you basically stated that there is no reference to a ga^ettal of a property described as section 122 and allotment 12.

THE CHAIRMAN: Was there any Land Board meetings, is it?

MR GERORO: That is in relation to—

THE CHAIRMAN: G9 2000, 12 February does not recall any land Board matters at all, is that correct?

MR GERORO: Is that is correct?

A: That is correct.

J2: Mr Kaiab, if I can refer you to a document which I showed to you. It appears to be a gazette notice, No G9, Port Moresby, Friday 28 January 2000. It is two pages, dated 25 January 2000 and it is signed by R Guise, Chairman, PNG Land Board. The G9 is dated 28 January 2000. In this particular document, it is relation to a Land Board meeting, No 2017. There are a number of items there and I will refer you particularly to page No 2 which relates to item number 25. It says there, at page 2, LFDC/122/012 Andrew Maid, a business commercial lease over Allotment 12, Section 122, Hobola, City of Port Moresby, National Capital District. You will note on the first page it says, that the Land Board meeting, in respect of all those items, listing the successful applicants for State leases and particulars of the land lease of which Mr Maid is gazetted as having being a successful applicant. If you can comment on this particular document that I have just shown you?

A: Thank you, Sir, with this particular gazette notice G9, I believe it was in a draft stage when the copy probably must have been given out to client or whoever. But there were correspondence that we received from Lands Department saying that there was a letter that we received on 4 February 2000 saying that there was no meeting held and therefore, this instrument to be withdrawn. So it was erased from the actual gazette therefore the final gazette G9 that was published on 3 February is the correct one; it is the correct gazette.

Q: Sorry, Chief Commissioner for the record the document that I have shown to Mr Kaiab, that is the gazette— it was only a draft copy of the gazette dated 28 January 2000, No G9 was produced by Mr Maid in a statement in response to a summons. So that is how we obtained this document, and have summonsed Mr Kaiab to comment on these documents. So Mr Kaiab, this is merely a draft copy?

A: A draft copy.

Q: For all purposes it was never gazetted or published to the National Gazette?

A: No.

MR GERORO: You confirm that?

A: Confirm, yes."

17. Fourth, the Chairman, Ralph Guise (dec'd) was not the Secretary for Lands & Physical Planning and therefore the purported gazettal notice G9 dated 28 January 2000 publishing the successful grant of leases, including Andrew Maid's grant, is null and void: Section 74 of the *Land Act 1996*.
18. Whilst Peter Pena generally assisted the Commission with evidence, he was quite evasive in giving a full and frank disclosure of his knowledge and issues concerning the purported grant of the lease to Andrew Maid in the illegal Land Board Meeting No. 2017.

(g) Lack of pleading in Statement & Amended Statement of Claim

19. The pleadings filed in WS No. 1534 of 2001 by Peter Pena & Associates for Andrew Maid do not sufficiently plead the alleged breaches committed by the State parties. There are no specific references to the relevant clauses of the lease or the provisions of any legislation alleged to have been breached. The only reference made is to Section 58 of the Constitution based on an alleged breach of Andrew Maid's proprietary rights. The legal basis of the proprietary rights asserted is not disclosed. In the ordinary course, Andrew Maid would not have been at liberty to lead evidence and claim damages for want of particulars had the State objected to these anomalies.

II. Assessment of damages

20. As the matter was setted out of Court, the Court did not make findings on the amount of damages to award Andrew Maid.

21. There is no record in the Solicitor General file indicating the bases for approving and settling Andrew Maid's damages at K4,000,000 plus cost of Id00,000 as stated in the Deed of Release dated 11 October 2002. Further, the reinstatement of tide to Andrew Maid could not possibly have entitled him to damages of K4 million. At best, Andrew Maid would only be entitled to any damages incurred as a result of the cancellation of the title up to the point of return of the title.
22. Peter Pena & Associates lodged with the Solicitor General on behalf of Andrew Maid a Without Quantum Prejudice Submission dated 21 May 2002. A summary extract of the Quantum Submission by main headings is outlined below:

	Damages	Assessment (K)	Supporting Document
a)	Damages for breach of Constitutional Rights (Sect. 58)	1,500,000	Quote of Constitution- Section 58
b)	Damages for loss of land and improvements	1,346,500	Valuation from Tack Realty (Unknown to IPA)
c)	Damages for loss of business and profits	5,901,189	Cashflow from Ram Business Consultants
d)	Loss of funds expended to secure and hold title	27,280	License fees, land rental fees and Architectural fees
e)	Costs	57,240	Legal fees, Accountant fees & Valuation fees
f)	Interest	0	
g)	Aggravated Damages	200,000	Quote of Common Law
h)	Exemplary Damages	200,000	Quote of Common Law
	Total	9,232,209	

23. The quantum submission was attached with relevant supporting attachments including alleged breaches related to the Constitution. Some of the monetary damages assessed were quite excessive. Also the quantum submission included damages for loss of land and improvements only (b) and yet the said land was re-instated.
24. The Cash-flow projection prepared by Ram Business Consultants which was part of the Quantum Submission had serious flaws. The following are worth noting;
- (a) The cash-flow is flawed and unacceptable to be regarded as an accurate Cash flow especially in terms of operating a supermarket in a city environment. The following relevant costs associate with operating a supermarket were not factored into the cash flow -
 - (i) Cost of goods sold (COGS)
 - (ii) Staff remuneration
 - (iii) Costs of utilities
 - (iv) Security costs
 - (v) Capital expenditure
25. The above list is not exhaustive but to show that the cash flow projection prepared by Ram Business Consultants completely ignored obvious /relevant costs associated with such investment.
26. The cash-flow did not consider the loss for year 1, especially during construction period where most start-up business at inception would incur loss. The cash-flow projection prepared by Ram Business Consultants projected a net profit after tax of K1.12 million in year one. There are no
- I compelling factors to believe that such a projection was realistic as many relevant costs were not factored into this projection.

There is no basis on the revenue of K2.0million projected in year one and thereafter increased by 7.5%.

The Net Present Value (NPV) calculated using 12% with 10 years' income was K5,901,189. This figure is completely inaccurate when compared to our calculation based on the same assumption Ram Business Consultants used. According to our calculation, the NPV is K1,241.539. Ram Business Consultants deliberately inflated the NPV by K4,659,650 for reasons known only to themselves. Further, we do not understand the basis of using a 10 year period in the NPV calculation.

A non-cash item in respect of depreciation of K300,000 was also added back to the cash flow to inflate the profit by IC300,000.

There is also the issue whether the bank would loan them the K3 million as there was no evidence to show that the bank would have approved the K3 million loan stated in the cash-flow. Further, Andrew Maid and his company, Piu Mauwin Trading, did not own any tangible assets which would be mortgaged to obtain that significant loan. In commercial terms, no bank or financial institution would have loaned such an amount without any known security to cover the loan in case of default.

The interest rate of 22% on a loan of K3 million does not have any basis. There is no correspondence from the lender or a general rate prevailing at the time from any commercial lender to support this rate.

From the review of the cash flow projection prepared by Ram Business Consultants we conclude that the Cash-flow projection was specifically engineered in a way to inflate the yearly income projection including NPV so that damages claim would be high. The Ram Consultants Report was based on mere trading assumptions supplied by Andrew Maid, not on proper business records and tax returns.

33. As to the costs of K100,000.00, this amount was not submitted in the Quantum Submissions nor was there a bill of costs in taxable form submitted to the Solicitor General.

III. Steps taken (or not taken) by Solicitor General in defence of the claim

34. Clearly, there is ample evidence of serious failures on the part of the Solicitor-General, Zacchary Gelu, in the performance of his professional duties as lawyer for the State because:

- (a) there was no liability on the part of the State or the Secretary, Department of Lands & Physical Planning, as we have found above; and
- (b) there was no actual or proper assessment of damages, if any, to justify K4.1 million as the settlement figure.

35. Zacchary Gelu breached his duty of care to his clients (Secretary for Lands & Physical Planning and the State) as a lawyer. He failed to perform (or properly perform) due diligence as to the claim by Andrew Maid by not seeking instructions from the Secretary, Department of Lands & Physical Planning when the purported Notice of claim was initially given, and then again upon service of the originating process until execution of the Deed of Settlement dated 11 October 2002.

36. As a result, Zacchary Gelu failed to take all steps necessary to defend the State and the Secretary, Department of Lands & Physical Planning by **NOT:-**

- (a) seeking any instructions from-
 - (i) Secretary, DLPP;
 - (ii) Registrar of Titles;
 - (iii) Attorney General;

- (iv) Government Printer;
- (b) conducting any due diligence, including searches or making relevant inquiries with the above offices;
- (c) filing a notice of intention to defend;
- (d) filing a defence for the State parties on the following merits:
 - (i) Lack of mandatory notice under Section 5 of the Claims Act;
 - (ii) The State Lease issued to Andrew Mr Maid was properly cancelled because-
 - Hon. Mr Maid was never recommended by the PNG ■ Land Board as the successful applicant for a State Lease because PNG Land Board Meeting No. 2017 was not properly convened and, therefore, illegal ○ PNG Land Board Minutes recommending Hon. Mr Maid as the successful application for a State Lease was done fraudulently ○ Hon. Mr Maid was never gazetted as the successful applicant for a State Lease
- (e) filing an appropriate application to dismiss the entire claim for non-compliance with Section 5 of the Claims Act
- (f) providing any advice to the State parties on the veracity of Andrew Maid's claim and any recommendations on the way forward to defend the claim
- (g) seeking any independent advice on the professional reports and material relied upon by Andrew Maid in support of his claim

In respect of the execution of the Deed of Settlement dated 11 October 2002, the Commission notes that there was lack of compliance with:

- (a) Section 61 of the Public Finances (Management) Act 1995- contracts involving the payment of an amount exceeding*

K100,000 require the approval of the Minister for Finance. No approval was sought nor obtained from the Minister for Finance through the Secretary for Finance prior to the signing of the Deed by Zacchary Gelu.

(b) *NEC Decision NG07 22 August 2002, Clause 10* - The National executive Council at its meeting on 22 August 2002 (some 2 months prior to signing of the Deed of Settlement) - *"directed that there be no more out of court settlements by any State body or authority, including by the Attorney-General and Solicitor-General, without the approval of the NEC, acting on advice of CACC."*

IV. Processing of claim and Pay-out

38. Our review of the payment vouchers maintained at the Dept. of Finance in relation to the case shows that an amount totalling K5,193,538 was paid out between 2003 and July of 2004. There were 16 cheque payments paid out over that period. The following were worth noting in respect of the payouts:

	Date	Code	Cheque No.	Amount (K)	Details	DOR Unsigned
1	25/1/2003	207-4201-4123-135	710210	190,000	Part Pay.- deed of release debt	Cheque copy only on file
2	17/2/2003	207-4201-2107-135	712248	100,000	Pynt for O/S Deed of Release Debt (P/P)	DOR has no signature of AG
3	20/3/2003	207-4201-4123-135	715407	100,000	Pmt for o/s DOR claim	Cheque copy only on file
4	4/4/2003	20742012107135	716806	300,000	Payment O/Standing Debts	Cheque copy only on file
5	20/10/2003	460- 31	736989	500,000	Pmt of o/s court order WS 1534 of 2001	DOR has no signature of AG
6	31/10/2003	460-31	738376	500,000	Loss & Damages to Properties O.S No. 426	DOR has no signature of AG

7	17/11/2003	207-4201-4123-135	739737	200,000	Pmt for o/s DOR claim	Cheque copy only on file
8	29/12/2003	460- 31	744562	1,000,000	Pmt o/s court order (part payment)	DOR has no signature of AG
9	18/3/2004	207-4201-2107-135	772571	250,000	O/S DOR Claim O.S No. 426 of 2001	DOR has no signature of AG
10	5/5/2004	207-4201-2107-135	777565	560,000	Pmt o/ s c/order OS#426 2004	Cheque copy only on file
11	24/5/2004	460-131	779266	200,000	Pmt for o/s DOR claim	Cheque copy only on file
12	21/6/2004	207-4201-2107-135	781989	200,000	Pmt for o/s DOR claim	DOR has no signature of AG
13	13/7/2004	460- 31	784063	200,000	Pmt for o/s DOR claim (legal fees)	Cheque copy only on file
14	10/3/2005	207-4201-2107-135	804833	400,000	Pmt for o/s claim for interest	Cheque copy only on file
15	7/6/2005	207-4201-2107-135	812767	293,538	Pmt for o/s interest	Based on Parkil Lawyers submission. Cheque copy only on file
16	30/6/2005	207-4201-2107-135	814547	200,000	Payment of O/S Court Order	Based on Parkil Lawyers submission. Cheque copy only on file
				5,193,538		
Damages agreed per DOR				4,100,000	Included costs of K100,000	
Interest calculated at 8%				893,538	Interests for 2yrs,8mths & 21 days	Based on Parkil Lawyers submission
Total to be payable				4,993,538		
Over payment				200,000	Unexplained over payment	

39. Some payment vouchers had copies of the DOR that did not have the SG signature (unsigned by Zacchary Gelu) while some were missing. Despite

the anomalies noted in terms of attaching incomplete documentation especially in regards to unsigned DOR, payments were approved and processed by staff at Finance Department who were tasked with financial authority, to ensure appropriate documentations were included prior to processing of claims

40. Payments made to Andrew Maid was over paid by K200,000, (cheque no. 784063 dated 13 July 2004). This amount has to be recovered by the State from Andrew Maid.
41. Payments were collected by Andrew Maid at the Department of Finance directly rather than through the SG office.
42. The Finance Department processed cheque payments for the damages direct to Andrew Maid in his name rather than in his lawyer's name (trust account).
43. Parkil Lawyers who acted for Andrew Maid demanded the Attorney General (Francis Damem) by letter dated 5 August 2004 for interest to be paid together with their calculation for an amount of K893,537.87.
44. The Attorney General then wrote a cover letter dated 5 January 2005 instructing the Finance Secretary to pay. He also stated in that letter that the calculation was in order and sanctioned for payment despite improper calculation of interest.
45. Some of the payments made were through the Vote 460-31 (Suspense Account #2). Funds in Suspense Account #2 are not considered as legally available funds for the purpose of Court settlements. Hence payments made out of the suspense accounts are deemed unlawful or illegal.

46. Interest totalling K893,538.00 was paid based on the submission made in 2004 by Parkil Lawyers and supported by the Attorney General and subsequently paid by the Department of Finance in 2005.
47. Based on the Commission's re-calculation of interest there was a miscalculation by Parkil Lawyers. Interest was over paid by K520,571.29. No independent verification was carried out by the Solicitor General, Attorney General or by internal auditor at Finance Department to verify the calculation before processing the interest component.
48. When Andrew Maid collected the cheques, which were made under his name directly from the Department of Finance, there were several correspondences from his lawyer (Peter Pena & Associates) complaining to the Finance Department regarding the method of payments.
49. The correspondence were either addressed to the Secretary of Finance and copied to the Solicitor General or Attorney General or vice versa, and related to an agreement that the lawyer had with his client about the amount of legal fees including standard procedures of settling court proceedings by Finance Department. The State was not privy to this agreement.
50. Peter Pena & Associates letters asserted having an interest in the total sum of the claim, totalling K1.1 million as legal fees. There was another letter written to Andrew Maid reminding him of the fee arrangement that they had in place, the pertinent part of which are quoted in respect of apparent improper dealings from both Peter Pena & Associates and Andrew Maid to obtain the settlement:

"Is there any wrong about the way we went in and negotiated (through making further written submission) and increased the damages by K1.1 million (even though you were prepared to accept K3 million)"

"We are aware of the arrangement you have with certain officers of the Department of Finance to access payment cheques directly. We think it is highly improper and have advised you so in writing. We place you on notice that should you do anything to interfere in payment of our fees, we will not hesitate to report your dealings directly to appropriate authorities for investigations and action".

51. Andrew Maid and his lawyers engaged in unprofessional conduct in the pursuit of the claim and its payment. Peter Pena & Associates claim for K1.1 million in legal fees is baseless in so far as the State is concerned as their costs were expressly limited to K100,000.00.
52. Because of the issues surrounding his legal fees, Andrew Maid wrote a letter to Peter Pena & Associates (copies to Attorney General and Finance Secretary) dated 15 April 2003 terminating their services. By then he was receiving parts of the settlement proceeds. An excerpt of the letter Andrew Maid wrote which is worth noting:

For you to claim a percentage of any reward relying on some verbal agreement which I cannot recall further, has not been evidenced in writing and which appear to be unreasonably excessive is simply not accepted. As far as I recall the Deed of Settlement sufficiently catered for your costs at K100,000 for a matter which did not go to court. In fact, a substantial portion of the work leading to settlement was done by my own contacts, with your knowledge and consent'.

G. RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

Referral to the Attorney General

1. Immediate commencement of an action against Hon. Andrew Maid, MP
to:

- a. challenge the legality of the Deed on the following grounds:
 - i. Lack of mandatory notice under Section 5 of the Claims Act;
 - ii. Hon. Mr Maid was never recommended by the PNG Land Board as the successful applicant for a State Lease because PNG Land Board Meeting No. 2017 was not properly convened and, therefore, illegal
 - iii. PNG Land Board Minutes recommending Hon. Mr Maid as the successful application for a State Lease was done fraudulently Hon. Mr Maid was never gazetted as the
 - » successful applicant for a State Lease
 - iv. *lack of Ministerial approval prior to executing the Deed under Section 61 of the Public Finance (Management) Act 1995, and by reason of the Supreme Court decision in Fly River Provincial Government v Pioneer Health Services (2003) SC705 and followed in NCD Commission v Yama Security Services Ltd (2005) SC835*
- b. recover the sum of K5,1 93,538

2. Immediate commencement of an action against Peter Pena & Associates to recover the sum of K200,000

Referral to the Public Prosecutor

3. Immediate commencement of an action against Hon. Mr Maid to recover the sum of K5,1 93,538 under the *Proceeds of Crime Act 2005*
4. Immediate commencement of an action against Peter Pena & Associates to recover the sum of K200,000 under the *Proceeds of Crime Act 2005*

Referrals to the Lawyers Statutory Committee

5. Zacchary Gelu for dishonourable, improper and unprofessional behaviour
6. Francis Damem for dishonourable, improper and unprofessional behaviour
7. Peter Pena of Peter Pena & Associates for dishonourable, improper and unprofessional behaviour
8. Jeffrey Abone of Parkil Lawyers for dishonourable, improper and unprofessional behaviour

Referrals to the Royal PNG Constabulary

9. Zacchary Gelu for settling Hon. Mr Maid's unlawful claim
10. Francis Damem for clearing overpayment of K520,571.29 in interest
11. Hon. Mr Maid for making and benefiting from his unlawful claim
12. Peter Pena of Peter Pena & Associates for assisting Hon. Mr Maid pursue his unlawful claim and the monies they gained from that claim
13. Jeffrey Abone of Parkil Lawyers for assisting Hon. Mr Maid pursue his unlawful claim and the monies they gained from that claim

Referrals to the Prime Minister

14. Appoint a Commission of Inquiry into the Department of Lands & Physical Planning
15. Appoint a Commission of Inquiry into the Office of Solicitor General

Consequential legislative or other reform

16. *Attorney General's Act 1989 and Claims By & Against the State Act be amended to the following effect:*

- a. the Solicitor General must be a lawyer of high standing and at least with 10 years litigation experience
- b. the Solicitor General to be appointed by Judicial Legal Services Commission
- c. the Solicitor General shall act on the written instructions of the State departments, agencies or instrumentalities concerned, unless in urgent cases where oral instructions would suffice provided written instructions are subsequently given within a reasonable time to retrospectively confirm the verbal instructions previously given
- d. the Attorney General granted with the exclusive power to settle cases out of court with prior approval from the all State departments, agencies or instrumentalities concerned and National Executive Council
- e. the Attorney General shall execute all deeds for settlement on behalf of the State and the Solicitor General shall witness his signature, failing which the deed is unenforceable
- f. all settlements involving the State, including Provincial Governments, departments, agencies or instrumentalities, has no effect unless sanctioned/approved by the National Court
- g. Any proposed settlement of costs concerning the State or costs awarded against the State must involve production of an itemized bill of costs in taxable form for consideration by the Solicitor General and Attorney General for settlement, and if not agreed upon, should be taxed in the normal way under the *National Court Rules*.

Financial Instructions made under the Public Finance (Management) Act 1995 be amended to the following effect:

- a. Finance Form 3 be revised to cover, where necessary, withholding of tax assessed for remittance to IRC in respect of all claims submitted for payment

- b. Finance should be prohibited from raising and settling any judgment orders or lawyers bill of costs, without written clearance solely from the Office of the Attorney General

Claims By & Against the State Act 1996 be amended to the following

effect:

- a. Notice of intention to make a claim against the State under Section 5 to be given to the extent damages is sought;
- b. Section 5 notice to be given to all State agents named as defendants
- c. Section 5 notice to be given to IRC to assess arrears in tax payable, if any
- d. Originating process (including statement of claim or in support) to be served on all the State agents named as defendants before any hearing
- e. All deeds of settlement to be drawn and executed on prescribed form

Land Act 1996, related legislation and instruments be amended to the following effect:

- a. Exemption of any State land from advertisement for application or public tender shall be determined by a Land Exemption Committee consisting of the Minister, Secretary, DLPP and State Solicitor who must all agree;
- b. Register of all leases, licenses and interests granted by the State to be created, kept and maintained by an officer appointed by the Secretary, which shall detail:
 - i. The name of the proprietor and date of acquisition;
 - ii. Nature of interest/ type of lease/license;
 - iii. Zoning status of parcel of land;

iv. Status of covenants and caveats registered, if any. c. PNG Land Board shall consult Register of all leases, licenses and interests granted by the State before considering application for a particular State lease

Public Services (Management) Act 1995, related legislation and instruments be amended to the following effect:

- a. Prescribe "serious disciplinary offence" is committed where:
 - L State line agency named as defendant fails to provide full and proper instructions to SG ii. State suffers loss as a result of negligence or failure to exercise due care in performance of duties
- b. On a finding of "serious disciplinary offence" -
 - i. Ground for termination
 - ii. Ineligible for appointment to any public office

B. Police

The Commission has opened investigation on forty five (45) matters, which are said to have arisen from Police raids. Fifteen (15) of these are reported. All disclose a similar pattern. These claims alleging unlawful actions by police have led almost to an industry in itself. Claims for compensation for assault, damage to a loss of property and crops have resulted in many judgments against the State for many millions of Kina. The Department of Justice and Attorney General has advised that claims based on Police raids account for some 40 % of all claims against the State.

All claims investigated by the Commission arose from raids which are alleged to have occurred in the Highlands region. Of these, the Commission has found that many of the matters were fabrications.

In most cases, the Commission finds the Solicitor General failed to effectively seek instructions from the police. In at least three (3) matters, instructions were provided by Police but deliberately ignored.

Like most State agencies examined, the Police do not have a systematic process by which records are created, maintained, reviewed and stored in an accessible manner.

In the course of conduct of hearings in Mt Hagen, the Commission visited the Solicitor General's Highlands Regional Office and found that ninety (90) per cent of all claims against the State handled by that office arose from alleged Police impropriety. The office had in excess of 3,000 files emanating from the five (5) Highlands provinces, all handled by three (3) lawyers,, two (2) of whom are recent

graduates to cover all the National and District Courts in the Highlands region. These gross inadequacies were exacerbated by the lack of logistical support.

The Highlands Divisional Commander called for improved consultation and greater co-ordination between the Police stationed throughout the country and the Solicitor General in this area.

The Commission recommends that there be greater co-ordination between the Police Commissioner and Director, Police Legal Services with the Attorney General and and Solicitor General so as to better defend die interests of the State.

Because these claims have not been defended the extent of responsibility of Police in them, has not been tested.

However the basis of these claims which have progressed to settlement are all allegations of gross breaches of constitutional rights of the People by unlawful Police action. This signals an urgent need for inquiry, not simply to stop compensation claims but more importantly to protect the constitutional rights of the People, as well as to ensure the integrity of the Police and their operations.

Accordingly the Commission recommends a Commission of Inquiry be held into the conduct of the Police and their use of 'raids' on communities in pursuit of criminal investigations.

(a) UmbaY Gabriel

An air of mystery surrounds this Police raid based claim. To this day, the Commission of Inquiry (Col) has not seen or heard from Umba Y Gabriel, even after summonses and letters were sent through his lawyers and Notices were extensively published in the Newspapers. Sworn evidence was given of a huge sum of money being lugged into a hotel room in the dead of night, for counting and distribution. In a case already full of intrigue, the biggest bombshell was dropped on 31st May 2009 when Mr. Gabriel Yer¹ supported by senior officials of the Department of Finance, gave sworn (affidavit) evidence that the full amount of K1.6 million had been returned to the Department of Finance (henceforth "DoF") on the 19th February 2008². This information was used by lawyer, Mr. Dick Korowa Kipoi in his application to have the Col cease investigations into the matter of Umba Y Gabriel. By a strange and twisted logic, he argued that the money had since been returned to DoF; therefore, no payment had originally been made so as to bring the matter within the Terms of Reference (henceforth "TOR") of the Col.



As will be seen in the brief, this matter has all the hallmarks of a scam claim created and facilitated by a triad of people in- the highest offices of the PNG bureaucracy. It was initiated by a serving Deputy secretary for DoF (current Secretary, Mr. Gabriel Yer) as principal plaintiff. Although no section 5 Notice was given, the claim was settled in record time by a willing Solicitor General (Mr. Zachary Gelu) and an even more obliging Secretary for Justice Department (Mr. Francis Damem).

¹ Refer to Annexure "E" in Affidavit of Gabriel Yer sworn on 31/05/09

² This happened shortly after the matter was listed in the newspapers as one of interest to the Col.

A cheque for K1,649,130 in the name of Umba Y Gabriel was made payable firstly to Paul Paraka Lawyers and then to Harvey Nii Lawyers Trust Account after the first cheque was cancelled. The amount was paid out to honour a Deed of Settlement signed on the 15th February 2003 between Mr. Zachary Gelu as Solicitor General and Mr. Paul Paraka who signed on behalf of Umba Y. Gabriel for reasons which have not been explained to date. The Deed of Settlement was signed scarcely a month after the claim was purportedly filed in the National Court on the 07th of January 2003 as WS 23 of 2003.

The earlier claim WS 805 of 2001 was filed by a different lot of plaintiffs represented by Blake Dawson Waldron Lawyers (BDW) and then by Posman, Kua and Aisi lawyers (PKA) when the action officer Mr. Goiye Gileng joined PKL after resigning from BDW. The claim is still pending. PPL were initially briefed by the State to defend the matter. Using evidence provided by the Simbu police, PPL filed a defence and successfully set aside default judgment obtained by the plaintiffs. Instructions from police in Simbu clearly stated that the damage was caused by tribal enemies of the plaintiffs clan who took advantage of the police and CIS presence which had caused people to abandon their properties and flee into the bushes to hide. Simon Kauba the current Divisional Commander for the Highlands region was Simbu Provincial Police Commander at the time. He gave evidence to the Col confirming that the Police never destroyed anything³. Yet PPL did not feel constrained by this knowledge because it went ahead and filed law suit for Umba Y Gabriel and others, a claim which arose from the exact same facts although the plaintiffs were different. Not only that, it managed to negotiate settlement with the Solicitor General on whose behalf it had steadfastly defended the related court proceedings in Joseph Witne Baundo and Others.

³ Refer Transcript # 102 from pg. 3300.

Later proceedings registered as OS 58 of 2006⁴ and OS 755 of 2008⁵ were filed by disgrunded co-plaintiffs of Gabriel Yer Toi in their efforts to get Mr. Yer to pay them their part of the payout. The two actions are still pending. At the same time a lot of pressure is being put on Mr. Gabriel Yer by his own tribesman outside of Court to pay them their share.

A. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE?

This matter falls under TOR No. 1, 5, 8,10 & 12 (see attached copy of TOR).

Firstly the amount claimed is over K300,000 and was paid out in 2004. The claim was settled out of court by a Deed of Release. This case also highlights the involvement of very senior governmental officials including the current secretary for DoF, Mr. Gabriel Yer, the then Secretary for the Department of Justice and Attorney General (henceforth DJAG) Mr. Francis Damem and the Solicitor General then, Mr. Zachary Gelu. Of significance is the role played by private law firm, Paul Paraka lawyers (henceforth referred to as PPL) which seems to have had a very close relationship with all three of them and Mr. Thaddeus Kambanei⁶. In fact PPL acted for Mr. Gabriel Yer, Mr. Gelu, Mr. Damem and Mr. Kambanei throughout the period of the Inquiry. PPL has also fought relentlessly both directly and through its satellite law firms⁷ to prevent the Col from carrying out its mandated tasks by filing numerous challenges in both the National and Supreme Court.

V

⁴ Paulus Kama v. Gabriel Yer Toi, Thadeus Kambanei & State. Action filed by Henaos lawyers seeking orders to remove Gabriel Yer as plaintiff in WS 1231/02 and to pay monies received in settlement of claim into National Court Trust account.

⁵ Mandai Aglua & 225 others v. Gabriel Yer & John Wau. Action filed by Gabriel Gendua Lawyers seeking similar orders as the above. Specific orders sought for court to make declaration that Gabriel Yer is in fact Umba Y Gabriel and not entitled to be a plaintiff in WS 23/03.

⁶ Secretary for DoF at time claim settled and request sent by Attorney General to Finance for payment.

⁷ Firms run by ex - employees of PPL including Nicholas Tame of NTame Lawyers, Mr. Jack Nalawaku of Nalawaku Lawyers, Mr. Dick Korowa Kipoi of Kipoi Lawyers and Mr. Kumoro Sino of Sino Lawyers.

B. SOURCE OF INFORMATION AND DOCUMENTATION

This brief comprises of facts and findings from the files and records of;

- The Solicitor-General's office
- The National Court Registry at Waigani.
- The Department of Finance
- Evidence given to COI by Mr. Joseph Biangigl
- Evidence given to COI by Mr. Goye Gileng
- Evidence given to COI by Mr. Billy Bonner
- Evidence given to COI by Mr. Gabriel Yer
- Written evidence given to COI by the Chief Electoral Commissioner, Mr. Andrew Trawen
- Evidence in writing given to COI by the Bank of South Pacific
- Evidence in writing given to COI by Harvey Nii lawyers
- Evidence given to COI by Mr. Gabriel Gendua of Gendua Lawyers
- Written evidence given to COI by Mr. Kama Paulus (co- plaintiff)
- Written evidence given to COI by Mr. Kain Wosae
- Written evidence given to COI by Mr. Joseph Witne Baundo

C. RELEVANT FACTS (CHRONOLOGY)

The Matter

1. The claim arose from an alleged combined police and CIS raid on several villages in the Gena area of Kerowagi District in Simbu Province on the 19th and 20th August 2000. The raid allegedly resulted in the burning down of houses, theft or killing of livestock, assault on plaintiffs, destruction of cash crops and other property and desecration of burial sites. The total loss of property claimed as lost and physical injury suffered added up to K1,649,130.

2. Despite the denials by Mr. Simon Kauba, it is within reason to infer that the Police and CIS did indulge in some destruction of property and assault on people though not to the extent claimed. The raids were done to track down high powered assault rifles from suspects who had broken into and stolen some from the armoury of the Barawagi jail in Simbu Province. The police and CIS personnel would have vented their frustration on the villagers as the theft of weapons from under their very noses would have been felt deeply indeed as a direct and even personal challenge to members of the two disciplined forces based in Simbu.

// 3. In September 2002, Mr. Gabriel Yer filed a writ of Summons WS 1231/02" and put his name, Gabriel Yer Toi as lead plaintiff on behalf of himself and 225 others. This matter was never pursued and still remains pending in the National Court giving rise to the possibility that it could be used to reclaim the money returned to Finance in 2008 *once the Commission of Inquiry* into the Finance Department has ceased and things return to 'normal business as usual'. Perhaps this was the reason that the amount paid out in 2004 was returned without hesitation to the DoF when the Col began investigations.

4. Earlier, on the 12th of July 2002 (two years after the raid), Mr. Gabriel Yer wrote to the Attorney General giving notice of his intention to claim pursuant to section 5 of the *Claims By and Against the State Act*. The subject matter of the letter is captioned: "Notice of Intention to Make a Claim Against the State out of time...". The letter was addressed to Mr. John Kumura, who was Acting Solicitor General. The matter of seeking leave to make a claim out of time under Section 5(2)(c) is a matter for the Attorney General to make such a decision and not the Solicitor General. Therefore this letter should

have been written to the Attorney General and not the Solicitor General.

In the second paragraph of the letter of 12 July 2002, Mr. Yer states the purpose of the letter to be: **"to comply with the requirements of *Notice under the claims By and Against the State Act 1996*. Since the raids occurred some nearly two years ago, I am writing to you to seek an extension of time under Section 5(2)(c)(i) of the Claims By and Against the State Act 1996."** Mr Yer then gave reasons for the delay. The letter is legally and procedurally incorrect because when a possible claim is out of time as this one was, the consent of the Attorney General must be obtained to give a Section 5 notice out of time. This is a requirement under Section 5(2)(c) of the *Claims By and Against the State Act (CBASA)*. Only after the Section 5(2)(c) permission is obtained from the Attorney General, then a Section 5 Notice of Intention to Make a claim Against the State can then be made within such time allowed by the Attorney General. These are two separate processes both in time and sequence and also in law. Mr. Yer's letter of 12 July 2002 however intended to and did eventually accomplish both of these in the one and same letter.

Although the letter was addressed to Mr. John Kumura, Mr. Damem, Secretary for DJAG, responded by letter dated 21 August 2002. He wrote... "I note your Notice of Intention to Sue the State. I also note that your notice is out of time. I also note your reasons for delay in giving notice. I have considered the reasons for the delay in giving notice. I am satisfied with the reasons given. I therefore grant you leave to give notice out of time. You are given 21 days within which to lodge a formal notice of claim against the State." (emphasis added).

Clearly Mr. Damem's letter only granted leave to Mr. Yer and others to lodge a formal section 5 Notice of Claim Against the State within 21 days. Presumably the Attorney General would then assess the late s.5 Notice and make a determination about whether it was proper in form and had sufficient detail before accepting it as proper s.5 notice.

7. Mr. Yer did not make a formal Section 5 Notice of Claim Against the State, and have it personally served (as required under s.5 (3) of the CBASA) either on the Acting Solicitor General or the Attorney General within the 21 days period granted to him. Instead, Mr. Yer proceeded to file proceedings in WS No 1231 of 2002 on 19 September 2002.

8. In WS No. 1231, the mandatory Notice of Intention to Make a Claim against the State was never served on either the Attorney General or the Solicitor General as required under Section 5 of the CBASA. The purported Section 5 Notice of the letter of 12 July 2002 is a nullity. The letter of 12 July 2002 does not and cannot qualify as a Section 5 Notice for various reasons, including:
 - letter only sought leave to make a claim against the State out of time pursuant to s.5(2) of the CBASA;

 - leave to serve a formal Notice of Claim Against the State was granted by the letter from the Attorney General on 21 August 2002, but the Plaintiffs did not follow through with service of a formal Section 5 Notice as required under s.5(1) and (3) of the CBASA which together require personal service.

9. At Paragraph 7 of the Statement of Claim in WS 1231 of 2002, the plaintiffs did not clearly plead that they had properly filed a Section 5 Notice of Claim Against the State or that they had sought leave from the Attorney General to file their claim out of time in their letter of 12 July 2002 and that they had been granted leave to file within 21 days and that they had filed their Section 5 Notice within time.

10. Four months after filing WS 1231/02 in January 2003 another claim was purportedly filed by a person called Umba Y. Gabriel on behalf of himself and 225 others in Proceeding WS 23/2003. This time the claimants were represented by Paul Paraka Lawyers. Except for the change in the name of the principal plaintiff from Gabriel Yer Toi to Umba Y Gabriel all the other details including the names of the plaintiffs, the Defendants and the pleadings were exactly the same as the action filed by Mr. Gabriel Yer in WS 1231 of 2002. In the list of plaintiffs the lead plaintiff is named only as Umba Y G. There is no explanation as to why the person's middle name and surname were abbreviated to mere initials. The National Court Registry has told the Col that file WS 23/2003 is not registered in their system.

11. WS No. 23 of 2003 did not comply with all the requirements of Section 5 of the CBASA. Since these were new proceedings, it was mandatory that a Section 5 Notice of Intention to Make a Claim Against the State had to be made. Given that the claim was out of time, a Section 5 (2) leave to make a claim out of time had to be obtained, and then a formal Notice of Claim made and personally served on either the Solicitor General or the Attorney General. None of these happened. Non compliance with Section 5 of the CBASA is fatal — rendering the claim a nullity because of the mandatory wording of Section 5 (1): "No action to enforce any claim against the State lies

against the State unless notice in writing of intention to make a claim is given in accordance with this section...". This makes WS No. 23 of 2003 an unlawful claim.

Evidence on file suggests that in 2007, the principal plaintiff in WS No. 23 of 2003 - Umba Y Gabriel - was a pupil in Grade 5, Class 5.1 at the Port Moresby Grammar School. Umba Y Gabriel is the son of Gabriel Yer and Nigl Zerike and was born on the 01st of May 1994 in Port Moresby. If this is so, then the principal plaintiff in WS No. 23 of 2003 is a minor, and therefore did not have the capacity to sue. At the time when the proceedings were filed, he would have been only 9 years old.

Further to the above, the Electoral Commission has provided written evidence to the Col that in the entire electorate of Kerowagi, Simbu Province, there was only one registered voter named Umba Gabriel described as a Subsistence Farmer of Genakeglaku Ward in Gena Waugla local level Government area. Born in 1986 he would have been about 14 years old in the year 2000 when the raids took place. He would also have lacked capacity to sue in person and would have needed an adult to act as his 'next friend' if indeed he is the elusive Umba Y Gabriel named in WS 23 of 2002.

On the 15th of February 2003, Paul Paraka Lawyers acting for the Plaintiffs executed a Deed of Release with the then Solicitor General, Mr. Zachary Gelu in the matter of Umba Y Gabriel WS No. 23 of 2003 and settled for the sum of K1,667,925.56. Mr. Paul Paraka personally signed the Deed of Release on behalf of the plaintiff. Note that 4 days later on 19 February 2003, Mr Gelu as Solicitor General

filed a Notice of Intention to Defend in the related matter of Gabriel Yer Toi WS No. 1231 of 2002.

Questions: 1. Was the Solicitor General ever aware that these two matters were related?

2. Whether Paraka Lawyers were at that time Acting for the State in all civil matters, including this one?

15. On March the 3rd 2003, Mr. Zachary Gelu, the Solicitor General wrote to the then Secretary for Finance, Mr. Kambanei and requested payment in WS No. 23 of 2003 since they had been settled out of court by a Deed of Settlement and Release. He requested that the full payment of K1, 667, 925.56 be made payable through the
* Trust Account of PPL, lawyers for the Plaintiffs.
16. Now comes the first surprise move done by PPL. On the 18th of March 2004 PPL wrote to Secretary Kambanei and advised that they had ceased to act for the Plaintiffs in *Umba Y Gabriel & 225 Others -v- The State, WS 23 of 2003* and that the Plaintiffs were now represented by Harvey Nii Lawyers. PPL asked Finance to pay the full sum into the Trust Account of Harvey Nii Lawyers. It is not clear why the plaintiffs decided to instruct a new lawyer after PPL had successfully negotiated a settlement with the Solicitor General's office for the full amount sought in the Writ. All that remained to be done was to collect the money from Finance. Again Mr. Paul Paraka has failed to explain why he relinquished the case and forfeited his full legal fees by allowing the clients to instruct a new lawyer after his firm had done such magnificent work in settling the matter so swiftly.
17. None of the plaintiffs in the Umba Y Gabriel matter gave evidence to the Col to explain why the decision was made to engage another lawyer at that stage of the proceedings. In the absence of any

evidence of dissatisfaction on the part of the plaintiffs against PPL it is open to the Commission to find that this was a deliberate move orchestrated by PPL to confuse anyone who might later investigate

J and follow the paper trail to PPL's doorstep.

18. PPL has kept right on representing Mr. Gabriel Yer during the Inquiry. Umba Y Gabriel has been represented at the Inquiry by a plethora of lawyers beginning with Mr. Harvey Nii, then Paul Othas of PPL. Then by known associates and ex — employees of PPL including Mr. Jack Nalawaku, Mr. Dick Korowa Kipoi of Kipoi lawyers and finally by Mr. Kumoro Sino of Sino lawyers. Such dedication by a law firm to ex - clients who had previously been ungrateful and dumped them as their lawyers in favour of another firm, is remarkable. It is also very suspicious when it comes to working out their motives for doing so.
19. On the 22nd of March 2004, the then Attorney General himself, Mr. Francis Damem wrote to the Secretary for Finance and advised that PPL had ceased acting for the Plaintiffs in the matter of *Umba Y Gabriel & 225 Others -v- The State, WS No. 23* of 2003 and that Harvey Nii Lawyers were now their lawyers and requested for the settlement payment to be made payable to Harvey Nii Lawyers Trust Account. In this same letter, Mr. Damem endorsed the decision of the Solicitor General to settle this matter out of court.
20. This action by Mr. Francis Damem is remarkable. Mr. Damem as Secretary for Justice and the Attorney General at the time did not need to write that letter. This task was one normally done by the Solicitor General. The Commission finds that his actions raises

suspicious about whether Mr. Damem had a personal interest in the outcome of this claim.

21. On the 26th of March 2007, Harvey Nii Lawyers wrote to the then Secretary for DoF, Mr. Thaddeus Kambanei and requested payment in this matter of WS No. 23 of 2003 as agreed to under the Deed of Settlement. Mr. Kambanei promptly endorsed payment for the full amount as requested. Less than a month later, on the 24th of May
« 2004 a Cheque of K1,667,925.00 was made payable to Paul Paraka Lawyers but this cheque was cancelled.
22. On the 12th of July 2004 through payment voucher GE:990161 a replacement Cheque for K1,667,925.00 was raised and made payable to Harvey Nii Lawyers Trust Account for the settlement payment of Umba Y Gabriel & 225 others.
23. Mr. Thaddeus Kambanei was represented by Mr. Guguna Garo, a Senior Associate in PPL, at the Inquiry hearings when he was summoned to give evidence. His relationship with the firm of PPL has endured like that of Mr. Francis Damem and Mr. Zachary Gelu. Again it is open for the Col to make a finding that the firm of Paul Paraka Lawyers had a close relationship with the highest officials in DJAG (Secretary Damem and Solicitor General Gelu) and the boss of DoF, Mr. Kambanei and his deputy, Mr. Gabriel Yer.
24. On the 19th of February 2008 the ftiU amount of K1,667,925 was returned to the DoF by Harvey Nii Lawyers. In his cover letter dated 19/02/08, Mr. Nii said the funds had been held in his firm's Trust Account since it was paid on 16th July 2004 ... *"on instruction of our clients pending a resolution of various disputes among our clients on the*

*distribution of the settlement monies.. In view of above and coupled with the recent NEC decision in early 2006 which halted all out of court settlements being paid based on the landmark Supreme Court judgment in the case of **NCDC and Yama Security Services Limited**, our client has accordingly instructed us to reimburse the money back to the State. ⁵ Mr. Nii ends his letter with the remark that ... "The claimants can pursue their cases normally and have them proven before the Court of Law". Any future claims arising from the raids conducted in Gena tribe in the year 2000 are now well and truly time barred under the Fraud and Limitations Act and so one would have to wonder which Court Harvey Nii Lawyers expect Umba Y Gabriel and his co-plaintiffs to pursue their claims in?*

ORAL EVIDENCE GIVEN TO COMMISSION

A. Mr. Gabriel Yer

Gabriel Yer is the current Secretary for DoF. Aged about 45 years, he is from the Gena area of Kerowagi District in Simbu Province. He is an Accountant by profession and joined DoF in 1990 soon after graduating from university. Rising swiftly through the ranks, he was Acting First Assistant Secretary for Public Accounts division when the raids were conducted in Gena.⁹ In 2002 when he filed WS 1231/02 he had already been promoted to Deputy Secretary DoF and was still in that position in 2004 when the cheque was approved and paid to Umba Y Gabriel c/- Harvey Nii Lawyers Trust Account. In the year 2007 he was elevated to become Secretary for DoF and was in that post when he received the amount of K1,667,925 back from Harvey Nii Lawyers in 2008.

⁸ Letter is Annexure "E" in Affidavit of Gabriel Yer sworn on 31st May 2009.

⁵ See page 4268 in Col Transcript # 120

Mr. Yer gave evidence on the 12th of August 2009 in relation to the matter of Umba Y Gabriel. ¹⁰ From the start he maintained that he did not know anything about the matter of Umba Y Gabriel. He also made the startling revelation that he had drafted the Writ of Summons in WS 1231/02 himself without help from any qualified lawyer because as he said he had seen many summons in his working life to know what to do¹¹. Despite this, he said in evidence that he had never been aware that the matter of Umba Y Gabriel was exactly the same as his claim except for the change in the name of the lead plaintiff.¹²

In summary the following can be gleaned from his evidence:

- In 2000 he was living and working in Port Moresby but said he had lost properties amounting to K20,000 that he had left in his father's house in the village. His property damaged in the raid consisted of radios, sewing machines and a laptop used for work which was inexplicably left behind in the village. Mr. Yer promised to provide a list of his properties to the Col but has failed to do so.
- His father Mr. Yer Toi is listed as plaintiff No. 37 on both WS 1231/02 and WS 23/03 and purportedly suffered damages worth K1 0,000.¹³
- Gabriel Yer himself flew 12 leaders of the Gena Nolku tribe down to Port Moresby. This group authorized him to file Court action to claim for destruction caused by Police and CIS personnel.

¹⁰ Refer Col Transcript # 120 from page 4265

¹¹ Ibid at Page 4272

¹² Ibid at page 4274 to 4278

"ibid atpg4270

He drafted the Writ himself and gave section 5 Notice to State before filing his claim in the National Court.

- In evidence he said ... "There are a number of two or three Umba Y Gabriels at home. There is an Umba, Mr. Y is a name and Gabriel and there is another Umba Gabriel, they are all at home" (sic).¹⁴
- Gabriel Yer denied that his son is named Umba Y Gabriel. Instead he is called Umba Yer.
- Gabriel Yer said he did not pursue his case after filing it in 2002 because he felt that it would be a conflict of interest if he prosecuted the case while being employed as Secretary for DoF.
- While he was Deputy Secretary for Finance he was aware of the claim of Umba Y Gabriel as one among many that passed through his desk for payment. But he said that he did not realise that the claim arose from the raids in Gena on which his own claim was based.
- In his Affidavit of 31st May 2009 he described Paulus Kama and Joseph Biangigl as his tribal enemies. He recanted this unambiguous statement when he gave sworn evidence to the Commission and said that what he really meant was that they were his relatives but were acting like enemies.¹⁵
- Gabriel Yer denied bringing K1.6 million to a room at the Ponderosa hotel in Port Moresby and sorting it out for payment with Joseph Biangigl and other leaders of Gena Nolku tribe.

¹⁴ Page 4273 of Col transcript H120

¹⁵ Page 4280

- However he did not deny that during discussions he did say that he would fly the money into the village by helicopter.¹⁶
- Yer denies ever instructing Paul Paraka Lawyers to act in his matter or Umba Y Gabriel's matter

B. ACP Simon Kauba

Mr. Kauba is an Assistant Commissioner of Police (ACP) and is currently the Highlands Divisional Commander. He gave sworn evidence to the Col on Tuesday the 19th of May 2009 at Mt. Hagen.¹⁷ He was summoned to give evidence on a number of cases. His evidence in relation to the claim by Umba Y Gabriel consisted of the following, summarized in point form:

- ACP Kauba was the Provincial Police Commander of Simbu Province at the time of the alleged raids in Gena.
- He was out in the field with his men and trying to contain a long standing tribal fight between the two biggest tribes in Gena area of Kerowagi.
- It was during this time that members of one tribe broke into the CIS armoury at Barawagi jail and escaped with a large number of high powered guns.
- ACP Kauba denied that the Police and CIS were in any way responsible for the destruction and theft of property. Instead he

¹⁶ At pg 4280

" COI Transcript #120 from pg. 3300

blamed the destruction on opportunistic tribal enemies of those who fled into the bushes to hide.

- Mr. Kauba also said under his command his policemen had gone into the operation with what he termed 'strict standing orders'. Further to that foil briefings were conducted to inform personnel going out of the dos' and don'ts of the operation.
- ACP Kauba said after the alleged raids he did not know that several cases were filed in the National Court alleging unlawful acts by police. He said the Solicitor General's office never communicated with him to seek instructions.
- Mr. Kauba made some useful suggestions that the system should be changed so that it became mandatory for Police out in the Provinces to be notified as soon as any case on Police raid allegation was commenced (section 5 Notice stage).

C. Mr. Joseph Biangigl

Mr. Biangigl is a subsistence farmer from Gena Nolku Tribe. He is listed as plaintiff number 5 in both WS .1231 of 2002 and WS 23 of 2003. He is now among the group of 225 disgruntled plaintiffs who have taken court proceedings against Mr. Gabriel Yer¹⁸ to force him to pay their share of the money they say he received after the claim (WS 23/03) was settled out of court. He gave sworn evidence to the Col on Wednesday 20th May 2009 in Mt. Hagen. A summary of his evidence is as follows:

- After the combined raid in his village he travelled to Port Moresby with another plaintiff called Kama Paulus. There they instructed Kuman lawyers to file their claim.

¹⁸ OS 255/08 Mandai Aglua & 225 others v. Gabriel Yer & John Wau.

- Before they could proceed further they were approached by Gabriel Yer who promised to take up their matter. He said he would "assist on the release of funds side".¹⁹ Both agreed to Mr. Yer's suggestion
- The two men were told to wait until further advice. The two stayed with Gabriel Yer until 2004 when Yer told them he had got the money and would give their share soon.
- No money was forthcoming until the next year 2005. In that year Gabriel Yer travelled to the village in Kerowagi and again bought plane tickets for twelve people to accompany him to Port Moresby.

In Port Moresby the group waited three more months until Yer finally got the money. One night, the group of twelve met with Gabriel Yer, his wife Ranu Yer and sister Korai Yer, at the Ponderosa hotel. Others in the group were named as John Wau, Gigimai Boronge, Gigimai Wemin, Puka Wemin, Batme Gigimai, Gemene Makus, Gent Vincent, Joseph Biangigl and Bomai Pama.

According to Joseph Biangigl, this group all fitted into a single hotel room. There Gabriel Yer brought in a large bag or case with wheels on it. When opened he saw that it was stuffed full of cash all in 50 kina notes.

- Led by John Wau, the group began counting the money. The money was bundled into packs containing K5,000 each which were then placed into envelopes with names of individuals written on them.

¹⁹ Coi Transcript # 120 @ pg 3459.

Some days later Joseph Biangigl was told to go back to the village in Kerowagi and prepare for Gabriel Yer to fly in on a helicopter and deliver the money to the people. In great anticipation and joy the villagers went about constructing a platform to be used as the stage. Pigs were gathered for slaughter and 'flower girls' were organized for the momentous day.

Much to their dismay, Gabriel Yer never made the grand appearance by helicopter that he had promised. Mr. Biangigl testified that none of the plaintiffs ever received any of the promised money.

OTHER EVIDENCE

1) Mr. Goiye Gileng

Mr. Gileng gave sworn evidence to the Commission. Much of what he says has been covered in the introduction to this brief. He produced several affidavits sworn by co plaintiffs of Gabriel Yer in WS 1231 of 2003. One of them, Paulus Kama's evidence is discussed below.

2) Mr. Paulus Kama

Paulus Kama is the 03rd named plaintiff in both WS 1231 of 2002 and WS 23 of 2003. He filed an Affidavit saying that at a gathering at Mr. Gabriel Yer's Boroko house, he was heard to say that he was upset with people complaining about his handling of the matter. Mr. Yer threatened at that meeting that he would return all the money to the DoF and would leave the plaintiffs themselves to go to court and get it back if they could.

PAYMENTS BY FINANCE

- 1) Cheque # 779264 paid to Paul Paraka Lawyers dated 24/05/2004 was not paid from lawfully available funds. It was paid out of the Suspense account Trust fund 460 — 31.
- 2) Likewise the replacement cheque # 784512, dated 16/07/2004 was paid from the same account No 460 - 31.

COMPLIANCE ISSUES

- 1) There was breach of section 61 of the *Public Finance (Management) Act* when Ministerial approval was not sought before Zachary Gelu signed the Deed of Release.
- 2) There was no section 5 Notice given under the *Claims by and against the State Act 1996*.
- 3) NEC Decision of NG 07/2002 on 22 August 2003 directed that there be no more out of court settlements by any State body or authority, including by the Attorney General and Solicitor General, without the approval of the NEC acting on advice from the CACC. Mr. Gelu as Solicitor General chose to disregard this NEC directive when he signed the Deed of Release on 15th February 2003.
- 4) NEC Decision NG 07/2002 Clause 10 was rescinded by a subsequent NEC Decision 150/2003 of July 25, 2005. Note that this was well before the Deed of Settlement and Deed of Release to effect the out of court settlement was executed on 15 February 2003. Nevertheless this particular

NEC decision, at Paragraph 5, only directed the Solicitor General, in consultation with the Attorney General "to settle any future claims for amounts only up to K1,000,000" only if they are satisfied that the claim is genuine and that there is no defence and has complied with all the processes under the CBASA. Paragraph 6 of this particular NEC Decision NG 07/2002 states that "all out of court settlements in excess of K1,000,000 are to be approved by the NEC prior to any payments by the Department of Finance."

Note that the settlement payment in Umba Y Gabriel WS No. 23 of 2003 was made through their lawyers, Harvey Nii Lawyers on or about 12 July 2004. Even so, NEC Decision 150/2003 of 25 July 2003 requires that all out of court settlement payments above K1,000,000 must be approved by the NEC prior to payment by Finance. NEC approval was not obtained before the settlement payment was made on 12 July 2004. To this extent this payment fails to comply with the NEC Decision 150/2003.

FINDINGS

- 1) There was a combined raid by Police and CIS into the Gena area and some unlawful acts may have been carried out, but not to the extent claimed, ie., to over 400 households (if plaintiffs in WS 850/2001 and WS 1231/02 are combined).

- 2) Mr. Gabriel Yer personally did not suffer any injury to his property or to his person to claim damages in WS 1231 of K20,000. He therefore lodged a false claim.

Mr. Gabriel Yer used his position as Deputy Secretary of DoF to benefit himself.

WS 23 of 2003 was lodged by Gabriel Yer with help from Paul Paraka Lawyers when he realised the controversy that would be caused if his name was associated with a successful claim against the State while he was serving as Deputy Secretary.

Writ of Summons 23 of 2002 was never filed in the National Court. It is a fabrication done by Paul Paraka Lawyers as a cut and paste job from WS 1231/02.

Umba Y Gabriel is the name of Gabriel Yer's son born on the 01st of May 1994 and is not a real adult person of the Gena area of Kerowagi District, Simbu province who suffered injury in the year 2000 from unlawful acts by servants of the State.

The Solicitor General's Office was extremely reckless or negligent in its handling of this matter.

The SG at the time, Mr. Zachary Gelu connived with Mr. Paul Paraka of PPL and Mr. Gabriel Yer to pursue¹³⁷orexpeditate this claim and payment.

The Solicitor General's office never sought instructions from Police in Simbu Province.

The office of Solicitor General was reckless or negligent in not ascertaining the validity of the claim.

- 11) Mr. Zachary Gelu as Solicitor General knew of the Defence filed in WS 1231 of 2002 - Gabriel Yer Toi v. State & 5 Others. He would therefore have known that the claim in WS 23 of 2003 was an exact same replica of WS 1231 of 2002.
- 12) By going ahead to sign the Deed of Release on 15th of February 2003 Mr. Gelu knew that the claim was not properly verified as truthful.
- 13) Paul Paraka lawyers acted for the State as defendant in the matter of WS 805/01 Joseph Witne Baundo and later acted for the plaintiff claimants in WS 1231/03, Umba Y Gabriel. They were clearly acting in conflict of interest.
- 14) Because Paul Paraka signed the Deed himself on 15th February 2003 instead of Umba Y Gabriel, a finding can be made that there was never such a person to start with.
- 15) Lawyer Mr. Kumoro Sino lied to the COI about receiving instructions from Umba Y Gabriel in Mt. Hagen City.
- 16) Mr. Kumoro Sino fabricated evidence filed in the National Court Judicial Review proceedings OS (JR.) No. 377 of 2009. In those proceedings he committed perjury by filing an Affidavit in Support and an Affidavit verifying Facts under the name of Umba Y Gabriel when there was in fact no such person as Umba Y Gabriel.
- 17) Mr. Mario Cueva a senior officer of the Department of Finance, Cash Management branch gave evidence in favour of Umba Y Gabriel to confirm that Harvey Nii Lawyers had returned the amount in full. Mr. Cueva did this in mid May 2009. A finding is made that he had

- 18) **knowledge of this from the 19th February 2008 and failed to assist the COI by imparting that important piece of intelligence. A finding is made that Mr. Cueva was covering up for his boss Gabriel Yer.**
- 19) Ms. Josephine Dinni of the Department of Finance also swore an Affidavit similar to Mr. Mario Cueva. The same findings as were made of Mr. Cueva is made of Ms Dinni.
- 20) There was breach of the Public Finance Management Act. Payment of cheque # 779264 paid to Paul Paraka Lawyers dated 24/05/2004 was not paid from lawfully available funds. It was paid out of the Suspense account Trust fund 460 - 31.
- 21) Likewise the replacement cheque # 784512 dated 16/07/2004 was paid from the same account No 460 - 31.

RECOMMENDATIONS

_____ / [^]lr _____

1. That Mr. Gabriel Yer is terminated forthwith from the job of Finance Secretary for showing his total willingness to rot the system.
2. That Gabriel Yer is referred to the Police Fraud Squad for further investigations.
3. That Paul Paraka Lawyers are referred to the lawyers Statutory Committee for that body to deliberate on whether the firm has committed any breach of ethics by filling a lawsuit with the full knowledge that the claim was a false one. As discussed above (@ pg. 3)PPL had been acting for the State in defending an earlier action WS

805 of 2001 and in the process had received clear evidence from Simbu Police denying any unlawful acts. By acting for Umba Y Gabriel and others PPL were in a conflict of interest situation.

4. Paul Paraka is referred to the Police Fraud Squad for further investigations for colluding with Gabriel Yer to make a claim under false pretences.
5. Mr. Kumoro Sino is referred to the Police for investigations to determine whether perjury charges should be laid against him.
6. That the Solicitor General apply for summary dismissal of the claim for failure to comply with the requirement for section 5 Notice under the CBASA
7. That the Solicitor General applies to have the matter of Gabriel Yer Toi summarily dismissed for want of prosecution (8 years has lapsed since date of filing writ).
8. Alternatively that the trial is expedited and the matter is defended to the fall and Gabriel Yer is cross examined in the witness box to test his credibility and the veracity of his claim.
9. Following ACP Kaupa's suggestion, changes are made to alert Police in the provinces as soon as section 5 notice of claims against the State are lodged with the Attorney General's office.
10. That practices be put in place for Police and the Solicitor General's office to liaise with each other regularly and with a view to providing reports and instructions expeditiously.

Generally that the Solicitor General should be restricted in the amount he/she can sign off in Deeds of Settlement that bind the State. Perhaps to less than K50,000. Further that the Secretary for DJAG should also be constrained in the amounts he/she can commit the State to say K1 00,000. Any amount over this cap should go to the NEC for approval.

APPENDIX "A" (LIST OF PLAINTIFFS^

No.	NAME	CLAN	AMOUNT CLAIMED
1	UmbaY. G.	Gena Noglku - Paglaukane	K20,000.00
2	Waim Kama	Gena Noglku - Paglaukane	K 5,000.00
3	Paulus Kama	Gena Noglku - Paglaukane	K1 0,000.00
4	Jim Waim	Gena Noglku - Paglaukane	K20,000.00
5	Joe Biangle	Gena Noglku - Paglaukane	K1 0,000.00
6	Peter Kunma	Gena Noglku - Paglaukane	K 5,000.00
7	Kaiglo Kama	Gena Noglku - Paglaukane	IC 5,000.00
8	Waim Kama (junior)	Gena Noglku - Paglaukane	K 5,000.00
9	Peter Waim	Gena Noglku - Paglaukane	K1 0,000.00
10	Kombrisunga Waim	Gena Noglku - Paglaukane	K 6,100.00
11	Klen Bagime	Gena Noglku - Paglaukane	K 5,000.00
12	Nombri Y	Gena Noglku - Paglaukane	K 5,000.00
13	John Jerry	Gena Noglku - Paglaukane	K 6,000.00
14	Ende Yomba Nombri	Gena Noglku - Paglaukane	K 8,000.00
15	Mauwi Nombri	Gena Noglku - Paglaukane	K 5,500.00
16	Kagl Kominde	Gena Noglku - Paglaukane	K 6,400.00
17	Guand Kagl	Gena Noglku - Paglaukane	K 7,100.00
18	Bame Kagl	Gena Noglku - Paglaukane	K 5,700.00
19	Ludwig Kagl	Gena Noglku - Paglaukane	K1 0,000.00
20	Kombukun Tei	Gena Noglku - Paglaukane	IC 8,000.00
21	Boi Kawagle Tei	Gena Noglku - Paglaukane	IC 8,000.00
22	Enn Tei	Gena Noglku - Paglaukane	K 8,300.00
23	Umayagle Guand	Gena Noglku - Paglaukane	K 4,500.00
24	Waim Guand	Gena Noglku - Paglaukane	K 6,000.00
25	Enn Toimbo	Gena Noglku — Paglaukane	K 5,500.00
26	Kawagle Kombukum Aglua	Gena Noglku — Paglaukane	K 7,000.00
27	Taia Kombukun	Gena Noglku — Paglaukane 216	K 6,500.00

28	Bombar Kawagle	Gena Noglku - Paglaukane	K 5,500.00
29	Tei Kawagle	Gena Noglku - Paglaukane	K 7,600.00
30	Kua Kawagle	Gena Noglku - Paglaukane	K 6,000.00
31	Bombar Apa	Gena Noglku - Paglaukane	K 8,000.00
32	Enn Kolkia	Gena Noglku - Paglaukane	K 5,000.00
33	Grai Kilkia	Gena Noglku — Paglaukane	K 6,000.00
34	Kaman Ande Kumo	Gena Noglku — Paglaukane	K 7,300.00
35	Toi Ande Kumo	Gena Noglku — Paglaukane	K 6,000.00
36	Miugle Ande Kumo	Gena Noglku - Paglaukane	K 7,000.00
37	Yer Toi	Gena Noglku — Paglaukane	K10,000.00
38	Apa Toi	Gena Noglku - Paglaukane	K10,000.00
39	Taia Kagl	Gena Noglku - Paglaukane	K 6,000.00
40	Aglua Taia	Gena Noglku - Paglaukane	K 5,000.00
41	Api Kagl	Gena Noglku - Paglaukane	K 6,000.00
42	Waine Api	Gena Noglku - Paglaukane	K 5,500.00
43	Waine Kagl	Gena Noglku — Paglaukane	K 6,000.00
44	Noglai Taia	Gena Noglku - Paglaukane	K 6,000.00
45	Teine Noglai	Gena Noglku - Paglaukane	K 4,500.00
46	Demaine Teine	Gena Noglku - Paglaukane	K 6,000.00
47	Guand Teine	Gena Noglku - Paglaukane	K 5,000.00
48	Wauglabogle Teine	Gena Noglku — Paglaukane	K 4,500.00
49	Kagl Wauglabogl	Gena Noglku - Paglaukane	K 4,000.00
50	Waiwo Waine	Gena Noglku - Paglaukane	K 5,000.00
51	Waim Waiwo	Gena Noglku — Paglaukane	K 6,000.00
52	Kagl Noglai	Gena Noglku - Paglaukane	K 7,000.00
53	Komainde Y	Gena Noglku — Paglaukane	K 5,600.00
54	Kaiglo Demane	Gena Noglku — Paglaukane	K 4,500.00
55	Gewi Onguglo	Gena Noglku — Paglaukane	K 3,500.00
56	Numabo Taia	Gena Noglku - Paglaukane	K 4,300.00
57	John Kamb Numabo	Gena Noglku - Paglaukane 217	K 7,000.00 '

58	Gewi Raphael	Gena Noglku — Paglaukane	K 8,000.00
59	Bagle Komainde	Gena Noglku — Paglaukane	K 6,350.00
60	Suine Komainde	Gena Noglku — Paglaukane	K 3,400.00
61	Siune Bagle	Gena Noglku — Paglaukane	K 6,400.00
62	Waugla Bagle	Gena Noglku — Paglaukane	K 4,000.00
63	Bombar Gabriel	Gena Noglku — Paglaukane	Kl 0,000.00
64	ApaMikal	Gena Noglku — Paglaukane	IC10,000.00
65	Gabriel Apa	Gena Noglku — Paglaukane	Kl 0,000.00
66	Ambane Kagl	Gena Noglku — Paglaukane	K 6,000.00
67	Ongoglo Kagl	Gena Noglku — Paglaukane	K 6,000.00
68	Gende Kagl	Gena Noglku — Paglaukane	IC 6,400.00
69	Peter Kagl	Gena Noglku — Paglaukane	K 4,000.00
70	Noglai Baglme	Gena Noglku — Paglaukane	IC 7,000.00
71	Konia Baundo	Gena Noglku — Paglaukane	IC 5,000.00
72	Gigimai Leo	Gena Noglku — Paglaukane	IC 7,000.00
73	Wanuwa Temb	Gena Noglku — Paglaukane	IC 6,200.00
74	Wau Andiyomba	Gena Noglku — Paglaukane	K 5,500.00
75	Wanuwa Kagl	Gena Noglku — Paglaukane	K 7,500.00
76	Wau Siya	Gena Noglku - Paglaukane	K 4,300.00
77	Wamuna Waiya	Gena Noglku — Paglaukane	IC 3,500.00
78	Damba Wamuna	Gena Noglku — Paglaukane	K 4,300.00
79	Kagl Noglai	Gena Noglku — Paglaukane	K 6,300.00
80	Noglai Tenei	Gena Noglku — Paglaukane	IC 3,000.00
81	Kuglame Duru	Gena Noglku — Paglaukane	IC 8,000.00
82	Gigimai Kawagle	Gena Noglku — Paglaukane	K 4,600.00
83	Mondai Kambo Kawagle	Gena Noglku — Paglaukane	K 4,000.00
84	Parr Gigimai	Gena Noglku - Paglaukane	IC 5,350.00
85	Wenabo Kagama	Gena Noglku - Paglaukane	K 6,800.00
86	John Wenabo	Gena Noglku — Paglaukane	K 4,800.00
87	Kaiglo Wenabo	Gena Noglku — Paglaukane	K 5,300.00

88	Gigimai Mogli	Gena Noglku - Paglaukane	K 5,300.00
89	Nimbne Piai	Gena Noglku - Paglaukane	K 5,850.00
90	MogilParr	Gena Noglku - Paglaukane	K 6,400.00
91	Noglai Baglme	Gena Noglku - Paglaukane	K 7,500.00
92	Wanua Baglme	Gena Noglku - Paglaukane	K 5,900.00
93	Konia Gablme	Gena Noglku — Paglaukane	K 6,800.00
94	Kianuga Baundo	Gena Noglku - Paglaukane	K 7,500.00
95	Konia Kawagle	Gena Noglku — Paglaukane	K 5,200.00
96	Baglme Noglai	Gena Noglku — Paglaukane	K 7,800.00
97	Gene Mondo	Gena Noglku — Paglaukane	K 5,600.00
98	Piu Gende	Gena Noglku - Paglaukane	K 6,700.00
99	Wie Wanua	Gena Noglku - Paglaukane	K 7,500.00
100	Baglme Sie	Gena Noglku — Paglaukane	K 7,500.00
101	Kaken Kagl	Gena Noglku — Paglaukane	K 4,800.00
102	Kaiglo Kagl	Gena Noglku — Paglaukane	K 5,900.00
103	Kaima Dua	Gena Noglku - Paglaukane	K 7,000.00
104	Gende Gene	Gena Noglku - Paglaukane	K 6,700.00
105	Jim Gene	Gena Noglku — Paglaukane	K 6,200.00
106	Kigl Dru	Gena Noglku - Paglaukane	K 6,800.00
107	Umba Dru	Gena Noglku - Paglaukane	K 6,000.00
108	Andrew Y	Gena Noglku — Paglaukane	K 8,300.00
109	Baglme Gigimai	Gena Noglku — Paglaukane	Kl 0,000.00
110	Giglma Dua	Gena Noglku — Paglaukane	K 7,200.00
111	Siune Kawagle	Gena Noglku — Paglaukane	K 6,300.00
112	Domyagl Umba	Gena Noglku - Paglaukane	K 5,700.00
113	Wau Domyagl	Gena Noglku - Paglaukane	K 7,100.00
114	Baglme Onguglo	Gena Noglku - Paglaukane	K 5,400.00
115	Wau Sie	Gena Noglku - Paglaukane	K 5,200.00
116	Aglai Apa	Gena Noglku - Paglaukane	K 8.000.00
117	Kolkia Aglai	Gena Noglku - Paglaukane	K 5,800.00

118	Mandai Aglua	Gena Noglku — Paglaukane	K 7,000.00
119	Kondayagl Aglus	Gena Noglku — Paglaukane	K 6,100.00
120	Kombukun Kaiglo	Gena Noglku — Paglaukane	K 5,650.00
121	Waugla Kaiglo	Gena Noglku — Paglaukane	K 7,000.00
122	Mary Waim	Gena Noglku — Paglaukane	K 5,000.00
123	AlexWai	Gena Noglku — Paglaukane	K 5,000.00
124	Bonggro Kaiglo	Gena Noglku — Paglaukane	K 5,000.00
125	Kamane Joseph	Gena Noglku — Paglaukane	Kl 5,000.00
126	Kamane Kagl	Gena Noglku - Paglaukane	Kl 0,000.00
127	Apa Gumakambri	Gena Noglku — Paglaukane	K10,000.00
128	Bomai Apa	Gena Noglku — Paglaukane	Kl 0,000.00
129	Yer Apa	Gena Noglku — Paglaukane	Kl 3,000.00
130	Wamuna Bomai	Gena Noglku — Paglaukane	Kl 0,000.00
131	Ombo Ami Bomai	Gena Noglku — Paglaukane	IC 8,000.00
132	Peter Ande Gigimai	Gena Noglku — Paglaukane	IC15,000.00
133	Dombian Gigimai	Gena Noglku — Paglaukane	K20,000.00
134	Kaima Peter	Gena Noglku — Paglaukane	Kl 0,000.00
135	Willie Agleagle	Gena Noglku — Paglaukane	IC 7,000.00
136	Gawi Agleagle	Gena Noglku — Paglaukane	K 6,000.00
137	Koima Agleagle	Gena Noglku — Paglaukane	K 6,500.00
138	Kagl Agleagle	Gena Noglku — Paglaukane	K 6,200.00
139	Yer Umda	Gena Noglku — Paglaukane	Kl 0,000.00
140	Harry Kindin	Gena Noglku — Paglaukane	K 7,000.00
141	Gigimai Kuku	Gena Noglku — Paglaukane	Kl 0,000.00
142	Kawagle Kuku	Gena Noglku — Paglaukane	IC 5,000.00
143	Biana Baglme	Gena Noglku — Paglaukane	Kl 0,000.00
144	Mond Willie	Gena Noglku — Paglaukane	Kl 0,000.00
145	Alphonse Willie	Gena Noglku — Paglaukane	K10,000.00
146	Debra Peter Gideon	Gena Noglku — Paglaukane	Kl 0,000.00
147	Wenaimbu Deglbi	Gena Noglku - Paglaukane 220	K 5,000.00

148	NiglZ	Gena Noglku — Paglaukane	Kl 5,000.00
149	Winge Gabriel	Gena Noglku — Paglaukane	K10,000.00
150	John Kagl	Gena Noglku — Paglaukane	Kl 0,000.00
151	Roselyne Gigimai	Gena Noglku — Paglaukane	K 5,000.00
152	Elisabeth Gigimai	Gena Noglku — Paglaukane	K 7,500.00
153	Gona Gandi	Gena Noglku - Paglaukane	K10,000.00
154	Korai Willie	Gena Noglku — Paglaukane	Kl 0,000.00
155	Andrew Apa	Gena Noglku — Paglaukane	K10,000.00
156	Yer Wau	Gena Noglku — Paglaukane	K 7,000.00
157	Kanawi Komade	Gena Noglku — Paglaukane	I< 5,000.00
158	Wamuna Yaglpen	Gena Noglku — Paglaukane	K 4,000.00
159	Puglma John	Gena Noglku — Paglaukane	K 7,000.00
160	Kagl Taia	Gena Noglku — Paglaukane	K 4,000.00
161	Kambuglnoguwa Numabo	Gena Noglku — Paglaukane	K 5,300.00
162	Bomai Apa	Gena Noglku — Paglaukane	K 6,000.00
163	Apa Marias	Gena Noglku — Paglaukane	K 7,500.00
164	Gendi Kuku	Gena Noglku — Paglaukane	K 8,000.00
165	Ulanua Kagl	Gena Noglku — Paglaukane	K 8,500.00
166	Umba Kagl	Gena Noglku — Paglaukane	K10,000.00
167	Yet Kagl -	Gena Noglku — Paglaukane	K 5,000.00
168	Wau Michael	Gena Noglku — Paglaukane	K 5,500.00
169	Konia Baglme	Gena Noglku — Paglaukane	K 6,000.00
170	Waia Wamuna	Gena Noglku — Paglaukane	Kl 0,000.00
171	Wamuna William	Gena Noglku — Paglaukane	K 9,500.00
172	Noglai Yaglkops	Gena Noglku — Paglaukane	K 9,000.00
173	Wai Wamugl	Gena Noglku - Paglaukane	K 8,500.00
174	Baglme Wai	Gena Noglku — Paglaukane	K 7,400.00
175	Peter Wai	Gena Noglku - Paglaukane	K 6,000.00
176	Frank Gene	Gena Noglku - Paglaukane	K 7,300.00
177	Baglme Yuar	Gena Noglku - Paglaukane	K 7,800.00

178	Kawage Akepurkwa	Gena Noglku — Paglaukane	K 9,600.00
179	Baglme Kawagle	Gena Noglku — Paglaukane	K 5,700.00
180	Mondo Moiwo	Gena Noglku — Paglaukane	K 8,200.00
181	Kawage Kelly	Gena Noglku — Paglaukane	K 9,700.00
182	Mondo Kawagle	Gena Noglku — Paglaukane	Kl 0,000.00
183	Kulan Dombe	Gena Noglku — Paglaukane	K 8,100.00
184	Mun Kakin	Gena Noglku — Paglaukane	K 5,000.00
185	Gigimai Leo	Gena Noglku — Paglaukane	IC 8,000.00
186	Teine Leo	Gena Noglku — Paglaukane	K 6,300.00
187	Mogil Teine	Gena Noglku — Paglaukane	K 9,200.00
188	Kaima Dua	Gena Noglku — Paglaukane	K 8,900.00
189	Whagi Kaima	Gena Noglku — Paglaukane	IC 6,200.00
190	Kiangua Dua	Gena Noglku — Paglaukane	K 7,300..00
191	Wau Kianuga	Gena Noglku — Paglaukane	K 5,800.00
192	Onguglo Armstrong	Gena Noglku — Paglaukane	IC10,000.00
193	Stanley Ambane	Gena Noglku — Paglaukane	K 7,400.00
194	John Rai	Gena Noglku — Paglaukane	K 9,720.00
195	Kawagle Denbi	Gena Noglku — Paglaukane	IC 8,400.00
196	Baglme Kianuga Jr	Gena Noglku — Kamanegaumo	IC 8,000.00
197	Wau Thomas	Gena Noglku — Kamanegaumo	IC10,000.00
198	Aina Par	Gena Noglku — Kamanegaumo	K 9,100.00
199	Peter Aina	Gena Noglku — Kamanegaumo	K 9,000.00
200	Samuel Aina	Gena Noglku - Kamanegaumo	K 6,300.00
201	Kawagle Kipa	Gena Noglku — Kamanegaumo	K 8,900.00

202	Samuel Kipa	Gena Noglku — Kamanegaumo	K 9,000;00
203	Numambo Kawagle	Gena Noglku — Kamanegaumo	K 8,900.00
204	Wamuna Bomai	Gena Noglku — Kamanegaumo	Kl 0,000.00
205	Gigimai Kianugua	Gena Noglku — Kamanegaumo	Kl 0,250.00
206	Baglme Kianugua	Gena Noglku — Kamanegaumo	K 7,900.00
207	Raymond Aina	Gena Noglku — Kamanegaumo	K 8,100.00
208	Parak Pogo	Gena Noglku — Kamanegaumo	K 8,850.00
209	Bombar Pogo	Gena Noglku — Kamanegaumo	K 8,500.00
210	Gigimai Baglme	Gena Noglku — Kamanegaumo	K 8,450.00
211	Tony Bombar	Gena Noglku — Kamanegaumo	Kl 0,000.00
212	Wenabu Denbi	Gena Noglku — Kamanegaumo	K 5,000.00
213	Sinue Bundo	Gena Noglku — Kamanegaumo	K 2,500.00
214	Domyagl Piu	Gena Noglku - Kamanegaumo	K 5,500.00
215	Toi Koglkiya	Gena Noglku — Kamanegaumo	K 7,000.00
216	Koglkiwa Wamuna	Gena Noglku — Kamanegaumo	K 4,700.00

217	Demane Kaiglo	Gena Noglku — Kamanegaumo	K 6,200.00
218	Demane Wanuwa	Gena Noglku — Kamanegaumo	K 7,200.00
219	Waruwe Waim	Gena Noglku — Kamanegaumo	K 4,000.00
220	Kaiangua Kimbe	Gena Noglku - Kamanegaumo	K 5,300.00
221	Waine Kagl	Gena Noglku — Kamanegaumo	IC 3,300.00
222	Apa Aglai	Gena Noglku — Kamanegaumo	K 7,500.00
223	Gabriel Aglai	Gena Noglku — Kamanegaumo	IC 7,000.00
224	Kombukun Alfred Yaglkama	Gena Noglku — Kamanegaumo	IC 9,000.00
225	Peter Aglua Leo	Gena Noglku — Kamanegaumo	K 9,000.00
226	Kunagil Kolkia	Gena Noglku — Kamanegaumo	IC20,000.00

SUB TOTAL

K232,450.00

GRAND TOTAL

K1,649,130.00

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(b) Leo Kainam

The claim is based upon a police raid on a village in the Gembogl District of Simbu province on the 15th September 1995. The raid allegedly resulted in the death of one person, rape of two women, serious assault of 10 people and the willful destruction or theft of property belonging to 28 claimants. Thirty- seven plaintiffs altogether were listed in the Writ as suffering injury to the person or to property or both. Total loss of property claimed was PGK123,100.00.

Due to the Solicitor General's failure to file a Defence on time, the 37 plaintiffs obtained default judgment in August 1996. After that the matter remained dormant for over 5 years until 2001.

In May 2002 the Plaintiffs themselves set aside default judgment given in their favour in 1996. Application was made to amend Writ to include 77 new plaintiffs. Total damages rose to over PGK 2 million. Despite clear instructions from Simbu police given in 1996, the SG did not oppose any of these moves. In fact Mr. Mundua Kua of SG who was the action officer, consented to those court orders and signed on behalf of the SG.

On 11/10/02 an order was signed off by Hagen Registry official as made by the National Court (yet to be verified from court file) for the State to pay PGK 1.7 million in full and final settlement. Zacchary Gelu as SG signed a certificate of judgment also dated 11/10/02 which was sent off to finance requesting payment of judgment orders.

A. Does the matter fall within the Terms of Reference?

This matter falls under TOR No.s 1, 2, 3, 5, 8, (see attached copy of TOR) for the following reasons. Firstly the amount claimed is over K1.7 million and was paid out between 2003 and 2007. It involves consent judgment entered into between a private lawyer, Joe Wai and a junior lawyer from Solicitor General (SG) named Mundua Kua. Earlier in the history of the case J. Wai had obtained default judgment because other SG lawyers failed to file a Defence on time. Under TOR 8 the State should never have been made liable for K1.7 million and in fact liability resulted from fraudulent collusion between J. Wai, Mundua Kua and possibly someone in the Mt. Hagen National Court Registry.

B. Source of Information and Documentation

This brief comprises of facts and findings from the files and records of;

- The Solicitor-General's office (Most documents attached to this brief come from their file- SG 20/96)
- The National Court Mount Hagen Registry.
- The Department of Finance
- Evidence given to COI by Mr. Zacharry Gelu
- Evidence given to COI by Mr. Mundua Kua

C. Relevant Facts

The Matter

1. The matter commenced by way of a writ of Summons WS 531 of 1996 dated 03rd June 1996 and served on the State on 04th June 1996

(Exhibit SG 1). There is no indication of date it was filed although there is a court stamp affixed to the document. The Writ claims damages for injuries suffered from an illegal police raid on a village in the Gembogl District of Simbu province on the 15th September 1995. The raid allegedly resulted in the death of one person, rape of two women, serious assault of 10 people and the willful destruction or theft of property belonging to 28 claimants. Thirty- seven plaintiffs altogether were listed in the Writ as suffering injury to the person or to property or both. Total loss of property claimed was PGK123,100.00.

On the 16th July 1996, Mr. Colin Makail, then lawyer of SG office, wrote to Joe Wai asking for a 60 day extension of time within which to file a Defence (see exhibit SG 2). On the same day Mr. Makail wrote to the Provincial Police commander of Simbu seeking instructions (refer exhibit SG 3).

A Notice of Intention to defend (NOID) was filed by SG on the 02nd of August 1996, about a month after the 30 day time limit within which to file NOID (see exhibit SG 4).

By a letter dated 06/08/96, Joe Wai replied to Mr. Makail's letter of 16/07/96 noting the late filing of the NOID. He warned that if no Defence was filed by 09th August 1996 (3 days hence), he would seek default judgment. As noted from letter (Exhibit SG 5) the letter was received by SG on the 07th August 1996 and marked as urgent. Nothing seems to have been done in spite of that. Default judgment was obtained on 15th August 1996. The Court order was signed by Lawrence Newell as Registrar, but note that the

document is headed "In the National Court of Justice at Kundiawa" (see exhibit SG 6). There is also no notation on the document to indicate whether it was filed and entered. It is difficult to tell where exactly the court sat, if it sat at all, until the court file is perused.

Almost two months after default judgment Simbu police faxed 22 pages of instructions clearly denying the allegations made against police of wholesale destruction to property and rape and unlawful killing of several people as claimed. John Nuglai a policeman who went on the raid gave a sworn statement attesting to the following [see exhibit SG 8(3)]. That he was the investigating officer of a complaint lodged by a cigarette company salesman who had been held up and his cargo of smokes as well as his company vehicle had been stolen. Acting on information obtained a search warrant and then led a team of regular as well as auxiliary police on a raid on the plaintiffs village. They found cigarettes and parts of the stolen vehicle which had been stripped and stored in various houses. He admitted to burning down of 4 houses in which stolen car parts had been stored. He denied destroying other property on the scale alleged and the claims of women being raped or killed. Also faxed were District Court documents which showed that several of the plaintiffs had been charged by police and had subsequently pleaded guilty in the Court to charges of being in possession of stolen property [see exhibit 8(21) to 8(25)].

Nothing was done by SG after receipt of those unambiguous instructions i.e., if it were at all possible to seek to set aside default judgment even if it had been obtained seven weeks earlier. In fact the case lay dormant for over five years.

On 04/07/01 Joe Wai wrote to Mr. John Kawi who was then Solicitor General seeking an early trial date for assessment of damages [refer exhibit SG 9]. Various letters passed between the two until an agreed Notice to set down for trial was signed by both of them. Joe Wai later sent a copy of the Notice to SG but again the document had not been filed, nor did it have any court stamp on it [refer exhibit SG12]. This Notice set the matter down for trial "generally" and was received by SG on 29/10/01.

No trial for assessment of damages was ever conducted. Instead Joe Wai wrote to SG by letter dated 12/03/02 seeking out of court settlement on a number of his matters including Leo Kainam. [refer exhibit SGI 3].

Two months later on 24/05/02 Wai filed a Motion at the National Court seeking firstly to set aside default judgment given in favour of the plaintiffs 15/08/96. Secondly it sought orders that the plaintiffs be given seven days to amend particulars of damages. The defendants to be given 60 days to file a Defence [refer exhibit SG 14].

In support of the above Motion Joe Wai filed an affidavit sworn on 20/05/02 and filed on 24/05/02 [refer exhibit SG 15]. He alluded to his "discovery" of 77 new plaintiffs who had suffered damage. At paragraph 5 and 6 he says that after he found these new plaintiffs he entered into discussions with Mundua Kua of SG office with a view to amend the particulars of damage to include the 77 new claimants. He said that on the 20th of May 2002, after a month of talks, agreement was reached on a draft consent order.

Annexed to Joe Wai's affidavit as Annexure "A" is the draft consent order referred to above [see exhibit SG 16]. It bears the signature of Mundua Kua who signed on behalf of the SG on 20/05/02 and Joe Wai. Note that Joe Wai signed on the 24th May 2002 which is the same day the Notice of Motion and Affidavit in support were filed. Also filed is an affidavit in support sworn by one of the new claimants a Mr. Paul Nirongo [refer exhibit SG 17]. Nirongo swears that he was one of 77 others who had delegated Leo Kainam to fly to Moresby and engage a Lawyer on their behalf. He said when Wai Lawyers approached them to get affidavits assessing damages they realized their names were not on the WS. He does not say **how J. Wai knew to approach him in particular and when this approach was made.**

Leo Kainam also swore an affidavit in support [exhibit SG18]. Kainam swore that his tribe authorized him to engage a lawyer to claim against the State. When Mr. Wai visited them later to obtain affidavits proving damages ... "we told him there were 77 other members ...not included." Kainam also annexed to his affidavit a '**Consent Authority** (undated, not filed) that lists 114 Plaintiffs [refer exhibit SG 19]. All the plaintiffs signed or put their marks on the **25th and 26th May 2002**. Please note that that would **postdate** this affidavit (sworn 23/05/02 and filed 24/05/02) by several days. Please also note that the signatures beside the names are very similar in style and may have been signed by the same person.

A court order was purportedly obtained by Wai lawyers on 04th June 2002 in the terms of the draft judgment order referred to in paragraph 1 above. It was signed by someone on behalf of the

Registrar and bears the Court stamp of the Mt. Hagen National Court [refer exhibit SG 20].

16. *On the 04th of June 2002 a Notice of Amended Particulars was filed [refer exhibit SG 21]. Document reads "pursuant to the Order of Court made on 4 June 2002, the particulars of damage endorsed on the Writ of Summons No. 531/96 was amended by inserting at the end of paragraph 10 the words and figures appearing in Schedule 1 annexed(sic) to this Notice." The Schedule lists names of 114 Claimants and the new damages. Note that no such Order has so far been sighted.*
17. A Minute dated 06th June 2002 was sent by Mr. Buri Ovia who was the resident SG lawyer in Mt. Hagen to John Kumura who was the Acting SG at the time [refer exhibit SG 22] . He notified Kumura of the orders referred to above.
18. Joe Wai next sent a letter dated 30th June 2002 to SG, attention Mr. Mundua Kua enclosing 114 affidavits all dated 24/06/02 [refer exhibit SG 24]. They all attest to wrongful acts done by police to them. All the Affidavits are the same except for a few changes here and there. Two new women swear to being raped and two extra deaths.
19. Belatedly John Kumura filed a Defence on the 19th July 2002 [exhibit SG 25]. I say this because by this time Kumura would or should have been aware of the Minute sent to him by Mr. Ovia [exhibit SG 22] which advised of orders taken out on 04th June 2002.
20. Mr. Kumura then scribbled a note to Mundua Kua of all persons, instructing him to prepare a Deed of Settlement and write to Joe Wai

21. **offering to settle the claim for PGK 150,000. Mr. Kua would have been well aware at this time that he had consented to orders that dramatically increased the State's liability way above PGK 150,000, so his following actions would seem to be almost farcical. Based on this instruction a letter was drafted (presumably by Mr. Kua) and signed by Zacchary Gelu who appears to have been SG at that time. The letter [exhibit SG 27] dated 06th August 2002 was then sent to Mr. Wai.**
22. Of course Joe Wai rejected the offer of PGK 150,000. He wrote back to SG on 18th September 2002 [exhibit SG 28] reminding SG that according to the amended particulars of damages the damages had increased to PGK2,943,898.00. He made a counter offer of PGK1,700,000.00 in full and final settlement.
23. Wai then filed Notice of Motion on 27/09/02 seeking orders that the State pay PGK 1.7 million [see exhibit SG 29]. The Notice was set for hearing on 11th November 2002 at 9.30 am at Mt. Hagen as it bears court seal of Mt. Hagen National Court. There is no record to show whether the SG appeared and whether the Motion was opposed.
24. It seems as if the Motion was not opposed because on 11th October 2002 an order was purportedly made [see exhibit SG 30] granting orders as sought in the Motion to pay PGK 1.7 million. The order was filed and entered on 14/10/02 and stamped with the Mt. Hagen National Court seal. The person who signed bears the same signature as the one who signed orders setting aside default judgment and allowing for amendment of particulars of damages.

25. As further confirmation that the Motion was not challenged in court, a certificate of judgment dated 11th October 2002 (date of motion) was signed by Mr. Zacchary Gelu on behalf of the State [see exhibit SG 31]. This certificate of judgment is signed off on behalf of the Registrar by the same person who signed the two preceding court orders. His title is Deputy Registrar. This fact alone is suspicious as according to Mr. Augerea, there are no Deputy Registrars in any center outside Waigani and never have been.

26. Zacchary Gelu next wrote to Mr. Kambanei requesting payment of PGK 1.7 million attaching court order of 11/10/02 and certificate of judgment dated same day [see exhibit SG 32]. The first cheque number 714554 in the amount of PGK180,000 was issued on 12/03/03. Finance Department cashbook (see below) shows that the amount was paid in full.

E. Evidence iven to the Commission

(i) Mundua Kua

Mr. Mundua Kua gave evidence first and said that yes he had carriage of the matter but he denied any wrong doing. Instead he said that Mr. Joe Wai and the principal Plaintiff, Leo Kainam and a third person called Paul Niriongo were regularly seen by him going and coming from Mr. Zacchary Gelu's office. He said in sworn evidence also that he had filed a Defence after the Plaintiffs had set aside their own default judgement and sought further Orders. Mr. Joe Wai had confronted him in his office and told him that ... "You have spoilt

In evidence, Mr. Kua denied ever appearing at Mt. Hagen during his time as lawyer with the SG office because as he explained, there was a lawyer based in the Hagen SG office. Most of the Court Orders were entered in the Mt. Hagen National Court. This explanation would to some degree tend to lend credence to Mr. Kua as he could not possibly have been in a position to influence matters far away from his normal work place which was Waigani.

Zacharry Gelu

In evidence Mr. Gelu flatly denied having any knowledge of this matter and lay the blame squarely on Mr. Mundua Kua. He denied seeing Mr. Wai, Mr. Leo Kainam or Mr. Paul Niriongo in connection with the Leo Kainam matter. He also denied signing consent Orders and said his signature was forged.

National Court Registry

After repeated follow up with the National Court Registry, the only documentation that was provided were new Affidavits filed after Default judgment was entered and the damages were re-adjusted to cater for the 77 new plaintiffs. Other than that the file has not been found and so the Col cannot make any conclusive findings on whether there were any genuine Court Orders made to set aside the 1995 default judgment and to allow for the inclusion of 77 new claimants.

Mr. Joe Wai.

At the time of hearing Mr. Joe Wai had already died. His practice had since been taken over by his daughter, Maryanne Wai. Ms. Wai did not contact the Col to clear her fathers name, even though the matter was well publicized in the Newspaper (see attached clippings). There

is evidence on file that she managed to collect all outstanding amounts from the Finance department after her Fathers demise.

PAYMENTS BY FINANCE

As shown below full payment was made out of properly appropriated votes 207- which are for Court case payments and for payment of Arrears. The amount exceeds PGK 1.7 million, but that is explained by the fact that a cheque for PGK300,000 had been cancelled after it had been paid into the wrong lawyers Trust account, i.e., that of Gadens lawyers instead of Joe Wai lawyers.

SCHEDULE OF PAYMENTS TO LEO KAINAM

Schedule of payments made to Leo Kainam:
COI File No. 45

Date	GE/LPOCA Account Drv	Function Act	Item Payee	Details	Ty	Cheque NeOebits Reference (Receipts) (Payments)	Credits (Payments)	Yearly Total Prmtt
1/29/2003	890967	207	4201 2107	135 Leo kainam 8 113 0	Pymt ol O/S C/Order	CO	710429	180,000.00
3/12/2003	698275	207	4201 4123	135 Leo Kainam & 1130	Reimbof CHO No: 710	CO	714554	180,000.00
7/29/2003	925303	207	4201 2107	135 Leo Kainam 81130	Pmt o/s c/order WS#5	CO	728763	:K->000.00
11/30/2004	19974	207	4201 2107	135 Leo Kainam & 113 0	O/S C/O WS No.531 of	CO	796532	100,000.00
12/30/2004	114595	207	4201 2107	135 Leo Kainam & 113 0	P/Pmt lor O/s c/o	CQ	800182	190,000.00
5/27/2005	1033361	207	4201 2107	135 Leo Kainam	Replacement of Chq 0	CO	811735	100,000.00
6/7/2005	1034873	207	4201 2107	135 Leo Kainam	Pmt for o/s c/order	CQ	812724	:100,000.00
3/23/2005	1023643	207	4201 2107	135 Leo Kainam & 113 0	Pmt for o/s certi or	CQ	806377	150,000.00
3/23/2005	1023643	207	4201 2107	135 Leo Kainam <1130	Pmt for o/s certi or	CO	806377	>00,000.00
5/12/2005	1032042	207	4201 2107	135 Leo Kainam & 1130	Replacement of Chq#B	CO	810154	100,000.00
7/4/2006	1081043	207	4201 2107	135 Leo Kainam 8 1130	O/S C/Order Pmt (WS	CO	839496	100,000.00
8/11/2006	1086375	207	4201 2107	135 Leo Kainam 8113 0	O/S SG 20/96	CQ	841921	:<n>.00
							0.00	<u>2330,000.00</u>
12/31/2006	1106888	207	4201 2107	135 Leo Kainam & 113 0	Pmt C/Order WSB31/9	CQ	855210	100,000.00
								400,000.00

D. Findings

> The Solicitor General (SG) was negligent in not filing Notice of intention to defend within 30 days after service of Writ.

y The SG was even more negligent in not opposing the move by Wai to increase the number of plaintiffs through the back door well after 6 years had expired making the case for the 77 new plaintiffs statutorily barred under the *Fraud and Limitations Act*.

- > Alternatively, the SG was not able to oppose the motion to amend particulars of damage because of collusion by its own action officer, Mr. Mundua Kua.
 - > Mir. Mundua Kua as a junior lawyer did not have the authority to agree to and sign consent judgment on behalf of the Solicitor general and the State.
 - > The addition of 77 new plaintiffs was patently false. Where were they from 15th September 1995 to 2002? This assertion is supported at the end where some Plaintiffs complained that Leo Kainam did not distribute the money fairly or at all.
- y Alternatively, the SG was not able to oppose the motion to amend particulars of damage because of collusion by the action officer of SG, Mr. Mundua Kua or Mr. Zacchary Gelu or both in colloboration.
- ^ There may have been assistance given to the perpetration of this bogus claim by an official in the Mt. Hagen Registry or by someone with access to the National Court stamp.

COMPLIANCE ISSUES

- 1) There was breach of section 61 of the *Public Finance (Management) Act* when Ministerial approval was not sought before Zacchary Gelu signed certificate of judgment.
- 2) There is no section 5 Notice under the *Claims by and against the State Act 1996*, on file. This Writ was filed in the same Month that the Claims Act came into force, i.e., June 1996.

- 3) The addition of 77 new plaintiffs was done 7 years after the cause of action arose in September 1995. The new plaintiffs were added on in May 2002. This is not allowed by section 16 (1) of the *Statute of Frauds and Limitations Act 1998*.

Recommendations

1. That Mundua Kua be referred to the Fraud squad for further investigations.
2. That Mr. Zacchary Gelu also be referred to the Fraud Squad for further investigation.
3. That recovery action is taken against the firm of Wai and Company lawyers after purported judgment is set aside as being fraudulent.
4. Something be done to prevent such negligence by the Solicitor General's office in not filing NOID and Defence on time. Perhaps legislation can be passed to increase the time limitation of 90 days or three months within which to file Defence to 180 days or six months taking into account remote locations like Simbu province and the difficulty SG lawyers and the police have in taking instructions.
5. The Solicitor General's office becomes more proactive in obtaining instructions from the Police in a timely manner. It is suggested that the Solicitor General's office go straight to the Provincial Police Commanders for their Instructions as soon as a section 5 notice is served instead of dealing with the Police Head Quarters and its legal section.

6. That the National Court Registry tighten up on the security and use of National Court Stamps. Mr. Augerea made several recommendations in his evidence and these should be supported.

TABLE OF DOCUMENTS TO BE TENDERED

No	Exhibit	Description	Comments
1	SGI	WS 531/96	No indication of date filed, but is dated 3/6/96 and was served on SG on 4/6/9
2	SG 2	SG Letter (16/7/96)	Written by C. Makail to J. Wai asking for extension of 60 days within which to file Defence.
3	SG 3	SG Letter (16/7/96)	From C.Makail to PPC Simbu seeking instructions
4	SG 4	NOID	Notice of Intention to Defend filed by SG on 2/8/96
5	SG 5	J.Wai Letter (6/8/96)	To SG noted NOID and warned that if no Defence filed by 9/8/96 he would seek Default judgment.
6	SG 6	DEFAULT JUDGMENT	Obtained by J.Wal on 15/08/96. Damages to be assessed.
7	SG 7	Letter (26/8/96)	From Police lawyer to SG advising that he was in the process of obtaining instructions to defend case.
8	SG 8(1) to 8(25)	25 page Fax from PPC Simbu to SG sent on 10/10/96	Various affidavits deny extent of damages claimed. Also contain District Court documents showing criminal charges laid against several plaintiffs (who were captured during the raid complained of), to which they pleaded guilty.
9	SG 9	J. Wai Letter to	Refers to discussion between Wai And John

		SG (4/7/01)	Kawi (then SG) to obtain earliest possible trial date for assessment of damages.
10	SG 10	J.Wal Letter to SG (4/9/01)	Query whether matter should be listed for trial on 10/09/01
11	SG 11	Letter (08/1/01)	From Assistant Registrar Hagen to Wai advising that both parties had to sign Notice to set down for Trial before matter could be placed on civil list.
12	SG 12	NOTICE TO SET DOWN FOR TRIAL	On 29/10/01 SG received copy of Notice (undated, not filed) to set down for trial 'generally'.
13	SG 13	J Wai Letter to SG (12/03/02)	J. Wai asked SG to consider out of court settlement for a number of his cases against the State including WS 531 of 1996.
14	SG 14	Notice Of Motion Filed on 24/05/02,	Plaintiff sought orders that 1) Default Judgment obtained on 15/08/96 be set aside, 2) Plaintiffs be given 7 days to file their amended particulars of damages.
15	SG 15	Affidavit in Support - J.Wal, sworn 20/05/02 and filed 24/05/02	Wai alludes to the discovery of 77 new plaintiffs who had also suffered damages. Says entered into discussion with Mundua Kua of SG in order to amend particulars of damages to include 77 new plaintiffs.

16	SG 16	Draft Consent Orders	Referred to above. Note that Mundua Kua signed as Solicitor General. Note also that the date this was signed was on 24/05/02, the same date as J. Wal's Affidavit, the Notice of Motion and affidavits in support listed below.
17	SG 17	Affidavit of Paul Niriongo dated 24/05/02	One of the new Plaintiffs.

18	SG 18	Affidavit of Leo Kainam sworn on 23/05/02 and filed 24/05/02	Affidavit in support of Motion. Kainam swore that his tribe authorized him to engage a lawyer to claim against the State. Affidavit by several days.
19	SG 19	Consent and Authority	Annexed to Leo Kainam's Affidavit (above).
20	SG 20	Court Order	Dated 4/6/02 and entered 5/6/02 in terms stated in the draft consent orders
21	SG 21	Notice of Amended Particulars of Damage (Filed 4/6/02)	Document reads " <i>pursuant to the Order of Court made on 4 June 2002...etc</i> ". The Schedule lists names of 114 Claimants and the new damages claimed.
22	SG 22	Minute of 6/6/02	Written by Mr. Buri Ovia, the resident SG lawyer in Hagen to John Kumura advising that

			Orders had been granted in terms of the consent Orders.
22	SG 23	J. Wai Letter to SG	Attention Mundua Kua, cover letter attaching 114 Affidavits all dated 24/06/02, attest to the wrongful acts of the police raiding party. Two extra deaths and two more women swear to being raped.
23	SG 24 (1) TO 24(114)	114 Affidavits collated in two books (No. 1 & 2)	Referred to above. The three page affidavits are all almost exactly the same except for slight variations made here and there.
24	SG 25	DEFENCE filed on 19/07/02	By John Kumura (A/SG) even when he was fully aware that 'Consent' Orders had already been granted.
25	SG 26	Hand written note of 30/07/02	Scribbled note by Kumura? To Mundua Kua instructing him to prepare Deed of Settlement and write to J.Wal offering to settle for K1 50,000.00.
26	SG 27	SG Letter to J.Wal of 06/08/02	Letter signed by Z. Gelu offers to settle claim at K1 50,000.00 inclusive of all heads of damages, interest and cost. Action seems to be a sham, an attempt to make it look like efforts had been made to protect the interest of the State.
27	SG 28	J. Wai letter to	Rejects offer of K150, 000.00 and points out

		SG of 18/09/02	that new damages as amended total K2,943,898.00 but is willing to settle at K1,700,000.00.
28	SG 29	Notice of Motion filed 27/09/02	Motion seeking orders that the State pay K1,700,000.00 in full and final settlement.
29	SG 30	Court Order dated 11/10/02	Court Order signed on behalf of the Registrar ordering State to pay K1,700,000.00. Note, this is yet to be verified from the WS file.
30	SG 31	Certificate of Judgment filed 14/10/02	Signed by Deputy Registrar (same signature as above) on 11/10/02 and signed by Z. Gelu as A/SG on the same date.
31	SG 32	Gelu letter to Kambanei 08/11/02	Cover letter signed by Gelu to Kambanei requesting payment of K1.7 million. Attached as supporting documents were Court Order of 14/10/02 and Certificate of Judgment dated 14/10/02.
32	SG 33	Letter by Maryanne Wai to SG	Ms Wai (Joe Wal's daughter?), wraps things up in this letter to SG advising of payments received.
33	FD 34	Cheque No. 714554	Dated 12/03/03. First Cheque paid in amount of PGK180,000.00
34	FD 35	Cheque 722456	Dated 30/05/03. Part payment of PGK100,000.00.

35	FD 36	Cheque 728763	Dated 29/07/03 for PGK30,000.00.
36	FD 37	Cheque 796532	Dated 30/11/04 for PGK100,000.00

37	FD 38	Cheque 812724	Dated 07/06/05 for PGK200,000.00
38	FD39	Cheque 839496	Dated 04/07/06 for PGK100,000.00
39	FD 40	Cheque 855210	Dated 31/12/06 for PGK100,000.00
40	FD 41	Letter from Mileng Lawyers to SG	Letter dated 02 September 2005 complains of Leo Kainam not distributing payments equitably. Alleged to have fraudulently collected cheques directly from Finance and kept all the proceeds.
41	FD 42	Finance cash book extract	Extract of payments made to Leo Kainam

APPENDIX "A" (LIST OF PLAINTIFFS)

	NAME	DATE SWORN	DATE FILED
1	Leo Kainam	24/06/02	25 / 06 / 02
2	Joseph Onguglo	24 / 06 / 02	25 / 06 / 02
3	Peter Kagl	24 / 06 / 02	25 / 06 / 02 •
4	John Gigmai	24 / 06 / 02	25 / 06 / 02
5	Josepha Karka	24 / 06 / 02	25 / 06 / 02
6	Tine Umba	24 / 06 / 02	25 / 06 / 02
7	Bare James	24 / 06 / 02	25 / 06 / 02

8	Umba Gorua	24 / 06 / 02	25 / 06 / 02
9	Komsen Dru	24 / 06 / 02	25 / 06 / 02
10	Bare Mamba	24 / 06 / 02	25 / 06 / 02
11	Gendwena Michael	24 / 06 / 02	25 / 06 / 02
12	Andrias Danga	24 / 06 / 02	25 / 06 / 02
13	Aloise Dru	24 / 06 / 02	25 / 06 / 02
14	Kumo Gorua	24 / 06 / 02	25 / 06 / 02
15	Bare Maslai	24 / 06 / 02	25 / 06 / 02
16	Kugl Maria	24 / 06 / 02	25 / 06 / 02
17	Gande Takai	24 / 06 / 02	25 / 06 / 02
18	Philip Kom	24 / 06 / 02	25 / 06 / 02
19	Klepas Kumo	24 / 06 / 02	25 / 06 / 02
20	Onguglo Andekumo	24 / 06 / 02	25 / 06 / 02
21	Joseph Koi	24 / 06 / 02	25 / 06 / 02
22	Gumia Alphones	24 / 06 / 02	25 / 06 / 02
23	Bare Teine	24 / 06 / 02	25 / 06 / 02
24	William Siune	24/06/02	25 / 06 / 02
25	Peter Nime	24 / 06 / 02	25 / 06 / 02
26	Ignas Gorua	24 / 06 / 02	25 / 06 / 02
27	Bare Kukagl	24/06/02	25 / 06 / 02
28	Peter Gigmai	24 / 06 / 02	25 / 06 / 02
29	Peter Kaglmavi	24 / 06 / 02	25 / 06 / 02
30	Bonny Kaiglo	24 / 06 / 02	25 / 06 / 02
31	Sugma Yu	24 / 06 / 02	25 / 06 / 02
32	Philip Kom (snr)	24 / 06 / 02	25 / 06 / 02
33	John Wamuna	24/06 / 02	25 / 06 / 02
34	Marta Penda	24 / 06 / 02	25 / 06 / 02
35	William Siune Kutne	24 / 06 / 02	25 / 06 / 02
36	Kilen Swaire	24 / 06 / 02	25 / 06 / 02
37	Bare Alsinpa	24 / 06 / 02	25 / 06 / 02

38	Kuange Dru	24 / 06 / 02	25 / 06 / 02
39	Kua Bolkon	24 / 06 / 02	25 / 06 / 02
40	Gende Klepas	24/06 / 02	25 / 06 / 02
41	Joseph Sogan	24 / 06 / 02	25 / 06 / 02
42	Mond Kolkia	24 / 06 / 02	25 / 06 / 02
43	Paul Masta	24 / 06 / 02	25 / 06 / 02
44	Gande Gumia	24 / 06 / 02	25 / 06 / 02
45	Kilen Warka	24 / 06 / 02	25 / 06 / 02
46	John Takai	24 / 06 / 02	25 / 06 / 02
47	Peter Tora	24 / 06 / 02	25 / 06 / 02
48	Philip Dru Komkuange	24 / 06 / 02	25 / 06 / 02
49	Moro Takai	24 / 06 / 02	25 / 06 / 02
50	Warka Kuglame	24 / 06 / 02	25 / 06 / 02
51	Kmbugl Bare	24 / 06 / 02	25 / 06 / 02
52	Takai Peter	24 / 06 / 02	25 / 06 / 02
53	Kongo Kindagl	24 / 06 / 02	25 / 06 / 02
54	Onguglo Caspar	24 / 06 / 02	25 / 06 / 02
55	Marka Awi	24 / 06 / 02	25 / 06 / 02
56	Angai Bare	24 / 06 / 02	25 / 06 / 02
57	Yu Sugma Kuatowa	24/06 / 02	25 / . 06 / 02
58	Philip Sugma	24 / 06 / 02	25 / 06 / 02
59	John Mombo Tisa	24 / 06 / 02	25 / 06 / 02
60	Kugl Bau	24 / 06 / 02	25 / 06 / 02
61	John Kuno Konduagle	24 / 06 / 02	25 / 06 / 02
62	Awi Adrias	24 / 06 / 02	25 / 06 / 02
63	Dokor Andamago	24 / 06 / 02	25 / 06 / 02
64	Philip Kunma	24 / 06 / 02	25 / 06 / 02
65	Kembir Alphonse	24 / 06 / 02	25 / 06 / 02
66	Umba Ingogo	24 / 06 / 02	25 / 06 / 02
67	Degba Biri	24 / 06 / 02	25 / 06 / 02

68	Dre Tasicia Simon	24/06 / 02	25 / 06 / 02
69	Kumo Tolai	24 / 06 / 02	25 / 06 / 02
70	Ambane Joseph	24 / 06 / 02	25 / 06 / 02
71	Polko Paglau	24 / 06 / 02	25 / 06 / 02
72	Awiamb Gaglu	24 / 06 / 02	25 / 06 / 02
73	Martha Plawa	24 / 06 / 02	25 /06 / 02
74	Linus Kuglame	24 / 06 / 02	25 / 06 / 02
75	Worn Waugla	24 / 06 / 02	25 / 06 / 02
76	Kumo Gigmai	24 / 06 / 02	25 / 06 / 02
77	Peter Kumuno	24 / 06 / 02	25 / 06 / 02
78	Maine Gugl	24 / 06 / 02	25 / 06 / 02
79	Gambugl Kindagl	24 / 06 / 02	25 / 06 / 02
80	Peter Madime	24 / 06 / 02	25 / 06 / 02
81	Oglam Kuglame	24/06 / 02	25 / 06 / 02
82	Kimde Aglai	24 / 06 / 02	25 / 06 / 02
83	Mondo Braun	24 / 06 / 02	25 / 06 / 02
84	Mary Ambane	24/06 / 02	25 / 06 / 02
85	Morris Onguglo	24 / 06 / 02	25 / 06 / 02
86	Rose Kamb	24/06 / 02	25 / 06 / 02
87	Angai Merawo	24 / 06 / 02	25 / 06 / 02
88	Dru Penda	24 / 06 / 02	25 / 06 / 02
89	Mond Lucas	24 / 06 / 02	25 / 06 / 02
90	Konam Gorua	24 / 06 / 02	25 / 06 / 02
91	Steven Noglai	24 / 06 / 02	25 / 06 / 02
92	Philip Gene	24 / 06 / 02	25 / 06 / 02
93	David Yama	24 / 06 / 02	25 / 06 / 02
94	Daka Waugla	24 / 06 / 02	25 / 06 / 02
95	Komson Kembra	24 / 06 / 02	25 / 06 / 02
96	Yuana Saidor	24/06 / 02	25 / 06 / 02
97	Korai Kainam	24 / 06 / 02	25 / 06 / 02

98	Kilen Gagande	24 / 06 / 02	25 / 06 / 02
99	Emma Kombukun	24 / 06 / 02	25 / 06 / 02
100	Gambagl Kamb	24 / 06 / 02	25 / 06 / 02
101	Kama Nigl	24 / 06 / 02	25 / 06 / 02
102	Awi Dorme	24 / 06 / 02	25 / 06 / 02
103	Paul Onguglo	24 / 06 / 02	25 / 06 / 02
104	Baiya Kalpi	24 / 06 / 02	25 / 06 / 02
105	Enni Gande	24 / 06 / 02	25 / 06 / 02
106	Bundo Gende	24 / 06 / 02	25 / 06 / 02
107	Waugla Korai	24 / 06 / 02	25 / 06 / 02
108	Kutna Asue	24 / 06 / 02	25 / 06 / 02
109	Elina Gambugl	24 / 06 / 02	25 / 06 / 02
110	Mond Auno	24 / 06 / 02	25 / 06 / 02
111	Nilkutna Onguglo	24 / 06 / 02	25 / 06 / 02
112	San Dux	24 / 06 / 02	25 / 06 / 02
113	Parak Kama	24 / 06 / 02	25 / 06 / 02
114	Paul N Kuange	24 / 06 / 02	25 / 06 / 02

(c) Andeka Tepoka

A. LAWYERS

y For Plaintiffs: Simon Norum of Norum Lawyers

> For Defendants: Office of Solicitor General & Attorney General

- 1) Mr. Francis Damem as SG
- 2) Mr. Anlus Iwais as lawyer having carriage of matter
- 3) Mr. Michael Gene as Secretary & AG
- 4) Mr. John Kumura as Acting SG &
- 5) Mr. John Kawias SG

B. SOURCE OF DOCUMENTS:

- > Department of Finance (DoF)
- > District Court Registry &
- > National Court Registry

C. BACKGROUND

1. This is a claim by a total of 130 individual complainants who through their Lawyer, Mr. Norum lodged their respective claims against the Defendants which were dealt with jointly. The Complainants alleged that on 30th of July 1991, the First Defendant and other Policemen went into their village called Kulimbu in the Baiyer River District, WHP and without any reason assaulted them and destroyed their properties such as houses, trade stores and even killed domestic animals.
2. Following the raid, the Complainants then filed Court Proceedings: DC 33-167 of 1997 in the Mt Hagen District Court on or about 20 May 1997 through Simon Norum Lawyers.
3. It seems that the Complaints were then set down for hearing on 27 June 1997, but due to the non-appearance by the Defendants Lawyers, Mr. Norum applied for leave to proceed with the hearing ex parte which the Court granted and adjourned to 15 July 1997 for hearing.
4. The Court then proceeded to hear all the claims on 15 July 1997 and made a ruling on the same date in favour of all the Complainants allowing judgement on each of the claims in full as claimed. (D/C 5).

5. Except for the amount claimed by each Plaintiff, and the amount awarded as exemplary damages, which varied, the others Orders in each of the 130 claims are same. These Orders are: (DC 6 & 7)
 - a) Judgment entered in favor of the Complainant in the sum claimed to be paid by the Second Defendant (State)
 - b) Exemplary Damages at each respective amount claimed
 - c) Interest at 8% from date of issuing of summons to the date of Judgment. (20/03/97-15/07/97)
 - d) Costs of the Court proceedings to be taxed and
 - e) Judgment sum, Exemplary Damages, Interest plus costs to be taxed and shall be paid by the State forthwith.

6. See Schedule prepared by the Solicitor General's office for a list of all the claimants and their respective claims. (FD 13)

7. The District Court also issued Certificates of Judgment at the same time the orders were entered. (DC 6 & 7)

8. Altogether, the District Court has awarded a total sum of IC1,424,496.40. This amount comprises of: IC943,281.00 being total principal judgement, K25,083.00 being total interest awarded at 8% and K456,281 being costs.

LIST OF DOCUMENTS.

<i>NO.</i>	<i>DATE</i>	<i>DOCUMENT</i>	<i>COMMENTS</i>
DC1	20 March 1997	Summons To A Person Upon Complainant in DC	Filed by Simon Norum Lawyers in Mt Hagen

		33 of 1997	
DC2	20 March 1997	Summons To A Person Upon Complaint in DC 34 of 1997	Filed by Simon Norum Lawyers in Mt Hagen
DC3	14 July 1997	Affidavit of Service	Sworn by Joe Kenken and filed by Simon Norum Lawyers for service of Summons on the Second Defendant at the Solicitor General's office
DC4	27 June 1997	DC Magistrate's Endorsements	Handwritten endorsement by DC Magistrate Appa granting leave to Complainants to proceed with claims against the Defendants
DC5	15 July 1997	DC Magistrate's published Decision	Of Mr. Appa of hearing on 15 July 1997 granting orders in favour of Complainants
DC6	15 July 1997	Order	Formal orders made 15 July 1997 entered 23 July 1997 in favor of Complainant for the sum of K10,000.00 in DC 33 of 1997
DC7	15 July 1997	Order	Formal Orders made 15 July 1997 entered 23 July 1997 in favour of Complainant for the sum of K1 0,000.00 filed by Simon Norum

DC8			Lawyers in DC 34 of 1997
	18 November 1997	Letter	From Francis Damem Solicitor General to Finance Secretary enclosing copies of Orders of 15 July 1997 requesting cheque to be raised in settlement of the claims;

DC9	29 October 1997	Notice of Appeal	Filed by Solicitor General Francis Damem on behalf of State
FD10	9 February 1998	Letter	From Simon Norum to Secretary for Finance requesting cheque to be raised to Max Umbu Pili;
FD11	14 July 2000	Letter	From Michael Gene Secretary and Attorney General of Dept. of Justice & Attorney General requesting settlement of judgment debt;
FD12	26 July 2000	Letter	From John Kumura Acting Solicitor General to Secretary for Finance advising he had no objection to cheque being paid to Max Umbu Pili
FD13		Schedule	Prepared by the Solicitor General's Office setting out names of

			Claimants and the amounts claimed by each claimant.
FD14	11 January 2002	Letter	From John Kawi Solicitor General to Max Umbu Pili enclosing cheque in the sum of K668,215.49 as full and final settlement of the judgment debt.
FD15	12 March 2002	Letter	To Simon Norum regarding Rote Rapura and 47 others o/s payments (annexure to an affidavit by Rote Rapura)
FD16	21 March 2002	Letter	From John Kawi Solicitor General to Mr. Yele Iamo Finance Secretary regarding payment of post judgment interests in the sum of K417,841.49
NC17	20 December 2002	Writ of Summons No. 1668 of 2002	Filed by Kunai & Co. Lawyers against Simon Norum and Max Pili
NC18	7 October 2003	Order	In OS 407 of 2003 made 7 October 2003 entered 8 October 2003 in favour of Smith Alvi & 127 others for Finance to pay K417,841.49 being the remaining balance in relation to judgment in DC 33-164 of 1997

FD19	24 November 2003	Information	Laid by Kandi Kinim against Max UmuPuli
FD20	27 May 2004	Letter	From Francis Kuvi Acting Solicitor General to Finance Secretary requesting payment of cheque to Paul Paraka Lawyers on behalf of Smith Alvi and 127 ors
FD21	14 January 2005	Letter	From Mathew Damanu Detective Chief Inspector to Secretary for Finance requesting assistance in relation to documents regarding payments to Max Umbu Pili;
NC22	18 January 2006	Ruling	Ruling by Justice Davani in OS 7 of 2003 for audit of Paul Paraka Trust Account
NC23	19 April 2006	Ruling	Ruling by Justice Davani in OS 407 of 2006
NC24	25 July 2007	Notice of Acquittal/Discharge	By Justice David acquitting and discharge Max Puli Umbu from Misappropriating contrary to s.383a of the Criminal Code
NC25	7 December	Decision	By Justice Davani refusing

	2007		application by Rote Rapura for endorsement of Consent Orders
NC26	10 December 2007	Letter	From RPNGC to Paul Paraka Lawyers re: authorization to collect cheque by Rote Rapura
NC27	12 August 2008	Notice of Motion (Cross-Motion)	Filed by Pius Kingal Lawyers for Rote Rapura seeking leave to be joined as a party in OS No. 407 of 2003
FD28		Schedule	Of payments made between 2001 and 2004 totaling K1,126,790.49

D. WITNESSES

Following witnesses were called and gave evidence in respect of their involvement (if any) in this matter, they are:-

- a) Eric Kiso
 - He produced to the Commission District Court Files on this matter
- b) Thaddeus Kambanei (Former Secretary — Department of Finance)
- c) Francis Damem- (Former SG) and
- d) Simon Norum- (Acted for the Plaintiffs at the relevant time)

E. FINDINGS

1. The Claim

The claim herein is for damages for loss of properties, domesticated animals and assault.

The claimants are 130 people from a village called Kulimbu Village in the Baiyer River District in the Western Highlands Province, who claim that on 30th July 1991, several policemen based in Mt. Hagen raided their village for no reason resulting in the loss suffered. Consequently they went to Simon Norum of Simon Norum and Co. Lawyers who then filed their claim in the District Court in Mt. Hagen on 14th March 1997.

The Mt. Hagen Police, through Chief Inspector Ambane, who was examined in Mt. Hagen, denied that there was a raid as claimed by the claimants and produced copies of statements he obtained from two people from the same village as the claimants. These two persons are: Jakina Sauli and Koke Wapuli. Koke Wapuli is closely related to Andeka Tepoka, the Principal Claimant in this matter.

Contrary to Mr. Ambane's Statement, both these gentlemen in their statement essentially stated that, there was a raid in 1991 but the destruction was very little and estimated that only 20 houses were destroyed as opposed to the destruction caused by the villagers themselves in 1992 following the General Elections, which these two villagers believe was the true cause for the loss these 130 claimants claim they suffered and not as a result of the purported police raid. Unfortunately, this cannot be further investigated due to lack of time.

Mr. Norum in his evidence says there was a Police raid, but it is hard to believe what he says because he himself did not personally attend

to the village to conduct his own investigations or have other villagers verify his clients' instructions. It is as a result of Mr. Norum's conduct that the District Court made the kind of Decision it did.

2. Whether/not Claim is within time.
Time limitation is not an issue in this matter.
3. *Compliance with Claims By & Against the State Act.*

The claim herein arose in 1991 but the Claimants did not pursue it in Court until 14th March 1997. By this date, Section 21(2) of the current *Act* was already in operation. (20th February 1997). Upon the enactment of the current *Act*, which includes Section 21 (2), two situations were created in respect of a cause of action that accrued against the State as at the time of the enactment and the commencement date of this *Act*.

The first situation relates to cases in which proceedings had already been instituted whilst the second relates to cases in which no proceedings had yet been issued. Based on this, the claimants in this matter would have had until 20th August 1997 to give the required notice but instead of giving the Section 5 Notice, they, through their lawyers filed proceedings in the District Court on 14th March 1997 which is premature act, which the State Lawyers could have relied on to have the proceedings dismissed for failure to comply with the *Claims By and Against the State Act*.

4. District Court Procedures

The manner in which this claim was brought about in the District Court was an unusual one. This was a matter that involved 130 claimants, who

instructed Simon Norum Lawyers to file proceedings in the District Court for damages for assault and loss of properties they claim, were destroyed as a result of a police raid in their village. Obviously, this was a representation action appropriate to be dealt with at the National Court, given the number of claimants and most importantly the fact that all these claims arose from the incident.

Despite conceding to this, Mr. Norum gave evidence that he pursued the matter in the District Court only because he was instructed to.

As a result of this attitude, the District Court also held the view that there was nothing wrong with hearing all these 130 claims individually, which if that was to be the case it would have taken days or weeks to properly consider all the evidence on their own, but as it turned out all 130 claims were heard on one day only (27 June 1997) and a month later the Court handed down only one decision, resulting in a total award of K1,424,496.40.

In addition, not only, did the District Court made such a huge award, but it even went further to issue Certificate of Judgements, a document usually issued by a claimant in the National Court to be signed by both the Registrar of the National Court and the Solicitor General. At nowhere in the *District Court Act* or the *Claims By and Against the State Act*, does it empower a District Court Magistrate to issue the Certificate the was Mr. Appa did in this matter.

Similarly, Mr. Appa had no powers to award costs on a solicitor client basis as he did. Award costs.

5. Costs

One of the Orders of the District Court Judgement of 15 July was for costs and that the costs be taxed. (DC6 &DC7) In spite of the said order which was very clear, Mr. Norum presented his clients' legal fees and got an order for costs in the amount of K456,281.00.

There was no application for taxation, nor was there any bill of costs in taxable form produced by neither Mr. Norum nor the District Court Registry.

6. Interest

Like costs, there was also an order for interest at 8% to be calculated from the date of filing of the proceedings (20.03.97) to the date of the Judgement (15.07.97) This was calculated at K25,083.00 and was included in the total amount payable (That is: K968,215.49). At no time at all, was there an order for Post Judgement Interest.

However, as it turned out, there was an advice that the Claimants' were entitled to Post Judgement Interest and the Finance Department has paid that into the Trust Account of Paraka Lawyers.

7. Action/Steps taken to Defend Claim by SG & AG

Solicitor General

There is no evidence by . the State to show when the State Lawyers of the Office of the Solicitor General first became aware of this claim.

According to the published Decision (DC 5) of Mr. Appa, then the Principal Magistrate, the Solicitor General then, Mr. Damem, first became aware of this claim on 12th May 1997 and wrote to the First Defendant, the Chief Inspector for instructions on 26th May 1997, but received nothing.

Consequendy, no appearances were made for the State and after numerous adjournments; the hearing proceeded ex parte to the detriment of the State.

In his evidence, Mr. Damem stated that, this claim could not be defended at all due to the following:

- Lack of instructions from the Police
- Shortage of employed lawyers and
- Lack of Notice of the dates scheduled for either Mention or Hearing of the matter.

There was the opportunity to do things correctly when an was filed against the District Court Decision, but again for reasons, the Appeal, although there were good grounds, thrown out.

Appeal
the same
it got

Attorney General

The Attorney General at the relevant time was Mr. Michael Gene, who did not feature much in the claim at the trial stage or the Appeal Stage, but when he did, that was in July of 2000, and instead of taking steps to benefit the State, he did the actual opposite, by writing to the

Secretary of Department of Treasury and Finance at that time, and requesting that payments in settlement of the claim be to Mr. Tepoka.

Payment

Following the various letters from the Office of the Solicitor General and the Attorney General to the Secretary Department of Finance on 18 November 1997, 14 July 2000, 26 July 2000 and 21 March 2002 respectively, payments totalling K2,000,912.98 was paid by the Department of Finance with respect to this matter.

The Break-up of this payment is as follows:

No.	Amount (K)	Payee	Date of Payment	Cheque No.	Comments
1	968,215.49	Max Umba Puli	various	various	See FD 28
2	158,575.00	18 other individual claimants	various	various	See FD 28
3	456,281.00	Simon Norum	28.08.01 & 30.12.01	657325 & 668857	Costs component of the District Court Order of 15.07.97
4	417,841.49	Paraka Lawyers Trust Ac.	Not known	Not known	Post Judgement Interest. See advice of John Kawi (FD 16) Also see: National Court Order in OS 407/03 (NCI 8) & letter by F.Kuvi (FD20)

Mr. Norum who had acted for the Claimants in the District Court gave evidence that K129,934.00 was paid into his trust account, which he had it there for a while waiting for the respective payees to attend to his office to get their payments, but when no one turned up, he refunded the money back to the State. (See Affidavit of Simon Norum-Tab 4)

Taking that into account the repayment made by Mr. Norum, the total paid out by Finance Department is now reduced to a total of K1,870,978.98.

After this adjustment and assuming that the award of K1,424,496.49 was properly made, there would be an overpayment of K446,482.49.

9. Related Proceedings

There is currently before the National Court, the proceedings, OS 407 of 2003. This proceeding was filed by 127 people who were part of the 130 claimants in the District Court Proceedings referred to herein. They filed this proceeding essentially claiming that they were not given their payments due to them under the District Court Order of 15 July 1997 and so filed these proceedings seeking orders to have Finance Department pay to them through their lawyers, namely, Paraka Lawyers, the amount of K417,841.49 which Mr. Kawi had identified as Post Judgement Interest and the remaining balance in this matter.

RECOMMENDATIONS

1. Simon Norum

According to Mr. Norum's own evidence (see Transcript of Proceeding- Tab 5 & his affidavit sworn - 19 May 2009 - Tab 4) he was taking instructions from one of the claimant, namely, Max Umbu Puli, who practically did Mr. Norum's job in attending to taking other claimants' statements for their affidavits and after those affidavits were drafted, he was then tasked to take those to the individual

claimants to sign. This resulted in a lot of defects on the affidavits. Some of these defects were crucial but without any reasonable explanation, the District Court accepted those.

For instance, almost all the affidavits were signed by inserting mere thumb prints and had nothing else to explain why it was signed that way or whether the person signing knew what he or she was signing and agreed to what is contained therein.

On examination of Mr. Norum on this issue, amongst other things, Mr. Norum essentially stated, it was the State's responsibility to object to such matters in Court, but since no one attended to represent the State, and raise the objection, it's the State's loss and his clients' gain. Such conduct does not only amount to unprofessionalism but also negligence in that as a lawyer and an officer of the Court, Mr. Norum's duty is first to the Courts and not his clients.

He should therefore be referred to the Lawyers Statutory Committee and be warned. Otherwise he is setting a bad precedent.

Jurisdiction.

The provision on District Court Jurisdiction in the District Court *Act* should be amended to deal with Representation action.

If the Court is to have jurisdiction, then the State must be represented at all times. Otherwise, it should be a matter for the National Court only.

3. Costs

Obviously, The District Court Magistrate at the relevant time and Mr. Norum do not know the difference between party/party costs and solicitor/client costs. A clear and simple distinction can be seen in the case of Baiyer River LLG v Robert Yandapu Kundi Maku [1980] PNGLR 430

The Court held in that case that, "party!party costs means, one party to pay another party's costs, which is distinct from solicitor! client costs, which the client agrees with his Solicitor that he will pay his costs".

The costs that were claimed by Mr. Norum and paid by the State even though the State was not liable to pay, was clearly solicitor/client costs and not party/party costs. If Mr. Norum had followed the District Court Costs Scale, the State would not have been made liable to pay what has been paid. In fact, his clients were liable for the costs of K456,281.49. Mr. Norum has obviously received what he was entitled to and sued to recover the amount paid to him as costs.

4. Post Judgment Interest. (K417,841.49)

As this is being currently contested in court, it is recommended that State join as a party in the Court Proceedings OS 407 of 2006, if it has not already done so and apply for the money to be paid back to Finance, as the money was wrongly paid out in the first place.

Lynette Malu

A. Parties

i. For the State

- (a) Police
- (b) Attorney General

ii. For the Claimant:

- (a) Forty nine (48) villagers of a village at the outskirts of the Kagau Township of Southern Highlands Province
- (b) JB Nanei & Co. Lawyers
- (c) Gamoga Nouairi Lawyers & Associates

iii. Others (if any)

None

Matter

- Police raid
- The claimant claimed for damages allegedly suffered as a result of that raid.
- A Writ of Summons No. 662 of 1995 was filed with the National Court in Mt Hagen
- The State failed to file defence against the litigation hence a default judgement was obtained.
- A Deed of Release was signed on 27 November 2002 for final consideration of K4.5 million.

K3.88 million was paid by Department of Finance.

Matter was referred to Police for investigations but it is not clear what has come about from the Police investigations.

C. Recommended Findings

- Two (2) separate Writ of Summons were filed for this claim. Some of the claimants in all three court proceedings are the same persons. Clearly an act to defraud the State.
- Claimant's initial Quantified Claim propose in 1997 was for K1, 094,762.99 but revised it up to K4.5 million in 2002.
- No trial of assessment of damages was instituted for this claim
- Six payments totalling K2.7 million were made from the Trust Fund Suspense Account
- Fraud
- No proper assessment of damages. Matter did not warrant settlement at all

D. Terms of Reference

Attached herewith is the copy of the Terms of Reference. This is a case which falls within the terms of the reference of this inquiry. The relevant and applicable terms of references in respect of this case are *Terms of Reference No.s'1(i,ii,vi,vii,i), 2, 3, 7, 8, 9 & 10.*

E. Documents and investigations conducted at:

- Solicitor-General (SG)
- Department of Finance (NQ)
- Other Sources relevant this case (OD)

F. Brief facts/ Evidence

1. On 22 September 1990, it is alleged that a faction of Mendi Police Force conducted raids in and around Wabi Sumi and Apote villages at the outskirts of the Kagua Erave Electorate of Southern Highlands Province. The raid was conducted in an attempt to apprehend suspects involved in alleged theft of 100 bags of dried coffee.
2. The consequence of the Police action resulted in a number of plaintiffs allegedly having suffered damages, loss of properties and suffered personal injuries. Annexure '1-DF' is copy of letter dated 28 November 2002 from Solicitor General, Zacchary Gelu to the Secretary for Department of Finance, Thaddeus Kambanei highlighting this matter.
3. Three National Court proceedings were instituted against the Police and the State in respect of the Police raids conducted on 22 September 1990. This is one of the claims by 49 plaintiffs in which Lynette Malu was the principal plaintiff. The other two proceedings is one by Benny Balepa Malu (individual claim) and one by Yakoa Pape for and on behalf other persons.
4. A Writ of Summons No. 662 of 1995 was allegedly filed by JB Nanei & Co. Lawyers on 4 August 1995 with the National Court at Waigani. Annexure '2-SG' is the copy of the Writ obtained from the Solicitor General file and the following parties were mentioned:

Plaintiffs: Lynette Malu and 48 Others.

First Defendant: The Police Commissioner. *Second*

Defendant: The State.

5. On 17 February 1997 JB Nanei & Co. Lawyers wrote to the Solicitor General proposing to settle for K1,094,762.99 inclusive of interest and cost. Annexure '3-SG' is the copy of the subject fax.
6. On 14 March 1997 JB Nanei & Co. Lawyers followed up with the Solicitor General on the proposal. Annexure '4-SG' is the copy of the faxed notice.
7. On 29 December 1997 David Keta Lawyers acting for the plaintiffs on Writ of Summon No. 201 of 1995 wrote to the Office of the Solicitor General alleging that the Writ of Summon No. 662 of 1995 is a duplicate to Writ of Summon No. 201 of 1995 wherein the plaintiffs in both Writs were the same and arising from the same cause of action. Annexure '5-SG' is the copy of the subject letter obtained.
8. On 30 December 1997 David Keta Lawyers wrote to the Registrar of the National Court alleging the same issues as those raised in the letter to Solicitor General mentioned in paragraph 7 above. Annexure '6-SG' is the copy of the subject letter.
9. Annexure '7-OD' is the copy of W.S. No. 201 of 1995 purportedly filed by Ray Vaea Lawyers on 20 March 1995 with the National Court at Waigani in which a total of K688,075.00 was claimed for damages. Note that copy of this Writ was obtained from the COI file of Yakoa Pape & 48 Ors v the State.
10. Also obtained from the COI file of Yakoa Pape & 48 Ors v the State Note is the copy of default judgement entered on 31 July 1995 on W.S. No. 201 of 1995. Annexure '8-OD' is the copy of the default judgement.

11. Also alleged in David Keta Lawyers' letters identified in paragraphs 7 and 8 above is W.S. No. 266 of 91, which also aroused from the same cause of action. The National Court decided in favour of the plaintiff, Benny Balepa for total damages awarded at K35,008.00 on 22 September 1995 in spite of a quantified claim of K566,515.50 being submitted by the plaintiff. Annexure '9-SG' is the copy of the Court decision on this Writ.
12. Note that Mr. Balepa is also mentioned as one of the plaintiffs on this claim's Writ of Summon No. 662 of 1995 and hence constitutes a duplicate- claim. Mr. Balepa is also allegedly married to Lynette Malu, the principal plaintiff on this claim.
13. On 3 August 1998, David Keta Lawyers again wrote to the Office of Solicitor General reiterating the anomalies involved in the Writs mentioned in the above. It is also alleged that the State had failed to file defence against these Writs resulting to default judgement being entered. Annexure '10-SG' is the copy of the subject letter.
14. On 26 October 1999, Mr. Balepa being alleged as the authorised spokesperson for the plaintiffs of the claim (W.S No. 662 of 1995) wrote to the then Solicitor General disdaiming the allegation made by David Keta Lawyers and the W.S. No. 201 of 1995 was alleged as duplicate to W.S No.
. 662 of 1995. Mr. Balepa also claimed that W.S. No. 201 of 1995 was filed subsequent to their Writ (W.S 662/95). Annexure '11-SG' is the copy of the subject letter.
15. Note that Mr. Balepa's letter mentioned in paragraph 11 above only reaffirms the fact that W.S. No. 201 of 1995 and the W.S. No. 662 of 1995 are for a duplicated claim as alleged by David Keta Lawyers.

21. The consideration of the Deed of Release signed is K3.4 million more than the initial Quantified Claim of K1,094,762.99 being proposed by claimants first lawyer, JB Nanei & Co. Lawyers to the Solicitor General on 5 February 1997 as verified in paragraph 5.
22. On 28 November 2002 the then Solicitor General, Zacchary Gelu wrote to the Secretary for Department of Finance, Thaddeus Kambanei advising of the circumstances in which the quantum assessment in respect of the State liability was derived. Note that the wording of letter is similar to that of the Deed of Release. Annexure '1-DF' is the copy of the subject letter.
23. The revised total losses allegedly claimed by the 49 plaintiffs in comparison the initial agreed Quantified Claim by Solicitor General in 1997 are particularized as follows:

(a) Actual Loss Suffered	IC598,732.12
(b) Damages	K571,704.92
(c) Economic Loss	K3,426,323.00
(d) Interest	K2,597,104.96
(e) Costs	<u>K220,000.00</u>
Total	<u>K7,413,865.00</u>

24. It appears that the claimants' revised Quantified Claim might have being influenced by the claimants' new lawyers, Nouairi Lawyers & Associates. Annexure '14-SG' is the copy of Nouairi Lawyers' letter dated 29 January 2002 addressed to the Attorney General advising their claimants revised Quantified Claim as highlighted in paragraph 23 above.
25. On 15 April 2003 the then Secretary and Attorney General, Francis Damem wrote to the Secretary for Department of Finance advising stop payment of

a cheque made in respect to this case. Annexure '15-DF' is the copy of this advice.

26. On 20 May 2003 Mr. Damem again wrote to the Secretary for Department of Finance advising having not noted any anomaly to this claim and advised settlement. Annexure '16-DF' is the copy of this advice.

27. Finance Department made the following payment for which the Commission has abstracted from the electronic Department of Finance Cash Book listings provided:

Date	No	Acc	Progrm	Act	Item	Payee	Details	Ty	Ref#	Payments
17/2/2003	893426	207	4201	4123	135	Lynette Malu &48 O	Pymt for O/S Deed of	CQ	712255	100,000.00
20/3/2003	899882	207	4201	4123	135	Lynette Malu &48 O	Pmt for O/S BEDT SG3	CQ	715408	100,000.00
4/4/2003	902946	207	4201	4123	135	Lynette Malu &48 O	Being pmt o/s debtS	CQ	716801	200,000.00
20/9/2003	935450	207	4201	4123	135	Lynette Malu &48 O	O/S Debt SG3.4.787 (CQ	733833	400,000.00
31/10/2003	943734	460	31	0	0	Lynette Malu &48 O	O/S DOR Claim SG3.4.	CQ	738386	100,000.00
17/11/2003	946046	207	4201	4123	135	Lynette Malu &48 O	Payment for O/S DOR	CQ	739743	80,000.00
6/2/2004	962379	207	4201	2107	135	Lynette Malu &48 O	P/pmt. o/s DOR claim	CQ	768312	200,000.00
2/4/2004	972866	460	31	0	0	Lynette Malu &48 O	Pmt o/s DOR claim p/	CQ	774340	300,000.00
2/4/2004	972866	460	31	0	0	Lynette Malu &48	Pmt o/s DOR claim p/	CQ	774340	300,000.00

						O				
10/8/2004	994719	207	4201	2107	135	Lynette Malu &48 O	Being pmt for o/s DO	CQ	786708	100,000.00 ¹
27/8/2004	997961	460	31	0	0	Lynette Malu &48 O	Pmt for o/s DORClai	CQ	788408	500,000.00 ¹
27/8/2004	997961	460	31	0	0	Lynette Malu &48 O	Pmt for o/s DOR Clai	CQ	788408	500,000.00 ¹
17-09-2004	1255	460	31	0	0	Lynette Malu &48 O	P/pmt for o/s DOR cl	CQ	790470	1,000,000.00 ¹

Total 3,880,000.00

28. Note that the Department of Finance made thirteen (13) separate payment to this claim between February 2003 to September 2004, totalling to K3.88.million. Of these 13 payments, six (6) payments totalling K2.7 million appeared to have been made out from the Trust Fund Suspense Account, which is considered to be no illegally available funds.
29. Annexure '17-DF' is the only payment voucher noted on the Department of Finance file reviewed despite a 13 payments being made. The payment relates to cheque ref# 738386, which also appears to be one of the payments being made out of the Trust Fund Suspense Account based on the Budget Account Code ref# 4601 - 31, the budget account code reference of Trust Fund Suspense Account.
30. On 18 February 2005 Director of National Fraud and Anit-Corruption Division (NFACD), Awan Sete wrote to the office of the Solicitor General advising their finding into the alleged fraud by Benny Balepa Malu and Lynette Malu. The findings revealed Mr. Balepa's involvement in W.S. No. 266 of 1991 and W.S. No. 662 of 1995 as stated above which may amount to fraud. Annexure '18-SG' is copy of this letter.

31. Note that the letter by Director of NFACD note paragraph 29 was signed by Detective Inspector of NFACD, Timothy Gitua whose signature has been confirmed in annexure '19-SG'.
32. In evidence, Mr Nanei confirmed that he had acted for Benny Balepa in the earlier proceedings instituted by Benny Balepa himself. He also acted for Benny Balepa, Lynnette Malu & Others in the proceedings this time instituted by Lynnette Malu.
33. Benny Balepa also appeared before the Commission and gave evidence confirming that he was also a party to the Lynette Malu proceedings.
34. In an affidavit filed by Lynette Malu in a separate proceedings (appears to be currently on foot), Lynnette Malu deposes to persons who have benefitted which included a church and persons not even parties to the proceedings.
35. This is a duplication of proceedings and may amount to fraud. The amount settled was far in excess of what the Lynette Malu claimed in the Statement of Claim. Furthermore, the amounts awarded in the two proceedings (Benny Balepa & Yakoa Pape) which went before the National Court on hearing of damages were less compared to the settlement in Lynette Malu. In the case of Benny Balepa (full trial), the National Court awarded approximately K40, 000.00 whilst Yakoa Pape & Others, the National Court awarded approximately K200, 000.00.
36. Messrs Francis Damem and Gamoga Jack Nouairi were invited to appear and give evidence but failed to attend. Mr Nouairi through his daughter and another person advised that he was not feeling well and also needed to arrange for some other persons to also come forward with him to give evidence.

37. Police have already formed an opinion in regards to this claim as such investigations should continue and appropriate persons involved in this matter should be called to answer in respect of their involvement.

G. Findings:

38. W.S. No. 201 of 1995 and W.S. No. 662 of 1995 are duplicated claims arising from the same cause of action.
39. The matter appears to be a fraud and as such be referred to Police for further investigations. In this case, Police have conducted their investigations it is not of clear of the current status. Police need to continue with their investigations and persons involved should be brought in for further questioning.

E. Recommendations

39. Matter be referred to Police for further investigations.
40. Attorney General take appropriate action to file for recovery against the claimants.

Index of Relevant Documents

- | | | |
|----|----|---|
| 1- | DF | - Copy of the letter from Solicitor General to Secretary for Department of Finance dated 28 November 2002 |
| 2- | SG | - Copy of Writ of Summon No. 662 of 1995 |
| 3- | SG | - Copy of fax dated 17 February 1997 from JB Nanei & Co. Lawyers to Solicitor General re Quantified Claim |

- 4- SG - Copy of fax dated 14 March 1997 from JB Nanei & Co. Lawyers to Solicitor General.
- 5- SG - Copy of letter dated 29 December 1997 David Keta Lawyers to Solicitor General
- 6- SG - Copy of letter dated 29 December 1997 David Keta Lawyers to Registrar of National Court
- 7- OD - Copy of Writ of Summon No. 201 of 1995
- 8- OD - Copy of Default Judgement on Writ of Summon No. 201 of 1995
- 9- SG - Copy of National Court decision on Writ of Summon No. 226 of 1991
- 10- SG - Copy of letter dated 3 August 1998 by David Keta Lawyers to Solicitor General
- 11- SG - Copy of letter dated 26 October 1999 by Benny Balepa to Solicitor General
- 12- SG - Copy of letter dated 31 October 1996 by Benny Balepa to David Keta
- 13- DF - Copy of the Deed of Release
- 14- SG - Copy of letter dated 29 January 2002 from Nouairi Lawyers to Attorney General re Quantified Claim
- 15- DF - Copy of letter dated 15 April 2003 from Attorney General to Secretary of Department of Finance
- 16- DF - Copy of letter dated 20 May 2003 from Attorney General to Secretary of Department of Finance
- 17- DF - Copy of payment voucher
- 18- SG - Copy of letter dated 18 February 2005 from Director of National Fraud & Anti-Corruption' Division to Solicitor General

Copy of letter dated 15 December 2005 from Det. Inspector
of National Fraud & Anti-Corruption Division to Solicitor
General

Simon Wapo

PARTIES:

(i) For the State:

1. Royal Papua New Guinea Constabulary (RPNGC)
2. Department of Justice and Attorney General ('DJAG')
3. Department of Finance ('DoF')

(ii) Claimant:

(a) Simon Wapo, Peter Mogia, James Kaupa, Bob Nilkama, John Era, Ana Era, Anges Wegna, David Sul, Kaupa Nilkama, Jonathan Wall, Peter Kaupa, John Nime, Paul Kawage, Paul Gene, David Mune, Dickson Mika, Leslie Kikmai, Sipike Wale, Sul Nilkama, JoemKona, Konda Kinde, Gene Nime, Nonne Wale Kaupa, Thomas Kaugl, Angra Siune and Ambia Kera Nime

NATURE OF CLAIM:

There was an alleged Police raid conducted in Gumin Village, Kundiawa, Simbu Province resulting in damages and losses to the claimants' cash, food crops, houses, trade stores and other properties.

The State was purportedly ordered by the National Court to pay the claimants K4 million in general damages, exemplary damages, costs and interest.

C. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

1. The Solicitor General purportedly issued a letter dated 21 March 2003 to the Secretary for Finance to draw a cheque in the sum of K4 million in favour of a Simon Wapo. This was based on a purported Certificate of Judgement dated 28 February 2003 and purported Court Order made on 28 October 2002 and entered on 28 February 2003 in respect of an alleged illegal Police raid conducted on 8 June 2000 in Gumin Village, Kundiawa, Simbu Province.
2. The Department of Finance issued 12 cheques between 24 September 2004 and 23 December 2005 totaling I<C3,860,000.00, falling within the period under inquiry 2000 to 1st July 2006.
3. In the circumstances, this matter falls within Terms of Reference No. 1, 6, 7, 8, 9,11,13 and 14.

D. SOURCES OF INFORMATION AND DOCUMENTATION

4. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

National Court Registry -

(i) original Court file referenced WS No. 172 of 2000

i. original Court file referenced CR 136 of 2007 - Boas Hembehi

ii. Evidence of Ian Augerea, Registrar

b. Department of Justice & Attorney General -

Evidence of -

Hitelai Kiele-Polume, former Acting Solicitor General Zacchary Gelu, former Solicitor General

a. Department of Finance —

(i) Payment vouchers

(ii) Evidence of -

o Jacob Yafai, former First Assistant Secretary, Public
Accounts Division o Boas Hembehi, Expenditure
Controller (under Suspension)

b. Royal PNG Constabulary —

1. Court file Brief - Police v John Vailala, Boas Hembehi & Jacob
Yafai

6. The relevant transcripts of proceedings are provided with this Brief.

7. The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

E. CHRONOLOGY OF EVENTS

2000

1. On 8 June 2000, Police allegedly conducted an illegal raid on Gumin Village, Kundiawa, Simbu Province.
2. Simon Wapo & 25 others purportedly filed WS No. 172 of 2000.

2003

3. On 28 February 2003, purported Court Order made in WS No. 172 of 2000 on 28 October 2002 was entered.
4. On 28 February 2003, a purported Certificate of Judgement was certified by the Registrar of the National Court and the Solicitor General.
5. By a purported letter dated 21 March 2003 to Secretary for Finance, the Solicitor General, Zacchary Gelu, requested a cheque in the sum of K4 million be drawn in favour of Simon Wapo pursuant the purported Certificate of Judgement dated 28 February 2003 and purported Court Order entered on 28 February 2003.

2004

6. On 18 August 2004, a Simon Wapo appointed a Donald Lunen under a Memorandum of Agreement to pursue payment of K4 million from the Department of Finance on behalf of the claimants for a fee of K1.5 million upon receipt of said payment.
7. By letter dated 24 September 2004 to the Manager, BSP Ltd, Joseph Yagi of Yagi Lawyers identified Simon Wapo and requested an account to be opened in his name.

On 27 September 2004, a Margoni Wamanimbo, Manager, Police Association Credit Fund Ltd and Thomas Taian, lawyer, Boroko Police Station declared themselves as acceptable referees for Simon Wapo.

By letter dated 1 October 2004 to the Manager, BSP Ltd (Waigani), Jacob Yafai, First Assistant Secretary, Public Accounts Division, DoF, requested DoF cheque (# 791791) payment of IC500,000.00 into the account of Simon Wapo purportedly as part-payment of K4 million awarded by National Court.

On 5 October 2004, a Simon Wapo on behalf of 25 others executed a Trust Deed effectively indemnifying BSP Ltd from any claims brought against the bank as a result of any dispute between the parties. The 25 others identified were: Peter Mogia, James Kaupa, Bob Nilkama, John Era, Ana Era, Anges Wegna, David Sul, Kaupa Nilkama, Jonathan Wall, Peter Kaupa, John Nime, Paul Kawage, Paul Gene, David Mune, Dickson Mika, Leslie Kikmai, Sipike Wale, Sul Nilkama, Joem Kona, Konda Kinde, Gene Nime, Nonne Wale Kaupa, Thomas Kaugl, Angra Siune and Ambia Kera Nime.

On 6 October 2004, BSP Ltd opened "Simon Wapo Trust Deed Account".

2005

By letter dated 25 March 2005 to the Manager, BSP Ltd (Waigani), a Mary Martin, Financial Controller, DoF requested DoF cheque payment of K350,000.00 into the account of Simon Wapo purportedly as part-payment of K4 million awarded by National Court. **2008**

13. By letter dated 2008 to the Commission, Samuel Ikiso, Deputy Registrar, National Court confirmed that WS No. 172 of 2000 is an existing Court file that -
 - (a) is registered at Lae, not Waigani;
 - (b) involves completely different parties, Nadlam Investment Ltd v Sealand Pacific Ltd; and
 - (c) concerns a completely unrelated claim altogether.

14. By letter dated 6 October 2008 to the Commission, BSP Ltd r\ produced its records relating to "Simon Wapo Trust Deed Account", I which revealed that K3,280,000.00 was deposited into that account in I 10 cheque payments cleared by Bank of Papua New Guinea between 24 September 2004 and 23 December 2005.

FINDINGS I. Liability

In Issue

(a) No Solicitor General file

1. The records and evidence of the Solicitor General's office confirm that there was no Solicitor General file for the alleged claim filed by Simon Wapo & 25 others against Allan Kundi and the State under WS 172 of 2000, or at all.
A
2. As there was never a Solicitor General file in existence in respect of I this matter, the purported letter dated 21 March 2003 to Secretary for / Finance from the Solicitor General, Zacchary Gelu, requesting a / cheque in the sum of K4 million be drawn in favour of Simon Wapo I is fraudulent. This was confirmed in evidence by Zacchary Gelu, who J/ denied knowledge of any such document as he was purportedly the
author of the letter dated 21 March 2003 and allegedly the Solicitor

General at the time. This is shown in relevant excerpts of the transcript of 6 March 2009 containing his answers to questions raised by the Commission, which are reproduced hereunder:

[At 2684-2686]

"A: Thank you Chief Commissioner. In relation to schedule 13, the case of Simon Wapo and 25 others -v- The State in WS 172 of 2000 have been subject to scrutiny by the Parliamentary Public Accounts Committee where I was summonsed to appear before it. Before the Committee I deny knowledge of the claim. Therefore my answers to the question raised are as follows:

- (a) I have no knowledge of the court order dated 28 October 2002. My first name in front of the court order was spelt incorrectly. My name is spelt Z-A-C-C-H-A-R-Y G Gelu and not Zachery Gelu.*
- (b) The signature on the certificate of judgment was not my signature; and I am not aware of the certificate the judgment dated 28 February 2003.*
- (c) The letter to the Department of Finance was dated 21 March 2003. I was suspended and charged as Solicitor General on 6 March 2003 with instructions not to enter the office of the Solicitor General. Therefore, when the letter was sent and signed I was not in office. My signature has been forged.*
- (d) I was no longer the Solicitor General on 21 March 2003 to verify the authenticity of the court order and certificate of judgment.*

THE CHAIRMAN: That is fine, thank you.

MR GERORO: Chief Commissioner, if we may exhibit those documents referred to for purposes of record?

THE CHAIRMAN: Yes.

MR GERORO: *Mr Gelu, if you can identify the documents to confirm that those are the documents you are referring to?*

THE CHAIRMAN: *GW1&2.*

MR GERORO: *There are three documents Chief Commission, the first is the letter dated 21 March 2003 under the letter the Solicitor General signed by Zacchery Gelu, to Secretary Department of Finance, Attention Boas Hembeki - GW1 ?*

THE CHAIRMAN: *Yes.*

MR GERORO: *Second should be an order on 28 October 2002 and entered on 28 February 2003 - GW2, and the last document certificate of judgment dated 28 February 2003 can be exhibited as GW3?*

THE CHAIRMAN: *That is fine. Thankyou.*

[EXHIBIT TENDERED - GW1 -LETTER DATED 21 MARCH 2003 SIGNED BY MR GELU TO SECRETARY, DEPARTMENT OF FINANCE]

[EXHIBIT TENDERED - GW2 - ORDER ON 28 OCTOBER 2002 AND ENTERED 28 FEBRUARY 2003]

[EXHIBIT TENDERED - GW3 - CERTIFICATE OF JUDGEMENT DATED 28 FEBRUARY 2003]

MR GERORO: *Mr Gelu, if I may just ask in relation to GW1, letter dated 21 March 2003.*

The Action Officer there is identified as a D Lambu?

A: Yes.

Q: That would be Mr David Tambu ?

A: That is David Tambu.

Q. Was Mr Tambu in the office of Solicitor General at the time? Was he employed by the office of the Solicitor General as a Legal officer as identified in the document?

A: He was a Legal officer at that time but I understand at that time he resigned to contest the National Elections.

THE CHAIRMAN: He was not there at that time?

A: He was not there at that time."

3. Further, there was non-compliance with Section 5 of the *Claims By and Against the State Act 1996*.

(b) No National Court file

4. The records and evidence of the National Court Registry confirm that there was no claim filed by Simon Wapo & 25 others against Allan Kundi and the State under WS 172 of 2000, or at all.
5. As there was never a court file in existence in respect of this matter, the purported Court documents namely, Court Order entered on 28 October 2002 and Certificate of Judgment dated 28 October 2002 were fraudulent.

II. Assessment of damages

6. The purported Court Order entered on 28 October 2002 for judgment against the State in the sum of K4,000,000.00 inclusive of interest, and costs agreed at K6,000.00, was fraudulent so no proper assessment of damages was ever done.

III. Steps taken (or not taken) by Solicitor General in defence of the claim

All the documents were fraudulent. As such, the Solicitor General should immediately commence recovery action against persons involved in this fraud, including Simon Wapo and BSP Ltd.

IV. Processing of claim and Pay-out

8. There were 12 payments made between 24 September 2004 and 23

December 2005 as noted from the extract below obtained from the Department of Finance.

	Date	Cash Book and Vote No:				Cheque	Transaction	Particulars
		Div	Funct	Act	Item	Number	Amount (K)	
1	24/09/2004	460	31	0	0	791270	500,000.00	Pmt for o/s c/o
2	1/10/2004	460	6	0	0	791791	500,000.00	Pmt for replacement chq#791270
3	3/11/2004	207	4201	2107	135	794233	200,000.00	O/S C/O WS172 of 2000- compens.
4	6/12/2004	207	4201	2107	135	797227	700,000.00	O/standing court order (W.S 172/2000)
5	16/12/2004	207	4201	2107	135	798138	200,000.00	O/S C/O WS

								#172/2000
6	10/3/2005	207	4201	2107	135	804830	350,000.00	P/pmt for cert of judgment
7	10/5/2005	207	4201	2107	135	810029	500,000.00	P/Payment ofC/Order- SG 43/1711
8	3/6/2005	207	4201	2107	135	812533	200,000.00	Pmt for o/s C/O
9	1/7/2005	207	4201	2107	135	814722	500,000.00	Payment of O/S Court Order
10	31/08/2005	207	4201	2107	135	818833	50,000.00	Pmt for o/s court or
11	23/12/2005	207	4201	2107	135	827192	80,000.00	Auth. Cancellation
12	23/12/2005	207	4201	2107	135	827192	80,000.00	O/S Court Order
							3,860,000.00	

9. The following findings are made in respect of the payments -

- (a) Payment under items 1 & 2 above in relation to cheque numbers 791270 & 791791, respectively were made from funds not legally available. That is from Trust Fund Suspense Account # 2. Consequently, the total of K1 million paid is considered as illegal payments.

(a) FF3 and FF4 for payment under items 1, 3, 4, 6, 7, 8 and 9 above were raised and signed by Boas Hembehi as Financial Delegate and Jacob Yafai as Section 32 officer, which were beyond their financial powers/authority.

(b) Payments under items 1 and 11 above were purportedly cancelled according to the Department of Finance records. Bank of PNG's Clearing Unit confirmed that both cheques were presented separately and clearance was given to BSP Ltd for payment under item 11 for a K80,000 cheque.

(c) All the payments made were in the name of Simon Wapo and

I he collected them personally or through his accomplices at the DoF and not through the SG office, contravening the standard procedures.

(d) In all material respects, all the above payments are illegal.

b. Tracing of proceeds

The Commission summoned four (4) banks based in Port Moresby to supply details of Simon Wapo's bank account, if any, including transactions related to the account. Three (3) banks responded of having no account in the name of Simon Wapo, namely ANZ (PNG) Ltd, Westpac (PNG) Ltd and Maybank (PNG) Ltd. BSP Ltd confirmed holding such account and provided bank statements and copies of cheques. The details of the account are as follows:

(a) Account name: Simon Wapo Trust Deed Account

(a) Account number: 100 1013152

(b) Bank: Bank of South Pacific

- (c) Branch: Waigani
- (d) Simon Wapo is the sole signatory to the account.

16. The schedule below details the deposits and the withdrawals made on the account:

	Date Deposit	Amount Deposit	Date Withdrawal	Amount Withdrawal
1	6-10-04	500,000	6-10-04	10,000
2			7-10-04	480,000
3	4-11-04	200,000	5-11-04	196,000
4	8-12-04	700,000	8-12-04	10,000
5			9-12-04	690,000
6	31-12-04	200,000	31-12-04	200,000
7	11-3-05	350,000	15-3-05	340,000
8	12-05-05	500,000	12-05-05	250,000
9			13-05-05	248,000
10	8-06-05	200,000	8-06-05	200,000
11	4-07-05	500,000	4-07-05	500,000
12	1-09-05	50,000	1-09-05	50,000
13	28-12-5	80,000	28-12-5	80,000
		3,280,000		3,254,000
			Credit	26,000

17. The following findings are made in respect of the bank transactions above involving the settlement proceeds —

- (a) All cheques deposited were cleared on the same day. The BSP Ltd bank staff that assisted Simon Wapo perform all the clearances was a John Wailala;

The withdrawals were all in cash done on the same or the next day;

Payments under items 1 and 11 of DoF records were confirmed as cancelled since they were not deposited into the BSP Ltd account;

The bank account was created with the assistance of a John M. Wailala of BSP Waigani on 6 October 2004. The following documentations/references were used to opened the account —

- (i) A letter by DoF Financial Controller Mary Martin dated 16 March 2005;
- (ii) A letter by DoF FAS Jacob Yafai dated 1 October 2004 addressed to Manager of BSP explaining the background of the payments made to Simon Wapo from the DoF;
- (iii) A trust deed done by 25 members of the claim authorising Simon Wapo to operate the account on their behalf, and be sole signatory;
- (iv) It is difficult to identify the name of the Commissioner of Oaths since the stamp was not legible, just a signatory;
- (v) Copy of certificate of judgment pertaining to the matter WS no. 172 of 2000;
- (vi) BSP Acceptable Referee Declaration Form was signed by the following two referees —
 - a. Margoni Wamanimbu, Manager (Accountant), Police Credit Fund, P O Box 7580, Boroko, NCD
 - b. Taian Thomas, Lawyer, Boroko Police Station, Telephone no. 324 4314/685 5272.

- c. An identification letter addressed to Manager, BSP from principal of Yagi Lawyers, Mr. Joseph Yagi, identifying Simon Wapo.

18. The above information from BSP Ltd was gathered purposely to identify any persons who may have benefited from the proceeds apart from Simon Wapo. Unfortunately, the Commission did not achieve the desired result since all withdrawals were done in cash to avoid detection, and presumably distributed to the Simon Wapo's accomplices.

19. The Commission also finds that Justice Yagi has provided an adequate explanation as to the circumstances surrounding the issuance of the letter dated 24 September 2004 to BSP Ltd, which bears his signature and his former law firm's letterhead when he was in practice. He confirmed being the author of the letter but stated he was misled by a relative of his named Alphonse Silas, then unemployed residing at Gerehu Stage 6, NCD and now employed by Office of Climate Change & Environmental Sustainability. Justice Yagi stated that he was introduced by Alphonse Silas to a person identified as Simon Wapo whom he came to know a year later as Boas Hembehi.

(c) Status of criminal proceedings

20. The Commission notes the following criminal proceedings:

- (a) Boas Hembehi - committed to stand trial in the National Court on charges for false pretence and misappropriation. Trial pending.

- (b) John Wailala - committed to stand trial in the National Court on charges for false pretence and misappropriation. Trial pending.
- (c) Jacob Yafai- Information struck out on 12 October 2006
- (d) Moko Ezzo - Convicted by David, J for misappropriation as reported by *The National* on 2 October 2009 at page 4. Awaiting sentencing. He was found to have posed as "Simon Wapo" and collected several cheques at the Department of Finance before cashing them and applying the money to his own use.

RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

Referral to the Secretary for Finance

1. Immediate stop payments on any further claims for payment made in respect of this matter
2. Immediately investigate and report any payments made after 1 July 2006 to Royal Police Constabulary and Attorney General in respect of this matter.

Referral to the Attorney General

3. Immediate commencement of an action against Moko Ezzo, Alphonse Silas, John Vailala, and Boas Hembehi to trace and recover

the sum of K3,280,000.00 in whatever form (cash, property or other investments).

4. Immediate commencement of an action against Bank South Pacific (PNG) Ltd to recover the sum of K3,280,000.00 for facilitating fraud and not acting with due diligence.

Referral to the Royal PNG Constabulary

5. Mrs Mary Martin, former Financial Controller of Finance Department and signatory to various cheque payments, for being an accomplice in committing fraud by authorising BSP Ltd, in writing, to pay the fraudulent claimant..
6. Margoni Wamanimbo, Manager, Police Credit Fund Ltd for being an accomplice in committing fraud by assisting the fraudulent claimant open a bank account with BSP Ltd.
7. Thomas Taian, lawyer, Boroko Police Station for being an accomplice in committing fraud by assisting the fraudulent claimant open a bank account with BSP Ltd.

Referral to the Lawyers Statutory Committee

8. Thomas Taian, lawyer, Boroko Police Station for dishonourable, improper and unprofessional behaviour for being an accomplice in committing fraud by assisting the fraudulent claimant open a bank account with BSP Ltd.

Referral to the Certified Practising Accounts (Disciplinary & Ethics Committee)

9. Margoni Wamanimbo, Manager, Police Credit Fund Ltd for dishonourable, improper and unprofessional behaviour for being an accomplice in committing fraud by assisting the fraudulent claimant open a bank account with BSP Ltd.

Referral to the Commercial Bankers Association, commercial banks and financial institutions

10. Reform processes and procedures to enable detection of such fraudulent
 - (a) Opening of bank accounts;
 - (b) Processing of deposits
 - (c) Processing of withdrawals

Consequential legislative or other reform

11. *National Court Rules* be amended to the following effect:
 - a. the requirement of a "State" Court track to exclusively deal with all claims made by and against the State.
 - b. official seal of the National Court be impressed on all originating processes and all judgments in the nature of final orders. This requires necessary increase in fee to be paid
 - c. Registrar to create and maintain Register of court documents covered by (b) above
 - d. National Court stamp to be used for ordinary court documents

Financial Instructions made under the Public Finance (Management) Act 1995 be amended to the following effect:

- a. legal clearance for all court related claims for payment shall be in writing from Office of Attorney General upon recommendation by Solicitor General
- b. the payment of court related claims by Department of Finance shall be based on the production of original clearance letter, which shall —
 - i. where court order for payment -
 - o emanate from person occupying office of Attorney General
 - o bear SG file reference number
 - o enclose certified copy of Order impressed with National Court seal o recommend payment
 - ii. where deed of settlement for payment -
 - o original duly signed Deed of Settlement bearing respective signatures of Attorney General on behalf of the State and the Solicitor General as his witness o emanate from person occupying office of Attorney General
 - o bear SG file reference number
 - o contains National Court order sanctioning/approving settlement
- c. Finance Form 3 be revised to incorporate, as an attachment, the internal pre-audit verification report
- d. all cheques for payment of court related claims to be forwarded to Office of Solicitor General for collection in the following circumstances:-

- i. where no lawyer on record - collection by the claimant in person provided appropriate identification is produced, such as passport, driver's licence or original statutory declaration;
 - ii. where lawyer on record - collection by lawyer on record.
- e. Solicitor General maintain a register of all —
 - i. Clearance letters issued to Department of Finance
 - ii. Cheques and relevant details received from Department of Finance pursuant to clearance letter
 - iii. Cheques collected from his office by claimant or claimant's lawyer
- f. Secretary for Finance maintain a register of all —
 - i. Clearance letters received from Solicitor General
 - ii. Cheques sent to Solicitor General pursuant to clearance letter

Public Services (Management) Act 1995, related legislation and

instruments be amended to the following effect:

- a. Prescribe "serious disciplinary offence" is committed where:
 - i. State suffers loss as a result of negligence or failure to exercise due care in performance of duties
- b. On a finding of "serious disciplinary offence" —
 - i. Ground for termination
 - ii. Ineligible for appointment to any public office

(0 **Michael Tendele**

A. Does the matter fall within the Terms of Reference?

The matter arose from a default judgment for a total amount of K1,277,430.00 purportedly made by the Mendi District Court. The judgment was awarded to Michael Tendele and 112 other claimants claiming separately instead of as a class action.

The matter is covered under Terms of Reference Numbers I(ix), (x),(xi), 2, 3, 4,10 and 12. Please refer to the attached Terms of Reference.

B. Source of Information and Documentation

This brief comprises of facts and findings from the files and records of;

- The Magisterial Services
- Mendi District Court
- The Department of Finance
- Documents provided by Simon Norum lawyers.

C. Relevant Facts

The Matter

1. The matter arose from an alleged police raid on a village in Tari, Southern Highlands Province on the 15th July 1999. Dwelling houses were burnt down, trade stores looted and cash crops destroyed. The

Commission has not sighted any sworn affidavits to support these claims.

Michael Tendele instructed Simon Norum lawyers based in Mt. Hagen. Section 5 Notice was given to the State in a letter dated 30th August 1999. Hitelai Polume the then Acting Solicitor General, acknowledged the Notice in a letter dated 04th October 1999 and advised that the office was awaiting instructions and would advise in due course. In the meantime the file was allocated to Mr. John Kumura who was based in the Mt. Hagen SG office at that time.

The File from the Solicitor Generals office has not been provided to the Commission. But from all appearances, the Solicitor Generals office did nothing to defend this claim. In a letter written to the Finance Department to authorize payment of the court order the SG office blamed the police for not giving instructions (annexure). However there is no evidence that instructions were sought in the first place.

For some reason, Simon Norum decided to commence action against the State in the District Court at Mendi. There are jurisdictional issues involved in this decision as the matter allegedly occurred in Tari which is a gazetted sitting area for the District Court. A total of 113 civil summonses on complaint were filed for the 113 plaintiffs. Effectively they all became separate cases/claims although they arose from the same set of facts. That is the reason why the point is raised that it would have been neater to file the Action in the National Court under one writ of summons naming all the claimants. Noting also the fact that the damages suffered involved burning down of dwelling houses, looting trade stores and chopping down coffee trees,

one would assume that this would result in damages exceeding K1 0,000.00 for at least some of the individuals among the 113.

According to Simon Norum, the case was first mentioned on the 08th of April 2000, then on 18th August 2000 and finally on the 07th September 2000. On all those dates the State failed to turn up. On the 07th September the Court ruled in favour of the plaintiffs based on Affidavits filed by Norum (Yet to be seen). Norum has not included a copy of the Magistrates decision awarding damages to the 113 plaintiffs.

6. In possibly the largest award made contemporaneously (in one single day) in the history of the District Court of Papua New Guinea, the Court sitting in Mendi made orders for the State to pay K1,277,430.00 to Michael Tendele and 112 of his tribesmen. What boggles the mind is that the Magistrate one Raphael Appa, is supposed to have heard and disposed of a total 113 matters in a single day.

The total amount of K1,277,430.00 was broken up into the following categories;

Monetary damages K 821,030.00 Exemplary damages K
30,000.00

Lawyers Cost	K 425,600.00
Total	K1,277.430.00

Commissioners have noted from the opening done previously that the legal fees charged for a single days work in the District Court in a

v matter that never went to trial were quite high. In fact it amounts
 | N close to 50% of the total amount awarded.

9. Payment of this purported court order was first made on 29th July 2003 and was largely because the then Solicitor General, Mr. Zacchary Gelu wrote a letter to the Finance Department requesting payment. In the letter he blamed the police for not giving instructions to defend the case. He also said that although there were in fact 113 separate cases, they all arose from one incident and so a request was made to issue only one cheque.

10. For reasons which will become clear once Zacchary Gelu gives evidence, he requested Finance to pay a sum of K1,640,211.00. This is K362,081.00 more than was awarded by the District Court.

111. According to documents obtained from the department of Finance, a total of K1,740,211.00 was paid out between 2003 and 2006. There is no explanation for the payment of the additional sum of K462,781.00.

11/16/2005	1055060	207	4201	2107	135	Michael Tendele	Pymnt of OOrder-DC	CO	823962	40,000.00
5/16/2006	1077193	207	4201	2107	135	Michael Tendele	Replcmnt chqr#835887	CQ	836697	50,000.00
6/1/2006	1078268	207	4201	2107	135	Michael Tendele	O/S C/Order P/Pml	CO	837746	200,000.00
6/11/2006	1066362	207	4201	2107	135	Michael Tendele	O/S Court Order in O	CQ	641926	200,000.00
7/29/2003	925293	207	4201	2107	135	Michael Tendele i	Pmt o/s c/order lor	CQ	728753	50,000.00
9/23/2003	935958	207	4201	2107	135	Michael Tendele 8	Pmt o/s c/order (par	CQ	734207	145,000.00
11/27/2003	946677	207	4201	4123	135	Michael Tendele 8	Certificate of Judge	CQ	740915	40,000.00
12/15/2003	951310	207	4201	4123	135	Michael Tendele 8	O/S Legal Coat	CQ	742802	200,000.00
5/14/2004	976902	207	4201	2107	135	Michael Tendele t	Pmt o/s c/order fees	CQ	776441	35,211.00
6/7/2005	1034651	207	4201	2107	135	Michael Tendele i	Pmt for o/s c/order	CQ	812737	100,000.00
5/3/2006	1075811	207	4201	2107	135	Michael Tendele &	O/S C/Order (DC #12	CQ	635887	50,000.00
5/3/2006	1075811	207	4201	2107	135	Michael Tendele 8	O/S C/Order (DC *12	CQ	835867	50,000.00
12/31/2006	1106891	207	4201	2107	135	Michael Tendele 8	Pmt C/Order DCK126/0	CO	655235	180,000.00
10-12-2004 1	11229	207	4201	2107	135	Michael Tendele ft	O/S CTOrders fees	CQ	797440	300,000.00
5-12-2004 1	10155									
		207 4201	2107			135 Michael Tendele 8 P/pmt o/sc/oDC CQ		797164	100,000.00	
									1,740,211.00	

SHiii§

D. Recommended Findings

^ The Solicitor General (SG) was negligent in not filing a Defence to the claim.

- > The Magistrate who made the Orders, Mr. Raphael Appa was based at Mt. Hagen in the year 2000, not in Mendi.
- > Legal costs for cases that never went to trial are quite excessive when it makes up almost 50 % of the amount awarded.
- > Zacchary Gelu as Solicitor General requested for Finance to pay K362, 081.00 more than the Court awarded.
- > Further that the Department of Finance actually ended up paying out an additional K462,781.00

J^H\$rT"Simon Norum set up this scam>jJe^knew the capacity of the Solicitor Generals jifEce-wartretched to the limit even in handling matters commenced in the National Court. He would have known that it would be almost impossible for the Solicitor General in Mt. Hagen to travel into Mendi to defend matters filed in the District Court.

F. Recommendations

1. Simon Norum is referred to the Fraud squad or investigation.
2. Simon Norum is also referred to the Law Society for further investigation on his charging of excessive fees.
3. The question of taking instructions by the Solicitor Generals office is addressed as it seems that no effort is made to seek same. This is especially true for the Highlands provinces which has led to increased litigation by opportunistic claimants.

TABLE OF DOCUMENTS TO BE TENDERED

Exhibit	Description	Comments
OD 1	Section 5 Notice	Contained in letter written by Simon Norum to the Solicitor General dated 30 August 1999.
OD 2	Letter accepting above	Hitelai Polome as Acting Solicitor General wrote to Simon Norum acknowledging s. 5 Notice. Letter dated 04/10/99
OD 3	Norum letter to SG	Dated 14/09/2000 advising that SG failure to turn up for hearing had resulted in decision made in favour of plaintiffs

Wesley Aisora A. Parties

(i) For the State:

- (a) Finance Department
- (b) Attorney General/Solicitor General
- (c) National Court Registry
- (d) Police Department
- (e) Constable Ben Babat

(ii) For the Claimant:

- (a) Wesley Aisora for and on behalf of Ajura villagers

Introduction

1. This matter came before the Commissioner on Wednesday, 8 October 2008 and the matter was called and brief facts presented. The matter was subsequently adjourned to allow parties with interest to come forward and provide response in respect of the matter. Initially, there were no documents (at all) to identify the full facts or nature of claim leading to the alleged claim (refer to the original brief). All we had on file (at that time) were the following documents, they are:-

- (i) letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006; marked 1 - SG.
- (ii) letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006; marked 2 - SG.
- (iii) COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008. Marked 3 - COI.

2. The brief facts derived from the documents identified above were that the claimant Wesley Aisora & Others allegedly obtained a consent order for K7,527,264.20 on 4th June 2004 and submitted the said order to the Finance Department for payment. It appears the letter from Ms Kiele to Mr Cueva was prompted by the fact that Mr Cueva sought instructions or clearance from the Solicitor General in relation to the said order.
3. After checking records at the Solicitor General's office, Ms Kiele wrote to the National Court registry to confirm with their records also. The letters from Mr Augerea and Ms Kiele state there are no records (at all) of such a case/matter in the Solicitor General's file and the National Court Registry.
4. Following issuing of summons to Ms Kiele, Mr Augerea and Messrs Gabriel Yer and Mario Cueva from the Finance Department, we have now received certain documents relating to this matter from these persons and those with interest in the matter. Mr Cueva was cross examined and at the same time produced documents which were marked as **Exhibit 4 - FD**. Essentially, Mr Cueva confirms that no payments have been made in respect of this matter.
5. It is important to state at this juncture that initially documents (evidence) stated above indicate that there were no files both at the National Court Registry and the Office of the Solicitor General.

National Court file

6. In relation to the National Court file, after the issuing of the Summons, Mr Augerea provided the Commission with a 'List of Matters' containing

the search results. The search results provided by Mr Augerea is marked **4-NCR**.

7. Commissioners note from the List of Matters (which also includes this matter), under the heading 'database search' Mr Augerea has indicated that the file **exists**. Furthermore, the Commission was provided with the Supplementary Court file (not the original court file).
8. However, we have two conflicting letters both written by former Registrar, late Lohia Raka both stating the opposite, that is, letter dated 13 June 2006 (see document marked 2 - SG) states that the registry does not have a record of a file under the name Wesley Aisora, and further states that the court file reference W.S No. 754 of 2000 is for a different matter filed here in the Waigani National Court parties of which are . Steamships Ltd —v- South Pacific Builders.
9. Another letter is dated 20 June 2006 (almost a week later from 13 June 2006, first letter) also by former Registrar, late Lohia Raka stating that this is a Goroka matter (presumably filed in Goroka). The letter further confirms that W.S No. 754 of 2000 is a Wagani matter, parties of which are Steamships Ltd -ats- South Pacific Builders. This time the letter states it is proceedings filed by South Pacific Builders. Note difference in 'v' and ats'. Letter is marked 5 - **NCR**.
10. We will address the issue as to whether or not the National Court Registry did have a file created for this matter. At the outset, our proposed findings are that the file was only created recently at the request of Makap Lawyers, notwithstanding the fact that the Commission was provided with a 'Supplementary Court file' and not the original court file.

Solicitor General file

11. Although Ms Kiele by letter dated 20th June 2006 (see letter marked 1 - **SG**), advised that the Solicitor General does not have a file in respect of this matter, following issuing of the Summons, the Commission was provided with a Solicitor General office file with the reference SG188/07.

12. We will also address in the submission as to whether or not there is a Solicitor General file for this matter, however, at the outset our proposed findings are that the file was created recently only for "record keeping purposes" in relation to exchange of correspondence. We note that the file was only created recently for purposes of "record keeping". That is when lawyers and the claimants were pursuing the claim. We have again written to Ms Kiele and Mr Augerea to address the Commission on the circumstances (if not reasons) as to how the files came about when initially there were no files. See letter marked 6 — **COI**.

13. As stated above, initially, there were no documents at all in relation to this matter. The brief facts stated below are derived from the documents provided by Mr Augerea and Ms Kiele.

Brief facts/evidence

14. The Plaintiffs allege that on or about 6th May 2000, Constable Ben Babat (First Defendant) a Policeman based at Kainantu together with other
| Policemen also from Kainantu entered and raided Ajura village after U suspecting that youths from the said village were involved in the theft of
\ a vehicle. The Policemen entered the village and in the process of

V

conducting raid burnt down houses and caused damages to properties and at the same assaulted several villagers causing injuries.

15. The Plaintiffs then allegedly engaged Manu & Associates Lawyers and a writ of summons was filed on 13 November 2000 at the Waigani National Court. No section 5 notice was lodged for this claim. There is no evidence of such notice/letter on the Solicitor General's file. (Note, the word 'allegedly' is used to describe representation by Manu & Associates Lawyers as the firm denied acting for the Plaintiffs. This is discussed below). Marked **7 - NCR** is the Writ of Summons.
16. The Plaintiffs claim that as a result of the unlawful actions of the Policemen they sustained damages and claim the sum of K7, 527, 264. 20 as 'general damages'.
17. The Writ of Summons was allegedly served on a lady (not named) but identified as the Secretary to the Solicitor General on 28 November 2000. Marked 8 - NCR is the copy of the Affidavit of Service.
18. It appears the Solicitor General failed to file a Defence nor a Notice of Intention to Defend and as such on 17 June 2001, the Plaintiffs allegedly obtained an order at the National Court Waigani for default judgment in the sum of K7,527,264.20 with costs and interest at 8 per cent. The time for entry of the orders was also abridged. Marked **9 -NCR** is the court order.
19. The authenticity and legality of the court order is doubtful for three main reasons:-
 - (i) this is a claim arising from an alleged unlawful police raid. The Plaintiffs claim **K7,527,264.20** under the heading **general**

damages. In the normal practice, even if the State is said to be in default, normally the court would grant default judgment but with Homages to be assessed as the Plaintiffs are required to prove their \ losses. In this case, there is no document on the Solicitor General 1 file and the Supplementary National Court file providing evidence 1 quantifying the actual value of losses to the tune of K7,527,264.20;

- (ii) The Court Order is said to be made on 17 June 2001 and filed on 22 June 2001. However, the dates are confusing and contradicting. Below the terms of the actual orders, it states, ordered 17 October 2001 and entered 20 October 2001. This is not in conformity with the dates on the front cover page. It appears the signature of the Registrar and the dates were also scanned (photocopied) and inserted; and
- (iii) in such instances, the court rarely grants abridgment of time. There is no reason for ordering abridgment of time.

There are no documents such as a Notice of Motion and affidavits both in the National Court and the Solicitor General's file indicating (evidencing) that an application for default judgment was filed. However, there is an affidavit of service stating (quote), *..I have served a sealed copy of the Default Judgment herein on the Third Defendant....'* An application for default judgment should comprise the following essential documents, they are:-

- (i) Notice of Motion seeking default judgment to be entered;
- (ii) Affidavit in support;
- (iii) Affidavit of search confirming that a Defence was not filed;
- (iv) Affidavit of service, confirming service of both the writ of summons and the Notice of Motion seeking default judgment;

- (v) Forewarning letter addressed to the Solicitor General (sometimes/often annexed to the affidavit in support).

Marked **10 - NCR** is the copy of the Affidavit of Service.

- 21. In this case, we are not sure if the Affidavit of Service confirms service of the above documents as it basically states service of copy of the Default Judgment or it was for service of the court order granting default judgement. If the affidavit of service was for the delivery of documents in relation to the default judgment application, then there appears to be a problem as documents were served well after the court had already granted default judgment. The Affidavit of Service is not conclusive and in the normal circumstances a proper affidavit of service must be filed to confirm if documents were actually served (personal service). There is an issue with service of court documents.

- 22. On 4th June 2004, the court ordered by consent of the parties in the following terms :-
 - (i) That the Defendants pay the Plaintiff the sum of K4,559,443.00 being for all outstanding payments for the period January 2001 to December 2003.
 - (ii) That the Defendants pay the Plaintiff the sum of K2,428,635.40 being damages assessed.
 - (iii) That the Defendants pay the Plaintiff the sum of K539,185.80 as damages on quantum meruit basis for the period 2000.
 - (iv) That the Plaintiff abandons its claim for judicial interest at 8% per annum.
 - (v) That the Plaintiff party/party costs be taxed if not agreed.

Parties who allegedly consented to the said orders are, Mr Timothy L Cooper, lawyer for the Plaintiffs and Mr Francis Kuvi for the State. Marked **11 - NCR** is a copy of the Consent Order.

23. Commissioners do not know the reason why a consent order was obtained when an order had already being made which can be relied on to enforce the claim. There is a court order already in place granting the sum of K7,527,264.20 so what is the purpose of obtaining consent order again. This is a clear case of fraud and misrepresentation. Some of the reasons for such proposed findings will be made at the conclusion below.
24. On 9th June 2004 (a week later) Certificate of Judgment was filed for the sum of K7,527,264.20. Mr Kuvi signs and endorses the Certificate of Judgment. The Certificate of Judgment was signed and endorsed on the same day it was filed. It appears the signing and filing of the Certificate of Judgment was done with a lot of haste. In the normal practise, the Solicitor General would sign and endorse the certificate of judgment a day or sometime later (weeks/months) after it is signed by the Registrar National Court as the certificate of judgment would be filed and then later served on the Solicitor General for his endorsement. In this case, it was signed (endorsed) and filed on the same day.

Marked **12 - NCR** is a copy of the Certificate of Judgment.

25. On 26 June 2005, Mr Kuvi on behalf of the State and Mr Timothy L Cooper, lawyer for the Plaintiffs together with Wesley Aisora (Principal Plaintiff) sign a deed of release for the sum of K7,527,264.20. Again, we raise similar arguments as in the case of consent orders. What is the use of signing/entering in to a deed of release when there is already a court

26. **order purportedly awarding the sum parties have just signed and agreed to in the deed of release? This is a case of fraud and misrepresentation (false pretence). We will highlight other issues supporting such proposed findings.**

Marked 13 — NCR is a copy of the deed of release.

27. On 4th October 2005, Mr Kuvi wrote to Mr Otto Wangilan, Finance Department to settle the judgment debt as soon as possible. It also appears that Mr Kuvi's name and signature were scanned (photocopied) and inserted in the letter as they are slanting and further, the usual statement, yours faithfully (etc) is not included. Marked 14 - NCR is a copy of the letter dated 4th October 2005.

28. The following law firms confirm having acted for the Plaintiffs (apart from Manu & Associates Lawyers). They are:-

- (i) Kakaraya Lawyers;
- (ii) Amnol & Company Lawyers; and then recently,
- (iii) Makap Lawyers. However, following investigations of this matter by the Commission, Makap Lawyers filed Notice of Ceasing to Act. See letter from Makap Lawyers dated 7th October 2008 which is marked 15 - COI.

29. All these law firms took action or steps to enforce payments/settlement of the claim by writing to the Solicitor General and the Finance (Treasury) Department. Necessary correspondence and documents emanating from these law firms to relevant authorities in regard to this matter are all included in the list of documents in this brief.

29. This is a clear case of fraud and misrepresentation (false pretence). Those involved in this case have attempted to defraud the State and their actions amount to misrepresentation (false pretence). The basis for such proposed findings (apart from those stated above) are stipulated below.

Reasons/basis for proposed finding of fraud and misrepresentation

A. Scanned signatures (names) of Messrs Francis Kuvi and Timothy L. Copper

30. It is our submission that the signatures of both Mr Francis Kuvi and Mr Timothy L. Copper have been scanned. Commissioners note from the Court Order, Consent Order and the Deed of Release that the signatures do not appear straight as one would expect in the normal original documents. In this case, the signatures appear slanting (either upward or downward and not straight as is in a normal original and genuine document). They are either leaning downward or upward. In the case of the deed of release, Commissioners note that Mr Kuvi's signature appears leaning upwards whilst his name appears leaning downwards. This is the same in the Certificate of Judgment. The signatures of Francis Kuvi and Timothy Cooper (and their names) were scanned and inserted in the documents. See also signature (and the name) of Francis Kuvi in letter dated 4th October 2005 (marked 14 - NCR). It also appears that the signature of the Registrar signing the consent order may have been scanned and inserted.
31. Also on Signatures, there appears to be a major difference in the signature(s) of Wesley Aisora, the principal plaintiff. For instance see the difference in the Affidavit of Service for the Writ of

Summons and the Affidavit of Service of default judgment. See also Wesley Aisora's signature on the deed of release.

Mann & Associates Lawyers never acted for the Plaintiffs

32. Enquiries with Manu & Associates Lawyers show or confirm that Manu & Associates Lawyers never acted for the Plaintiffs. We wrote to Manu & Associates Lawyers enquiring about the firm's involvement in this matter and Mr Edward Manu, Principal of Manu & Associates Lawyers replied by letter dated 7th October 2008 stating that his firm never acted for the Plaintiffs. Our letter to Manu & Associates Lawyers dated 6th October 2008 is marked **16 - COI** and the response from Mr Manu is dated 7th October 2008 and is marked **17 — COI**. We have read in full the contents of the letter from Mr Manu.
33. We also enquired with Mr Cooper about his involvement in this matter. Mr Copper denied involvement and stated that he would do a written statement however as at the date of this Report, Mr Cooper has not provided a written response. Commissioners believe that Mr Cooper's signature (name) was scanned (photocopied) and inserted Mr Cooper was employed by Manu & Associates Lawyers from 2003 — 2004. Proceedings were filed in 2000. Further, Manu & Associates Lawyers were never operating from the address stipulated on the writ of summons. Marked **18 - COI** is a copy of our letter to Mr Cooper dated 7th October 2008.
34. It appears Mr Cooper's signature may have been scanned (photocopied) from the documents in relation to his involvement in the Alert Security matter where he was the lawyer acting for Alert

Security. This could be confirmed by the fact that, in the consent orders, it states (quote), "...I, *Timothy L Cooper, Tamer for the Plaintiff Company.....*" (*underlined*). In this case the Plaintiffs are individual persons. The reference to "Plaintiff Company's" refers to Alert Security company not Wesley Aisora and others.

Signing of the Writ of Summons and address on Affidavits

35. If the Writ of Summons was drafted by Manu & Associates Lawyers as the firm's name appears on the writ of summons, as it is a common practise, a lawyer from Manu & Associates Lawyers should have signed the writ of summons, however, this is not the case. The Plaintiff, Wesley Aisora signed the writ of summons. Further why was it that both affidavits of service have Wesley Aisora's name and address on the affidavits and not Manu & Associates Lawyers when the writ of summons and the court orders bear Manu & Associates Lawyers name and address.

No court file for this matter

36. Despite the conflicting letters allegedly written by former Registrar late Mr Lohia Raka, we submit that there was never any court file created for this matter. It is our view that the earlier letter written by late Lohia Raka dated 13 June 2006 (see document marked 2 - SG) is legitimate that reflected the true and correct position since 2000 (year/date when the writ was allegedly filed).
37. The letter dated 20 June 2006 may have been written by someone else with the signature of late Mr Lohia Raka photocopied if not scanned and inserted. This letter further states that Provincial

National Courts issue their own W.S and O.S numbers. It states that the registry does not have a centralised numbering system in place. This contradicts what Mr Augerea stated when he appeared before the Commission stating that all numbering given to proceedings filed in the other centres (National Court) are coordinated and given here at the National Court Waigani Registry.

38. This is further confirmed by the Registrar, Mr Augerea upon our enquiries (see letter marked 6 - COI) amongst others in relation to the conflicting letters by late Mr Lohia Raka. Mr Augerea has confirmed that all O.S or W.S numbers (i.e. court referencing numbers) are allocated by the Waigani National Registry. Thus, it is not true that respective registries allocate their own court referencing numbers.

39. Mr Augerea further confirmed that according to the Court Reporting Services there are no records of the purported court order of 17 June 2001 awarding IC7,527,264.20 to the Plaintiffs. Also W.S No. 754 of 2000 belongs to Steamships Ltd -v- South Pacific Builders Ltd.

Marked **50 — NC** is the copy of the document (letter) from Mr Augerea in response to our enquiries and marked **51 - NC** is a copy of the National Court file cover confirming that W.S 754 of 2000 is for the matter Steamships Ltd —v- South Pacific Builders Ltd.

40. Furthermore, the Commission notes from the letter dated 20th June 2006 that the letter states that the file is a Goroka matter however the Writ of Summons as it appears was filed here at Waigani. It states in the National Court of Justice at Waigani. Furthermore, the said letter states that the court order (presumably referring to court order of 17 October

2001) was also obtained at Goroka however it appears the court order was filed here at Waigani. It also states in the National Court of Justice at Waigani. If Manu & Associates Lawyers acted for the Plaintiffs we would doubt that this would be a typographical error (or an oversight), notwithstanding the fact that all documents purportedly filed in the National Court bear the citation 'In the National of Justice at Waigani.'

41. Further, Commissioners note from the National Court registry data entry pro-forma. The pro-forma is marked **19 - NCR**. Where it states Location, the name Goroka is stated. Under File Transfer, it then states Transfer Location? Waigani. As to Transfer Date, the date is written as 01/02/00. This would mean on the 1st February 2000, the matter was transferred from Goroka to Waigani. The date of transfer is contradicting as this would mean that at the date of transfer (01/02/00) there was never any matter (file) in the name Wesley Aisora & Others — v- The State as the writ was filed in 13 November 2000. The writ of summons for this matter was non existent on 1st February 2000.
42. Furthermore, where it states Remarks, it states (Quote) 'General damages entered for the Plaintiff for damages to be assessed.' This again is contradictory and confusing, as documents show that default judgment was granted for the sum actually claimed. The order never stated damages to be assessed.
43. When we summoned the production of the court file, Mr Ian Augerea, Registrar provided the Commission with a Supplementary Court file. Marked **20 - NCR** is a copy of the court file cover confirming production of supplementary court file. Commissioners note from the file cover that the file was created on 19 June 2008 (Commence 19/06/08). There was never any court file created for this matter, simply

44. there is no court file for this matter. The Supplementary Court file was created at the request of Makap Lawyers. See letter from Makap Lawyers to Registrar dated 12 June 2008 - marked 21 - NCR. The notation in the said letter reads (Quote), "*.. Marie, create Supp- file, 17/ 6/ 08. Marie m will continue look for file - although thorough check has been done in case it is located. 17/ 6/08.*"
45. Mr Makap of Makap lawyers confirmed in evidence that he had requested the Registrar create a supplementary file following his numerous searches at the Registry. Mr Augerea also confirmed in evidence that the Supplementary file was created to hold documents that have been exchanged pending the search for the original file. Mr Augerea however confirmed that the "original court file" was never located and in essence confirmed that there was no file registered under the Plaintiffs name and the file reference (number) related to a different matter. Mr Augerea also stated that the signature on the Court Order and that of the Certificate of Judgment belong to Mr Eric Kiso, currently Assistant Registrar, Mt. Hagen National Court.

No Solicitor General file

46. Commissioners note that the Writ of Summons was filed in 2000. The file reference is SGI88/07. This appears to contradict the evidence provided by Ms Kiele as the Commission was advised that when a writ is served on the Solicitor General's office, the file reference must correspond with the year the writ of summons or the section 5 notice is lodged. In this case, it should be SGI88/00 (2000). In this case, however the reference to SGI 88/**07** which would mean the file was only created recently (2007).

47. On 12 March 2007, Mr David Lambu wrote to Kakaraya Lawyers advising that the Solicitor General had no file for this matter. The letter further stated that the file reference referred to in the Affidavit of Ben Babat (First Defendant) purportedly prepared and filed by the Solicitor General was a file reference belonging to a different matter.

Marked 22 - **SG** is a copy of the letter dated 12 March 2007 and marked 23 - **SG** is a copy of the affidavit of Ben Babat.

48. Further the Solicitor General's file creation instructions sheet confirms that Section 5 Notice was never lodged by the Plaintiff. Marked 24 - **SG** is a copy of the Solicitor General file creation instructions sheet.

49. All these issues clearly indicate that there was no file created for this matter since the alleged filing of the writ in 2000. Furthermore, the affidavit of service filed by Wesley Aisora deposing to service of the writ and default judgment is doubtful for the reason that the wording used in both affidavits are identical.

Evidence of witnesses called

50. The following persons appeared before the Commission (on summons) and gave evidence. They are:-

- i. Mario Cueva — Consultant, Finance Department;
- ii. Petals Bom - Financial Controller, Finance Department;
- iii. Ian Augerea, Registrar, National Court
- iv. Dan Salmon Kakaraya - lawyer and Principal of Kakaraya Lawyers;
- v. Luther Makap - lawyer and Principal of Makap Lawyers;
- vi. Bernard Amnol - lawyer and Principal of Amnol & Co. Lawyers;

- vii. Dawa Agu Klewaki — lawyer;
- viii. Greg Michael Konjib - lawyer and Principal of Konjib & Associates;
- xi. Paul Kamakande — consultant;
- x. Timothy Cooper — lawyer;
- xi. Francis Kuvi — lawyer;
- xii. Wesley Aisora - claimant

50. We address each of the above witnesses in the order stipulated above.

Evidence — Mario Cueva

51. Mr Cueva is a Consultant with the Finance Department As mentioned above, Mr Cueva appeared before the Commission and provided documents that were provided to the Finance Department for settlement of the claim. He confirmed that no payments were made. Mr Cueva was not able to identify the person who lodged the documents for payment at Finance Department but stated that upon receipt of the documents a letter was written to the Solicitor General to verify the claim.

Evidence — Petrus Bom (hereafter referred to as "Tetrus")

52. On 6 February 2009, Mr Kamakande whilst giving evidence stated that he was engaged as a consultant by Wesley Aisora to follow up on payment of the claim. Mr Kamakande advised that he would attend at Finance Department and speak to Petrus regarding the claim. He was advised that a part payment was made in respect of the claim by Wesley Aisora and gave him (Kamakande) a copy of the warrant. This evidence appeared to contradict the evidence by Mario Cueva in relation to payments.

53. Petrus appeared before the Commission on 13 February 2009 (on summons) and gave evidence. Petrus was asked if he had met Kamakande following up on the payment and said yes, however, denied advising Kamakande that a part payment was made in respect of this matter. The only advice, Petrus told Kamakande at the material time was that "...I will check out to see if there is any payments been made or not." Petrus also denied ever providing a copy of the warrant that Kamakande produced to the Commission alleging that a part payment was made.
54. Petrus confirmed that no payments were made in respect of the claim.

Evidence — Ian Augerea

55. Mr Augerea appeared on 6 February 2009 and on 7 April 2009. Essentially Mr Augerea as stated above confirmed that there was no file created for this matter, the only file being a Supplementary file. File reference (number) belonged to another matter.
56. One critical piece of evidence by Mr Augerea is that the National Court stamps are easily accessible by the Deputy Registrars and the Court Clerks/staff. It is therefore submitted that the National Court stamp can be abused like what happened in this case.

Evidence - Dan Salmon Kakaraya

57. Mr Kakaraya took instructions to act for the claimant in March 2006. In relation to the court documents, the Mr Kakaraya was only provided with the copies of all the court documents we have on file. Mr Kakaraya actively pursued the matter. It is submitted that there is evidence to

58. **suggest that there were seriously problems with this matter however
Mr
Kakaraya failed to conduct thorough investigation and also failed**

59. For instance, Mr Kakaraya was well aware of the fact that the current Solicitor General refused or otherwise never gave clearance on the matter because of serious issues surrounding the matter. However, Mr Kakaraya relied on a letter that was fabricated bearing the signature of the former Solicitor General. That is, on 31st December 2007, Mr Kakaraya wrote to the Finance Department stating (quote para.3), "...due to the delay in the provision of the legal clearance by the current Solicitor General, we enclose legal clearance by the previous Solicitor General in the same matter. As you aware, the claim is bona fide and the file exists." Mr Kakaraya was asked how he established if the claim was bona fide and the file exists.

60. As to the Solicitor General file, Mr Kakaraya stated, "...Solicitor General, they have not confirmed nor denied the existence but I assume they were doing their own investigations and collating the file and making the relevant enquiry in establishing the....." (quote). In this case, Mr Kakaraya should not have relied on the purported legal clearance by the former Solicitor General as evidence clearly shows the letter was a fabrication.

61. Furthermore, prior to the letter by Kakaraya to Finance Department dated 31st December 2007, the Solicitor General had written to Mr Kakaraya on 12 March 2007 expressing serious issues concerning this matter. Mr Kakaraya admitted receiving the letter. That letter was sufficient to raise alarm bells and Mr Kakaraya ought to have sought detailed instructions from the claimant before taking steps to enforce

62. **payment of the claim. When asked about the letter, Mr Kakaraya stated he lost track of his client and as such could not respond to the letter by the Solicitor General.**
63. Although he mentioned that he had lost contact -with his client and therefore could not respond to the Solicitor General's letter, Mr Kakaraya wrote to the Finance Department stating that the claim was genuine and that payments be settled. It is submitted that Mr Kakaraya's actions were unreasonable and his actions may amount to fraud as he knew very well that serious issues arose from this case yet he stated that the claim was bona fide and the file exists when the evidence by the Solicitor General clearly stated that "no file exists for this matter". Furthermore, the Solicitor General file reference on the Affidavit of Ben Babat relate to a entirely different matter. That is sufficient for Mr Kakaraya to stop taking any further action until full and authentic instructions were sought on the issues raised.
64. Further, it is submitted that Mr Kakaraya was aware of the fact that the claimant had engaged other law firms to act for him, yet he never took steps to withdraw his services. Mr Kakaraya confirmed that the claimant had advised him of the engagement of other law firms.

Evidence - Luther Makap

65. Mr Makap confirmed that his firm took instructions to act for the claimant. Essentially, Mr Makap confirmed that he requested for the creation of the supplementary file. However, they withdrew instructions after noticing that the matter was subject of inquiry and that there were serious issues concerning the matter.

Evidence - Bernard Amnol

66. Mr Amnol was engaged in February 2008 and his services terminated in June 2008. Essentially Mr Amnol stated that he wrote to the Solicitor General to give clearance of the claim but whilst waiting for the response from the Solicitor General, his services were terminated. He had only acted for four months, within which he stated that not much work was undertaken.

Evidence — Dawa Agu Klewaki

67. Mr Klewaki said he met the claimant on three occasions at which he was asked by the claimant to assist him draft a claim. Mr Klewaki stated that he only provided a sketch/precedent to draft the Statement of Claim and it was written. Mr Klewaki stated that he had no idea of the claim by the claimant.
68. However, Mr Klewaki's evidence is contradictory to that of the claimant as Mr Aisora stated in evidence that he was introduced to Mr Klewaki by Eddie Bugie. Mr Bugie advised the claimant that he must see Mr Klewaki and he will assist. Mr Aisora stated that he was not aware of the kind of assistance Mr Klewaki would provide but he stated that Mr Klewaki and Mr Bugie may have spoken about the claim.
69. It is submitted that Mr Klewaki be further investigated into his role in the alleged claim as most of the documents used in this case bear the address of Manu & Associates Lawyers of which Mr Klewaki was employed. Furthermore, first Mr Klewaki stated that he obtained a precedent copy from one of Manu & Associates Lawyers files but later

70. **changed it to state that he only provided a handwritten precedent of how to make a claim.**

Evidence - Greg Michael Konjib

71. Mr Konjib took instructions in October 2008. Mr Konjib stated that he was instructed by Paul Kamakande who introduced himself as the Consultant for the claimant. His engagement was formalized by way of an Agreement. Essentially, Mr Konjib's evidence is that they (his firm) never pursued the matter any further as following the listing of this matter for investigation by the Commission of Inquiry, they were cautious with pursuing the matter any further.

Evidence - Paul Kamakande

72. Mr Kamakande was engaged as a Consultant in September 2007. In a letter to the Commission of Inquiry dated 28th January 2009, the claimant, Wesley Aisora stated that Mr Kamakande basic function was to "...assist investigate the authenticity and validity of the claim.....". It appears this statement is contradictory to the work undertaken by Mr Kamakande because at all times, the claimant was at the disposal of Mr Kamakande. That is to say, Mr Kamakande maintained contact (if not regular contact) with the claimant as opposed to the lawyers who had difficulty communicating with the claimant. The answer to the issue of the "validity" and "authenticity" of the claim rested with the claimant yet Mr Kamakande failed to seek detailed instructions from the claimant.
73. Evidence is overwhelming that Mr Kamakande instead of acting within the scope of his appointment he had actually appointed lawyers and took steps to pursue payment of the claim. Furthermore, Mr Kamakande was

74. **instrumental in preparing most of the documents. The claimant was only asked to sign. Mr Kamakande be referred to the Police for further investigation in relation to his involvement in this matter. He is deemed to be a crucial witness to this claim.**

Evidence — Timothy Copper

71. Essentially, Mr Cooper advised the Commission that he had no knowledge of the purported claim by the claimant nor did he ever act for the claimants. Mr Copper advised that the claim was a fraud and that his name and signature was forged.

Evidence — Francis Kuvi

72. Mr Kuvi's evidence is similar to that of Mr Cooper. Essentially, Mr Kuvi stated that his name and signature was forged. He had no knowledge of the claim nor did he ever act for the State in defending the alleged claim. The claim is a fraud.

Evidence — Wesley Aisora ("claimant")

73. Mr Aisora is the claimant. Following several adjournments, Mr Aisora eventually appeared before the Commission and gave evidence respecting this claim. Essentially, Mr Aisora confirmed or stated that this was a bogus claim and an act to defraud the State. He mentioned that the idea of making up this claim was by late Eddie Bugie, an Officer with the Sheriffs Office, National Court. Mr Aisora stated that he had no knowledge of court process, etc and in this case all the documents were drafted (or prepared) by Eddie Bugie and he was only asked to sign and follow up on the claim.

74. It is submitted that although Mr Aisora knew that the claim was bogus he took no step in advising any of the lawyers or the persons whom he engaged to pursue his claim. He therefore was actively involved in pursuing this bogus claim.

D. Findings

1. There was no Solicitor General file created for this matter. The file provided to Commission was only created recently in 2007. No Solicitor General file.
2. There was no court file created for this matter. The court file provided to the Commission was a Supplementary one created at the request of Makap lawyers acting for the Plaintiffs. No Court file.
3. Signatures and names of Mr Francis Kuvi and Mr Timothy L Cooper were either scanned or photocopied and inserted on the documents to make them look genuine.
4. Manu & Associates Lawyers never acted for the Plaintiffs.
5. This is an act to defraud the State. Fraud and misrepresentation (false pretence).

E. Recommendations

1. "Wesley Aisora be referred to Police for further investigations.

2. Court Registry staff involved in facilitating sealing of the documents be investigated and referred to appropriate authorities such as Police for investigation and charges to be laid.
3. The Law Society conduct investigations into the conduct of the law firms or lawyers involved.
4. Finance Department must not make any payments.
5. Paul Kamakande, Dan Kakaraya, Dawa Agu-Klewaki be referred to Police for further investigations.
6. Attorney General, Solicitor General and Finance Department immediately reject this claim and mark their records accordingly.
7. An inquiry be conducted into the National Court Registry to ascertain how National Court stamps have been abused and persons involved to be prosecuted and be dismissed from their employment.

INDEX TO DOCUMENTS TENDERED AS EVIDENCE

1. Letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006- marked **1-SG**.
2. Letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006 marked 2 - **SG**.
3. COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008. Marked 3 - **COI**.
4. The search results provided by Mr Augerea - marked 4 — **NCR**.
5. Letter dated 20 June 2006 by former Registrar, late Lohia Raka - marked 5- **NCR**.
6. Letter from Commission of Inquiry to Augerea, Kiele and Court Reporting - marked 6 - **COI**.
7. Writ of Summons - Marked 7 - **NCR**.
8. Affidavit of Service - Marked 8 - **NCR**.
9. Court Order - Marked 9 -**NCR**.
10. Affidavit of Service - Marked 10 - **NCR**.
11. . Consent Order - Marked 11 - **NCR**.
12. Certificate of Judgment - marked 12 - **NCR**.
13. Deed of Release - Marked 13 - **NCR**.
14. Letter dated 4th October 2005 - Marked 14 - **NCR**.
15. Letter from Makap Lawyers dated 7th October 2008 - marked 15 - **COI**.
16. COI letter to Manu & Associates Lawyers dated 6th October 2008 - marked 16 — **COI**.
17. Letter from Mr Manu is dated 7th October 2008 - marked 17 - **COI**.
18. COI letter to Mr Cooper dated 7th October 2008 - Marked 18 - **COI**.
19. National Court registry data entry pro-forma - marked 19 - **NCR**.
20. Court file cover confirming production of supplementary court file - Marked 20-**NCR**.

21. Letter from Makap Lawyers to Registrar dated 12 June 2008 - marked 21 - NCR.
22. Letter dated 12 March 2007 - Marked 22 - SG.
23. Affidavit of Ben Babat - marked 23 - SG.
24. Copy of the Solicitor General file creation instructions sheet - Marked 24-SG.
25. Letter from Wesley Aisora to Solicitor General dated 25 August 2008 — marked 25 — SG.
26. Letter from Kakaraya Lawyers to Finance Department dated 1st March 2006 - marked 26 - SG.
27. Notice of Change of Lawyers filed by Kakaraya Lawyers on 3rd March 2006 - marked 27 - NCR.
28. Letter from Kakaraya Lawyers to Registrar dated 13 June 2006 - marked 28 - SG.
29. Letter from Kakaraya Lawyers to Solicitor General dated 15 August 2006 - marked 29 - SG.
30. Letter from Kakaraya Lawyers to Solicitor General dated 26 February 2007 - marked 30 - SG (binded document).
31. Letter from Gevame J Namane, Acting Registrar, Goroka National Court registry to Solicitor General dated 16 February 2007 - marked 31 - SG.
32. Telephone attendance record between Tindiwi & Kakaraya dated 14 March 2007 - marked 32 - SG.
33. Letter from Pauline Nuau, Finance Department to Solicitor General dated 5th December 2007 - marked 33 - SG.
34. Letter from Kakaraya Lawyers to Solicitor General dated 19 August 2007- marked 34-SG.
35. Letter from Kakaraya Lawyers to Solicitor General dated 31 December 2007 — marked 35 — SG.

36. Letter from Kakaraya Lawyers to Finance Department dated 31 December 2007 - marked 36 - SG.
37. Letter from Wesley Aisora to Kakaraya Lawyers dated 27 February 2008- marked 37-SG.
38. Authority & Direction from Wesley Aisora to Amnol & Company Lawyers dated 28 February 2008 - marked 38 - SG. Authority & Direction from Wesley
- 39, Aisora to Finance Department dated 28 February 2008 - marked 39 - SG.
- 40, Letter from Amnol & Company Lawyers to Finance Department dated 28 February 2008 - marked 40 - SG.
- Letter from Wesley Aisora to Solicitor General dated 3rd March 2008
41. — marked 41 - SG.
- Letter from Amnol & Company Lawyers to Solicitor General dated 4th June
- 42, 2008 - marked 42 - SG.
- Letter from Wesley Aisora to Amnol & Company Lawyers dated 10th June 2008
43. - marked 43 - SG.
- Letter from Makap Lawyers to Solicitor General dated 19th June 2008
44. - marked 44 - SG.
- Notice of Change of Lawyers filed by Makap Lawyers on 19 June 2008 -
45. marked 45 - SG.
- Letter from Makap Lawyers to Solicitor General dated 11th August 2008 -
46. marked 46 - SG.
- Letter from Solicitor General to Makap Lawyers dated 3rd September 2008-
47. marked 47-SG.
- Handwritten memo to Ms Tindiwi, Solicitor General's Office from Paul
48. Kamakande (undated) - marked 48 - SG. Handwritten note to Mr Devete, Solicitor General Office from Dan Kakaraya (undated) - marked 49 - SG.
49. Copy of the document (letter) from Mr Augerea in response to our enquiries - marked 50 - NC.

50

Copy of the National Court file cover confirming that W.S 754 of 2000 is for the matter Steamships Ltd -v- South Pacific Builders Ltd - marked 51-NC.

Ben Noel

Parties

(i) For the State:

(a) Police

(b) Attorney General/ Solicitor General

(ii) For the Claimant:

(a) Ben Noel

Matter

- > Claim for malicious prosecutions
- > Two writ of summons filed for the same cause of action
- > Both proceedings were heard together before the National Court
- > Following a full hearing, National Court awarded K45, 000.00 inclusive of costs. Interests to be calculated at 8 %
- > Despite the National Court award, proceedings were again settled for K850,000.00
- > K150, 000.00 paid so far

Recommended Findings

- > No basis for the out of court settlement as the matter was determined by the National Court
- > Fraud

Attached herewith is the copy of the Terms of Reference. This is a case which falls within the terms of the reference of this inquiry.

D. Documents and investigations conducted at:

- National Court
- Office of the Solicitor General
- Finance Department

E. Brief Facts / Evidence

1. Ben Noel a local business man in Goroka made two civil claims against three police officers and the State. By Writ of Summons and statement of claim filed on 3 September 2001, described as WS 1269 of 2001, Mr Noel sought damages for having being wrongfully arrested and detained for a period of 35 days from 26 July 1999 to 31 August 1999.
2. Then on 21 January 2002, Mr Noel filed another Writ of Summons and statement of claim in proceedings WS 46 of 2002 against the same defendants, claiming damages for defamation, false imprisonment and malicious prosecution, in relation to the same facts and allegations of wrongful arrest.
3. On 26 April 2002, the National Court entered default judgment against all the defendants, including the State in proceedings WS 1269 of 2001. In relation to WS 46 of 2002, although Mr Noel filed an application for default judgment, Mr Noel's lawyer withdrew that motion because both parties had consented to the merger of proceedings WS 1269 of 2001 and WS 46 of 2002 because they arose from the same facts.
4. Orders for consolidation of those proceedings was endorsed by the Court on 10 October 2003. After a contested hearing on the assessment of

damages, the National Court published a written decision on 26 April 2004 assessing Mr Noel's damages at K40,000.00 and awarded costs at K5,000.00 and interest.

5. Almost two (2) months later on 9 June 2004 Mr Ben Noel entered into a deed of release in the sum of K850,000 with Mr Francis Kuvi as Solicitor General on behalf of the State. Finance Department records reveal that a total of K1 50,000 has been paid to Mr Noel on 6 July 2005 in one cheque payment.
6. The following persons were called to give evidence in respect of the matter. They are Ben Noel, Francis Kuvi and Alois Kintau.

Evidence of Ben Noel

7. Ben Noel appeared before the Commission and confirmed that he was well aware of the decision of the National Court awarding him K45, 000.00. He then attended at the Solicitor General's Office and commenced discussions with Mundua Kua and Francis Kuvi. He confirmed that Francis Kuvi was well aware of the decision by the National Court. They (Kuvi/ Noel) agreed to settle for K850, 000.00. Ben Noel was confident and appeared to be aware of the issues that arose from the claim.

Evidence by Francis Kuvi

8. Francis Kuvi appeared before the Commission and was advised of the evidence by Ben Noel and responded that he would like to respond in writing to the issues that arose in light of the evidence by Ben Noel. A statement was received from Francis Kuvi dated 17 June 2009.
9. Mr Kuvi confirmed that he had appeared at the National Court during trial on assessment of damages but stated that a junior lawyer could have

appeared to received the Court's decision. However, Mr Kuvi contradicted himself by stating that he was no sure if a decision was made.

10. In essence, Francis Kuvi was very much aware of the matter proceedings to trial on assessment of damages yet proceeded to setde the matter for K850, 000.00 in direct defiance (contempt) of the National Court order. In his statement, Mr Kuvi has attempted to deny that he had signed the deed of setdement. It is clear from Mr Kuvi's evidence and that of Ben Noel that Francis Kuvi was instrumental in the signing of the deed of release.
11. Mr Kuvi's actions amount to serious ethical issues that warrant referral to the Lawyers Statutory Committte and the Police for further investigations and possible charges to be laid.

E. Recommended Finding(s)

1. No lawful basis for the settlement by deed of release.
2. An act to defraud the State. Fraud.
3. Francis Kuvi's actions amount to. serious unprofessional conduct as a lawyer and an act to defraud the State as he knew very well that the matter had already been determined by the National Court.
4. Ben Noel's actions amount to an act to defraud the State as he also knew that his matter(s) were already determined by the National Court.

F. Recommendations

1. Francis Kuvi be referred to the Lawyers Statutory Committee and the Police for further investigations and possible charges.

2. Ben Noel be referred to the Police for further investigations.
3. Attorney General (Solicitor General) immediately file court proceedings and set aside the deed of settlement and seek recovery of the monies paid to Ben Noel.
4. Finance Department immediately cease any further payments in respect of this matter.

(i) IBK (PNG) Ltd A.

Parties

(i) For the State:

- (a) Finance Department
- (b) Attorney General/Solicitor General
- (c) National Court Registry

(ii) For the Claimant:

- (a) IBK (PNG) Ltd

B. Brief facts /evidence

1. This is a matter where we do not have any documents (at all) to identify the facts or circumstances leading to the alleged claim. All we have on file are following documents, they are:-

- (i) Letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006; marked 1 - SG.
- (ii) Letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006; marked 2 - **SG**.
- (iii) COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008. Marked 3 -**COI**.

2. Commissioners, it appears the claimant IBK (PNG) Limited allegedly obtained a Court Order for K1,900,000.00 on 18 October 2002 and submitted the said Order to the Finance Department for payment. It

appears the letter from Ms Kiele to Mr Cueva was prompted by the fact that Mr Cueva may have sought instructions or clearance from the Solicitor General in relation to the said Order.

After checking records at the Solicitor General's office, Ms Kiele may have written to the National Court Registry to confirm with their records also. The letters from Ms Kiele and Mr Augerea state there are no records (at all) of such a case/matter in the Solicitor General's file and the National Court Registry respectively.

I Investigations at the companies registry (IPA) confirm that there is no company registered under the name IBK (PNG) Ltd however there is a company registered as IBK Stationary Supplies (PNG) Ltd'. The Company ceased to operate on 21st April 2006 as being the date it was deregistered.

Marked with '4 — IPA' is the Company Extract of the said Company, IBK Stationary Supplies (PNG) Ltd obtained from the IPA, Company Registry.

Following issuing of the Summons, the following persons brought with them certain information/documents on Monday, 6th October 2008 vital to our investigations, they are:-

- ① Mr Ian Augerea, Registrar National Court;
 - Ms Hitelai Polume-Kiele, Acting Secretary; Department of
 - (ii) Justice & Attorney General;
 - Mr Mario Cueva, Finance Department; and
 - (iii) Mr Augerea has confirmed in writing that the National Court
- A Registry does not have a file registered under the said name
IH IBK PNG Ltd -v- The State, essentially confirming the

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contents of the letter from the late Mr Lohia Raka (marked 2 - SG) in regard to this matter.

Marked '5 - **NCR**' is the copy of the note/document produced by Mr Augerea.

7. Ms Kiele confirmed the contents of the letter dated 20th June 2006 (marked 1- SG) and at the same time provided copies of the following documents which we did not have (during our initial investigations), they are:-

(i) letter dated 27th March 2006 from, Ms Cathy Ali, Finance Department to Ms Kiele - marked '6 - SG';

(ii) letter dated 21st March 2003 from the Office of the Solicitor General by Mr Zacchary Gelu to Mr Boas Hembahi, Finance Department — marked '7 — **SG**';

(iii) Court Order filed and entered on 18 October 2002 - marked '8 - **SG**';

(vi) Certificate of Judgment dated 18 October 2002 - marked '9 - **SG**';

8. The Commission notes from Cathy Ali's letter dated 27 March 2006 that when the documents were lodged at the Finance Department, the documents were referred back to the Solicitor General seeking clearance and verification on the issues raised in the said letter.

9. Mr Cueva attended the Commission hearing on Wednesday, 8th September 2008 and was cross-examined. Mr Cueva confirmed on oath that no payments were made in respect of this matter and at the

same time provided a bundle of documents. These documents were marked as Exhibit 5 — DF.

10. Mr Zacchary Gelu appeared before the Commission on his own will (without summons) and gave evidence in respect of the matter. Mr Gelu stated that the claim was a fraud stating his reasons amongst others that his signature was forged, the format of the letter was different to the one that is used in the Solicitor General's Office, his name was spelt incorrecdy and at the material time when the letters and the documents were signed (bearing his signature) he was no longer the Solicitor General. Mr Gelu said this was a fraud.
11. Both Ms Kiele and Mr Augerea have confirmed that there is no file registered in the National Court Registry and the Office of the Solicitor General.
12. In the meantime few issues that need to be highlighted are;
 - (a) Certificate of judgment does not indicate if the State wishes to take further action or the judgment must be satisfied. This is a fatal error;
 - (b) Both the Court Order and the Certificate of Judgment are both dated 18 October 2002 and filed 28 February 2003. It can be noted from the dates that the same person wrote the dates as they are very identical. Furthermore, in the normal course of practice, often (always), the Certificate of Judgment is always drafted and filed a day or more after the Court Order is obtained. These issues raise serious doubt as

to the authenticity and legality of these documents. This is a fraud (misrepresentation);

(c) There is no Writ of Summons and other necessary court documents that would lead credence to such orders being made.

13. The Commission has not received any documents or information from the claimant, IBK PNG Ltd. The publication of this matter in the Newspaper is sufficient notice to the claimant, IBK PNG Ltd. There was no appearance for the claimant nor any form of communication was received from the claimant.

Finding(s)

1. No Solicitor General file created for this matter.

2. No court file for this matter.

3. The issue generally in this case is, how did IBK PNG Ltd obtained a Court Order for the sum of K1.9 million on 18 October 2002? As it appears this is a clear case of fraud. Those involved in. facilitating of claim must be referred to appropriate authorities. Finding of fraud.

Recommendations

1. Matter be referred to Police for further investigation to ascertain persons behind this claim.
2. Those National Court Registry staff involved in facilitating the claim by sealing the court documents be referred to appropriate authorities for investigation and appropriate action to be taken. Likewise, staff(s) at the Attorney General or Solicitor General's Office be investigated to ascertain how the letterhead for the Office of the Secretary & Attorney General was used to facilitate this fraud.
3. The letterhead for the Office of the Solicitor General and the Secretary and Attorney General be improved with special security features so that it is not used without lawful authority.
4. A different National Court seal with improved security features be used to seal court orders and certificate of judgments.
5. No payments must be made by the Finance Department on this claim.
6. Solicitor General must take appropriate action to put a stop to this purported claim. That is a letter be written to Finance Department to immediately put a stop to the claim from being processed. An action/application be filed in Court to set aside the Court Order otherwise it possible that an unsuspecting Officer can act on the Court Order.

7. Apart from the requirement to give Notice under section 5 of the *Claims By and Against the State Act ("Act")*, a provision be included in the said *Act* make it mandatory that:-

- (a) the Registrar of the National Court should after every four (4) months (quarterly) provide an up-dated list of all proceedings brought against the State. This is to avoid the experience now seen whereby a person can collude with Registry official and draft a Court Order without a physical file actually created for the matter. The Solicitor General and Finance Department can use the list to check against documents submitted to their Office for processing;
- (b) the section 5 notice issued to the Attorney General/Solicitor General must also be copied to the Principal Defendant, such as in this case the Police Commissioner.

Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the Commission's Terms of Reference. All the terms of reference are relevant however, those that apply specifically to this case are those that have being highlighted, they are *Terms of Reference No.s 1 and 8*.

INDEX TO DOCUMENTS TENDERED AS EVIDENCE

1. Letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006; marked **1-SG**.
2. Letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006; marked 2 - **SG**.
3. COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008. Marked 3 - **COI**.
4. Company Extract of IBK (PNG) Ltd - marked **4 - IPA**.
5. Copy of the note/document produced by Mr Augerea — marked 5 - **NCR**
6. Letter dated 27th March 2006 from Finance Department to Ms Kiele — marked **'6 - SG**.
7. Letter dated 21st March 2003 from the Office of the Solicitor General by Mr Zacchary Gelu to Mr Boas Hembahi, Finance Department - marked 7 - **SG**.
8. Court Order filed and entered on 18 October 2002 - marked 8 - **SG**.
9. Certificate of Judgment dated 18 October 2002 - marked **9 - SG**.

Besalam Investment Ltd

A. Parties

(i) For the State:

- (a) Police
- (b) Attorney General

(ii) For the Claimant:

- (b) Besalam Investments Ltd

B. Matter

- Alleged police raid
- Judgment entered for K2, 646 000.00

C. Recommended Findings

- Fraud
- No court proceedings
- No Solicitor General file

D. Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the terms of reference of this inquiry. All the terms of reference are relevant and applicable to this case, however, this case falls squarely within *Terms of Reference No.s' 1 (i) to (xii) and 5 (i) to (mi)*. Also attached is the advertisement containing list of matters (including this matter) published in newspaper.

E. Documents and investigations conducted at:

- Attorney-General (AG)
- Solicitor-General (SG)
- Registry of National Court (NC)
- Department of Finance (Finance)

F. Brief facts/ Evidence

1. Besalam Investment Ltd filed proceedings in W.S No. 306 of 2001 against the Police and the State for unlawful police raid which resulted in loss of proceedings.
2. The matter purportedly went to full trial and the National Court awarded the sum of K2, 646, 000. 00 inclusive of interest with costs to be taxed if not agreed on 24th June 2001.
3. The Court Order and the Certificate of Judgment was settled and filed on the same date 29th June 2001. Mr Gelu purportedly signed the Certificate of Judgment. On 14th October 2005 Mr Kuvi purportedly wrote to Mr Otto Wangilen to settle the judgment debt.
4. On 4th May 2006, Ms Polume-Kiele wrote to Mrs Cathy Ali, Finance Department stating the purported claim by Besalam Investment Ltd was fraudulent as there were no Solicitor General and National Court files for this matter and as such advised that no payments be made until further advice.

G. Findings

1. The Claim appears to be a fraud and needs further investigation.

Recommendations

1. The matter be further investigated by the Police.
2. The Attorney General and the Solicitor General conduct further investigation into this matter to ascertain amongst others if a proceedings were actually filed in Court and take appropriate action to stop payment.
3. Finance Department immediately stop payment. Persons following up on the said claim be referred to police for investigations.

(k) John Toa

A. Parties

(i) For the State:

(a) Attorney General

(ii) For the Claimant:

(a) John Toa

B. Matter

- Judgment entered for IC786, 000.00

C. Recommended Findings

- Fraud
- No court proceedings
- No Solicitor General *file*

D. Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the terms of reference of this inquiry. All the terms of reference are relevant and applicable to this case, however, this case falls squarely within *Terms of Reference Nos 1 (i) to (xii) and 5 (i) to (vii)*. Also attached is the advertisement containing list of matters (including this matter) published in newspaper.

E. Documents and investigations conducted at:

- Attorney-General (AG)
- Solicitor-General (SG)
- Registry of National Court (NC)
- Department of Finance (Finance)

F. Brief facts/ Evidence

1. John Toa filed proceedings in W.S No. 304 of 2001 against the State claiming the sum of K786, 000.00 and obtained Orders for the said amount on 14th June 2001 and submitted the Order to the Finance Department for settlement. As a result on 24th March 2006, Finance Department wrote to the Solicitor General to verify the authenticity of the claim.
2. On 20th June 2006 Ms Polume-Kiele wrote to Mr Mario Cueva, Finance Department stating the purported claim by John Toa was fraudulent as there were no Solicitor General and National Court files for this matter and as such advised that no payments be made until further advice. Because there are no documents such as the writ of summons we are not able to ascertain the nature of claim.

G. Findings

2. The Claim appears to be a fraud and needs further investigation.

I. Recommendations

1. The matter be further investigated by the Police.

2. The Attorney General and the Solicitor General conduct further investigation into this matter to ascertain amongst others if a proceedings were actually filed in Court and take appropriate action to stop payment.
3. Finance Department immediately stop payment. Persons following up on the said claim be referred to police for investigations.

(1) Dick Teman

A. Parties

(i) For the State:

- (a) Finance Department
- (b) Attorney General/Solicitor General
- (c) National Court Registry
- (d) Police Department

(ii) For the Claimant:

- (a) Dick Teman

B. Brief Facts/Evidence

1. This is a matter where we do not have any documents (at all) to identify the facts or circumstances leading to the alleged claim. All we have on file are following documents, they are:-

- (i) Letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006.
- (ii) Letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006.
- (iii) COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008.

The claimant Dick Teman is alleged to have obtained a Court Order for K3,600,000.00 on 14th July 2005 and submitted the said Order to the Finance Department for payment. It appears the letter from Ms Kiele to Mr Cueva was prompted by the fact that Mr Cueva may have sought instructions or clearance from the Solicitor General in relation to the said Order.

The letters from Ms Kiele and Mr Augerea state there are no records (at all) of such a case/matter in the Solicitor General's Office and the National Court Registry respectively.

Following issuing of the Commission Summons, the following persons brought with them certain information/documents on Monday, 6th October 2008 vital to the Commission's investigations, they are:-

- (i) Mr Ian Augerea, Registrar National Court;
- (ii) Ms Hitelai Polume-Kiele, Acting Secretary;
- (iii) Mr Mario Cueva, Finance Department; and
- (iv) Mr Francis Kuvi.

Mr Augerea has confirmed in writing that the National Court Registry does not have a file registered under the said name Dick Teman —v- The State, essentially confirming the contents of letter from the late Mr Lohia Raka (marked 2 — SG) in regard to this matter.

Marked '4 - NCR' is the copy of the note/ document produced by Mr Augerea.

6. Ms Kiele confirmed the contents of the letter dated 20th June 2006 (marked 1- SG) and at the same time provided copies of the following documents which we did not have (during our initial investigations), they are:-

(i) letter dated 7th March 2006 from Finance Department to Ms Kiele - marked '5 - SG';

(ii) letter dated 17th August 2005 from the Office of the Secretary & Attorney General by Mr Francis Kuvi to Mr Boas Hembeli, Finance Department — marked '6 - SG';

(iv) Court Order of 14 July 2005 - marked '7 - SG';

(v) Certificate of Judgment dated 1st August 2005 - marked '8 - SG'

8. The Commission notes that when the documents were submitted with the Finance Department for payment, Mr Otto Wangilen, Finance Department wrote to Ms Kiele on 7th March 2006 seeking verification as it appeared that Mr Kuvi's signatures were scanned. The Commission also notes that the purported letter written by Mr Kuvi to Finance Department on 17 August 2005 was written under the letterhead of the Office of the Secretary & Attorney General. In this case, it should have been written under the letterhead of the Office of the Solicitor General.

9. Mr Cueva attended the Commission hearing on Wednesday, 8th
September 2008 and was cross-examined. Mr Cueva confirmed on

oath that no payments were made in respect of this matter and at the same time provided a bundle of documents. These documents were marked as Exhibit 4 - DF.

10. From the letter purportedly written by Mr Kuvi (marked 5 - SG), it appears the claim was allegedly for unlawful police raid which resulted in destruction of properties.

11. Mr Kuvi gave evidence on 17 March 2009 and denied having any knowledge of this matter. He stated that his signature was forged. Mr Kuvi's evidence is crucial as his signature appears on the Certificate of Judgment and the letter to Finance Department giving clearance for settlement of the claim.

11. We did not receive any documents or information from the claimant Dick Teman. It is submitted that there was sufficient publicity of this claim by way of advertisement and that it was incumbent on the claimant to come forward and assist the Commission. He has not done so.

12. As it is, both Ms Kiele and Mr Augerea have confirmed that there is no file registered in the National Court Registry and the Office of the Solicitor General. Further, Mr Kuvi has denied any knowledge of this claim.

C. Finding(s)

1. No Solicitor General file created for this matter.
2. No Court files for this matter.
3. The issue generally in this case is, how did Dick Teman obtain a Court Order for the sum of K3.6 million on 14 July 2005? As it appears this

is a clear case of fraud. Those involved in facilitating this claim must be referred to appropriate authorities.

Recommendations

Dick Teman be referred to Police for investigation and such other action to be taken where necessary.

Those National Court Registry staff involved in facilitating the claim by sealing the court documents be referred to appropriate authorities for investigations and actions to be taken. Likewise, staff at the Attorney General or Solicitor General's Office be investigated to ascertain how the letterhead for the Office of the Secretary & Attorney General was used to facilitate this fraud.

The letterhead for the Office of the Solicitor General and the Secretary and Attorney General be improved with special security features so that it is not used without lawful authority.

A different National Court seal with improved security features be used to seal Court Orders and certificate of judgments.

No payments must be made by the Finance Department on this claim.

Solicitor General must take appropriate action to put a stop to this purported claim. That is a letter be written to Finance Department to immediately put a stop to the claim from being processed. An action/application be filed in Court to set aside the Court Order otherwise it possible that an unsuspecting Officer can act on the Court Order.

7. Apart from the requirement to give Notice under section 5 of the *Claims By and Against the State Act ('Act')*, a provision be included in the said *Act* make it mandatory that:-

- (a) the Registrar of the National Court should after every four (4) months (quarterly) provide an up-dated list of all proceedings brought against the State. This is to avoid the experience now seen whereby a person can collude with registry officials and draft a Court Order without a physical file actually created for the matter. The Solicitor General and Finance Department can use the list to check against documents submitted to their Office for processing;
- (b) the section 5 notice issued to the Attorney General/Solicitor General must also be copied to the Principal Defendant, such as in this case the Police Commissioner.

Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the Commission's Terms of Reference. All the terms of reference are relevant however, those that apply specifically to this case are those that have being highlighted, they are *Terms of Reference No.s 1 and 8.*

INDEX TO DOCUMENTS TENDERED AS EVIDENCE

1. Letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006; marked **1 - SG.**

5. Letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006; marked **2 - SG**.
6. COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008. Marked 3 - COI.
4. Marked '4 - **NCR**' is the copy of the note/ document produced by Mr Augerea.
5. Letter dated 7th March 2006 from Finance Department to Ms Kiele - marked **'5 - SG'**.
6. Letter dated 17th August 2005 from the Office of the Secretary & Attorney General by Mr Francis Kuvi to Mr Boas Hembahi, Finance Department — marked **'6 - SG'**.
7. Court Order of 14 July 2005 - marked '7 - **SG**';
8. Certificate of Judgment dated 1st August 2005 - marked '8 - **SG**'

(m) John Jaintong

A. Parties

(i) For the State:

- (a) Finance Department
- (b) Attorney General/ Solicitor General
- (c) National Court Registry
- (d) Bougainville Interim Government
- (e) PNG Harbours Board

(ii) For the Claimant:

- (a) John JaintonG
- (b) Joseph Bare Onguglo

B. Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the Commission's Terms of Reference. All the terms of reference are relevant however, those that apply specifically to this case are those that have being highlighted, they are *Terms of Reference No.s 1 and 8*.

C. Introduction

1. This matter came before the Commissioners on Wednesday, 8 October 2008 and the matter was called with brief facts presented. The matter was subsequently adjourned to allow parties with interest to come forward and

provide response in respect of the matter. Initially, there were no documents (at all) to identify the full facts or nature of claim leading to the alleged claim. All we had on file were the following documents, they are:-

- (i) letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006; marked 1 - SG.
- (ii) letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006; marked 2 - SG.
- (iii) COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008. Marked 3 - COI.

2. Commissioners, it appears the claimant John Jaintong allegedly obtained a court order for ICl, 347, 703. 20 on 21st October 2001 and submitted the said order to the Finance Department for payment. It appears the letter from Ms Kiele to Mr Cueva was prompted by the fact that Mr Cueva sought instructions or clearance from the Solicitor General in relation to the said court order.

3. After checking records at the Solicitor General's office, Ms Kiele wrote to the National Court registry to confirm with their records also. The letters from Mr Augerea and Ms Kiele state there are no records (at all) of such a case/ matter in the Solicitor General's file and the National Court registry.

4. Following issuing of the Summons, the following persons responded to the summons and brought with them certain information/ documents on Monday, 6th October 2008 vital to our investigations, they are:-

- (i) Mr Ian Augerea, Registrar National Court;
- (ii) Ms Hitelai Polume-Kiele, Acting Secretary;
- (iii) Mr Mario Cueva, Finance Department; and

(iv) Mr John Jaintong, Plaintiff

5. A Mr Augerea has confirmed in writing that the National Court Registry does not have a file registered under the said name John Jaintong -v- The State, I essentially confirming contents of letter from late Mr Lohia Raka (marked 2 \ - SG) in regard to this matter.

Marked £4 - NCR' is the copy of the note/ document produced by Mr Augerea.

6. Ms Kiele confirmed the contents of the letter dated 20th June 2006 (marked 1- SG) and at the same time provided copies of the following documents, they are:-

- (i) letter dated 8th March 2006 from Finance Department to Ms Kiele - marked £5 - SG';
- (ii) letter dated 14th October 2005 from the Office of the Solicitor General by Mr Francis Kuvi to Mr Gabriel Yer, Finance Department - marked % - SG';
- (iii) Court Order filed and entered on 21st October 2001 - marked £7 -

SG';

Certificate of Judgment dated 21st October 2001 - marked '8 - SG';

Deed of Release made on 12th October 2005 - marked '9 - SG';

Certificate issued by Martin Miriori dated 28 August 1996 - marked '10 - SG'.

7. Mr Cueva attended hearing on Wednesday, 8th September 2008 and was cross-examined. Mr Cueva confirmed on oath that no payments were made in respect of this matter and at the same time provided a bundle of documents. These documents were marked as Exhibit 4 - DF. Essentially, the documents are similar to those provided by Ms Kiele,

however, what is important in respect of Mr Cueva's evidence before the Inquiry is that he has confirmed that no payments have been made.

Mr John Jaintong was also present on Wednesday, 8th September 2008 and advised to do a statement in relation to this matter. Marked '11 - COI' is a copy of the Contact Details Form filled in by Mr Jaintong.

On 15th October 2008, Mr John Jaintong provided the following documents, they are:-

- (i) letter from Mr John Jaintong dated 14 October 2008 to Mr Kassman -marked '12 - COP;
- (ii) Index of documents (Attached Folio attached to John Jaintong's letter - marked '13 - COI';
- (iv) Deed of Release dated 5th July 2005 - marked '14 - COI';
- (v) Letter from Solicitor General, Mr Francis Kuvi to Mr Thaddeus Kambanei, Finance Department dated 8th July 2005 - marked '15 - COI';
- (vi) Letter from John Jaintong to Mr Thaddeus Kambanei, Finance Department dated 25th August 2005 - marked '16 - COI';
- (vii) Letter from John Jaintong to Acting Secretary, Finance Department dated 12th May 2006 - marked '17 - COI';
- (viii) Unsigned Agreement between John Jaintong and Joseph Bare Onguglo dated 19 May 2006 - marked '18 - COI';
- (ix) Memorandum of Understanding between Joseph Bare Onguglo, Kevin S Yalkwien and Michael Konjib dated 01st February 2005 - marked '19 - COI';
- (x) Unsigned letter by John Jaintong to Mr Gabriel Yer dated 22 May 2006 - marked '20 - COI';
- (xi) Hand Written note by Joseph Bare Onguglo to Finance Department dated 19 May 2006 -marked '21 - COP;

(xii) Letter from John Jaintong to Chairman Commission of Inquiry dated 21st October 2008 - marked '22 - COI'.

10. Further, on the 18th October 2008, one Namba Yosi Ososo (interested I person) provided a hand written statement. He claims to be a witness for John Jaintong. Essentially he alleges that Joseph Onguglo was involved in facilitating the claim for payment (para.2 & 4). He also makes reference to his meeting(s) with one Michael Konjib. He alleges that Mr Konjib's J brother in-law who was the State Solicitor at that time facilitated the claim J (para. 6). He states at paragraph 7 (quote), '*...I have been the prime witness for | this matter but have no idea any of any court proceedings at Waigani National Court relating to the State v John Jaintong. If there was such courtproceedings I should be called upon witness.*'

1

11. Namba Yosi Ososo's letter/ statement dated 18th October 2008 is marked '23 - COI'.

|

The letter from Mr Francis Kuvi, Solicitor General to Mr Thaddeus Kambanei, Finance Department dated 8th July 2005 indicates that the case relates to some consultancy work allegedly undertaken by John Jaintong.

13. Briefly, Mr Kuvi states in the letter that the claim is by Joseph Bare Onguglo, who is claiming for outstanding fees for consultancy services * provided by himself and or by his agent, one John Jaintong to the Bougainville Special Task Force which was specifically setup by the National Government at the material time to initiate, develop and negotiate the peace process in Bougainville.

14. *Mr Jaintong states at paragraph 12 of his letter dated 21st October 2008 marked 22 - COI (quote), " ..The letters written by the promoters of this scam for my signature is an attempt to implicate me and is attached as per Folio 7, 8 and 9*

15. Mr Jaintong further states in the said letter that the deed of release together with the court order was done without his knowledge, (see paragraphs 10 & 13 of the said letter).

16. *On 19 May 2006 (marked 21 - COI), Joseph Bare Onguglo wrote a letter to the Finance Department, Attention FAS & As Public Accounts stating (quote), "...This letter is to inform you of my formal withdrawal to the above said financial claim. It is my intention to withdraw formally to allow the incumbent Mr John Jaintong to proceed with the above claims for payment. Your kind attention to this regard is highly appreciated. Yours faithfully, Onguglo, Joseph Bare (Mr), 19 May 2006."*

17. As it is, Commissioners, both Ms Kiele and Mr Augerea have confirmed that there is no file registered in the National Court registry and the Office of the Solicitor General. This is further confirmed by Mr Jaintong (himself) that he denied having any knowledge of the deed of release and the court order.

11. John Jaintong appeared and confirmed that he was not aware of the court proceedings and that someone had used his name in an act to defraud the State. Jaintong confirmed that he provided consultancy services to the State during the Bougainville crisis in his personal capacity and was not engaged // by Joseph Bare Onguglo and his Black Action Party. He confirmed T|/ submitted a claim and was still following up on the claim. He confirmed h / that he is yet to be paid.

12. In support of Jaintong's evidence, Namba Yosi Ososo was called by Jaintong and essentially corroborated the evidence of Jaintong.
13. Joseph Bare Onguglo was called and gave evidence. Mr Onguglo maintained that Jaintong was engaged by his party and all expenses was paid for by his party as such he was the rightful claimant. He was asked to provide copies of receipts or proof payments, etc but failed to provide those information. He confirmed that a deed of settlement was signed by him and Mr Francis Kuvi to settle the claim and was yet to be paid. He denied having issued court proceedings under John Jaintong's name. Asked about Kuvi's evidence that he denied signing the deed of release, he maintained that Kuvi was telling lies or may have forgotten.
14. Francis Kuvi was called to confirm evidence by Onguglo if he had actually entered into a deed of release with Onguglo. Francis Kuvi denied signing a deed of release in this matter with Onguglo. Asked if he was telling the truth and he said, he knows Onguglo well and that he was a former MP and any matter involving Onguglo (as it is in this case) he would recall clearly. He denied ever signing the deed of release with Onguglo nor did he have any knowledge of this claim. Asked if his signature may have been forged, he answered it appears to be.

C. Finding(s)

15. The issue generally in this case is, how did John Jaintong obtain a court order for the sum of K1, 347, 703. 20 on 21st October 2001? As it appears this is a clear case of fraud. Those implicated must be referred to the Police and appropriate authorities for investigation.

16. Francis Kuvi's name and signature was used to advance this claim and as such appears to be a fabrication. Matter be referred to Police for further investigation.
17. This is not a genuine claim.

D. Recommendations

18. Matter be referred to Police for further investigations.
19. Francis Kuvi, John Jaintong and Joseph Bare Onguglo be referred to Police for further investigations.
20. Attorney General (Solicitor General) take appropriate action immediately put a stop concerning claims by Joseph Bare Onguglo and John Jaintong concerning this matter.
21. Finance Department must not make any payments.

INDEX TO DOCUMENTS TENDERED AS EVIDENCE

1. Letter from Ms Hitelai Polume-Kiele to Mr Mario Cueva dated 20th June 2006; marked **1 - SG.**
7. Letter from late Mr Lohia Raka to Ms Hitelai Polume-Kiele dated 13 June 2006; marked 2 - SG.
8. COI letter to the Acting Solicitor General and copied to Ms Kiele and Mr Augerea dated 17th September 2008. Marked 3 - COI.
4. Marked '4 - **NCR**' is the copy of the note/ document produced by Mr Augerea.
5. Letter dated 8th March 2006 from Finance Department to Ms Kiele - marked **'5 - SG'**.

6. letter dated 14th October 2005 from the Office of the Solicitor General by Mr Francis Kuvi to Mr Gabriel Yer, Finance Department - marked '6 - **SG**';
7. Court Order filed and entered on 21st October 2001 - marked '7 - SG';
8. Certificate of Judgment dated 21st October 2001 - marked '8 - SG';
9. Deed of Release made on 12th October 2005 - marked '9 - SG';
10. Certificate issued by Martin Miriori dated 28 August 1996 - marked '**10 - SG**'.
11. Marked '**11 - COI**' is a copy of the Contact Details Form filled in by Mr Jaintong.
12. Letter from Mr John Jaintong dated 14 October 2008 to Mr Kassman - marked '**12 - COI**'.
13. Index of documents (Attached Folio attached to John Jaintong's letter - marked '**13 - COI**'.
14. Deed of Release dated 5th July 2005 - marked '14 - **COI**'.
15. Letter from Solicitor General, Mr Francis Kuvi to Mr Thaddeus Kambanei, Finance Department dated 8th July 2005 - marked '**15 - COI**'.
16. Letter from John Jaintong to Mr Thaddeus Kambanei, Finance Department dated 25th August 2005 - marked '16 - COI'.
17. Letter from John Jaintong to Acting Secretary, Finance Department dated 12th May 2006 - marked '**17 - COI**'.
18. Unsigned Agreement between John Jaintong and Joseph Bare Onguglo dated 19 May 2006 - marked '**18 - COI**'.
19. Memorandum of Understanding between Joseph Bare Onguglo, Kevin S Yalkwien and Michael Konjib dated 01st February 2005 - marked '**19 - COI**'.
20. Unsigned letter by John Jaintong to Mr Gabriel Yer dated 22 May 2006 - marked '**20 - COI**'.
21. Hand Written note by Joseph Bare Onguglo to Finance Department dated 19 May 2006 -marked '**21 - COI**'.

2. Letter from John Jaintong to Chairman Commission of Inquiry dated 21st October 2008 - marked '**22 - COP**'.
3. Namba Yosi Ososo's letter/ statement dated 18th October 2008 is marked '**23 - COI**'.

(Rex
n Leo

(i) **For the State:**

(a) Police

E.

(b) Attorney General

(ii) **For the Claimant:**

(a) Rex Leo

(b) Godwin Lawyers

B. Matter

- Police raid.
- Judgment entered by default judgment for **K2.5** million (no trial conducted)
- Payment made in full to Godwin Lawyers

C. Findings
2.

- Fraud
- No Police raid
- No court proceedings
- No Solicitor General file

D. Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the terms of reference of this inquiry. All the terms of

reference are relevant and applicable to this case, however, this case falls squarely within *Terms of Reference No.s' 1 (i) to (xii) and 5 (i) to (mi)*. Also attached is the advertisement containing list of matters (including this matter) published in newspaper.

Documents and investigations conducted at:

- Attorney-General (AG)
- Solicitor-General (SG)
- Registry of National Court (NC)
- Department of Finance (Finance)

Brief facts / Evidence

A Court Order was obtained on 24 October 2002 for the sum of K2.5 million inclusive of interest and costs. Both Court Order and the Certificate of Judgment were ordered and filed on the same day. The claim appears to relate to an unlawful police raid resulting in destruction of properties and judgment was obtained by default.

On 4th January 2005, Mr Francis Kuvi wrote Mr Hembehi advising that a default judgment was obtained in the said amount and requested settlement of the claim. In the letter, Mr Kuvi stated (quoted);-

"..I refer to the above matter and advice that the claim is for damages and destruction to property following an alleged police raid. Proceedings were instituted in the Waigani National Court and the default judgment was obtained against the Police and the State for a total amount of K2, 500, 000.00 inclusive of interest and cost in this proceeding."

This matter involves an alleged Police raid wherein proceedings were instituted for loss of property, etc. The matter never went to full trial but judgment was entered by default. In the normal course of practice, in matters such as this, the Courts will enter default judgment with damages to be assessed. The Court will enter default judgment for the amount claimed only where it is a liquidated claim. This was a claim seeking damages that would require assessment in accordance with the Rules of the Court.

The Plaintiffs never named the alleged tort-feasors. The Police Commissioner or Police Commander or the relevant Police Officers allegedly involved never named. State was the only Defendant named in the court proceedings. The State is only a nominal Defendant and cannot be held responsible for actions of some unknown persons. Further, it appears the matter was dealt with "haste" in that the Court Order and the Certificate are both dated and filed on the same day.

Furthermore, the Solicitor General is required to indicate by whether (a) judgment will be satisfied or (b) the State proposes to take further action. This is a fatal error as the Certificate of Judgment is deemed to be a nullity. The rules require the Solicitor General to indicate the State's position in respect of the matter by crossing off (a) or (b) in the Certificate of Judgment.

The signatures of the Registrar and the Solicitor General appear to have been scanned and pasted as they are all identical both in the Court Order and the Certificate of Judgment. Clearly this is a cut and paste job. This needs to be further investigated. ~

~ ~

Godwin Lawyers filed Notice of Change Lawyers on 12 May 2005 and thereon acted for the Plaintiffs.

On 19 June 2006, Ms Polume-Kiele wrote a letter to Mr Mario Cueva giving clearance and requesting settlement of the claim. The amount was paid in full - K2.5 million to Godwin Lawyers Trust Account. Ms Kiele in her letter stated (quote) :-

. I refer to your letter dated 1st June 2006 on the above matter. A copy is enclosed for your convenience. I note your query on this claim and advise that, it is perfectly in order and that you should proceed to settle the judgment debt. It has taken you more than a year to come back to me and query this judgment debt. In the meantime, the interest on the judgment sum is increasing. I therefore urge you to proceed to settle the judgment sum including interests and costs immediately."

It appears the letter is a fabrication. Firstly, the Court Order and the Certificate of Judgment were purportedly obtained in 2002 and it took more than 4 years for the clearance letter to be issued by Ms Kiele, Acting Solicitor General. Likewise, it took Mr Kuvi more than 3 years to issue the clearance letter.

This is a matter that warrants further investigation. Letters were written to Ms Hitelai Polume-Kiele, Mr Ian Augerea and Mr Godwin Haumu inviting them to address the Commission on issues raised above but no responses were received.

Findings

The letters by Mr Francis Kuvi and Ms Hitelai Polume-Kiele were a fabrication.

2. The Claim appears to be a fraud and needs further investigation.

Recommendations

1. The matter be further investigated by the Police.
2. The following persons be referred to Police for further investigation:-
 - i. Mr Ian Augerea, Registrar National Court be further investigated;
 - ii. Ms Hitelai Polume-Kiele;
 - iii. Mr Francis Kuvi;
 - iv. Godwin Haumu; and
 - v. Rex Leo
3. The Attorney General and the Solicitor General conduct further investigation into this matter to ascertain amongst others if a proceedings were actually filed in Court.

C. Civil Works

The Commission examined some ten (10) matters and has reported on four (4) that concerned alleged breaches by the State of civil works contracts. The claims were pursued either in the National Court or through negotiated settlements with the Solicitor General.

The Commission's Terms of Reference required inquiry into claims above K300,000. In all matters examined, the claims arose from 'Minor Works Contracts' which by statute are defined to be contracts valued up to K300,000. Despite that, the claims were settled by the Solicitor General for excessive sums - K4.1 million (Pioneer Construction) and K8.6 million (Manoburn Earthmoving). Both matters have been fully investigated, the reports for which are provided.

The Commission notes the Department of Works is primarily responsible for the management of all civil works contracts. There is a three (3) stage process - feasibility, design and implementation. The Departments of National Planning, Finance, Treasury, Works and donor agencies are all involved in discussions as to funding. Once funds are secured, the implementation process follows.

The implementation stage involves the engagement of the contractor following strict compliance with the tender procedures pursuant to the Public Finances (Management) Act (in particular the relevant Supply & Tenders Board requirements).

When the contract is executed, implementation rests with the Department of Works for all projects funded by the National Government. That includes contract supervision and administration of the contract on behalf of the State (if delegated with the task). Payments are made consistent with the terms and conditions of the

Works Contract. The certification and approval of any component of the contract must be certified by technical experts (*engineer, architects, surveyors, builders etc, involved in the design, construction, supervision and certification*) duly registered with their professional organizations.

Despite the above comprehensive and widely recognized processes, the Solicitor General and Department of Finance failed to consult the Department of Works when considering the authenticity, price and payment of the claims. This was the trend in all matters investigated.

Further, the Solicitor General failed to raise objection on the basis of the claimants' failure to include the Department of Works as a party to proceedings filed in the National Court. A further feature has been the Solicitor General's failure to insist on the referral of the claims to arbitration of disputes under the provisions of arbitration clauses which every Government department provide as a standard term. Arbitration provisions have the prime purpose of averting immediate resort to Court action. These are all in addition to the other defences identified in each report.

The Commission finds that certain Solicitors General have been grossly negligent in protecting the State's interests.

(a) Mountain Pearl Ltd

A. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE?

1. The matter falls within the Terms of Reference of the Inquiry. The contract was allegedly awarded on 11 March 2002. The Plaintiff filed the Court proceedings in 2004 and the matter was eventually settled out-of-court by a Deed of Release dated 28 February 2005, pursuant to which a part-payment was made in August 2005.
2. This matter may be covered under the following Terms of Reference: 1, 5, 8, 9, and 12.

B. SOURCE OF INFORMATION AND DOCUMENTATION

3. This brief comprises of facts and findings from the files and records of:
 - The Attorney-General's Office
 - The Solicitor-General's Office
 - The Department of National Planning & Rural Development - Office of Rural Development
 - The National Court Mount Hagen Registry
 - The Department of Finance
 - Central Supply & Tenders Board (*CSTB*)
 - Marley Nandi Lawyers

BACKGROUND: RELEVANT FACTS

THE MATTER

4. Mountain Pearl Limited (*Plaintiff Company*) filed a claim against the
5. State [through the Department of Planning & Rural Development -
Office of Rural Development (ORD) (*Department*)] in which it
alleged that it was awarded a contract by the Central Supply &
Tenders Board (*CSTB*) to construct some buildings at the Sialum
Technical High School in the Tewae-Siassi area of Morobe Province.
The alleged value of the Contract was IC1,000,000.00.
6. i The Plaintiff Company claimed that in preparing to start work on the
7. building project, it expended money on mobilization costs, but the
Department failed or refused to perform its obligations to provide
funding for the construction works, thereby breaching the alleged
contract.
8. Based on the foregoing, the Plaintiff Company filed proceedings WS
9. No. 969 of 2004 in the National Court at Waigani claiming damages
in the sum equivalent to the value of the alleged contract being
K1,000,000.00. The State responded by filing its Notice of Intention
to Defend and Defence and the matter progressed until it was
dismissed for want of s. 5 notice in 2006.
10. **However, the records of the Solicitor-General and the
Department of Finance on the other hand, show that the
Plaintiff Company's claim had been settled by the former
Acting Solicitor-General; Francis Kuvi, by a Deed of Release
dated 28 February 2005.**

11. Based on the Deed of Release the Department of Finance has already paid out a total of K400,000.00 in two (2) separate payments of K300,000.00 and K100,000.00 respectively.

PAYMENTS BY THE DEPARTMENT OF FINANCE.

12. According to the Department of Finance Cash Book, on 31 August 2005, the Plaintiff Company was paid K300,000.00 by cheque no. 818848 as part-payment on the Deed of Release - Payment vouchers ~ FF3 & FF4 on file as well as other documents from the Department of Finance confirming payment.
13. Subsequently, on 25 October 2005, the Plaintiff Company collected cheque no.822372 for the sum of K100, 000.00, being a further part- payment on the settlement amount.
14. Therefore, it appears that the Plaintiff has yet to collect K600, 000.00 from the Department of Finance to finally settle the entire amount in the Deed of Release.

CHRONOLOGY

15. The Plaintiff Company claims that by a Letter of Acceptance dated 11 March 2002, the CSTB awarded it a contract for the construction of stage one of Sialum Technical High School. The alleged contract was in respect of Tender no. CSTB 01010, for Project no. 2.21-E1-02- 0395, and valued at K1,000,000.00.
16. On 2 April 2002, the Plaintiff Company wrote to a Mathew Tepu, Director, Office of Rural Development (*.Directoi*) seeking his advice

17. **in respect of the availability of the Letter of Acceptance for its execution in acceptance of the alleged contract. The Director responded by letter dated 9 April 2002, confirming that the Plaintiff Company had been awarded three (3) contracts, including this one, and that as soon as the Letter of Acceptance was ready they would be contacted to sign the Acceptance.**
18. Eventually on 15 May 2002, the Plaintiff Company signed the Letter of Acceptance and thereafter, had allegedly expended a substantial amount of money to mobilize material, equipment and workmen to the project area. Further, the Plaintiff Company had requested the Department to make funds available for the commencement of the project, but the Director failed to respond.
19. On 30 April 2004, the Plaintiff Company through its lawyers, Nandi & Company Lawyers, gave Notice of its intention to bring a claim against the State, as required under section 5 of the *Claims By & Against the State Act 1996*.
20. However, by a letter dated 27 May 2004, the Acting Solicitor-General advised the Plaintiff Company that its purported section 5 Notice of 30 April was inadequate, as it did not include a copy of the alleged contract upon which the Plaintiff had intended to base its claim.
21. On 28 June 2004, the Plaintiff Company's lawyers wrote a further letter to the Acting Solicitor-General in an attempt to improve its section 5 Notice, this time, enclosing a copy of the Letter of Acceptance and various correspondences exchanged between the Plaintiff Company and the Director.

18. Thereafter, on 28 July 2004, the Plaintiff Company filed proceedings

WS No. 969 of 2004. In its claim, the Plaintiff Company alleged that-

- (i) the State's failure to provide funding for the project, amounted to a breach of the alleged contract,
- (ii) as a result of the alleged breach, the Plaintiff Company was deprived of its revenue or benefits it would have enjoyed under the alleged contract and
- (iii) accordingly, the State was liable to the Plaintiff Company in damages equivalent to the value of the alleged contract.

19. The Plaintiff Company served the Writ of Summons on the State on 4 August 2004. The Writ of Summons had been issued out of the National Court Waigani Registry and nominated for trial (on the back of the Writ) in Mount Hagen. Based purely on this nomination by the Plaintiff Company, the court file was transferred to the National Court Mount Hagen Registry (without a court order granting such permission.)

20. The State responded by filing a Notice of Intention to Defend and a Defence on 8 September 2004. In essence, the State's defence stated that:

- (a) there was no contract as alleged by the Plaintiff Company and
- (b) even if there was a contract, neither the State nor the Department were privy to such contract and
- (c) in any event, the Plaintiff Company had itself failed to perform the prerequisite conditions of the contract whereby the Plaintiff Company was required to obtain and provide proof of insurance cover in respect of the project.

21. As the file had been transferred to Mount Hagen, the Acting Solicitor-General forwarded sealed copies of the State's sealed Notice of Intention to Defend and Defence under the cover of a letter dated 13 September 2004, to be placed on the court file in the Mount Hagen Registry.
22. By a letter dated 10 October 2004, Nandi & Company Lawyers acknowledged that the State had filed its Notice of Intention to Defend and Defence, and further, advised the Solicitor-General that the Plaintiff Company's intended application to strike out the State's Defence and enter judgment for the Plaintiff Company, for contravening Order 8 rule 28 of the *National Court Rules* by pleading the general issue.
23. The Plaintiff Company filed a Notice of Motion on 20 October 2004 seeking an order that the State's Defence be struck out and judgment entered in favour of the Plaintiff Company. The application appears to have been supported by the Affidavit of Marley Nandi also sworn and filed 20 October 2004. The affidavit, however, does not sufficiently support such an application.
24. By a letter dated 12 November 2004, Nandi & Company Lawyers advised the Solicitor-General that they had requested the Assistant Registrar to list the Plaintiff Company's application for hearing on the same day - 12 November 2004. It appears from this letter, that the application by the Plaintiff Company had been returnable on 5 November 2004. Further, there were other applications returnable on the same date, arising from other proceedings against the State, which had also been filed by Nandi & Company Lawyers on behalf of KK Kuni Building & Constructions Limited -

- *WS 982 of 2004 - KK Kuni Building & Constructions limited -v- The State & 2 Ors*
- *WS 983 of 2004 - KK Kuni Building & Constructions Umited -v- The State & 2 Ors*
- *WS 984 of 2004 - KK Kuni Building Constructions Umited -v- The State & 2 Ors.*

AH of the above applications were seeking either summary judgment or default judgment - see (below) minute from David Lambu to Buri Ovia dated 25 November 2004.

25. On 25 November 2004, David Lambu from the Solicitor-General's office sent a facsimile to Buri Ovia, a lawyer from the Mount Hagen branch of the Solicitor-General's office, instructing him to attend the hearing of the Plaintiff Company's application and oppose same on the basis that the State's Defence did not offend Order 8 rules 21 and 28 of the *National Court Rules*.

<p>It cannot be ascertained from the files in our custody what became of the application for summary judgment by the Plaintiff Company, however, it is presumed from the succeeding events that the application may have not been heard or was heard and refused: the court file may assist once available.</p>

26. On 10 February 2005, Paul Paraka Lawyers took over the State's Defence with of this claim. Paraka Lawyers wrote a letter each to the Acting Solicitor-General, Francis Kuvi and a Tau Tau also from the Solicitor-General's office, seeking verification as to whether the Plaintiff Company had provided section 5 notice of its claim. From the documentation on the Solicitor-General's file, the Solicitor- General's office apparently did not respond to the query.

This appears to have prompted a letter from Nandi & Company Lawyers to the Acting Solicitor-General dated 15 February 2005 and entitled "Notice of Intention to sue the State by Mountain Pearl Limited & Jack Herebe." The letter advises that:

"...The entire project was worth a sum of K106, 000.00 and of these, a total of K76,769.50 was already paid to our client. Hence a sum of K29,230.50 remains due and pending payable to our client. We confirm his instructions that the assigned contracts were completed and certificates of completion were issued by the responsible people who oversaw the constructions of those projects. On numerous demands for payment of the contract value, the Office of Rural Development has failed and or neglected to release the funds earmarked for those projects.

Now our client intends to sue the State to claim the remnant of the contractual sum. In that setting we say that this is our client's mandatory section five (5) notice pursuant to the Claims By & Against the State Act 1996..." The letter requests the State to accept this letter as constituting s. 5 notice.

Two (2) days later, on 17 February 2005, Francis Kuvi, as the Acting Solicitor-General prepared a letter of clearance to the Secretary for Finance authorizing payment of K1,000,000.00 to the Plaintiff Company. In support of his clearance letter the Acting Solicitor- General attached a copy of a Deed of Release dated 28 February 2005, which he had counter-signed with the Plaintiff Company. No one at Finance seems to have picked up the anomaly in the dates, i.e., the DOR would seem to post date the Clearance letter of 17 February by 8 days. The clearance letter is stamped as received by the Office of the Secretary for Finance, on 12 April 2005.

29. On 25 February 2005, Paul Paraka Lawyers forwarded a sealed copy of their Notice of Change of Lawyers to the Acting Solicitor-General for his records. Even then, there is nothing on file to show that the Acting Solicitor-General had advised the State's lawyers of his instructions to settle the claim by Deed of Release.
30. By Deed of release dated 28 February 2005, the Acting Solicitor-General settled the claim by the Plaintiff Company for K1,000,000.00, being the entire amount claimed in the Statement of Claim. Francis Kuvi signed the Deed of Release on behalf of the State, and a representative of the Plaintiff Company signed on its behalf, albeit not under seal.
31. Thereafter the following events transpired:
- on or about 12 April 2005, the Secretary for Finance received Francis Kuvi's letter
 - by a letter dated 24 May 2005, Nandi & Company Lawyers wrote to a Boas Hembehi of the Office of the Secretary for Finance, advising of the settlement and authorizing Jack Herebe, the Managing Director of the Plaintiff Company, to pick up the cheque from the Department of Finance.
 - also on 24 May 2005, Nandi & Company Lawyers wrote to Boas Hembehi advising that payment was in order and will not entail any legal consequences.
 - Hembehi may have raised concern with propriety of such payment.
32. Then on 31 August 2005, the Department of Finance released a cheque for K300,000.00 to the Plaintiff Company in part-payment of

its claim, and thereafter on 25 October 2005, the Department of Finance paid a further K1 00,000.00.

It appears that K600, 000.00 remains to be paid under the Deed of Release.

LIST OF DOCUMENTS TO BE TENDERED

EXHIBIT NUMBER	DATE	DOCUMENT	COMMENTS
OD 1	11 March 2002	Letter of Acceptance from the Central Supply & Tenders Board to the Plaintiff.	Letter allegedly awarding the contract Plaintiffs claim based on. Attached to the letter is a Receipt signed under seal by a Jack Herebe as Managing Director of Mountain Pearl.
OD 2	Undated	Tender document	Showing recommendation of Plaintiff Company's bid.
OD 3	2 April 2002	Letter from "Mountain Pearl Limited" Sawmilling Construction and Maintenance Contractors to the Director, ORD.	Seeking the Director's advice as regards certain contracts that the Plaintiff Company claims were awarded in its favour.
OD 4	9 April 2002	Letter from Mathew Tepu, the Director, ORD to the Plaintiff Company.	Advising the Plaintiff Company of the contracts that it had been awarded.
OD 5	30 April 2004	Letter from Nandi & Company Lawyers to the Solicitor-General	The letter purports to comply with section 5 of the <i>Claims By & Against the State Act 1996</i> .
OD 6	14 May 2004	Marley Nandi & Company Lawyers 'Notice Service Form'	Shows proof of service of purported section 5 notice. The Process Server named on the form is John Kekenso.
SG 7	27 May 2004	Letter from the Acting Solicitor-General to Nandi & Company Lawyers	Advising that the Plaintiff Company's purported section 5 notice is inadequate/insufficient.
OD 8	28 June 2004	Letter from Nandi &	The letter responds to the Acting Solicitor-General's letter

		Company Lawyers to the Acting Solicitor- General	of 27 May and attempts to correct and improve the purported section 5 notice provided earlier by attaching a copy of the CSTB Letter of Acceptance.
0 D 9	28 July 2004	Writ of Summons filed by Nandi & Company Lawyers on behalf of the Plaintiff Company	The Statement of Claim essentially alleges breach of contract and seeks damages to the total value of the alleged contract - K1,000,000.00 for alleged loss of benefit of the contract. The Statement of Claim alleges that the Plaintiff Company had expended a substantial amount of money in preparation and mobilization, but the Statement of Claim fails to specifically plead the particulars of such claim — only makes a note that " <i>Full particulars of money expended will be supplied prior to the date of the trial.</i> "
OD 10	30 July 2004	Letter from Nandi & Co. Lawyers to the Acting SG enclosing Writ of Summons by way of Service.	
OD 11	Undated	Company Profile of the Plaintiff Company	Sets out particulars of the Plaintiff Company and the services it provides. The Profile states that the Plaintiff Company was formerly known as Kuni Business Group Incorporated, registered with the IPA.
SG 12	8 September 2004	Defence filed by Francis Kuvi, the Acting Solicitor-General on behalf of the State.	The Defence essentially- denied the allegations in the Statement of Claim saying there was no contract. the Plaintiff had failed to give s. 5 notice of the claim, and that the Plaintiff had failed to name the proper party from the department concerned; Plaintiff had caused the non-performance of Contract by failing to comply with a prerequisite condition requiring Plaintiff to obtain all insurance policies and to show receipt of payment of premiums as proof of payment.
SG 13	8 September 2004	Notice of Intention to Defend filed by the	

		Acting Solicitor- General	
SG 14	13 September 2004	Letter from the Acting Solicitor-General to the Assistant Registrar, National Court Mount Hagen	Enclosing sealed copies of the State's Notice of Intention to Defend and Defence filed at the National Court Waigani Registry as the file had somehow been transferred to the Mount Hagen Registry (without a court order.)
OD 15	10 October 2004	Letter from Nandi & Company Lawyers to the Solicitor-General	Notifying the State of the Plaintiff Company's intention to apply for judgment on the ground that the State had pleaded the general issue in contravention of Order 8 rule 28 of the <i>National Court Rules</i> .
SG 16	20 October 2004	Notice of Motion filed by Nandi & Company Lawyers	The motion comprises an application by the Plaintiff to strike out the State's Defence and enter judgment in favour of the Plaintiff.
OD 17	20 October 2004	Affidavit of Marley Nandi sworn 20 October 2004.	The affidavit bears the file reference WS 969 of 2004, but the Plaintiff is named as " <i>KK Kuni Building & Constructions Ltd.</i> " It annexes a copy of the Plaintiffs letter of 10 October 2004, and appears to support an application to strike out the State's Defence.
OD 18	12 November 2004	Letter from Nandi & Company Lawyers to the Solicitor-General	Advising the Solicitor-General of various motions filed on behalf of the Plaintiff Company and KK Kuni Building & Constructions Limited in respect of claims filed against the State.
SG 19	25 November 2004	Facsimile Transmission from Solicitor-General's Office enclosing Minute dated 19/11/04 to Buri Ovia, SLO Mt Hagen Office.	Instructing Ovia to attend at the National in Court Mount Hagen to oppose various applications by the Plaintiff Company and KK Kuni Building & Constructions Limited for Default Judgment and Summary Judgment, all against the State (all filed by Nandi & Company Lawyers on behalf of the Plaintiffs.)
		The Minute attaches copy of a judgment in the case of <i>Akipa & Ors v Loma & Ors</i> [1990] PNGLR 502.	

OD 20	10 February 2005	Letter from Paul Paraka Lawyers to the Acting Solicitor- General, Francis Kuvi	Seeking instructions/verification as to whether the Plaintiff had given section 5 notice, and general instructions to prepare for trial.
OD 21	10 February 2005	Letter from Paul Paraka Lawyers to the Acting Solicitor- General Office, attention: Tau Tau	Seeking instructions/verification as to whether the Plaintiff had given section 5 notice, and general instructions to prepare for trial.
OD 22	15 February 2005	Letter from Nandi & Company Lawyers to the Acting Solicitor- General Francis Kuvi	The letter purports to comply with the requirements of section 5 of the <i>Claims By & Against the State Act 1996</i> , and states that the Plaintiff had been awarded a contract for K106,000.00 of which K76,769.50 had been paid and K29,230.50 remained to be paid.
SG 23	17 February 2005	Letter of Clearance from Francis G. Kuvi, the Acting Solicitor- General Thaddeus Kambanei, Secretary for Finance	Advising of the Plaintiff Company's claim and subsequently, settlement of same by Deed of Release, and requesting payment of the settlement amount by the Department of Finance. The Clearance letter attaches (the) Deed of Release which post-dates it.
OD 24	25 February 2005	Letter from Paul Paraka Lawyers to the Acting Solicitor- General	Enclosing sealed copy of Paul Paraka Lawyers' Notice of Change of Lawyers.
SG 25	28 February 2005	Deed of Release signed by Francis Kuvi and the Plaintiff Company	Settling the claim for K1,000,000.00.
OD 26	24 May 2005	Letter from Nandi & Company Lawyers to the Secretary for Finance	Pursuing payment of the settlement amount.
OD 27	24 May 2005	Letter from Nandi & Company Lawyers to the Secretary for Finance	Pursuing payment of the settlement amount and advising that payment is in order and will not entail any legal consequences.
FD 28	26 August	Department of	The report indicates that the claim of K1,000,000.00 had

	2005	Finance Public Accounts Division - Internal Pre-Audit Verification Report	been certified by a Nelson H, and entered in the Register* for payment and that only K300,000.00 of the full amount had been paid as at August 2005.
FD 29	31 August 2005	Department of Finance Requisition for Expenditure form -FF3	Requesting payment of K300,000.00 to the Plaintiff Company, " <i>being payment of O/S Deed of Settlement Claim.</i> " The Form was signed as authorized by the same person whose signature appears on the Pre-Audit Verification form, and approved by the Acting Deputy Secretary (Operations.)
FD 30	31 August 2005	Department of Finance General Expenses Form — FF4 GE: 1046817	In respect of payment of K300,000.00 to the Plaintiff Company " <i>being payment of o/s DOR claim</i> " The FF4 -was certified by the Acting Deputy Secretary (Operations)
FD 31	31 August 2005	Department of Finance & Treasury Remittance Advice	Confirming payment of K300,000.00 by cheque no. 818848 to the Plaintiff Company on 31 August 2005.
NC 32	7 April 2006	Court Order filed by Paul Paraka Lawyers	
SG 33	12 April 2006	Letter from the Acting First Assistant Secretary - Cash Management & Expenditure Control, Department of Finance to the Acting Solicitor-General	Advising of part-payment collected by the Plaintiff Company and seeking verification as regards further payment in light of NEC Decision halting all payments under Deed for amounts exceeding K100,000.00. It is also stated in this letter that the claim is pending prior approval of the Minister for Finance under s. 61 of the <i>Public Finances (Management) Act.</i>
OD 34	26 April 2006	Letter from Paul Paraka Lawyers to the Acting Attorney- General	Reporting on the status of the claim, in particular, advising that the proceedings had been dismissed for want of section 5 notice.
SG 35	26 June 2006	Letter from Hitelai Polume- Kiele to the Secretary for Finance (Department of Finance — Cash	Instructing the Secretary not to pay the Plaintiff Company's claim that had allegedly been settled by Deed of Release for the following reasons: <ul style="list-style-type: none"> • The Solicitor-General's file did not contain die Deed of Release relied on by the Plaintiff

		Management & Expenditure Control) responding to the latter^ letter of 12 April 2006	Company in requesting payment, and • Pursuant to the Court's decision in the Yama case, all Deeds settling claims exceeding K100,000.00 are deemed null and void. The Acting Solicitor-General also requested copies of the supporting documentation relied on by the Plaintiff Company for verification, and confirmation that payment ■will not be made.
OD 36	7 August 2006	Letter from the Ombudsman Commission to Hitelai Polume-Kiele	Acknowledging receipt of cautionary note regarding the authenticity of such claims.
OD 37	3 September 2008	Historical Company Extract of Mountain Pearl Limited.	The extract shows as follows — the Plaintiff Company was registered in 2001; ceased operations on 20 June 2005; and the Plaintiff Company is presently deregistered and the Plaintiff Company has always had only one (1) director and shareholder—Jack Manda Herepe of Tanggi Village, Koroba Tari, Western Highlands Province.
OD 38	3 September 2008	Current Company Extract of Mountain Pearl Limited as at 3 September 2008.	The extract shows that the Plaintiff Company has been deregistered since 30 June 2005.

D. FINDINGS

(a) Claim - Liability and Quantum

Cause of Action in Law

33. The factual background giving rise to the claim and the Statement of Claim pleaded, do not disclose a reasonable cause of action:

(a) The Plaintiff Company alleged that it had been awarded a building contract for the construction of stage one of Sialum Technical High School in Morobe Province. However, apart from the Letter of Acceptance which was dated 11 March 2002, apparently only delivered and signed by the Managing Director of the Plaintiff Company, there is no written agreement.

(b) The Letter of Acceptance advised that a formal contract would ensue to formalize the relationship between the parties. Further and more importantly, as a prerequisite of the Plaintiff Company's performance under the purported contract, it was required to first obtain and produce proof of payment of insurance premiums. From the records, there is no evidence of-

- (i) the formal contract or
- (ii) the Plaintiff Company's compliance with the said prerequisite.

(c) In spite of its failure to obtain insurance premiums, the Plaintiff Company claims to have —

- a. proceeded with mobilization of equipment and labour at the project site, and
- b. pursued the Office of Rural Development for funding for
 - c. the project,

however, the Office of Rural Development did not respond favourably to the Plaintiff Company's request for funding, hence the Plaintiff Company filed the claim alleging breach of the purported contract.

33. The claim by the Plaintiff Company for damages in the full amount of the purported contract is based on a misconception. Even if the court had decided that there was a contract and that it had been breached, the appropriate measure of damages would have been based on the actual loss suffered as a result of the expectation.
34. Secondly, it appears quite odd that the Plaintiff Company filed proceedings for damages at the first instance rather than a claim seeking an order for specific performance, which in the circumstances would be reasonable. If the Plaintiff Company had indeed incurred mobilization costs, there is no evidence of such expenses either on the Solicitor-General's file or forming part of the Plaintiff Company's pleadings. Paragraph 8 of the Statement of Claim endorsed on the Writ of Summons filed 28 July 2004 pleads that the Plaintiff Company had expended a substantial amount of money to prepare and mobilize equipment and labour, but where it states that particulars of such costs would be provided, the claim states that *"Full particulars of the money expended mil be supplied prior to the date of the trial?"* This offends the law in relation to pleading of special damages, as set down in cases such as the *Ban^ Kopi Fektori* Case (a decision by Justice Gavara-Nanu.) This implies only one conclusion: that the Plaintiff Company did not in fact incur any mobilization costs.

The Deed of Release was not signed by Francis Kuvi and was fraudulently manufactured by Daniel Kop, Jack Herepe and other unknown persons.

(b) Attorney-General & Solicitor-General

(c) Compliance Issues

Public Finance (Management) Act 1995

- Ministerial Approval was not obtained prior to Mr. Kuvi signing the DOR

Claims By & Against the State Act 1996

- No proper section 5 notice was given to the Solicitor General or the Attorney General, the only two State officials upon whom such notice is to be served.

NEC Decisions

- Directive 10 of NEC Decision NG 07/2002 which specifically prohibited any further out of court settlements was ignored by Mr. Kuvi when he signed the DOR on 28th February 2005.
- Mr. Kuvi also breached Directives 5, 6 & 7 of NEC decision 150/2003

Recommendations

1. Mr. Francis Kuvi be referred to the fraud squad for further investigations.
2. Mr. Daniel Kop is referred to Fraud Squad as lawyer acting for Mountain Pearl at the time the Deed of Release was entered into.

Mr. Jack Herepe also be referred to the fraud squad for further investigations.
Pending outcome of case, his assets be seized under the *Proceeds of Crimes Act*
2005.

Payment Schedule ~ Mountain Pearl Limited - DEPARTMENT OF FINANCE

Cash Book.

Date									
31/08/05	1046817	207	420 1	2107	135	Mountain Ltd	Pearl	O/S Deed of Settlement	C Q
25/10/05	1053372	207	420 1	2107	135	Mountain Ltd	Pearl	Pmt for o/s DOR claim	c Q

(b) Manoburn Earthmoving Ltd

PARTIES

t For the State

- (a) Solicitor General ("**SG**") & Attorney General ("**AG**")
- (b) Posman Kua Aisi Lawyers (instructed to act on behalf of the State) ("**PKA**")

2. For the Plaintiff

- (a) Manoburn Earthmoving Limited ("Manoburn")

3. Others (if any)

- (a) Department of Works ("**DoW**")
- (b) Department of Finance ("**DoF**")
- (c) Oil Palm Industry Corporation ("**OPIC**")
- (d) Oro Province Supply and Tenders Board ("**OPS&TB**")

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

- 4. A claim for K13million for breach of civil works contract to upgrade 12 harvest roads at Oro Province. Almost K5million has been paid by the State with the balance of K3million the subject of an appeal to the Supreme Court.
- 5. **The claim falls within the TOR (a)(1) (i) to (xii),(2),(3),(4),(5),(8),(10) and (12)**

DOCUMENTS AND INVESTIGATIONS CONDUCTED AT

- 6. The documents the subject of review and examination are

- a. **Posman Kua Aisi Lawyers**-(For the Office of the Solicitor General/Attorney General)
- b. **Vincent Mirupasi Lawyers**
- c. **Department of Finance**
- d. **Department of Works**

THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

7. Manorburn Earthmoving Limited ("MANORBURN") is currently registered with Investment Promotion Authority. It was incorporated as a company on 12th November 1991 and de-registered on 2nd January 1997 for non compliance of statutory obligation. In October 1997, necessary application for reinstatement was made before the National Court and the Court ordered IPA to reinstate the company. The Company provided its updated Annual Returns as required by statute together with relevant documents and payment and the company was restored to the Companies Register on 10th October 1997. **(Refer to Folder "10" & "U" of "13B")**

8. The Directors and Shareholders of the Company are Mrs. Rose Titipu (234,000 ordinary issued shares as at 31 December 1999) and Mr. Timothy Titipu (Secretary of the Co.) (500,000 ordinary shares as at 12 November 1999)

The records produced by IPA to the Commission indicate that the following equipment and asset were registered as at 17th February 2008. They include:-

- a. *IPA Reg. No. 13683-Toyota Land Cruiser (Fixed Charge and Unsatisfied)*
- b. *IPA Reg. No. 13684-Hyundai Hydraulic Excavator(Fixed Charge and Unsatisfied)*
- c. *IPA Reg. No. 13685-Hyundai Hydraulic Excavator Eng. (Fixed Charge and Unsatisfied)*

- d. *IPA Reg. No. 13686-Caterpillar D6 Bulldozer Eng. (Fixed Charge and Unsatisfied)*
 - e. *IPA Reg. No. 13687-Loader(Fixed Charge and Unsatisfied)*
 - f. *IPA Reg. No. 13688-Nissan Dump Truck Registration No. LAH-576 (Fixed Charge and Unsatisfied)*
 - g. *IPA Reg. No. 13689-Nissan Dump Truck(Fixed Charge and UnsatisEedf*
- The Oro Oil Palm Industry Corporation (OPIC) Program Contractual Claim by Contractor Manoburn Earthmoving Ltd*

9. The *Oil Palm Industry Corporation* ("OPIC") program commenced in 1994 to further develop the Oil Palm Industry in PNG-and the funds were secured by way of a loan from the World Bank.
10. The Department of Works ('DoW') was tasked to carry out the implementation of the Infrastructure Portion of the Program which consisted of
 - a. Upgrading of existing harvest roads for all weather access;
 - b. Construction of new harvest roads into areas as per OIC plans for new plantations, and
 - c. Improve existing Infrastructure facilities (institutional roads, housing, aid post, schools, etc,) for the communities in those areas

The Minor Works Contract

11. Manorburn was engaged by the State/OPIC to upgrade 12 agricultural feeder roads in the Oro Province. The *Oro Provincial Government Supply and Tenders Board*

³(l) Refer to relevant documentation which includes Current and Historical Extracts and (2) Note that the equipment were on hire purchase and that the principal of the company had written to the then AG Mr. Sao Gabi to speed up payments for the daim as a result of the DOR/Default Judgment Order

("OPGSTB") headed by Mr. M. Derati as Chairman in **1997-1998**) and Col. Ken Noga (as Chairman in **1999**) approved and awarded the Contract to Manobum in respect of the 12 roads indicated below: -

- ▶ *Contract MWC 36-JA-60A1 / DR17-Construction of Agenahambo Road*
- ▶ *Contract MWC 36-YS-1A-60A1/DR 27-Construction of Tombata Road*
- ▶ *Contract MWC 36-YS-1A-60A1 jDR 31-Construction of Siai Raad (Section 1),*
- ▶ *Contract MWC 36-YS-1A-60A7/DR 32- Construction of Siai Road (section 2).*
- ▶ *Contract MWC 36-YS-01/DR 81A-Construction of Serembi/Diko Road-Section 1 (Tenderpapers indicate closing of bids as at 22 October 1997)*
- ▶ *Contract MWC 36-YS-02/DR37- Construction of Kakandetta/Jonita Road. (M. Derari as Chairman approved Iff July 1998)*
- ▶ *Contract MWC 36-YS-01/DR 51-Construction of Foruta Road.*
- ▶ *Contract MWC 36-YS-02/DR 52-Construction of Orekita Road. (M. Derari as Chairman approved Iff¹ July 1998)*
- ▶ *Contract MWC 36-YS-03/DR 121A-Construction of Ilimo Road-Section 1. (Ken Noga as Chairman approved 15.03.99)*
-)▶ *Contract MWC 36 YS-03/DR 121B-Construction of Ilimo Road-Section 2. (Ken Noga as Chairman approved 15.03.09)*
- ▶ *Contract MWC 36 YS-03/DR 129 & 130-Construction of Danny and Terter Road (Sakita Feeder Road). (Ken Noga as Chairman approved 15.03.99)*
- ▶ *Contract MWC 36-YS-03/DR 87 & DR 88-Construction of Shirma Bika Road. (Ken Noga as Chairman approved 15.03.99)*

(Refer to FOLDER "7" & "8" of "13B"- Contracts for Minor Works and Costing's and the approval for the award of the Minor Road Works Contracts ("MRW" Contracts.)

The only documents sighted by the Commission reflect that the Provincial CSTB office had not gone for a public tender thus providing an opportunity for other contractors to bid for the contract for road works.

13. During the work progress of the construction phase, Manoburn submitted its progress claim to the OPIC Project Office and the Department of Works for payment. The Company had in fact processed a number of invoices which was subject to clearance by the Works Department.
14. The assessment was normally conducted by the appointed superintendent of the project to ensure that the works was done in accordance with the specification provided under the contract. All progress claims would require certification and approval from the Engineer (who is a registered Engineer with the relevant body as required by statute). That certification is then processed through the Department of Works for payment out of funds approved for the project.
15. **The Department of Finance has no responsibility to facilitate the payment. In the normal course of business, the claims were rejected due to flaws in the work and the need to rectify such problems was common amongst contractors lacking the capacity to properly carry out the work before a certificate is issued.**
16. The evidence and perusal of documents indicate that Manoburn took the Department of Works and the State to Court over claims representing various heads of damages such as non-payment of agreed amounts and claims for loss of business. Manoburn also claimed that because of non —payment, its business would have prospered and it lost the opportunity to make additional profits. In addition, it has incurred unnecessary expenses because it was not paid on time.
17. Mr. Brian Kimmins, Chairman of the CSTB gave evidence to the Inquiry on 23rd September 2008 (COIFINANCE 25 dated 23rd September 2008 at pages 675 to) and made a specific reference to instances where Contractors were not performing their contracts and the need for CSTB to monitor the performance of Contractors particularly with the issue of 'stand down';

"A. .. From my contractual knowledge, there is allowance for interest to be added to a claim that is put in by a contractor or a service provider or supplier when payment is made or in such situations. A stand down one would think should only be applied to instances wh/ m there is a land disputes and that sort of thing, but I really think for the sake of not being paid, but that is a really poor reason to have to pay a contractor for stand down time.

A very poor reason. and that is — we hear those complaints are becoming very common by contractors as to whether they have got to stop work because they have not been paid. I don't know if it is the system that is slow or what is actually the cause of the nonpayment as per the terms of the contract. Every contract states that you put a claim in. and most of them are 30 days. Within 30 days we know instances where contractors are waiting three to four months to get payments. Contractors through sheer frustration do stand down until they get paid. So I do not think the stand down clause in the contract is there for the slackness of the agency that is not paying the bills on time, it for other reasons (weather).

Q. In the course of your investigation, we have come across matters where despite the contracts, stating specific amounts, penalties et cetera, when contractors have gone to court, either by a settlement or by judgment of the court have secured massive amounts in terms of interest on work performance, et cetera, non payment. You aware of that, what is your comment on that?

A. It is just poor performance on the part of the agency involved. If a contractor has to go to that extent - if the contractor has carried out what it is expected to do as per the requirements of the contract■ there is no reason why they should not be paid on time. So that really should not be the current system; it should not happen at all.

The Company engaged the services of Kinhill Kramer to assess the engineering aspects of the construction work on the road and RAM Consultants for accounting matters. It did not resort to the dispute/arbitration clause in the

Standard Minor Works contract for the 12 feeder roads which was the most suitable process to deal with the issues over payment

19. **The Commission notes that the engagement of the professional firm formed part of the heads of claim for damages which is totally a matter for Manoburn to incur rather than passing it onto the State. That was also another flaw in Mr. Gelu's acceptance of Manoburn claim for the State to pay for professional services rendered to the Company. This was a private business arrangement.**

-The Claim

Letter of Demand dated 6th October 1999 from Shepherds Lawyers Demanding Payment of K804, 053.94 before 15th October, 1999.

20. On 8th November 1999 Mrs. Cathy Davani (now Justice Cathy Davani) of Shepherds Lawyers wrote to the Secretary for Works and Implementation (Mr. Alphonse Nigints/Mr. N. Gopave) as a follow up to a series of telephone conversation with the two officers primarily over the demand for settlement of payments due to Manoburn. The deadline for any responses to the letter was 12th November, 1999.
21. On 15th November, 1999 Shepherds Lawyers gave 'formal notice of a claim to be made against the State 'in accordance with Section 5 of the "*Claims By and Against the State Act, 1996*" ("CBAS Act").

- Chronology based on National Court documents Sled in respect of the WS 285/2000 proceedings

22. Our review of the large volume of documents provided to the Commission by Posman Kua Aisi Lawyers provide a chronology on the proceedings in court which also included extensive research on the law, submissions on law, court

23. **appearances both in the National Court and the Supreme Court, various exchanges of correspondence between the parties, Department of Works documents, uncontested hearings on the Default Judgment, setting aside of the default judgment and eventually the Deed of Release.**
24. **Writ of Summons No. 285 of 2000.** dated 16th March 2000 was filed in the National Court, Waigani on 17th March 2000. The claim was for breach of contract (Minor Works Contract) over delays in payment for completed work consistent with the terms of the contract, loss of business, accrued interest on monthly repayments to Nambawan Finance (Lease of heavy machinery), Kinhill Kramer expenses for technical and contract assistance particulars prior to trial, RAM Consultants-consultancy expenses, accounting, legal, accommodation, travelling and hire car expenses incurred by plaintiffs representatives in their attempts to resolve the breaches and secure payments.
25. **22nd June 2000,** Blake Dawson Waldron Lawyers ("**BDW**") informs the Acting Solicitor General that the Notice of Intention to Defend filed on 29th March 2000. Our inquiries reveal that the "Defence" was to have been filed on 17 June 2000. BDW gave notice of their intention to apply for default judgment.
26. **On 14 July 2000,** BDW served application for default judgment on the State which included (1) Affidavit of Catherine Anne Davani in support of default judgment filed 14.07.00; (2) Affidavit of Search; and (3) Notice of Motion to move for orders for entry of default judgment and for damages to be assessed.
27. On 2nd August, 2000, **Notice of Motion dated 29th March 2000** was filed by the then acting Solicitor General Ms. Kiele in the National Court seeking orders for the proceedings to be struck out. The Application was supported by the **Affidavit of Mr. David Lambu dated 30th March 2000,** Mr. Lambu deposes to the fact that;

1. *No section 5 notice as required by CBAS Act was served on the Office of the Solicitor General,*

2. *Cause of action was for alleged breach of a number of contracts the first of which is alleged to have occurred on 24 April 1997 and this proceedings has been filed on 16 March 2000 which is almost three years later.
(Statute time barred)*

28. Application for Default Judgment was ordered by the **National Court on 11 August 2000** and entered by the Registrar on 21st August 2000 in the following terms; (1) default judgment be entered against the defendant and for damages to be assessed; and (2) the defendant (State) pay the costs of this application.
29. On **25 August 2000**, BDW informed the then acting Solicitor General, Mr. Lambu of the 'need to settle the matter of damages.'
30. On **2nd November 2000**, Mr. Titipu wrote to Mr. Sao Gabi, then Attorney General on the need to settle the claim.
31. On **10th November 2000**, Mr. Sao Gabi (then AG) responds to the letter and advises Mr. Titipu to file a Notice of Change of Lawyers and to pursue the claim through his lawyers.
32. On **3rd November 2000**, Mr. Titipu under letterhead of Manoburn writes to Mr. Damem as the new AG/Secretary to Department on the settlement of the claim. **Between November 2000 and February 2001**, the records indicate that Mr. Titipu wrote direct to the Department of Attorney General (S. Gabi/F. Damem/Gelu) Department of Finance (John Edeleni-AS/Administration Services; late Mr. Tarata (then Secretary-DoF)
33. **30th January 2001**-Mr. Edeleni wrote to the Secretary and AG requesting clearance on matters raised by Mr. Titipu. (It is noted that an handwritten minute on the letter by Fred Tomo as follows;

"Mr. Damem,

If the claims of this magnitude is to be settled by one person, the claim must be thoroughly assessed by several buyers. Each must provide their opinion independently. Here is a risk that the Department might be accused of not checking claims well. Pis let us discuss this and put mechanism in place. Fred Tomo 27102/01.

- The Conduct of the then Minister for Justice, Hon. Puri Riung

33. *The Commission notes from the records obtained from the Office of the Solicitor General, that on 13th February 2001-Hon. Puri Riung, MP Minister for Justice by issued a Ministerial Directive to Mr. Damem, that be "■■■(2) Issue a new Legal Clearance to the Treasury & Finance Department to pay out this claim without further delay; (3) Do whatever is possible within law to expedite the payment as the Company is desperately in need of Funds to bail out equipment from Nambawan Finance Ltd; and (4) Inform MANOBURN United of the actions your Office is taking" (Refer to Folder "2" of "13B" and Attachment "B")*
34. **The Commission notes with concern that the directive issued by the Minister relates to an abuse of power, especially matters that concerns a claim against the State and not only that but an issue that is currently active in the National and Supreme Court. The directive is our view an attempt to exert influence over Deed that has been challenged in the National Court by the State. Mr. Damem has in fact instructed PKA Lawyers to deal with the default judgment and the Deed of Release.**

(It is to be noted that Hon. Puri Ruing was not called to assist the COI with this aspect of the inquiry due to the completion of the tenure of the Commission)

- Opinion by John PALEK, Legal Officer dated February 2001 to Mr. Zacchary Gelu on the Manorburn Earthmoving v The State-WS No. 285 of 2000.

35. On 18 February 2001, Mr Palek rendered a legal opinion to Mr. Gelu and recommended settlement of the claim at K8.2million. He relied on documents submitted to SG by Manoburn and based on the actual business loss of the company for a period of three (3) years as a result of the dispute of delay in the payment of progress claim. It is evident that Mr. Palek a recently admitted lawyer was assigned by Mr. Gelu to undertake the assignment and advise on quantum and liability of the State. (See the evidence of Mr. Kawi at page _ of this submission. (Refer to Folder "2" of "**13B**" and Attachment "D")
- 36- Our observation of the Opinion rendered by Mr. Palek to Mr. Gelu with respect, disregarded the lack of research into the relevant legislations namely *Attorney General Act, Claims by and Against the State Act, Public Finances (Management) Act* and the *Statute of Frauds and limitations Act*, assessment of the technical reports prepared by the Department of Works which was the most important document. The officer concerned also failed to liaise and consult with officers at the DoW in order for the State to defend the proceedings.
37. It is with those concerns that Mr. Palek's involvement and role he played however minor has caused the State Eight million Kina of which Five million was paid in a scheme that was orchestrated by Mr. Gelu to enrich Manoburn. (Mr. Palek was invited to assist the Commission with the matter and he advised of his availability to assist the Commission on or about October 2009)

- Mr. Zacchary Gelu's recommendation for settlement

38. On 21 February 2001, Mr. Gelu recommended to the Attorney General that the claim should be settled at K8.6 million. He also referred to the legal opinion rendered by Mr. John Palek in support of his recommendation.

(Refer to Folder "2" of "13B" and Attachment "D")

- Proceedings for Assessment of damages

39. 27 April 2001: Mr. Moses Murray of Murray and Associates filed in the National Court, the Change of Lawyers document on behalf of Manoburn (WS 285 of 2000).
40. 30 May 2001: Mr. Murray filed a Notice to set down for trial on assessment of damages. Mr. John Kawi the then Solicitor General endorsed the Notice as Solicitor General (WS 285 of 2000). The endorsement was separately confirmed by Messrs Kawi and Murray on evidence before the Commission.
41. On 29th June 2001, Mr. Francis Damem the then Attorney General engaged *Posman Kua Aisi Lawyers* to institute proceedings to set aside the Deed of Release. The proceedings dealt with the authority of the Attorney General under the *CBASA* to settle matters. Mr. Gelu had always contented that being the Solicitor against the State without consulting the Attorney General.
42. **He also advised Mr. Gelu that the matter was briefed out to PKA and that he was no longer responsible for the file.** On 5 July 2001, PKA advised Murray and Associates that the firm has been instructed by the AG to defend the proceedings with the *"possibility of re-opening the case on the judgment on liability and as well*
9. *defend all proceedings in respect of quantum.'*
43. Whilst ongoing discussions between PKA and Murray and Associates had commenced, Mr. Mirupasi of Mirupasi Lawyers filed Change of Lawyers with the National Court [on behalf of Manoburn (WS 285 of 2000)] on 30 May 2002.
44. 16 July 2002: Mr. Damem advised PKA to continue to act for the State in WS 285 of 2000 after terminating their services on 5th June 2002.

Notice Motion dated 22nd July 2002 PKA on behalf of the State seeks orders to dismiss the proceedings etc... The Notice is supported by the Affidavit of Mr. Alexander MacDonald, Senior Lawyer with PKA.

31st July 2002: Murray and Associates Lawyers cease to act for Manoburn.

Likewise, prior to the execution of the Deed of Release, Mr. Gelu raises the same issue with the Attorney General on 6th August 2002. Whilst negotiations were on foot between Mr. Kerenga (Managing Partner of Posman Kua Aisi Lawyer) as Lawyer for the State and Lawyers for Manoburn on assessment for damages, the then acting Solicitor General Mr. Zacchary Gelu decided to settle the matter out of Court.

(See Folder "13B" of "13B" and Attachment "E")

A submission made by Mirupasi Lawyers on 'quantum' assessing damages at K12.5 million was quantified and on a without prejudice basis submitted to the then acting Solicitor General Mr. John Kumura. Mr. Kumura advised the plaintiff through Mirupasi Lawyers that the Deed of Release entered into between the State and Manoburn and the letter to Finance clearing it for payment was not binding and that in his view would require being re-negotiated.

Lawyers at the Office of the Solicitor General in consultation with the former Attorney General, Mr. Fred Tomo advised that the State would save millions of Kina in damages, interest and costs. State lawyers were concerned that if they were to go for assessment of damages, the figures would be very high given the date of the filing of the Writ to the eventual settlement including costs. By the terms of the Deed of Release, the State would save the 'interest' and 'cost component' of the claim and possibly K6-7 million in 'general damage.

I

50. /j On July 31st 2002, pending trial for assessment of damages, the former Solicitor General, Zacchary Gelu, without authority of the then Attorney General, Francis Damem, entered into a Deed of Settlement ("Deed") with Manoburn for I K8.6million arising from proceedings WS No.285 of 2000. Deed of Settlement * executed between the State (Gelu) and Mr. Titipu (Vincent Mirupasi signed as witness).
51. Mr. Gelu also cleared the Deed of Release for immediate payment by the Department of Finance.
52. Judgement on liability against the state was entered in August 2000 with damages to be assessed.

- Responses from OPIC

53. The Commission received a response from a Mr. Leo Ruki, current Project Manager by letter dated 14th August 2009 and stated as follows;

"...The Department of Works (DoW) was responsible for construction of these agricultural roads. It is during this period of time that Manoburn Earth Moving was engaged in the construction of roads in the Oro Province. The Managing Director, Mr. Timothy Titipu was heavily involved in the road constructions and progressed well among other local Contractors. The roads that the Contractor constructed, including Manoburn were tractor trailer track roads...."

54. Mr. Ruki's assessment of Manoburn's reputation was that OPIC recognized that it had the capacity to handle other projects quite competently and had established itself in Oro Province. OPIC had engaged the company in other projects apart from the 12 roads the subject of our review.

- Technical Reports by Engineers, Department of Works

The Commission reviewed three (3) Technical Reports prepared by Consultant Engineers from the Works Department which sets out their inspection of the work and the applicable payment for each scope of work completed by Manoburn. The Reports are as follows:

- (1) **Infrastructure Project for the Oil Palm Industry in Oro Province- Report on claims by Manoburn Pty Ltd (also known as Manoburn Earthmoving Pty Ltd) in respect of twelve contracts awarded to and executed (or being executed) by Manoburn Pty Ltd**

This report was prepared by D.P. WANIGASEKARA-MOHOTI on 16th February 2000 for the then Secretary for Works, Mr. A.J Niggins and submitted to the Solicitor General on 17th April 2001 for assessment of the claim on behalf of the State.

- (2) **Opinion to the acting Solicitor General dated 17th April 2001 and titled "Brief Comments on Claim by Manoburn Earthmoving through Shepherds Lawyers dated 6th October, 1999.**

This report was prepared by S. PANCHACHARAVEL, Project Director (J.B.I.C. Projects). In the report the Director assessed each of the 12 contract performed by Manoburn and the additional claims (including total interest commuted every six months with 20% mark up at K85, 482.66

- (3) ***Report dated 24th January 2000 titled "Oro Oil Palm Industry Corporation (OPIC) Programme Contractual Claim by Contractor Manoburn Earthmoving Ltd (Refer to Attachment "G" and Folder "7" of "13B")***

The Reports were made available to the Office of the Solicitor General as a result of the letter of demand dated 6th October 1999 from the law firm acting for

Manoburn that the claim for K804, 053.94 be settled by 15th October, 1999. There is evidence that Mr. Gelu had written to the Department of Works by letter dated 23rd November 2000 seeking their opinion on the 'quantification⁵ ad demanded by Manorburn'. However Mr. Gelu chose to ignore the expert opinion on the progress claim on each contract and the calculation for payment on each of the disputed claims.

57. Our review of the huge volume of technical documents and report over construction payments between Manoburn and the DoW, the technical advisors have quantified the claim and estimate the progress work at K600, 000.00.

-WS 1343 of2002

58. The then Attorney General, Mr. Francis Damem then issued instructions to the Department of Finance to put a stop payment on the settlement by way of the Deed of Release and then filed proceedings in the National Court under WS 1343 of 2002 alleging fraud, breach of section 61 of the *Public Finances (Management) Act*, breach of section 13(2) of the Attorney General's Act and on the grounds that Mt. Gelu acted *ultra vires* the powers of the Attorney General.

59. *The decision of the Supreme Court in State -v- Zacchary Gelu & Manoburn Earthmoving Limited (2003) SC 716 (August2003) confirms that;*

"where the State is a party in any litigation before the Courts, the SG may act as an advocate if instructed to do so by the AG in accordance with s.13 (2) of AG Act. Where SG is instructed, he must act in accordance with the instructions of the AG, such as to settle or not to settle a mater" and further

"the AG by virtue of s.5 of the AG Act is the principal officer who represents the interests of the State in terms of legal advice or opinion and where the State is a party before the court. It would follow from this that the AG may issue suits in the name of the State (s4 of CBAS Act) "(pages 12 and 13-14)

Payout by Department of Finance

60. The Finance Cashbook confirms that about K5, 050, 000.00 has been paid to the Manoburn. The following payments have been made to Manoburn;

Date	Company	Description	Cheq No.	Amount Paid
4/10/2002	Manoburn Earthmoving	Payment of C/Order W	698466	500,000.00
6/12/2002	Manorburn Ltd	Payment for upgrading	705097	50,000.00
25/01/2003	Manoburn Earthmoving	Part Pay.-SG 7-1947	710194	1,000,000.00
14/02/2003	Manoburn Earthmoving	P/Pymt for O/S Deed	712070	500,000.00
02/06/2005	Manoburn Earthmoving	Cancelled	812545	300,000.00
3/06/2005	Manoburn Earthmoving	re-issue of Chq #812	812575	1,000,000.00
3/06/2005	Manoburn Earthmoving	Pmt of o/s DOR-WS	812544	1 000,000.00
28/06/2005	Manoburn Earthmoving	Payment of O/S Court O	814191	1,000,000.00
			Total paid	5,050,000.00

61. The Commission was not able to obtain payment vouchers from Department of Finance to ascertain whether the above eight (8) payments were paid out from either budgeted funds or the Trust Fund Suspense Account # 2. On the 02nd of June 2005 DoF released a cheque No. 812545 of K300, 000 and endorsed as cancelled. The Commission was unable to verify with the Central Bank and Commercial Banks on the cancellation of the cheque and whether or not Cheque

No. 812544 in the amount of K1, 000,000 dated 03rd of June 2005. Was reissued and cashed.

62. It is a statutory requirement that under Section 61 of the *Public Finances (Management) Act 1995*, the Minister responsible for finance will approve contracts above K1, 000,000.00. In this instance, the Solicitor General did not seek the approval of the Minister for Finance at the time he settled the claim.

**DOCUMENTS PRODUCED FOR THE COMMISSION BY VINCENT MIRUPASI
LAWYERS**

(Refer to Folder "13A" of "13B")

63. Mr. Mirupasi provided to the Commission a by letter dated 10 July 2009 a chronology on the history of claim and the court proceedings involving the parties.
64. In his letter of 10th July 2009 to the Commission, Mr. Mirupasi confirmed that a total of K4 million on the Deed was paid to his client. The following were payments made to Manoburn (according to their records);
1. K500,000.00 -4th October 2002;
 2. K1 million - 27th January 2003 (Deposited with the Central Bank in Treasury Bonds);
 3. K500,000.00- 14th February 2003;
 4. IC1 million - 7th June 2005; and
 5. K1 million-30th June 2005
65. With regard to the remaining balance, the firm advised

'We then applied under OS No. 698 of 2006 to confirm the Deed of Release for enforcement and for our client to be the balance of K4.6 million still outstanding. The Court on 21st May

2007 held that the Deed of Release was current and enforceable and that the outstanding sum should be paid. This decision is subject to an Appeal under SCA No. 10 of 2008. This appeal was also not prosecuted and we filed an application before the Supreme Court for dismissal for want of prosecution and this was heard on the 3rd June 2009 and a decision is pending.

The K1 million with the Central bank was restrained by a Consent Order to hold until completion of the proceedings. After the dismissal of the proceedings under WS 1343 of 2002 we applied for the withdrawal of these funds but Messrs Gadens Lawyers acting for the Central Bank asked for specific Orders as the Ombudsman Commission had also issued a Directive not to pay until its investigations were completed. We then issued proceedings under OS No. 503 of 2006 seeking Declaratory and Directive Orders. These Orders were made on the 4th September 2006 and subsequently monies in the sum of K1,266,605.00 (which amount includes interest) was paid to our client on the 8th September 2006."

66. On 30th July 2009, Mr. Mirupasi personally appeared at the Commissions hearing with Mr. Timothy Titipu and sought adjournment of our inquiry into the claim for the reason that a Supreme Court Appeal filed by the State had been argued and a decision was pending.

(Refer to Transcript of proceedings COIFINANCE 119 dated 30th July 2009- Pages 4260-4264)

EVIDENCE RECEIVED AT HEARING OF THE COMMISSION

Mr. John Kawi

Former Solicitor General

(Refer to Transcript of Proceedings COIFINANCE75 dated 25th February 2009, pages 2138 to 2233)

67. **The evidence he provided is reproduced below (pages 2187 to 2189)**

"When I resumed in March, this was one of those matters that was brought to my attention and I requested for the file when it was brought to my attention and I immediately noticed the deed of release signed by Gebi for 8.6 million and I was not satisfied. So, I requested Vele Iamo not to pay out this claim until we properly investigated it. I went back to the Department of Works and I saw the deputy Secretary then. Roy Momo, jr went and we had a meeting on this and they too were surprised that this matter was being settled for 8.6 million and I asked if they could carry out an investigation. There was a Sri Lankan engineer. He has got one of those very long names which is pretty difficult to mention. I only called him Mr Mohoti. That is probably his first name and this engineer did carry out an investigation. He went to Pro for that purpose. he went across to Oro and he carried out an investigation - well, what he said was an investigation. I had to rely on him as being the person who carried out the investigation and he came back and he gave me a report. This was sometime in July or September 2001 - appropriate September 2001. He gave me a report saying that if it was - they looked at all the claims and then their view was that only for stand down of equipments that Works Department issued a stop work order which resulted in the Company allegedly making losses. So he said, "this appears to be the only aspect of that claim" which was quite valid. All the others no. So in his report he said for that he was entitled to some 186,000. We put that to Manoboum, Timothy Titipu was the proprietor of Manoboum and they refused. They refused to accept it so by then it was also during the period of my suspension too so, although my suspension was not long. I was suspended - all these things remained in abeyance. When I came, one of the things I also learned was that representations were being made even to Francis Damem the Attorney General and I advised Damem to brief this matter out which he agreed. So the matter was then briefed out to Kerenga Kua of Posman Kua Aisi Lawyers and they were then handling the matter.]

helped them. I did an affidavit for them when they were trying to set aside the matter. So that is my involvement in the Manoburn. / 2.25 pm] When I got the file to look at the settlement Gelu did, it was just a deed of release typical in this kind of settlement, just a deed of release and no supporting document. I questioned every lawyer in the office as to who did this settlement and eventually one of our legal officers, one of the those officers we just recruited, when he finished from LTI in 2000. he told he said. "Gelu directed me to do the submission." and I questioned him I said, "when you did the submission? What are the other supporting materials?" He said he had none, except that Gelu told him to make submission for 8.6 million and the submission I am referring to is not one which between lawyers, proper negotiations and submission. This was the letter to Finance requesting 8.6 million and I must say that I was quite surprised myself too when there was no documents on file justifying how you arrived at the amount of 8.6million. So that was it." (Underlining ours)

Mr. N. Gopave

First Assistant Secretary (Operations)-DoW

68. Mr. Gopave appeared briefly on 30th July 2009 and advised the Commission that he was short served and was not prepared give evidence. He was at one time involved in the project as Head of the Operations and fully aware of the project and the problems associated with it. He gave an undertaking to the Commission to provide a cost on the project based on the work component and to determine whether the payment of K8.6 million was justified. This matter was pending production of the calculated costs which remains pending.

Further Evidence-Witnesses yet to be called

69. **Vincent Mirupasi, Principal of Mirupasi Lawyers and Associates**

To be recalled to provide an explanation on the legal costs of K2million paid to his Law Firm for the Manoburn claim. To be further investigated.

70.. **Kerenga Kua, Executive Managing Partner of Posman Kua Aisi Lawyers**

Counsel for the State and his evidence will be on the instructions to defend the State in all the proceedings to date. He will also assist the inquiry with information that there was a lot of political pressure exerted by the former Minister for Justice, Mr. Puri Riung on the claim by Manoburn. Mr. Kua did not attend the Inquiry due to work commitments. Mr. Kua was unable to provide evidence and is required to assist in any further inquiry on the matter.

71. Timothy Tititpu, Managing Director of Manoburn

He could not give evidence due the application made by his lawyer, Mr. Mirupasi on 30th July 2009

72. **Zacchary Gelu**

j| 76.

i'

Former Acting Solicitor General at the time he executed the Deed of Release j between Manoburn and the State. Requested to assist the inquiry and has so far responded by applying for adjournment due to ill-health and stress. (Medical Certificate produced to the Commission) On record, Mr. Gelu was provided with all the relevant documents in so far as the Deed of Release is concerned.

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7.

Private Practitioner and at the time he was a Legal officer assigned with the Manoburn file. He responded to the request to assist the Commission on the matters concerning his involvement and he has informed the Commission that he would be available in October 2009. He had a full calendar of court commitment

78.

*COMPLIANCE WITH PROCESS-REQUIREMENTS OF THE CLAIMS BY
& AGAINST THE STATE ACT, 1996-(CB&S Act, 1996)*

Section 5 notice was given to the Solicitor General by Shepherd Lawyers on 6th October 1999 and is pleaded at Paragraph 3 of the Statement of Claim under WS 285 of 2000

The Claim: Liability and Assessment

The Company pleads under paragraph 7 of the Statement of Claim (WS 285 of 2000) on the States failure and refusal to certify the interim progress payments under the contracts within a specified time and therefore was entitled to late payments and interest at the current commercial bank rates. The initial claim was for some K481, 739.00 sum representing various damages for late progress claim payments and loss of business.

The amount of K8.6million as out of court settlement on 31 July 2002 was inflated without any proof that the State was responsible for causing financial hardship to the Company as a result of the dispute on the delay in progress payments. The amount as assessed was excessive and fraudulent as it was settled without basis in law.

The State was not responsible for costs incurred by the Company in relation to the providers of service namely Kinhill Kramer and RAM Consultants. That aspect was not covered under the MWC.

Steps taken (not taken) by the Solicitor General in defence of the claim The Solicitor General (Ms. Kiele was acting SG at the time the claim was registered with the SGO) failed to file the NOID and Defence on time and a default judgment entered against the State.

79. Ms. Kiele, then Solicitor General attempted to file Notice of Motion and Affidavit in Support (David Lambu) to have the Default Judgment set aside with the Notice of Motion and the Affidavit in Support (D. Lambu) dated 30 March, 2000 but filed with the Court on 2nd August, 2000. Default judgment was entered against the State on 11 August 2000. That only means that the Solicitor General was in breach of its duties and responsibilities under the Attorney General's Act

Steps taken (not taken) by the Attorney General in defence of the claim

80. The Attorney General (Francis Damem) was genuinely concerned at the manner in which the Manoburn claim was treated by the Solicitor General. The Commissions view on Mr. Damem, particularly the periods February 2001 to August 2001 where he did the following:-
- (a) Instruct PKA lawyers to defend the proceedings with respect to the quantum.
 - (b) Advised Mr. Zacchary Gelu that proceedings involving Manoburn was briefed to PKA Lawyers and that he was not responsible for that matter.
 - (c) With the engagement of PKA lawyers, default judgment was set aside.
 - (f) Supreme Court settles the issue over whether the SG can act independent of the AG in matters concerning settlements of claims against the State. The AG is authorized by law to settle claim against the State
 - (g) Ongoing proceedings to deal with the Deed of release and the balance of the K3million which is outstanding.

Settlement

81. None considered as the acting Solicitor General cleared it without conducting any due diligence on the claim and consulting the Department of Works and -or OPIC.

82. The matter was to proceed to trial on the assessment of damages which would in the circumstances be appropriate as there was no dispute that work may have been done as claimed by Manoburn. This was verified by the DoW through the Technical Reports and that would have served that purpose.
83. The settlement was far too excessive and without doubt inflated based on other heads of damages which were not tied to the initial claim for the delay in payment on the work performed by Manoburn under Contract.

Pay-out - Department of Finance compliance or otherwise with *Public Finances Management Act* and related process.

84. DoF had paid by installment based on the Deed of Settlement. The balance of K3 million is the subject of an appeal to the Supreme Court pending a decision.
85. The Department of Works paid an amount of K10, 543.33 to Lawyers acting for the Manoburn and the cheque was returned based on the proceedings and that '
86. Manoburn was seeking damages for breach of contract and that the actions of the DoW the contracts have been frustrated. (Sheperd Lawyers by letter dated 31 March 2000)

FINDINGS

87. **The lack of professional and management oversight of the claim was the major contributing factor at the Office of the Solicitor General.**
- a. The lack of initiative to deal with the letter of demand by the Solicitors of Manoburn on 6th August 1999 proposing to file a claim against the state for breach of contract. At that time the demand was for an amount less than K1 million.

- b. The lack of initiative to consult the Department of Works to obtain the necessary information for the purpose of making a decision whether to negotiate and settle the demand for payment or defend the proceedings.
- c. The lack of initiative to mediate a settlement of the dispute over progress claim on behalf of the State, because there is proof from the technical advisors report confirm that progress claims for work done was quantified at below Klmillion.
- d. The huge turn-over in the position of the Solicitor General (Kiele/Gelu/Kumura) has caused a loss of cohesion in the manner in which this proceeding has dragged on in the courts.
- e. The Solicitor General (including the Solicitors for Manoburn) had also overlooked the provisions dealing with Arbitration under the contract which was the appropriate dispute mechanism to mediate the dispute on the delayed payments by the DoW/State.
- f. The negligence of the Solicitor General in 1999 in failing to file the Notice of 'Intention to Defend' and the 'Defence' within time, resulting in a default judgment entered against the State.
 - a. That negligence on the part of the office of Solicitor General has caused the State to incur moire expenses with the engagement of PKA Lawyers to institute proceedings on behalf of the state to set aside the default judgment in 2002 including the issue of the AG/SG powers and the Deed of Release.
 - b. The accumulation of costs and payout on the Deed of Release (now in arrears) has adversely affected the budgetary appropriations.

The Deed of Release

88. The Commission makes adverse findings against Mr. Gelu's conduct in the settlement of the claim as follows;
- a. He had formed a professional view on the matter and had compromised the office of the Solicitor General by accepting the financial difficulties and losses of the business and the prolonged court proceedings (Cash Flow Statement) when in fact
- i. Manoburn had also contributed to the problem by the frequent change of lawyers and its instructions (Shepherd Lawyers/Blake Dawson Waldron/Murray and Associates/Mirupasi Lawyers)
 - ii. Manoburn had refused to accept the cheque of about K10,000.00 and returned to the DoW.
 - iii. The State was not responsible for the losses suffered by Manoburn and the costs incurred for professional services rendered by Kinhill Kramer, RAM Business Consultants, the costs of profits for the last three years to 31 December 1999 at K750,000.00, net profit for next 3 years at K1,050,000 and existing claim. These were not pleaded by Melbourne in WS 285 of 1999 and not verified.
89. Failed to comply with section 61 of the Public Finances (Management) Act where Ministerial approval is required for expenditure in excess of K300,000 and above. He did not obtain that approval prior to the execution of the DOR.
90. The Solicitor General also failed to comply with NEC Decision No 150/2003 of 25th July 2003 wherein the NEC directed the

- (i.) The Solicitor General in consultation -with the Attorney General were directed to settle any future claims for amounts up to K1,000,000 provided they were satisfied with the claims were genuine ;and
- (ii.) All amounts for out of Court settlement in excess of K1,000,000 are to be approved by the NEC prior to any payments being made by the Department of Finance; and
- (iii.) Approved that the Attorney General immediately apply to the court for Judicial Review of any questionable claims or out of Court settlements in excess of K500,000

90A. Where claims are pursued in court, once liability and damages are ascertained, the court may be asked to order that a party pay the costs of the other party. The State like any other party in court proceedings may be found liable to pay the costs of the other party or where the State is successful, the Court may order that the other party pay the State's costs. In either case, where there is no agreement as to the amount payable for costs, the avenue available under the National Court Rules is to have the successful party's costs taxed.

Taxation is also available to a client who is entitled to dispute the lawyer's legal fees. As such, unless there is prior agreement as to costs payable, the State is entitled to dispute the legal fees of the law firm briefed by the Attorney General.

The Commission notes the award for legal costs against the State following dismissal for want of proof of findings commenced by the State in this matter. Costs were taxed at K2 million. The matter warrants further inquiry to ascertain whether the costs were justified; RECOMENDATIONS"

91. The Office of the Solicitor General through its lawyers (if PKA is still retained as lawyer on record) to institute proceedings in the National Court to have the deed of release declared null and void.

92. That the State institute proceedings to recover the amount of moneys paid so far and to conduct a review as to what was the reasonable losses incurred by the Company.

(c) Pioneer Construction Ltd

PARTIES

(i) For the State

- (a) Department of Works
- (b) Attorney General/Solicitor General
- (c) National Court Registry (Waigani/Mount Hagen)
- (d) Department of Finance

(ii) For the Claimant

- (a) Mrs. Gertrude Arete (widow) Director of the Company)
- (b) Maladinas Lawyers (now practicing as Young and Williams)
- (c) Pato Lawyers (now practicing as Pacific Legal Group)

DOES THE CLAIM FALL WITHIN THE TERMS OF REFERENCE

The Company was paid a total of K 4.1 million by the Department of Finance in satisfaction of the Deed of Release which was executed between the State and Maladinas Lawyers (Lawyers on behalf of the Company) on 26th November 2002.

The applicable TOR are (a) (1) ((i) to (xii)), 5 (i) to (vii), 8 and 12.

THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

The Company was awarded Contract No. MWC-MR-001/99 Tomba to Tambul Road upgrading project by way of a Certificate of Inexpediency (COI) for a value of K3,878,151.00 on 11th March 1999. The then Secretary for Works, Mr. Micky

Tamarua approved the engagement of Pioneer Construction on the road works project.

Pioneer Constructions was registered PNG Company that carried on the business of earthmoving and civil engineering construction work. The Company shareholders/directors were Mr. Timothy Arete (now deceased), Gertrude Arete (widow), Shirley Arete (daughter) and Pius Kunji (now based at Tabubil) as the Secretary to the Company. At the time the company was awarded the contract, it was effectively winding up (**Refer to Mr. Joel Luma's letter dated 6th May 2009 to the COI and the attached advertisement**).

A Deed of Release was entered into between Mr. Zacchary Gelu as the then acting Solicitor General (on behalf of the State) and Maladinas Lawyers (on behalf of the Company) on 26th November 2002. The parties agreed to settle the claim for K3,287,710.00 for unpaid progressive claims for services rendered by the company and for damages caused by vandals to equipment, site offices and properties belonging to the company left on the work site over a period of two years (from 24th August 1999 to 2001). The company suspended operations at end of October 1999 after a period of 7 months alleging delayed unpaid progressive claims against the Department of Works.

The Department of Finance has paid the claimants **K4.109.988.70**. Below is a schedule of payments obtained from the payments vouchers sighted from documents received from the Department of Finance.

Schedule of Payments as per DoF Payment Vouchers

No.	Date	Reg.	Vote	Amount Paid (PGKm)	Remarks	FileRef
1	21.03.00	10038	207-4201-4123- 135	959,988.70	c/Pato Lawyers T/A	56-FD
2	28.11.02	63479	460-31	1,500,000.00	c/Maladinas T/A	74-FD
3	04.04.03	16725	207-4201-4123- 135	100,000.00	c/Maladinas T/A	15-FD

4	04.04.03	Chq.739374	207-4201-4123- 135	100,000.00	c/MaJadinas T/A	10-FD
5	22.09.03	48494	207-4201-4123- 135	300,000.00	c/Maladinas T/A	25-FD
6	31.10.03	56459	460-31	400,000.00	c/Maladinas T/A	11-FD
7	13.01.04	Chq. 74581	460-31	600,000.00	c/Makdinas T/A	9-FD
Total Paid				4,109,988.70		

**DOCUMENTS PRODUCED FOR OUR EXAMINATION AND
REVIEW BY THE COMMISSION**

Statements and Correspondence of Witnesses

The following documents have been reviewed and the following matters have been noted by the Commission;

i- Mr. G. J. Sheppard

Partner of Young and Williams Lawyers in response to COI request for the file advised the Commission that the files have been destroyed after 7 years. Young and Williams have taken over the practice of Maladinas lawyers. (Letter dated 26th March 2009)

ii. Mr. Joel Luma

Current Secretary for Works responded in writing to COI Letter dated 23rd March 2009 and the Summons dated 29th April 2009 with relevant and useful information on the history of the claim.

Mr. Luma informed the COI that

" • • . this road project was initiated in 1997 under Governor Pais Wingti and was awarded to COECON Ltd. It was shelved after the 1991 General Elections. In 1999 the second attempt was made to award the project to Pioneer when clearly there was no funding allocation in the 1999 budget"

The relevant information on the letter.-

- A Minute dated 22nd May 2000 by Mr. Mohotti, Technical Adviser, Works Department to Secretary raising concerns over the manner in which the contract was awarded when in fact the project was taken off the Public Investment Programme in 1999 (meaning that there was no funds allocated for the project)
- Mr. Michael Gene's concerns about the actions of Acting FAS (operations) Mr. BK Alois to certify the claim when he had no authority to do so. (letter dated 26 June 2000)
- Application for Certificate of Inexpediency by Mr. Tamarua to the Chairman, CSTB dated 5th March, 1999 seeking its approval citing 1997 election as the reason for delaying the project. No public bids for tender was made by CSTB on this contract.
- An advertisement in the newspaper on the winding up of Pioneer Constructions Ltd as of 5 October 1999. The Contract was awarded on 11th March 1999 by Certificate of Inexpediency when the company had gone into receivership.
- The letter of 8th .September 1999 by Mr. Alois of Works to PNGBC certifying the claim on the four progressive payments to Pioneer was not without authority nor did he have the appropriate section 32 financial delegates to do so.
- Former Minister for Transport, Mr. Vincent Auali's letter of 10th May 1999 to Manager of Pioneer Constructions approving revised schedule of rates.
- Former Works Minister, Mr. Yawe Rayon letter of 12* June 1999 supporting the Transport Minister's call to revise the schedule of prices.

iii. The Office of the Chairman, CSTB was summonsed to produce documents in relation to the tender/contract on 29th April 2009 and have asked for extension to locate the documents which have being archived.

iv. **Hitelai Polume-Kiele**

Acting Secretary for Justice and Attorney General has been summonsed to produce the SG file in relation to the claim made by Pioneer Constructions Limited and subsequently settlement of the claim by way of the Deed of Release. No response has been received to date and the file has not been produced.

v. **Ian Augerea**

Registrar of the National Court has also been summonsed to produce the file in relation to the claim lodged by Pioneer, but no response has been received to date.

vi. **Mr. Erick Kiso**

Assistant Registrar, National Court Mount Hagen has verbally informed the COI that no proceedings have been registered by Pioneer at Mount Hagen. He states that the files are normally registered at Waigani.

vii. **Mr. Michael Gene**

Former Secretary for Justice and Attorney General was requested by the Commission to assist with information relating to the clearance he gave to the DoF for payment of the claim. His letter of 18 May 2009 states as follows:

"In respect of Pioneer Constructions United matter, the contract progress payments were delayed as the Department of Works didjot have sufficient funds to meet the State's contract obligations for the Tomba/Tambul Road Upgrade Project (...). Mr. B.K Alois. A/EM (Operations) of the Department of Works confirmed the outstanding

progressive payments to the value of Kl. J59. 988.30 under his letter of 8 September 1999.

This matter also appears to be in order and I recommend that no further action is required by the COI

You may also seek further clarification from Mr. Pdmink Pato, now the Principal of Steele's lawyers. »

viii. Mr Ian Sheperd

Partner with Blake Dawson Lawyers informed the Commission by letter dated 19th May 2009 that the firm was briefed by the Solicitor General in 2005 to review the matter. The letter refers

"The works was undertaken with the assistance of funding from AusAID and an extensive file was in fact commenced under Proceedings WS 1093 of 2005 against Pioneer Constructions limited and Zacchary Gelu personally. In the proceedings. Blake Dawson obtained judgment for damages to be assessed but unfortunately the State has been extremely slow in paying our fees once the AusAID funding ceased and damages have not yet been assessed. (Our emphasis)

Included in the letter were two files relating to the proceedings WS 1093 of 2005. (Refer to BDW 2 and 3)

WITNESSES WHO GAVE EVIDENCE ON OATH

The following witnesses were gave evidence at the public hearings of the Commission held at the Mount Hagen Council Chambers from 18 May to 22 May 2009.

The hearing of the claim was recorded into proceedings **COIFINANCE 42** dated **27th October 2008** at Waigani.

- **Opening** submissions on **the** claim by **Pioneer** Constructions **Limited**~(Refer to pages 1050 to 1052)

COIFINANCE 101 dated 18th May 2009 at Mount Hagen-(Refer to pages 3172 to 3224)

- **Opening submission by the Commission-(Refer to pages 3172 to 3173)**
- **Evidence of Mr. Etick Kiso**, Assistant Registrar-National Court, Mount Hagen- Confirm that there were no Court Files on Pioneer neither registered nor archived in the Mount Hagen Registry. (Refer to pages 3173- to- 3179)
- Evidence of **Mrs. Gertrude Arete**, Director of Pioneer Constructions Ltd with the assistance of her lawyer Mr. Waifaf,(refer to pages 3215 to 3224)

- o Produced documents

- o Produced a statement on the history of the claim made by the Company

- o Confirmed that her husband died in 2002

- o She confirmed that all the payments were made to Pato Lawyers and Maladinas.

- o She was requested by the Commission to follow up with Maladinas (now Young and Williams) on the disbursement of the payments made by Department of Finance based on her information that the company had not received any of the payments. **(We take note that**

a request was made by the Commission for the verification of the payments from the Law firms and no further information was produced for our records).

COMPLIANCE WITH PROCESS-REQUIREMENTS OF THE CLAIMS BY & AGAINST THE STATE ACT, 1996-(CB&S Act, 1996)

No court proceedings instituted by the Company as evidenced by the lack of documents from the firm of lawyers (Maladinas).

No section 5 notice sighted from the documents produced by Mrs. Arete and from the payment vouchers submitted by the Department of Finance.

Steps taken (not taken) by the Solicitor General in defence of the claim

There was a lack of initiative on the Solicitor General to carry out due diligence on the claim and the failure to file a section 5 notice The State also did not consult the Department of Works, wherein the information furnished to the Commission by the current Secretary of the Department of Works *confirms* that the company was winding up when it was awarded the contract (Certificate of Inexpediency).

Steps taken (not taken) by the Attorney General in defence of the claim

The Attorney General was not consulted by the acting Solicitor General, when he executed the Deed of Release

Settlement

The settlement was done without consideration of the process under section 5 of the Act The acting Solicitor General also acted independent of the Department of Works when he settled the claim.

Pay-out - Department of Finance compliance or otherwise with Public Finances Management Act and related process.

Despite the fact that the contract was awarded by *the* Department of Works to the Company, the claim was settled by the Department of Finance. This is highly irregular and illegal because the provisions in the Contract provide the venue for payments to be paid out of funds allocated for the project by the Department where progressive payments are approved by engineers from the Department of Works and progressive payments approved for each completed work.

Payments out of the Trust Fund Suspense Account.

There are two payments made out of the Trust Fund Suspense Account#2. Those payments are highly irregular as the managers of the project was the Department of Works and therefore if any payments were to be made, it was considered proper that the Department would pay of funds approved and allocated for that project Any payments made to the claimant by the Department of Finance are considered to be outside the terms and conditions of the contract.

PROCEEDINGS WS 1093 OF 2005 BETWEEN THE STATE -V- PIONEER CONSTRUCTIONS LIMITED & ZACCAHRY GELU

The documents produced by Blake Dawson Lawyers reveal that proceedings were instituted on behalf of the State to set aside the Deed of Settlement. On 17th May 2006, the firm obtained judgment against Pioneer and Gelu and the Deed of Release was set aside. The firm ascertained that at least K1 00, 000 was paid to Pioneer pursuant to the Deed of Release.

Department of Finance payment vouchers confirm that about K4, 109,988.70 have been paid to date. The break-up of payment includes one payment of K959,988.70 paid into Pato Lawyers Trust Account and the balance of K4,050,000.00 paid into Maladinas Lawyers Trust Account. **There is a need for further inquiry into the payments made to Pato Lawyers Trust Account and Maladinas Trust Account for the reason that the widow of the claimant has**

informed the inquiry at Mount Hagen that they have not received any moneys, the subject of the deed of settlement.

The only aspect of the matter remaining is the enforcement of judgment based on the orders obtained by BDW on behalf of the State.

THE COMMISSIONS OBSERVATIONS ON THE FACTS AND EVIDENCE UNDER REVIEW

The engagement of Pioneer Constructions to undertake the sealing and road works of the Tombe Road is irregular, as the documents produced by the Department of Works indicate that the company was winding up. The contract was also awarded under very suspicious circumstances and the payment of K4million is questionable.

OUR FINDINGS

(Reference is also made to the Statement of Claim by the Lawyers for the State in WS 1093 of 2005 Between the State -v- Pioneer Constructions Ltd and Zacchary Gelu which pleads the matters which are consistent with our findings)

1. Pioneer was awarded the Contract in April 1999 to upgrade Tomba to Tambul Road. The Contract was awarded to Pioneer Constructions for the sum of K3,878,151.00 on 13th April 1999 by Mr. Henry Veratau, then Chairman of Central Supply and Tenders Board ^ The Central Supplies and Tenders Board failed to observe the procurement process under the *Public Finances (Management) Act* by calling for public tender for the Tomba to Tambul Road upgrade. y The manner in which the contract was awarded to Pioneer i.e. with a Certificate of Expediency is highly suspicious and irregular, because there were more reputable companies capable of providing such services to the State.

2. On 24th August, 1999 Pioneer informed Works that they "will stop work" and wait for outstanding progress claims to be paid in full. (This was done on the basis of differences between the Company and the State over unpaid progress payments.
3. Work was suspended at the end of October 1999. On the 27th July 2000, Pioneer issued another letter of demand *to* the State.
4. Between 24th August 1999 and sometime in 2001, Pioneer's equipment, site offices and storerooms that were left on site were vandalized. (The company failed to secure all its equipment at the time it suspended its operations)
5. Maladina's lawyers (Mr. Sheppard) in a letter dated 24th October 2002 proposed its claim against the State, outlining the facts alluded to above as the basis of Pioneer's claim and sought a claim for K3, 287, 710.00 (including Idle Time Costs/Equipment Vandalized/Site Office and Storerooms vandalized
6. Mr. Gelu, then acting Solicitor General having considered the letter, prepared the Deed of Release by actually adopting the content of the letter. On 26th November 2002, Mr. Gelu (on behalf of the State) executed the Deed of Release with Mr. Sheppard of Maladinas (on behalf of the Company)
7. Mr. Zacchary Gelu failed to carry out any due diligence on the basis of the proposal by Maladinas Lawyers to institute proceedings against the State on the purported claim that the State's delay in making progressive payments caused the Company to suspend its operation. The failure to undertake any due diligence is based on the fact that the Solicitor General and
 - y Did not consult the Department of Works who were implementing the minor works contract on behalf of the State.

- > The Arbitration Clause (Clause 11) in dealing with Disputes was never referred to by Pioneer.
- > No section 5 notice under the CBAS Act was given including a request to seek an extension of time to file proceedings in the National Court. This condition precedent was not satisfied by the Company.
- > There were no Court proceedings instituted by the Company.
- > The inclusion of Idle Time Costs/Equipment Vandalized/Site Office and Storerooms vandalized claim was the result of the Company's negligence in securing all the assets of the company when it suspended operations. The State was Only responsible for ensuring that the Company complied with the terms and conditions of the contract and to upgrade the road within 12 months.
- > The failure to conduct proper searches at the Registrar of Companies would have revealed that the company had wound up on or about 5th October 1999. It is noteworthy that Managing Director of the Company suspended operations in October 1999, which also coincides with the advertisement that the company was winding up.
- > He failed to give due regard to the provisions of section 61 of the *PFMA* where approval for amounts over K300,000.00 are approved by the Minister.
- > He failed to give due regard to the directives of the NEC as per NEC Decision NG 07/2002 at paragraph 10 on the direction that there be no more out of court settlements by any State body or authority including the Attorney General and the Solicitor General without the approval of the NEC acting on the advice from the CACC.
- > He also failed to give due regard to NEC Decision 150 of 2003 on conducting a review of all claims cleared by the AG for payment.

RECOMMENDATIONS

1* The Office of the Solicitor General to consult with Blake Dawson Lawyers and ensure that the National Court Orders dated 17th May, 2006 and 10th July 2006

under WS 1093 of 2005 setting aside the Deed of Release be pursued andjy^ regard be given for the enforcement of the judgment without delay.

2. That Mr Zacchary Gelu not be considered for any future appointments to a public office.
3. That the awarding of minor road works contract by the Department of Works be made subject to the tendering procedures under the *Public Finances (Management) Act, 1995*

(d) Orosambo Limited

Introduction

Terms of Reference (ToR)

This claim is subject to the ToR of this inquiry in that:-

- 1) payments made to date stands at K3, 432,168.90 (inclusive of cancelled cheques totaling to K850,000) (*per PGAS Cash Book Report - Dept of Finance!*) which is in excess of threshold for claims above K300.000 which is the subject of this investigation;
- 2) payments to date were made between 2003 and 2004 thus fall within the period between 2000 and July 2006 which is the subject of this investigation;
- 3) *manner and conduct of those involved within the various state offices and agencies authorizing and processing this claim appear as serving their own interests (and not the interest of the State) and that these parties may have compromised or subverted the standing protocols, processes, procedures, orders to accept this claim in a fraudulent and illegal manner. Hence, forms the basis of this inquiry's investigation.*

Source(s) of where Evidence was collated

For the purpose of this inquiry, files were accessed from the Solicitor General's office (**SG**), the National Court Registry (**NC**), Dept of Finance (**FD**) and other locations/offices deemed necessary to inquire into this claim.

Legislations cited for this claim

To present the findings of the Commission before a hearing on this matter investigated; relevant acts and legislations referred to include (but not limited to):-

1. Claims By and Against the State Act (1996)
2. Public Finance (Management) Act (1996)
3. Attorney General's Act
4. Wills Probate and Administration Act 1966
5. Public Curators Act
6. Companies Act 1997
7. Frauds and Limitations Act 1988

National Executive Council Decisions

1. Decision No.NG07/2002:- 2002 Supplementary Budget and Framework for the 2003 Budget
2. Decision No.150/2003:- Claims By and Against the State and Judgment Debts
3. Decision No.21/2006:- Out of court Settlements - By way of Deeds of Settlement/Release

Facts/Evidence

Background of the Claim

This is an alleged claim for breach of an agreement for construction of road works in Oro Province. The *Oro Provincial Government (f Defendant)* and the *State (2P^d Defendant)* were sued by *Orosambo Enterprise Limited (Plaintiff)* for failing to honour the terms and conditions precedent in the said agreement where the 1st defendant was unable to pay the required monies to the Plaintiff for services rendered since 12 September 1989. The liability and damages to this claim were admitted and assessed by way of default judgement sanctioned in Court on the 17/5/1993 and enforced by a Court Order for the 1st Defendant to settle. The claim has been progressively settled in instalments so far amounting to a total of

K3,432,168.90 90 (inclusive of cancelled cheques totaling to K850,000) being paid out of the Waigani Public Accounts.

Background of the Company - "Orosambo Enterprise limited" suing the Provincial Government and Independent State of PNG

- (a) On 25 March 1985, the late Godfrey Orosambo and Jack Bonard Orosambo incorporated a company called Orosambo Enterprise limited ("Company"). The company was registered on 13 August 1985. Late Godfrey and Jack were held five (5) shares each and they were the only shareholders and directors in the company.
- (b) The Commission confirms that a "Certificate of Incorporation" - No. C109922 was issued to the Plaintiff.

Agreement or Contract of Service

- (a) On the 11th April 1987, by an agreement made in writing the 1st Defendant (Oro Provincial Government) agreed to engage and pay the Plaintiff (Orosambo Enterprise Limited) for maintenance on all the roads throughout the Oro Province and the Plaintiff agreed to provide that service.
- (b) Under Clause 2 of the agreement the period of contract was to be for five years commencing 1st May 1987 and ending 31st April 1992.
- (c) Under Clause 4 and 5 of the agreement the contract price was stipulated at K300.000 per annum payable at equal monthly instalments. The contract of service is for five (5) years and is valued at K1 ,500,000 and that the Public Finance Management Act would apply.

(d) Under Clause 13 of the agreement the contract may be terminated by either party at the expiration of three months after the date on which notice of such termination is served on the other party except that by mutual consent the said period may be reduced or waived.

3. Compliance with Section 5 Notice: Claims By and Against the State Act

- (a) This piece of legislation although relevant because the State was initially joined in the proceedings as second Defendant however does not apply given the fact that the proceedings commenced in 1993 prior to the establishment of the Claims By and Against the State Act 1996.
- (b) Further, proceedings on this claim was made against the Oro Provincial Government under Section 12 of the Organic Law on the Provincial Government and Section 2 of the Legal Proceedings By and Against the Provincial Government Act 1977.

4. Claim - Cause of Action

Facts of the Matter - Breach of said contract

- (a) The Plaintiff is suing the Oro Provincial Government (1st Defendant) and the State (2nd Defendant) under Section 2 of the Claims By and Against the State Act for breach of contract by failing to make payments for services alleged to have been rendered by the Plaintiff under the said contract and claiming for damages suffered in the amount and time prescribed and pleaded in the Statement of Claim.
- (b) The said contract was not terminated but specific provisions of the said contract in relation to clauses 4 and 5 were breached. The Oro Provincial

Government did not have the funds available to settle the on-going claims made by the Plaintiff.

- (c) Liability: Although the said contract was signed and sealed without the Ministerial approval of the Department responsible for Finance thus bringing the validity of the contract into question; liability had been incurred resulting from breach of the said contract by the 1st Defendant (Oro Provincial Government).
- (d) Damages: damages should be claimed for loss suffered due to nonpayment of services rendered, if rendered at all; and in the period under the said contract but subject to assessment.

Court Proceedings - under WS # 53/1993

- (a) On the 26/2/1993, Orosambo Enterprise Limited filed a Writ of Summons - WS # 53/1993 along with a Statement of Claim in the National Court through its lawyers, AMNOL Lawyers.
- (b) *The Statement of Claim contained in the WS # 53/1993 para (9) states that on the 9th October 1989 the Plaintiff was frustrated from continuing to provide the agreed services due to non-payment of any monies by the 1st Defendant.*
- (c) On the 16/3/1993, the 1st Defendant - Oro Provincial Government filed a Notice of Intention to Defend. The defense was filed within 30 days of the date of service of the WS to 1st Defendant.
- (d) On the 6/4/93, the 2nd Defendant - the State filed a Defense stating that each every allegation in the Statement of Claim is denied because it was bad in law and disclosed no cause of action against the State. However, 1st Defendant - Oro Provincial Government may sue and be sued by virtue of

Section 12 of the Organic Law on the Provincial Government and Section 2 of Legal Proceedings By and Against the Provincial Government Act 1977. Further 2nd Defendant states that the Statement of Claim alleges an agreement between Plaintiff and the 1st Defendant for payment of services provided by the Plaintiff at the request of the 1st Defendant.

On the same date (6/4/93), the 2nd Defendant - State filed a **Notice of Motion** to (1) remove itself as a party in the proceedings and (2) such further orders this Court deems fit.

On the 7/5/1993, the Plaintiff filed a **Notice of Motion** seeking orders from the Court to (1) strike out NOID of the 1st Defendant, (2) judgement in default of Defence be entered against the 1st Defendant (3) Damages be assessed (4) 1st Defendant pay Plaintiffs costs of the proceedings and (5) such further orders as this Court deems fit.

On the 17/5/1993, **Judgement** was obtained in the National Court that (1) Notice Of Intention to Defend be struck out (2) Defendant is liable to the Plaintiff for damages (3) orders that damages be assessed (4) Defendant to pay the Plaintiff interests and costs.

On the 13/8/1993, Plaintiff filed an **Affidavit** in Court stating a meeting that was held on the 18/6/1993 by parties representing the Plaintiff and the 1st Defendant to negotiate the quantum of damages plus ancillary matters following National Court's order for interlocutory judgement to be entered against the Defendant. The Plaintiff refers to a Notice Of Motion and Consent orders dated 9/8/1993 where parties have agreed but the Commission has so far not sighted any evidence in respect of notice of the meeting, signed minutes of the meeting, etc, confirming that the meeting took place and further parties in the meeting did agree to the assessed amount of K1,320,384. (*Requested to the Administration of Oro*

*Provincial Government to provide records on this matter - COI Letter dtd:
9/9/2008 signed by Nolan Kom - Technical Counsel)*

Events at Solicitor General's Office

The office of the Solicitor General filed a motion in Court to withdraw its involvement on this matter as it claimed that it was not a party to the contract which was subsequently breached resulting in this claim.

Solicitor General's office only got involved to procure and process the assessed claim without any intention or appeal to provide advice to Oro Provincial Government to assess the liability and damages arising from the claim.

The Solicitor General's office merely received letters from the Claimant's lawyers and gave clearance notices instructing Dept of Finance to settle the claim.

The Solicitor General's office received and noted letters and correspondences from the various plaintiffs lawyers re: which lawyer's trust account should the payments be made to; how much is outstanding and to be paid; which parties on the Claimant's side were legitimate shareholders/ directors and other matters related to who has and does not have interest over the ownership and administration of the claimant's company (Orosambo Enterprise Limited), etc.

Events at Attorney General's Office

- (a) There were no participation from the Attorney General's office on this matter as observed from records inspected at the National Court Registry and Solicitor General's offices, respectively.

7. Settlement

- (a) From the proceedings under WS # 53/1993, the Settlement was done by way of a Judgement obtained in favour of Orosambo Enterprise Limited (Plaintiff) in the National Court on the 19/5/1993 after (1st Defendant) Oro Provincial Government failed to file a Defense in the proceedings under WS 53/1993.
- (b) In a letter dated 19/2/2003, The then Oro Provincial Administrator - Raphael Yibmaramba wrote to Secretary for Finance - Thaddeus Kambanei to assist the Provincial Government to settle the claim on its behalf raising concern Vbout the garnishee notice served on Oro Provincial Government's bank account and the effect this will have on its operations and the interest that continues to accrue at 8% p.a on the judgement amount without being settled.
- (c) In a letter dated 20/2/2003, NINAI Lawyers (Bonny Ninai) representing the Claimant, Orosambo Enterprise Limited wrote to Zacchary Gelu (Solicitor General) officially advising him of the judgement obtained io favour of Orosambo Enterprise Limited against Oro Provincial Government to settle the claim. The letter further asked the Solicitor General to give its legal clearance to Finance Department to settle the claim.
- (d) In a letter dated 26/2/2003, The Solicitor General - Zacchary Gelu writes to Department of Finance Secretary — Thaddeus Kambanei giving instructions to settle the claim for the sum of K1,968,751.20. The amount is inclusive of Judgement debt plus interest accrued over 10 years at a rate of 8% p.a. and legal costs.

8, Pay-Outs by Department of Finance

ban of Pyateits wait to Claimant- Orosambo Enterprise Limited

Date	CE/IL/POC	Division	Function	Activity	Item	Payee	Particulars of payment	Type	Chq #	Amount
17/4/2003	905305	207	4201	2107	135	Orosambo Enterpris	Payment O/Standing De	CQ	718078	44,000.00
20/5/2003	912503	207	4201	2107	135	Orosambo Enterpris	Payment for O/S C/Or	CQ	722445	100,000.00
28/7/2003	924500	207	4201	2107	135	Orosambo Enterpris	Pmt o/s c/order WS N	CQ	728495	80,000.00
23/9/2003	935970	207	4201	2107	135	Orosambo Enterpris	Pmt o/s c/order WS#5	CQ	734195	100,000.00
31/10/2003	943743	460	31	0	0	Orosambo Enterpris	O/S C/Order WS No.	CQ	738362	100,000.00
17/11/2003	946049	207	4201	4123	135	Orosambo Enterpris	Payment of O/S C/Ord	CQ	739730	100,000.00
16/3/2004	969454	207	4201	2107	135	Orosambo Enterpris	Pmt o/s c/order WS#5	CQ	772204	500,000.00
23/6/2004	987018	207	4201	2107	135	Orosambo Enterpris	Court/Ord.WSNo.53of	CQ	782212	350,000.00
10/8/2004	994718	207	4201	2107	135	Orosambo Enterpris	Being pmt for o/s c/	CQ	786699	100,000.00
10/1/2004	13470	207	4201	2107	135	Orosambo Enterpris	Pmt for replacement	CQ	791767	46,384.00
										1,520,384.00
Summary of Payments made to Claimant's Lawyer - AMNOL Lawyers										
17/3/2004	969832	207	4201	4123	135	Amnol & Company La	Repl chq. 772204	CQ	772427	500,000.00
6/7/2004	989081	207	4201	2107	135	Amnol & Company La	Repl/chq#78221-due t	CQ	783458	350,000.00
										850,000.00
Summary of Payments made to Claimant's Lawyer - Saulep Lawyers										
16/2/2006	1068525	207	4201	2107	135	Saulep Lawyers T/A	O/S C/Order Pmt	CQ	831259	400,000.00
11/5/2006	1076943	207	4201	2107	135	Saulep Lawyers T/A	O/S C/Order (WS#-53/	CQ	836477	100,000.00
1/6/2006	1078278	207	4201	2107	135	Saulep Lawyers T/A	O/S C/Order Pmt	CQ	837740	200,000.00
22/6/2006	1080138	207	4201	2107	135	Saulep Lawyers T/A	O/S C/Order Pmt (WS-	CQ	838904	361,784.90
										1,061,784.90
☐ = cheques issued to Orosambo Ent Ltd then cancelled and re-issued to AMNOL Lawyers										
Source: PGAS system - Dept of Finance Cashbook Report									Total Payments made	3,432,168.90
									Less: Cancelled & re-issued chqs	(850,000.00)
									Net Payments made	2,582,168.90

History of Payments

- A total of 16 instalment payments were made amounting to **K3,432,168.90** (inclusive of 2 lots of payments made and later alleged as cancelled worth **K850,000**) between years 2003 and 2006.

- From these set of payments made:-

^ 10 lots of payments were made in the name of Orosambo Enterprise Limited amounting to K1,520,384 (including cancelled cheques totaling K850,000)

p- 2 sets of payments made out under the name of AMNOL Lawyers for K850,000

y 4 instalment payments paid in the name of SAULEP Lawyers for K1,061,784.90

- 9/16 payments had some evidence provided which confirmed payments were made. From these 9/16 payments, the COI noted that documentation was not complete in each payment voucher details.

Pay-out by Oro Provincial Government

Per Correspondence dated: 19/2/2003 from the then Oro Provincial Administrator - Mr. Raphael Yibmaramba to Mr. Thaddeus Kambanei (Secretary DoF) - para 3: *The Provincial Government paid K400,000 in partial satisfaction of the debt.*

This payment is not showing on the WPA Cashbook records maintained by DoF. **Issue:**

Double clipping!

Action; Write to Oro Provincial Government to establish how much monies were paid to Orosambo Enterprise Limited and their lawyers out of the Provincial funds.

Other Proceedings of connected or of relevance

Other proceedings were filed under SCR # 45/1993:-

- (a) In about October 1993, PATO Lawyers filed SCR 45/1993 on behalf of Oro Provincial Government, seeking the Supreme Court's Review of the Judgement obtained in WS # 53/1993, in particular the amount of damages that was allegedly agreed to between Oro Provincial Government and Orosambo Enterprise Limited,

- (b) On the 8/10/1993, an interim restraining order was obtained to stay the enforcement of the Judgement that had been obtained by Orosambo Enterprise Limited with the alleged consent of Oro Provincial Government
- (c) On the 11/1/1994, the Supreme Court Review was discontinued and the restraining orders lapsed.

Other proceedings were filed under WS # 420/1993:-

- (a) On the 20/10/1993, another **WS # 420/1993** this time filed by PATO Lawyers acting for Oro Provincial Government seeking orders and declarations that consent orders made in WS # 53/1993 were invalid. PATO Lawyers contested that lawyers representing Orosambo Enterprise Limited under proceedings WS # 53/1993 made misrepresenting remarks and thereby induced Oro Provincial Government to consent to the judgement and orders made in relation to the claim. Further, PATO lawyers argued that:-
 - i) the claim should have been deemed **illegal and void** as it did not obtain the approval of the Minister for Finance as required under **Section 60 clause 1 of the Public Finance (Management) Act 1986**, and
 - ii) the damages (ie, the judgement debt) claimed were fraudulently calculated because the contractor did not perform the balance of the contract and that the contractor never discounted for overheads not incurred and taxes.
- (b) After fresh proceedings were filed under WS # 420/1993, Orosambo Enterprise Limited filed a Notice of Motion seeking orders that WS # 420/1993 be dismissed on the basis that it was an abuse of the Court

process - should have been pleaded in defense to WS # 53/1993 which has been already dealt with.

- (c) Accordingly, the Chief Justice heard the Notice of Motion and made a Ruling on the 22nd July 1999 in favour of Orosambo Enterprise Limited to dismiss proceedings under WS # 420/1993.
- (d) There was no appeal filed against the ruling/ order. Minutes of the orders were taken out on 23rd May 2000.

Other proceedings were filed under OS # 1347/2001:-

- (a) Jack Orosambo, the surviving shareholder in Orosambo Enterprise Limited filed court proceedings under OS # 1347/2001 seeking declarations and orders to restrain other Orosambo parties from holding out and acting in their capacity as shareholders and directors of Orosambo Enterprise Limited.
- (b) The matter as of the date of 12th August 2004 was still proceeding in court.

Other proceedings were filed under OS # 357/2004:-

- (a) On the 12th August 2004, Decision was made by GABI AJ, for the Court to hear two notices of motions filed by opposing parties under the proceedings OS#357/2004. Basically, Orosambo Enterprise Limited and Jack Bonard Orosambo were seeking declaration and orders that:-

- the estate of Late Godfrey Orosambo's be transferred to the Public Curator's office under Wills Probate and Administration Act 1996 and the Public Curators Act;

- the changes in the company's shareholding and directorship is fraudulent and illegal and in contrast to the relevant provisions of the Companies Act 1997;
- notice of change of lawyers filed by AMNOL Lawyers be struck out
- company forms completed and filed to effect changes in the company's shareholders and directors be of no effect and struck out
- order AMNOL Lawyers to refund monies of K850,000 to be repaid to the Court's trust a/c,
- restrain Department of Finance to make further payments to other parties
- all remaining funds due and payable to be paid into the National Court trust a/c
- AMNOL render to the courts a bill of taxable form for services rendered to the Plaintiff under WS # 53/1993
- AMNOL Lawyers to provide statement of funds held in trust
- further applied for restraining orders to restrain other persons claiming to be the lawful persons representing the interest of Orosambo Enterprise Limited.
- Leave to file a statement of claim for damages against the Defendants
- Cost of these proceedings

On the other hand, the Other parties including AMNOL Lawyers argued that:-

- " The whole proceedings under OS # 357/2004 be dismissed as the Plaintiffs do not have any "*locus-stand*,V to institute and prosecute in these proceedings, the actions is misconceived and that it is an abuse of the process.
- Respondent pay the Applicants cost of these proceedings

(b) Decision was reached by the GABI AJ, where the Court granted orders to declarations made by Plaintiff (Jack Orosambo) and its lawyers, SAULEP

Lawyers. The Defendant's (ie, Other Orosambo parties and AMNOL Lawyers) cross-motion was dismissed.

Recommended Findings

■ ***Breach of relevant Sections of the Public Finances Management Act***

The Commission noted that this agreement (contract of service) valued at K1,500,000 was never processed through the Central Supplies Tender Board or the Provincial Supply Tender Board as might be the procedure with tendering and awarding of contracts under **Part VII - State Tenders and Contractors of the Public Finances (Management) Act 1986**. It appears, that this contract was instead initiated directly by the then Oro Provincial Government and its administration with the contractor.

y This contract does not appear to have been awarded through the Central ' Supply Tenders Board nor the Provincial Supply Tender Board.

In this instance, if the contract was initiated directly by the Provincial Government and its Administration of Oro Province at that time, then was this appropriate by the provisions of the *relevant laws/ acts such* as the Public Finance Management Act 1986 and whether the financial delegated authorities and limits approved at that time were exercised correctly and not abused?

In the view of the Commission, unless proven otherwise, the said contract should have been declared as VOID as the Oro Provincial Government, and its administration did not and still do not have the powers under the Public Finances (Management) Act 1986 to approve and award contracts without following the due process and procedures in consultation with the Minister for Finance and the relevant Supply and Tender Board, established in the same Act.

" Breach of Section 47A of the Public Finances Management Act

Further, under Section 47A: Offences (42) of the Public Finances (Management) Act 1986, "Departmental Head\ Provincial Administrators, head of a public body or other officers who authorise or permits a breach of procedures relating to the - Calling^ consideration and warding of tenders; or The execution of a state contract for the purposes of the Public Services (Management) Act 1986 or any contract entered into under that Act, are guilty of serious disciplinary offences

It appears that then Oro Provincial **Administrator** (Mr Arthur Jawodimbari), **Premier** for Oro Provincial Government (Mr Dennis Kageni) or other officers including then **Provincial Legal** officer (Mr Tera Dawai) were not disciplined for being guilty of serious disciplinary offences in relation to breach of procedures.

" Involvement of AMNOL Lawyers

It appears that clause 13 concerning "Termination" of the contract only described that either parties may terminate the contract after 3 months of giving of notice to either party. There are no conditions binding on either parties stated that will arise in the vent the contract is terminated, no description of what consequences and liabilities binding on parties effecting the termination of the contract and loss suffered for termination of the said contract.

The Commission is merely highlighting a fact that AMNOL Lawyers had full knowledge of the contract because they had constructed the details of the said contract on behalf of the State and then used their knowledge of this very contract they put together to sue the State.

The question this Commission then asks is, have AMNOL Lawyers conspired with Orosambo Enterprise Limited and certain elements of the Oro Provincial Government to enter into this said contract and then later sue the State for breach of the contract?

Further, was this contract initiated at the time when Oro Provincial Government were short of funds and with this knowledge proceeded to award the said contract with a view to force the State or its Agent to breach the contract for non-payment and suffer a claim against the State?

No defence filed by Oro Provincial Government

The Commission noted in an Affidavit dated 7/5/1993 {*NCR Doc # 10*) and filed by Paul Korerua of AMNOL Lawyers in the National Court requesting for a summary judgement to be entered into under Order 12 Rule 38 against Oro Provincial Government for defaulting in filing a Defence as required under Order 8 Rule 4.

The question then is asked: Why did Oro Provincial Government file a NOID but did follow through to file a Defence within the allowable 90 days period and further did not seek any extension to file a Defence.

Further, this Commission noted that a Defence was never filed at all.

Assessment of damages claimed in the Judgement Amount

Damages should be claimed for loss suffered (if any) due to non-payment of invoices for rendering of services in the period under the said contract *subject to assessment by the Court.*

However, other considerations to take into account relate to whether or not the claims by the Plaintiff for services alleged to have been rendered were actually performed or not. In other words, did the Oro Provincial Government satisfy itself that work was actually done as claimed in the unpaid invoices received from the Plaintiff?

Did the Oro Provincial Government Legal Officer or Lawyers from the Solicitor General's office see the opportunity to initiate a counter-claim if they had satisfied themselves that work may not have been done as claimed in the Plaintiffs invoices to the 1st Defendant?

The Commission noted that "*Judgement*" dated 19/5/1993 {NCR -Doc # 11}, order (3) stipulates that, "*the damages be assessed*".

The assessment of quantum according to an *Affidavit Bled and dated 13/8/1993* (NCR - Doc # 13) in the National Court of one Paul Korerua of AMNOL Lawyers as stated in his own words that,

(4) meeting held to negotiate the quantum of damages plus ancillary matters following Judgement entered against Defendant.

(5) terms agreed to by parties are contained in the *Notice of Motion* and *Consent Orders* dated 9/8/1993 and filed herein which have been signed by the parties.

The *Notice of Motion* referred to in the Affidavit was filed by AMNOL Lawyers in the National Court dated 13/8/1993 and not on the 9/8/1993.

That Notice of Motion assess damages at **K1,320,384** as judgement debt apart from costs and compound interest rates.

The *Order* referred to in the Affidavit was filed entered on the 18/8/1993. The Order upholds the details of the NOM above in that damages be assessed at K1 ,320,384 as the judgement debt amount.

It appears in the view of this Commission that there is no evidence (ie, correspondences, signed minutes of the meeting, signatory of the Defendant approving of the assessment etc) was sighted on the files of the NCR and the SG reviewed to confirm that the Defendant did attend such a meeting and that in that meeting such quantum of assessment (ie, K1,320,384) was agreed to pay for as damages.

It appears that the quantum of value assessed for damages as judgement debt of K1,320,384 and costs of K10,000 were inserted in the NOM and Order by AMNOL Lawyers without any regard to reflect discount for overheads not incurred and taxation.

According to WS # 420/1993, filed by PATO Lawyers acting for the Defendant (Oro Provincial Government) under WS # 53/1993;

para (11),

"The said contract was entered into by a common fundamental mistake of the parties in that both the Plaintiff and the Defendant erroneously believed that the damages sought in the Notice of Motion and ordered were damages actually suffered by the Defendant (Orosambo Enterprise Limited) whereas in truth and fact the damages agreed to had not been suffered by the Defendant (Orosambo Enterprise Limited)".

para (18)

"Further or in the alternative the Plaintiff says that the Defendant made the representations fraudulently either knowing that the same were false, or recklessly and not caring whether they were true or false, in that:

(a) the Defendant must have known that it had not incurred overheads for the balance of the contract period; but in spite of this it made a claim for damages which did not reflect any discount for overheads not incurred".

Recovery of Monies from AMNOL Lawyers

A Notice of Motion (NCR Doc # 30) dated 9/7/2004 was filed in the National Court by Saulep Lawyers among other matters seeking orders from the Court to instruct AMNOL Lawyer to repay to the Court monies received from DoF on behalf of the Plaintiff. These monies paid to AMNOL Lawyers amount to **K850,000** in 2 lots of cheques. (*Verified to cashbook above in section 8*). These monies were part payment of the settlement of the judgement debt ordered by the Courts to pay the Plaintiff. The monies were not paid to the Plaintiff.

D. Employment with the State

The Commission examined a number of claims for loss of entitlements arising from alleged breach of contract and loss of office. Of those the seven (7) matters listed below were fully investigated:

1. Tau Liu (Provincial Administrator Southern Highlands);
2. Tau Liu (Provincial Administrator Western Province);
3. Isaac Lupari (Department head - Finance);
4. Isaac Lupari (Department head - Defence);
5. Isaac Lupari (Department head - DPM);
6. Isaac Lupari (Department head - Transport & Civil Aviation); and
7. Isidore Kaseng & 24 others (Members of Fly River Provincial Government).

Out of the seven (7) listed matters six (6) were as Departmental head or Provincial Administrator employed under standard government contracts specified in section 28 of the *Public Service Management Act (PSMA)*. The Public Service Commission advised the Commission that "Departmental heads are appointed, suspended and terminated under section 193(1A), 193(1B) and 193(1C) of the Constitution and the procedures are provided for under section 31 A, 31B, 31C, and 31D of the PSMA." In all six (6) matters, payments were made in excess of what was duly payable.

The claimants in the matter of Isidore Kaseng & 24 others were members of the Fly River Provincial Government at the time when Provincial Governments were abolished by law. Their claims were for the loss of entitlements which they alleged were due and owing for the period of suspension of the Fly River Provincial Government (FRPG⁵). Further, they claimed loss of entitlements for the unexpired term of office following abolition of the FRPG. Both claims were heard and refused by the Supreme Court.

The Public Services Commission advised the Commission that there are six (6) main ways in which employment contracts have been breached by Departmental heads terminating senior contract officers and the NEC terminating Departmental heads and provincial Administrators employment contracts:

- Laying of disciplinary charges under section 52 of the PSMA instead of clause 25 of the contract.
 - » Prematurely terminating the contract
- Departmental heads dismissing a contract officer without seeking and obtaining the approval of the Secretary of DPM as required under standard contract and Public Service General Order 9.24.
- Failure of a Departmental head to conduct a contract renewal review before expiry of the contract as required under General Order 9.
- Failure by Departmental head to determine disciplinary charges within 21 days of the date of reply received by officer — General Order 15.35
- Dismissing contract officer in breach of the principles of natural justice.

According to the PSC, the State has lost a substantial amount of money through unlawful/improper breaches of employment contracts. It lists a number of circumstances in which breach of contracts have occurred. Chief among them are:

- y Lack of or insufficient capacity of Departmental heads and Provincial Administrators to competently handle administrative and personnel matters.
- y Abuse of power. Done in order to replace officers with associates and for personal vendettas.
- y No consultation made with PSC for its mandatory recommendation under section 193 (1Q, (ID) and Sections 31C & D, and section 60 C(c) of PSMA before suspension and or termination of contract is effected.
- y Abuse of process detailed under section 1(3) of the Public Service (Management) Criteria and Procedures for Suspension and Revocation of Appointment of

Departmental Heads Regulation 2003, and Clause 17 of the Standard Terms and Conditions of Employment.

The Commission finds there is immediate need for co-ordination between Public Services Commission, Department of Personnel Management, Solicitor General, State Solicitor, Department of Finance & Departmental Heads (as to instructions, payments etc) to ensure:

- > compliance with *Public Services Management Act* 1995 & General Orders in administering employment contracts - lack of notice, failure to specify charges, failure to expedite hearings and determinations
- > Gross failure by Solicitor General to seek instructions from Department of Personnel Management ('DPM') and relevant departmental head
- > Gross failure by Solicitor General to seek instructions from DPM and relevant departmental head prior to signing deed of release
- y* Gross failure to apply terms of contract resulting in multiple or excessive payments i.e., unjust enrichment, particularly where the tenure of contracts overlap.

In most matters investigated, the Commission found that there was extensive delay in the finalisation of applications for judicial review of decisions concerning suspension, termination and related employment matters. As a result, the State has been unnecessarily hampered in the effective administration and delivery of services. Apart from that, the affected officers' morale, commitment and performance have deteriorated to unacceptable levels despite being remunerated while on suspension.

Immediate recommendations

- > Claims By and Against Act be amended to provide that on application by the Attorney General, an application for judicial review in respect of employment related matters shall be heard and determined within one (1) month after grant of leave.

> *Public Services (Management) Act 1995*, related legislation, instruments and contracts of employment be amended to the following effect: o a serious disciplinary offence is committed where:

- iii. State line agency named as defendant fails to provide full and proper instructions to Solicitor General
- iv. State suffers loss as a result of negligence or failure to exercise due care in performance of duties
- v. Non-compliance with NEC Direction o On a finding of guilt shall -
- iii. be a ground for termination
- iv. render the person ineligible for appointment to any public office within next 10 years

(a) Tau Liu - No. 1

A. Does the matter fall within the Terms of Reference?

1. The matter falls within the Terms of Reference of the Inquiry. The Contract of Employment between Tau Liu (*Plaintiff*) and the National Executive Council (*NEC*) had been signed on 26 October 1996. The Plaintiff filed the Court proceedings in 1999 and the matter was eventually settled out-of-court by a Deed of Release dated 28 February 2003, pursuant to which a final payment was made in or about 2005.

2. This matter may be covered under the following Terms of Reference: 5, 8, 9 and 12

B. Source of Information and Documentation

3. This brief comprises of facts and findings from the files and records of:

- The Attorney-General's Office
- The Solicitor-General's Office
- The Department of Finance

C. Background: Relevant Facts

The Matter

4. On 24 May 1999, the Plaintiff filed a claim against the State through the NEC for breach of his contract of employment (*Contract*) alleging that he had been unlawfully suspended and in effect, prematurely terminated from his position as the Administrator of the Southern Highlands Province.

5. The Plaintiff claimed a total of K204,586.55 originally and later amended that to a sum of K227,147.79 being the balance of his contract of employment, and in addition sought interest and costs.

6. On 28 February 2003, Zacchary Gelu, the Acting the Solicitor-General at the time, signed a Deed of Release with the Claimant, settling the claim at I<305,410.61. This amount includes K70,170.07, as interest @ 8% for a period of three (3) years.

7. **Payments by the Department of Finance.**

From the record of payments we have from the Finance Department, it is difficult to work out what payments were for the claim in this matter and what payments were for the claim WS 654/00, as the descriptions are not detailed enough. However as they are, they are records of payments to the Claimant. The record is as follows:

Date								Cheque no	Amount- K
06/02/04	962838	460	3100	0	0	Pmt 0/s contract ent	CQ	768421	300,000.00
28/04/04	977289	221	1501	1101	111	Pmt for O/standing C	CQ	776577	111,054.60
14/05/04	980289	207	4201	4123	135	Being pmt for o/s co	CQ	778433	100,000.00
14/05/04	980289	207	4201	4123	135	Being pmt for o/s co	CQ	778433	168,305.89
30/06/04	988448	207	4201	4123	135	Pmt o/s DOR WS#654	CQ	782652	200,000.00
09/12/04	11100	207	4201	2107	135	P/pmt for O/S contra	CQ	797364	83,716.50
03/06/05	1035007	207	4201	2107	135	Final payment-Deed o	CQ	812534	90,000.00
								TOTAL	1,053,076.99

In addition to the payments set out above, Claimant has also received from the State an Ex gratia payment of K30,000.00 in this matter. This was paid on 30/03/00 by cheque # 614181. The payment was made as compensation payment, on the direction by the NEC in its meeting No. 06/2000, after it

rescinded its earlier decision, Decision No. 112/99, to appoint the Claimant as the Administrator of Western Province.

The Claimant has given evidence that the payment of K11, 054.60 was not part of his claims referred to herein but rather his long service entitlements to the State whilst he was the Commissioner to the Public Service Commission. The Commission has confirmed this.

Further the Claimant has also given evidence that he has not received the sum of K168, 305.89, which is shown on the Finance records. Numerous attempts to get the Department to verify this has not been successful.

In light of that, it can be seen that the Claimant has only received a total of K773, 716.50 and not what is shown in the records given by the Department

Chronology

8. On 26 October 1996, the Plaintiff was appointed Administrator of Southern Highlands Province. He signed a Contract of Employment titled *The Contract of Employment for the Administrator of the Southern Highlands Provincial Government (Contract)*, with the NEC, for a term of four (4) years. The Contract comprised:
 - (a) the Employment Agreement and
 - (b) the Standard Terms and Conditions for the Employment of Provincial Administrators in the National Public Service (1995) *{Terms & Conditions}*
9. The Plaintiff served in that position until he was suspended by the Governor, Anderson Agiru on 7 August 1997. It appears from the pleadings that the Plaintiff had initially been suspended on full pay. However, on 6 January

1998, the State had proceeded to remove him from the payroll, effectively suspending him without pay. The Plaintiff was never terminated.

10. By a letter dated 3 May 1999, the Plaintiff, through his lawyers Paul Paraka Lawyers, gave notice of his intention to bring a claim against the State, in accordance with section 5 of the *Claims By & Against the State Act 1996*. The State received the purported notice on 5 May 1999, and acknowledged receipt of the said notice by a letter dated 10 June 1999, which also enclosed the State's Notice of Intention to Defend. The State did not take issue with the timing or adequacy of the notice.
11. Thereafter, on 24 May 1999, the Plaintiff filed proceedings WS No. 501 of 1999. In his Statement of Claim, he alleged that:
 - (i) he had been suspended on 7 August 1997 and
 - (ii) removed from the payroll on 6 January 1998 and
 - (iii) his suspension was arbitrary and unjustified and amounted to a breach of various clauses in the Contract, including, the NEC's failure to charge him and accord him a fair hearing.
12. Further, in his prayer for relief the Plaintiff claimed damages in the amount of K227,147.79, allegedly, being the value of the balance of the Contract, which had one (1) year nine (9) months and twenty-one (21) days remaining at the time of his suspension. On 25 May 1999, the Plaintiff served the Writ of Summons on the State through the Solicitor-General's office.
13. On 9 June 1999, the State (through the Solicitor-General) filed a Notice of Intention to Defend and following that, a Defence on 4 August 1999.

List of Documents

	<i>DATE</i>	<i>DOCUMENT</i>	<i>COMMENTS ~ ~</i>
1	26 October 1995	Contract of Employment for the Administrator of Southern Highlands <i>Provincial Government</i> - Mr. Tau Liu	The Contract of Employment comprises of: The Employment Agreement and The 1995 Terms & Conditions.
2	3 May 1999	Letter from Paul Paraka Lawyers to the Solicitor- General in compliance with the <i>CBAS</i> Act.	The letter does not specify any dates
3	24 May 1999	Writ of Summons filed by Paul Paraka Lawyers	Claiming the sum of K204,586.55 - essentially the balance of his Contract which still had 1 year 9 months and 21 days left. The Writ on the Solicitor-General's file is stamped as received on 25 May 1999.
4	9 June 1999	Notice of Intention to Defend filed by the Acting Solicitor-General on behalf of the State.	
5	10 June 1999	Letter from the Acting Solicitor-General to the Secretary, Department of	Advising of the Plaintiffs claim and seeking instructions as to whether the Plaintiff had definitely been

		Personnel Management	suspended and/or terminated.
6	10 June 1999	Letter from the Acting Solicitor-General to Paul Paraka Lawyers	Acknowledging receipt of s. 5 notice and enclosing by way of service, the State's Notice of Intention to Defend.
7	4 August 1999	Defence filed by the Solicitor-General's office.	<p>Basically, the Defence adequately condescends to the allegations in the Statement of Claim and states relevantly that:</p> <p>The Plaintiff had been suspended with full pay, for a disciplinary offence (not specified) which required an investigation to be conducted, and he had been given prior notice of his impending suspension,</p> <p>A The Plaintiff had absconded from work and therefore was removed from the payroll terms of suspension were not clearly set out,</p> <p>That there had not been any decision as to the Plaintiffs termination and</p> <p>4* The National Court had refused the Plaintiffs application for declarations that he had been unlawfully terminated, in another</p>

			<p>proceeding - OS NO. 503 of 1998 -for the reason that DPM had yet to receive the Plaintiffs response to the charge and make a decision as to whether he should be terminated.</p> <p>In effect, the State's position in respect of the Plaintiffs claim was that the proceedings were premature and/or misconceived.</p>
8	30 July 1999	Letter from the Attorney-General to the Acting Secretary DPM	Referring to a letter written by the Plaintiff to the Acting Secretary DPM in respect of his indefinite suspension from office. The letter, also copied to the Plaintiff, contains the Attorney-General's (Michael Gene) opinion and a recommendation for a way forward in the matter.
9	24 August 1999	Letter from the Attorney-General to Philemon Embel, Minister for Public Service.	The letter (also copied to the Plaintiff) provides a further opinion on the matter of the Plaintiffs suspension — this time, with the benefit of further material — and expresses a view that the Plaintiff be reinstated with back pay and the disciplinary process be re-enacted.

10	4 October 1999	Notice of Amendments (to the Writ) filed by Paul Lawyers.	
11	4 October 1999	Writ of Summons (as amended pursuant to Order 8 rule 51 of the <i>National Court Rules</i>) filed by Paul Paraka Lawyers	The amendments seek to include various other heads of claims, i.e. for CPI considerations, security allowance and Domestic Market Allowance, and an amendment to ' the total sum claimed from K204,586.55 to K227,147.79.
12	7 October 1999	Letter from the Plaintiff to Paul Lawyers	Enclosing a copy of the Attorney-General's further advice to DPM and emphasizing his view that the State had indeed conceded fault /liability in dealing with the issue of his suspension.
13	18 October 1999	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	The Plaintiffs lawyers refer to the opinion of the Attorney-General and seek the State's view as to an out-of-court settlement in light of the Attorney-General's opinion.
14	6 December 1999	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	Following up on the initial proposal for out-of-court settlement.
15	24 January 2000	Letter from Paul Paraka Lawyers to the Acting	Further urging the State to settle the matter out-of-court.

		<i>Solicitor-General</i>	
16	7 February 2000	Letter from the Acting Solicitor-General to Paul Paraka Lawyers	The letter refers to the Attorney General's opinion and a subsequent letter from the Plaintiffs lawyers, and insists that the State will continue to defend the Plaintiffs claim.
17	23 March 2000	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	Enclosing Notice to Set Down for Trial for endorsement by the Solicitor-General
18	4 April 2000	Letter from the Acting Solicitor-General to Paul Paraka Lawyers	Referring to the Notice to Set Down for Trial and advising of instructions being sought from DPM with a view to settling the matter.
19	10 August 2000	Notice of Motion filed by Paul Paraka Lawyers	Seeking orders to list the matter on the Call-over list for allocation of a trial date.
20	10 August 2000	Affidavit of Andrew Kongri filed by Paul Paraka Lawyers	The Affidavit deposes to the fact that the matter had been ready for trial for a while, awaiting the Solicitor-General's endorsement of the Notice to Set Down for Trial, being the reason for the application.
21	26 September	Letter from Paul Paraka	Setting out the Plaintiffs quantum

	2002	Lawyers to Zacchary Gelu — Solicitor-General	submission and proposing settlement at K313,194.84.
22	28 February 2003	Deed of Release prepared by Paul Paraka Lawyers	The Deed was for the full amount claimed by the Plaintiff in his Writ and signed by Zacchary Gelu as the Solicitor-General.
23	4 September 2003	Letter from the Plaintiff to the Attorney-General	Requesting the Attorney-General to authorize payment of the Plaintiffs 2 claims — this and the other <i>claim</i> in WS NO. 654 of 2000.
24		Finance Department Cash Book Record and Payment Advice/Vouchers	

D. Findings

Claim - Liability and Quantum

14. In its defence the State raised the argument that a notice of suspension had been sent to the Plaintiffs last known address at care of the Enga Provincial Administration Office in Wabag, and that the Defendant could not make a decision to terminate the Plaintiff as he was yet to respond to the disciplinary charge, as required under the Contract.

15. Notwithstanding that the State had filed a Defence within the required time period, raising valid points for contention that effectively warranted a full trial, there appears to have been a sudden shift of attitude by the state lawyers from actively defending the claim to considering an out-of-court settlement.

(a) Arguable cause of action in law

The Contract

15.1. The Contract was made pursuant to the *Public Services (Management) Act* 1995 (***Act,***) and comprised of-

- *The Employment Agreement* dated 26 October 1995 (***Agreement***) and
- *Standard Terms and Conditions for the Employment of Provincial Administrators in the National Public Service (1995)* (***Terms & Conditions***)

15.2 In both the Agreement and the Terms & Conditions, it was provided that the *General Orders* issued under the *Act* would prevail where the Contract, comprising both documents, is silent and in the event of a conflict of interpretation as between the Contract and the *General Orders*, the Contract would prevail.

Termination

15.3 The Terms and Conditions provides for termination as follows:

- (a) By the Administrator giving to the Governor at least three (3) calendar months' notice, or
- (b) By the NEC terminating the Administrator's appointment in accordance with Clause 17.1 (a), (b), (c), (e) or (f), in which event the Administrator will be entitled to payment in respect of three (3) calendar

months' notice, together with other emoluments calculated up to the expiration of the notice period, including *ex gratia* payments under section 12 where applicable, or

- (c) By the NEC terminating the Administrator's appointment under Clause 17.1(d) - for Cause as determined by the Terms & Conditions and (g) -for any breach of the Contract. In the event where the Contract is terminated by the NEC for cause or for breach, the Administrator will not be entitled to any payment in lieu of notice under the Contract.

Suspension and Termination for Cause A.

Suspension

15.4 The Contract Clause 27 sets out the procedure for disciplinary action against the Administrator in the event of serious disciplinary matters set out under Clause 18.1 (a) to (j) inclusive. Clause 27.1(a) provides for the suspension of the Administrator by the Governor, if he is alleged to have committed a serious offence under clause 18. The Administrator is then required to reply to the charge(s) within seven (7) days of the charges being laid. Thereafter, the Governor is required to consult with the DPM Secretary before making a recommendation for termination to NEC. The NEC decides whether the Administrator's appointment should be terminated, and the decision of the NEC is final. In reaching its decision, the NEC must be guided by advice from the State Solicitor and the Secretary DPM, as well as the Governor's report.

B. Termination

15.5 Clause 12 of the Terms & Conditions provides for termination for reasons other than cause, and Clause 18 provides for termination for cause.

15.6 Clause 18.2 prescribes termination without notice where the Administrator is found guilty of any of the charges set out under Clause 18. According to the documentation on the Solicitor- General's file, the Plaintiff was suspended for cause, and therefore, by operation of Clause 17.2(c), was not entitled to any payment in lieu of notice under the Contract.

16. Be that as it may, it must be noted at this juncture that the Plaintiff had only been suspended and his termination yet to be determined, when he filed these proceedings. The National Court had previously refused to entertain a similar proceeding he had filed in 1998 seeking declarations that he had been unlawfully terminated, on the ground that the Department of Personnel Management had yet to receive his reply to the disciplinary charge that he had been issued.

Wrong form of Action

17. It appears therefore, that on the face of it the Plaintiff had instituted the wrong form of action. It is considered that the appropriate cause of action should have been a judicial review proceeding seeking a writ for mandamus compelling the State to properly deal with his offence in accordance with set disciplinary procedure, and/or a final determination of his employment by termination.

Assessment of Damages - Quantum

18. In view of the above, the issue *of* damages should not have been considered given that the State had filed a Defence denying liability outright. The Plaintiff would not have been entitled to any relief under the Contract, as the Terms and Conditions Clause... prohibits payment of money in lieu of notice where the employee is terminated for cause.
19. Under the common law and the *Employment Act*, even where a person is terminated in breach of their contract of employment the most they may be entitled to would be money in lieu of notice. Further, it has been the Court's approach of late that, a claim for the balance of a contract of employment or in effect, penalty clauses are unenforceable.
20. Furthermore, in this case, Clause 17.2(c) of the Terms & Conditions specifically precludes *payment in lieu of notice or other emoluments under the Contract*, in the event that the employee is terminated for cause. It is therefore considered that the Plaintiffs claim for the balance of the Contract and the State's entertainment of such a claim in the circumstances was in direct contravention of the Terms & Conditions of the Contract.

Attorney-General & Solicitor-General

21. Under the cover of a letter dated 30 July 1999, the Attorney-General had provided advice to the Acting Secretary, Department of Personnel Management, in respect of the Plaintiffs claim, essentially recommending that the State lift the Plaintiffs suspension and reinstate him with full back pay to avoid payment of a large sum of money by way of compensation, or, the disciplinary process under Clause 27 of the Terms & Conditions be fully complied with and the Plaintiff properly terminated.

22. Thereafter, in a letter dated 24 August 1999, the Attorney-General provided advice to Philemon Embel, Minister for Public Service expressing the following view:

24 August 1999

~

Hon. Philemon Embel, TLB; MP;

Minister for Public Service

PO Box 519

WAIGANI

National Capital District.

My dear Minister

**SUBJECT: MR. TAU LIU - SOUTHERN HIGHLANDS
PROVINCIAL ADMINISTRATOR (IN SUSPENSION)**

I refer to your letter of 18 August 1999 in respect of the above matter in which you sought further advice.

Thank you for providing me documents and information to which I was not privy to when I first sent you my advice of 3rd July 1999.

I have perused the additional documents you forwarded and maintain that this matter should be dealt with by NEC once and for all.

This will help alleviate problems faced by parties to the problem and above all the people of Southern Highlands who are in need of administrative leadership when the Province is faced with massive project development such as the gas project and the law and order situation. Hence, I reiterate my earlier view that the suspension was only a temporary measure to allow for investigations so as to ultimately enable the National Executive Council to decide on whether or not to terminate Mr Tiu's services. Since the procedure enumerated under Clause 27 of the Contract of Employment has not been thoroughly complied with and completed, I consider it proper that this be done.

I take note of your acting Secretary's brief to you dated 4th August 1999 in which he presents the Department of Personnel Management's Position on the matter. In my view your Department's view is that the process of dealing with Mr. Liu be continued from where it was left. On the status of the case, I am sure that my Department will do its outmost to defend the interest of the State. However, no case can be finalised without incurring any form of costs to the parties. In this case the state will be made to pay damages and costs because the facts on the substantial issue tend to be in Mr. Liu's favour.

It is apparent .that Mr. Uu was not and has not been dealt with properly and the fact that he has been in suspension for this long In my view is unreasonable. The State may not win the pending case despite our efforts to defend only on one ground that Mr. Uu failed to respond to the charges. There are other substantive issues that would arise. Issues such as the long time it has taken the State to deal with him, failing to serve process effectively, failing to resolve the issue in compliance with the terms of the Employment Contract and the length of time that has taken the Department to take the matter for NEC's deliberation within reasonable time etc. In these circumstances, it is not unreasonable to expect that the State will be held responsible for improper action or inaction. The State must be protected against paying large sums of money for something that ought to have been settled promptly through administrative process. Let alone the embarrassment that your Department may be faced with.

I would maintain that unless the State has properly charged and substantiate the charges by due process, it is in the interest of the State to have the suspension lifted by Cabinet and have him serve his full term. If he is terminated, his termination was so done without properly dealing with the charges under clause 27 of the Contract of Employment. It is your prerogative to recommend to cabinet the best cause of action taking into accounts the law and the interest of the State.

Under the circumstances, try view is that it would have been cheaper to reinstate Mr. Liu with back pay and reenact the disciplinary procedures to take place. Taking the course

outlined in your Acting Secretary's Brief in my view may be expensive and counter productive.

I trust the interest of all parties will be taken into account when deciding on whether or not Mr. Uu is reinstated.

Please contact me directly should you have further queries on the matter.

Yours sincerely, [.....^g1^]

MICHAEL M. GENE *Secretary & Attorney General Cc: Hon. Kilroy Genia,
MP*

Minister for Justice

Cc: Mr. John Kali

A/Secretary, Department of Personnel Management Cc: Mr.

Tau Liu, Administrator (in suspension) Cc: Mr. Fred Tomo,

State Solicitor

MMG:bm

23. Initially, die Plaintiff had used his copy of the Attorney-General's advice in an attempt to negotiate the settlement of his claim. However, in a letter from the Acting Solicitor-General to the Plaintiffs lawyers dated 7 February 2000 Hitelai Polume-Kiele replied describing the Attorney-General's letter to the Secretary, Department of Personnel Management, as purely an expression of his [Attorney-General's] opinion, and as such, not binding on the State. In addition, the Solicitor-General advised the Plaintiff through his lawyers, that the State had filed a Defence and that the matter should be progressed to trial.

In the circumstances, it is considered that the actions of the Attorney- General in his advice to the Minister for Public Service appear to defy the principle duty of a lawyer to his client - in this case, the Attorney-General to the State - in terms of protecting the client's interest; for the following reasons:

- (i) the advice favors the Plaintiffs case when indeed the facts support a valid Defence with good prospects of success given that the State's disciplinary procedure had been primarily frustrated by the Plaintiffs inaction in failing to reply to the charges, as required under the Terms & Conditions. It must be noted at this juncture that the Plaintiffs disciplinary charge had something to do with the Plaintiffs abscondment from duties, and
- (ii) the Attorney-General had acted improperly in his duty as the principal legal advisor to the State by copying the Plaintiff in on his advice to the Minister thereby compromising the State's position with regards to pursuing its Defence.

Notwithstanding the above, it appears however, that the state had eventually agreed to settle the Plaintiffs claim on the basis of the Attorney-General's advice or opinion. The actions of the Attorney-General are covered under Term of Reference 12 of the Inquiry.

Further and in the alternative, it is considered that in his advice, the Attorney-General should have appropriately addressed the issue of quantum. In this case, the Solicitor-General had signed the Deed of Release agreeing to settle the full amount of the Plaintiffs claim, and it further appears that the Plaintiff may have collected more than the amount settled at from the Department of Finance.

Compliance Issues

(a) Public Finance (Management) Act 1995

28. There is no clearance letter from the Attorney-General or the Solicitor- General to authorize payments to the Plaintiff, which letter is a prerequisite to settlement/payment of any judgment debts, etc (refer to Yer's evidence.)

(b) Claims By & Against the State Act 1996

29. By a letter dated 3 May 1999, the Plaintiff, through his lawyers Paul Paraka Lawyers, gave notice of his intention to bring a claim against the State, in accordance with section 5 of the *Claims By & Against the State Act 1996*-

- The State received the purported notice on 5 May 1999, and notwithstanding that the notice had been insufficient and given outside of the prescribed six (6) months period, the State acknowledged receipt of the said notice by a letter dated 10 June 1999, which also enclosed the State's Notice of Intention to Defend. Accordingly, there does not appear to be any issue with the requirements in respect of notice under section 5 of the *CBAS Act 1996*.
- The letter comprising the notice omitted to state the date of the alleged breach,
- The notice was given outside of the six (6) months time period as required under the *Claims By & Against the State Act 1996*,
- However, the State did not take issue with the timing of the notice.

30. Further, in his Statement of Claim the Plaintiff had omitted to plead that he had given section 5 notice.

(c) Frauds & Limitations Act 1988

31. The Plaintiff had brought his claim within six (6) years as required under section 16 of the *Frauds & Limitations Act 1988*, hence there is no issue in this respect.

(d) Attorney-General Act 1989

32. It is obvious from the facts, with supporting documentation in this matter, that, both the Attorney General and the Solicitor General in exercising their functions, duties, and responsibilities as set out in the *Attorney General Act 1989* have not done so in the best interest of the State.

The Attorney General is the Principal Legal Adviser to the National Executive Council (section 3) and his functions, duties and responsibilities are set out in sections 7, 8,10,13,15 and 16 of the Act.

Essentially, by virtue of these functions, duties and responsibilities, the Attorney General must exercise those in the best interest of the State. Otherwise, he will be in breach, as it is in this case, where the Attorney General, then, Mr. Gene, in his letter of 30th July 1999 to the Minister for Public Service, compromised the State's position by copying his letter to the Claimant, Mr. Liu, who used that to his benefit. Such action is definitely not in the best interest of the State.

The Solicitor General on the other hand has one main role and that is set out in Section 13 of the *Act*. Section 13(1) states that, *the Primary function of the Solicitor General is to appear as an advocate for the State in matters coming before the courts in Papua New Guinea*, and in exercising that role, the Solicitor General must do so, on instructions from the Attorney General only(section 13(2)).

In this claim by Tau Liu, a defence, was filed on 04/08/99 by the State through Mrs. Hitelai Polume Kiele, the Solicitor General at the time, the

Claimant filed his proceedings in the best interest of the State, but despite that, Mr. Gelu, who took over from Mrs. Kiele, as the Solicitor General, for reasons not known and without any instructions from the Attorney General, entered into a Deed of Release on 28/02/03, effectively making the State liable to the claim by the Mr. Liu. Like the Attorney General, the action by the Solicitor General was definitely not in the best interest of the State.

(e) NEC Decisions

33. The Deed of Release was made on 28 February 2003 at which time NEC Decision NG 07/2002 (*Decision*) was in place. Clauses 10 and 12 of the Decision:
 - (i) Clause 10 - directed that there be no more out of court settlements by any State body or authority, including the Attorney-General and the Solicitor-General, without the approval of the NEC, acting on advice from the CACC and
 - (ii) Clause 12 — directed that no public officials, including Ministers and heads of departments and public bodies, are to commit the State to any new contractual obligations through agreements beyond the approved amounts in the 2002 supplementary budget.
34. From the Solicitor-General's records, there does not appear to be any approval sought or obtained from the NEC nor any advice from the CACC to legitimize the Deed of Release by which the Plaintiffs claim was finally settled. Accordingly, it is arguable that the Deed of Release was improper.

E. Recommendations

1. Out of Court Settlements

This was a claim which the State had a valid defence and it was filed in court within time, but for no valid reasons, Mr. Gelu who was the SG then, decided to settle the claim that was defensible.

In light of such conduct Mr. Gelu should never be allowed to hold a high position as that of SG ever again. His conduct clearly showed that he was not there to protect the interest of the State but perhaps for his own gain. This is clearly negligence on the part of Mr. Gelu.

Therefore to prevent further settlement to the detriment of the State, it is recommended that any State matter that has a defence and which has been filed, no one representing the State should settle the claim unless approval of the Departmental Head of the concerned Department is given after proper advice on the claim was considered.

In the absence of the approval, no settlement should take place.

2. Inclusion of Interest in settlement of Court

It has been noted in this matter and many others settled out of Court that, interest is always included. Whether this is right or not, is something to be cleared and perhaps that could be clarified by amendments to the Judicial Proceedings (*Interests on Debts and Damages*) Act and the *National Court Rules*. In the meantime, it should be left to the Courts to be the only Authority to order interest, unless it is payable as of right under Agreement as stated in the Judicial Proceedings (*Interests on Debts and Damages*) Act.

(b) Tau Liu-No. 2

A. Does the matter fall within the Terms of Reference

1. The matter falls within the Terms of Reference of the Inquiry. Tau Liu (*Plaintiff*) claims that the National Executive Council (*NEC*) appointed him Administrator of Western Province on 25 November 1999. The Plaintiff filed Court proceedings in 2000 and the matter was eventually settled out-of-court by a Deed of Release dated 28 February 2003, pursuant to which a final payment was made on 03 June 2005.
2. This matter may be covered under the following Terms of Reference: 2, 5, 8, 9 and 12.

B. Source of Information and Documentation

3. This brief comprises of facts and findings from the files and records of:
 - The Attorney-General's Office
 - The Solicitor-General's Office
 - The Department of Finance

C. Background: Relevant Facts

The Matter

4. The Plaintiff sued the State in proceedings WS No. 654 of 2000 for breach of an alleged contract of employment. He claimed that the NEC had appointed him Provincial Administrator of Western Province, and thereafter, recalled him and revoked his appointment without justification.

5. The Plaintiffs claim against the State was partly settled by way of a default judgment in respect of liability - the State had defaulted in filing its Notice of Intention to Defend and Defence. Thereafter on 28 February 2003, a Deed of Release was negotiated by the Plaintiffs lawyers, Paul Paraka Lawyers, and signed by the Plaintiff and the then Solicitor-General, Zacchary Gelu.

6. The _ Plaintiffs claim was settled in the entire amount claimed in the Statement of Claim as well as interest at the yearly rate of 8% for a period of two (2) years.

Payments by the Department of Finance.

7. From the record of payments we have from the Finance Department, it is difficult to work out what payments were for this claim and what payments were for WS 501/99, as the descriptions are not detailed enough. However as they are, they are records of payments to the Claimant. The record is as follows:

Date								Cheque no	Amount -K
06/02/04	962838	460	3100	0	0	Pmt 0/s contract ent •	CQ	768421	300,000.00
28/04/04	977289	221	1501	1101	111	Pmt for O/standing C	CQ	776577	111,054.60
14/05/04	980289	207	4201	4123	135	Being pmt for o/s co	CQ	778433	100,000.00
14/05/04	980289	207	4201	4123	135	Being pmt for o/s co	CQ	778433	168,305.89
30/06/04	988448	207	4201	4123	135	Pmt o/s DOR WS#654	CQ	782652	200,000.00
09/12/04	111100	207	4201	2107	135	P/pmt for O/S contra	CQ	797364	83,716.50
03/06/05	1035007	207	4201	2107	135	Final payment-Deed	CQ	812534	90,000.00
								TOTAL	1,053,076.99

In addition to the payments set out above, Claimant has also received from the State an Ex gratia payment of K30,000.00 in this matter. This was paid on 30/03/00 by cheque # 614181. The payment was made as compensation payment, on the direction by the NEC in its meeting No. 06/2000, after it

rescinded its earlier decision, Decision No. 112/99, to appoint the Claimant as the Administrator of Western Province.

The Claimant has given evidence that the payment of K11, 054.60 was not part of his claims referred to herein but rather his long service entitlements to the State whilst he was the Commissioner to the Public Service Commission. The Commission has confirmed this.

Further the Claimant has also given evidence that he has not received the sum of K168, 305.89, which is shown on the Finance records. Numerous attempts to get the Department to verify this has not been successful.

In light of that, it can be seen that the Claimant has only received a total of K773, 716.50 and not what is shown in the records given by the Department

Chronology

8. The Plaintiff claims that on 25 November 1999, the National Executive Council (*NEC*) appointed him Provincial Administrator of Western Province for a period of four (4) years (*Appointment*) The Appointment took place during the NEC Meeting No. NG 22/99 and by NEC Decision No. NG 112/99 (*Decision*) The Decision also included a directive to Bill Kua, the Secretary responsible for the Department of Personnel Management (*DPM*) to prepare a Contract of Employment for the Plaintiff to sign.
9. On 30 November 1999, the DPM Secretary wrote to the Plaintiff advising him of the Appointment and that a Contract was being prepared for his execution. In addition, the DPM Secretary instructed the Plaintiff to contact Wesley Malaisa, the Acting Administrator of Western Province and advise him of his travel plans. He also advised that the Western Provincial

Administration had been authorized to pay the Plaintiffs normal salaries. The Secretary also expressed his willingness to accompany the Plaintiff to Western Province to assist him in settling in and to ensure a *smooth transition*.

10. On 8 December 1999, the Plaintiff commenced work as the Western Provincial Administrator, on the expectation that his Contract was being prepared for execution in due course. However, on 25 December 1999, Robert Igara, the Chief Secretary to the Government at the time, instructed the Plaintiff to stop performance of all responsibilities and functions of the Administrator, return to Port Moresby and report to the Minister for Public Service (Philemon Embel) for redeployment.

In its Meeting No. 06/2000 the NEC directed the Secretary responsible for the Department of Finance & Treasury - Decision No. 26/2000 dated 1 March 2001 — to "immediately appropriate an ex gratia payment of ¥30, 000.00 to the Department of Prime Minister and National Executive Council to pay Tau Tiu, by way of compensation as three (3) months payment on a "quantum merit" basis..."

11. Accordingly on 30 March 2000, the Plaintiff was paid an *ex gratia* payment of K30,000.00, by way of compensation as three (3) months payment assessed on a quantum merit basis.
12. On 12 June 2000, the Plaintiff filed proceedings WS NO. 654 of 2000 against the State as sole defendant, claiming damages for breach of the employment contract he alleged to have reasonably expected to execute as a result of the representation from the DPM Secretary in his letter of 30 November 1999. In his Statement of Claim the Plaintiff pleaded a liquidated claim for the sum of K388, 517.12, which the Plaintiff had assessed in accordance with the entitlements of a Provincial Administrator prescribed in the Standard Terms & Conditions for the Employment of Provincial

Administrators in the National Public Service (*Terms & Conditions*.) In addition, the Plaintiff claimed interest and costs.

13. On 26 March 2001, the Acting Solicitor-General John Kawi wrote to the Winnie Kiap, NEC Secretary advising of the Plaintiffs claim and seeking instructions for the purpose of preparing a Defence on behalf of the State. The NEC Secretary did not respond, and the Acting Solicitor-General wrote to the Chief Secretary to the Government in pursuit of instructions.

14. On 27 July 2001, the Plaintiff obtained Default Judgment on liability against the State, for damages to be assessed. The State had failed to file a Notice of Intention to Defend and a Defence on time:
 - The Writ of Summons was served on the State on 21 June 2000,
 - The State was required to file its Notice of Intention to Defend by 21 July 2000, and
 - its Defence by 21 September 2000.

The State had defaulted by more than one (1) year.

15. Following that, on 28 February 2003, Zacchary Gelu, the Acting the Solicitor-General at the time, counter-signed a Deed of Release settling the Plaintiffs claim in the sum of K468,305.89, including K79,785.55, being 8% interest for a period of two (2) years.

List of Documents

	<i>DATE</i>	<i>DOCUMENT</i>	<i>COMMENTS</i>
1	30 November 1999	Letter from the Secretary, Department of Personnel Management to the Plaintiff.	The letter informs the Plaintiff of his appointment as Administrator for Western Province to replace the Acting Provincial Administrator, Wesley Malaisa.
2	1 February 2000	Letter from the Plaintiffs	Notifying the Solicitor-General of the Plaintiffs

		lawyers, Paul Paraka Lawyers to the Solicitor-General	intention to apply for judicial review in the form of a Writ for Mandamus to compel the State to gazette his appointment and progress the preparation and signing of the Employment Contract.
3	14 March 2000	Letter from the Acting Solicitor-General to Paul Paraka Lawyers	Acknowledging receipt of the Plaintiffs section 5 notice and advising that a response will be provided once instructions are confirmed.
4	12 May 2000	Letter from Paul Paraka Lawyers to the Solicitor-General	Providing notice of the Plaintiffs intention to bring a claim against the State, in compliance with the requirements of section 5 of the <i>Claims By & Against the State Act 1996</i> .
5	12 June 2000	Writ of Summons filed by Paraka Lawyers on behalf of the Plaintiff.	The Statement of Claim alleges breach of the Terms and Conditions of the Standard Contract of Employment for Provincial Administrators (<i>Terms & Conditions</i> ,) and seeks a total of K388, 517.12 as assessed in accordance with the different heads of allowance under the Terms & Conditions. The Plaintiff also seeks an order for interest and costs.
6	15 January 2001	Notice of Motion filed by Paul Paraka Lawyers on behalf of the Plaintiff	The motion seeks the entry of default judgment in the sum of K388,517.12 plus interest and costs, as pleaded in the Statement of Claim.
7	15 January 2001	Affidavit of Andrew Kongri sworn 10 January 2001, filed by Paul Paraka Lawyers	The affidavit was filed in support of the Plaintiffs motion for default judgment
8	15 January 2001	Affidavit of Tau Liu sworn 10 January 2001, filed by Paul Paraka Lawyers	The affidavit was filed in support of the application for default judgment
9	15 January 2001	Affidavit of Search sworn by Erick Ontimo on 10 January 2001, filed by Paul Paraka Lawyers	Filed in support of the Plaintiffs motion for default judgment essentially confirming that the State defendant had not filed a Notice of Intention to Defend and a Defence.
10	26 March 2001	Letter from the Acting Solicitor-General, John Kawi	Advising of the Plaintiffs claim and seeking initial instructions from the NEC Secretary as to the

		to the NEC Secretary.	NEC's/State's positions as regards the Plaintiff's claim.
11	12 June 2001	Letter from the Acting Solicitor-General John Kawi to the Chief Secretary	The letter makes reference to instructions sought earlier from the Secretary to the National Executive Council (NEC) and the lack of response, and advises of the Plaintiffs impending application for default judgment. In this letter the Acting Solicitor-General also inquires as to the Plaintiffs employment status in the Public Service.
12	17 July 2001	Notice of Motion filed by Paul Paraka Lawyers	The application by the Plaintiff seeks to withdraw the NOM filed 15 January 2001, and the entry of default judgment against the State in the sum of K388,517.12; or alternatively, for damages to be assessed.
13	18 July 2001	Affidavit of Guguna Kila Garo sworn 17 July 2001 and filed by Paul Paraka Lawyers.	The affidavit was filed in support of the application by the Plaintiff seeking default judgment.
14	18 July 2001	Affidavit of Search sworn by Eric Ontimo on 18/07/01 and filed by Paul Paraka Lawyers.	The affidavit supports the Plaintiffs application for default judgment and states basically that the State had not filed a Notice of Intention to Defend nor a Defence as at the date of the affidavit.
15	6 August 2001	Letter from the NEC Secretary to the Acting Solicitor-General	In this letter, Winnie Kiap takes issue with the Acting Solicitor-General's request to the Chief Secretary to "advise or direct" her to respond to an earlier letter from the Acting Solicitor-General dated 26 March 2001 seeking instructions in respect of the Plaintiffs claim. Kiap also instructs that the Plaintiff- <i>"was never formally appointed to the position of Provincial Administrator— western Province. NEC Decision No. NG 112/99 appointed Mr Liu as Administrator, but the process for appointment as prescribed by section 73(2) of the Organic Law on Provincial and</i>

			<i>Local Level Governments was never completed. That is, the appointment was not gazetted..."</i>
16	8 August 2001	Court Order for Default Judgment filed by Paul Paraka Lawyers	The Order is for: "JUDGMENT, in default of filing a Notice of Intention to Defend and Defence, THAT the Defendant shall pay the Plaintiffs damages to be assessed."
17	8 August 2001	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	Enclosing by way of service sealed Court Order for default judgment made 8 August 2001.
18	27 August 2001	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	Enclosing Notice to Set Down for Trial for the Solicitor-General's consent and endorsement.
19	28 August 2001	Affidavit of Tau Liu sworn 28/08/01 and filed by Paul Paraka Lawyers.	This affidavit was filed in preparation for trial for assessment of damages.
20	7 September 2001	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	The letter follows up with the Notice to Set Down for Trial, serves the above Affidavit of the Plaintiff on the State and gives notice of the Plaintiffs intention to rely on the said Affidavit. Further, it sets out the Plaintiffs submission seeking an out-of-court settlement.

21	8 October 2001	Letter from Paul Paraka Lawyers to the Acting Solicitor-General (J. Kawi)	Pursuing draft Notice to Set Down for Trial and the Plaintiff's submission for out-of-court settlement.
22	30 October 2001	Consent Order dated 26/10/01 filed by Paul Paraka Lawyers	Granting the Plaintiff leave to file an Amended Statement of Claim (incorporating claim for compensation for anxiety etc.)
23	30 October 2001	Amended Statement of Claim (Amended pursuant to Consent Order dated 26 October 2001) filed by Paul Paraka Lawyers	The amendments incorporate an additional claim for damages for <i>distress, frustration, anxiety and hardship</i> .
24	12 November 2001	Letter marked "Without Prejudice" from Solicitor-General Q. Kawi) to Paul Paraka Lawyers	Discussing the applicability (or lack thereof) of the <i>Peter Aigib</i> case relied on by the Plaintiff in his submission for settlement in respect of his claim for damages for stress and anxiety (distress, frustration and hardship.)
25	19 November 2001	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	Forwarding Notice to Set Down for Trial for endorsement by the Solicitor-General.
26	28 November 2001	Notice of Motion filed by Paul Paraka Lawyers	Seeking to set the proceedings down for trial for assessment of damages.
27	28 November 2001	Affidavit of Guguna Garo sworn 27/11/01 and filed by Paul Paraka Lawyers	In support of the Plaintiffs application to set the matter down for trial.
28	10 December 2001	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	Enclosing fresh set of Notice to Set Down for Trial for endorsement.
29	13 December 2001	Letter from the Solicitor-General (J. Kawi) to Paul Paraka Lawyers enclosing duly endorsed Notice to Set Down for Trial	
30	19 February 2002	Letter from Paul Paraka	Pursuing the Plaintiffs submission for an out-of-

		Lawyers to the Solicitor- General	court settlement and outlining the Plaintiffs argument based on the DPM Secretary's representation.
31	26 February 2002	Notice of Motion filed by Paul Paraka Lawyers	The Plaintiffs application for leave to further amend his Amended Statement of Claim.
32	26 February 2002	Affidavit of Guguna Garo filed by Paul Paraka Lawyers	In support of the Plaintiffs application to further amend his Amended Statement of Claim.
33	14 March 2002	Letter from Paul Paraka Lawyers to the Solicitor- General advising that the Plaintiffs NOM filed 14 February 2002 had been adjourned for hearing on 15 March 2002.	
34	18 March 2002	Letter from Paul Paraka Lawyers to the Registrar National Court	Requesting that the Plaintiffs Notice of Motion filed on 26 February 2002 be set for hearing before a Judge other than Kandakasi J (designated Motions Judge) who had disqualified himself from hearing the Plaintiffs application.
35	10 April 2002	Court Order filed by Paul Paraka Lawyers	Granting the Plaintiff leave to further amend his Amended Statement of Claim and file a Further Amended Statement of Claim within 7 days, and that the State file a Defence to same within 14 days after service of the Further Amended Statement of Claim.
36	12 April 2002	Amended Amended Statement of Claim filed by Paul Paraka Lawyers	The amendments incorporate the Plaintiff s claim that the DPM Secretary had represented to him that he would sign a Contract and be paid at the usual Administrator's rate, hence he had commenced employment as the Administrator of Western Province on the reasonable expectation that his appointment would be finalized and he would sign the Contract.
37	26 April 2002	Letter from Paul Paraka Lawyers to the Solicitor- General	Alerting the State of its omission to file a Defence to the Plaintiff s Amended Amended Statement of Claim within the required period, and enclosing Notice to Set Down for Trial for assessment of

			damages. The letter also mentions the Plaintiffs submission for an out-of-court settlement.
38	6 May 2002	Notice of Motion filed by Paul Paraka Lawyers	The motion seeks an order that the proceedings be set down for hearing in respect of assessment of damages.
39	6 May 2002	Affidavit of Jerry Kiwai sworn 03/05/02 and filed by Paul Paraka Lawyers	Filed in support of the Plaintiffs application for an order that the proceedings be set down for trial for assessment of damages.
40	14 June 2002	Letter from Paul Paraka Lawyers to the Acting Solicitor-General	Advising the solicitor-General: of the Plaintiffs intention to rely on the affidavit he swore on 6 September 2002 and that the Plaintiffs lawyers had filed the duly endorsed Notice to Set Down for Trial and would attend the next civil call over to obtain a trial date.
41	14 June 2002	Copy of a letter from Paul Paraka Lawyers to the Registrar, National Court	Requesting the Registrar to list the Plaintiffs claim on the call over listing for the allocation of a hearing date.
42	2 July 2002	Letter from Acting Solicitor-General John Kumura to Guguna Garo of Paul Paraka Lawyers.	Notifying the Plaintiffs lawyers of the Solicitor-General's intention to cross-examine the Plaintiff on his affidavit sworn 6 September 2002.
43	25 September 2002	Letter from Paul Paraka Lawyers to Zacchary Gelu (Solicitor-General)	The letter proposes a submission for settlement that includes arguments on the basis of a representation from the DPM Secretary, and encloses amongst others, a draft Notice of Motion for judgment in the amount of K400,517.12.
44	25 September 2002	Draft Notice of Motion prepared by Paul Paraka	The draft Notice of Motion seeks an order that the State pay the Plaintiff the sum of K400,517.12

		Lawyers	in full and final settlement of this action. It also annexes a document entitled <i>Instrument of Consent</i> signed by Hubert Namani of Paul Paraka Lawyers including a slot for the Solicitor-General's (Gelu) consent and signature.
45	28 February 2003	Deed of Release prepared by Paul Paraka Lawyers and signed by the Plaintiff (Releasor) and Zacchary Gelu on behalf of the State.	
46	10 July 2003	Letter from Secretary Finance-Thaddeus Kambanei to John Kumura, Acting Solicitor General	Enclosing Court Orders in both proceedings, (WS 501/99 and WS 654/00) and requesting assessment and clearance on the said orders before payments could be made.
47	4 September 2003	Letter from the Plaintiff to the Secretary for Justice and Attorney-General's Department	Seeking the Attorney General's authorization for payment of his two (2) claims settled by Deed of Release on 28 February 2003.
48		Finance Department Cash Book Record and Payment Advice/Vouchers	

D. Findings

17. The Claim - Liability and Quantum

(a) Liability

Liability had been settled by default occasioned by the failure or omission on the part of the NEC Secretary to provide the Solicitor-General with the NEC's instructions particularly in relation to the State's Defence to the Plaintiffs claim, within a reasonable time.

(b) Quantum - Assessment of Damages

The State should have allowed the matter to proceed to trial for assessment of damages. It is considered that a proper trial of the matter would have resulted in the Court upholding the State's position that the Plaintiff had been paid due compensation in the form of the K30, 00.00 *ex gratia* payment.

In light of the above it is therefore considered that the amount paid by the State in settlement of the Plaintiffs claim is exorbitant, unreasonable and may have been calculated with a view to defraud the State of a large sum of money.

18. Steps taken or not taken by the Attorney-General & Solicitor-General

The Solicitor General

The Solicitor-General had failed to file a Notice of Intention to Defend and a Defence and continued failing to file a Defence, on the various times the Plaintiff amended his Statement of Claim.

The Attorney General

The Attorney General could not have done much at this stage as the matter was in court and it was the duty of the Solicitor General to take steps to defend the claim, which could not take place because of the failure of the Office of the Secretary of NEC to provide instructions required by the Solicitor General.

19. Compliance Issues:

20. (a) *Public Finance (Management) Act*

There is no clearance letter from the Attorney-General or the Solicitor-General to authorize payments to the Plaintiff, which letter is a prerequisite to settlement/payment of any judgment debts, etc (refer to Yer's evidence.)

(b) *Claims By & Against the State Act 1996*

On 01st February 2000, the Plaintiff through his lawyers, Paraka Lawyers, wrote to the Solicitor General and gave notice of their client's intention to make a claim against the State.

*In that letter, Mr. Kongri of Paraka Lawyers stated that since his clients' appointment to the position of Administrator of Western Province, the Legislative Council had not prepared the relevant instrument and also had not arranged for its execution and gazettement to complete the process of appointment in accordance with the provisions of the **Organic Law on Provincial and Local Level Government**. Consequently they were instructed to apply for Judicial Review and seek an Order in the nature of **Mandamus** against the First Legislative Council and the State.*

At no time at all or anywhere in the said letter did the Plaintiffs Lawyers state that the claim was for damages for unlawful termination, which turned out to be the allegation raised in the proceedings and eventually settled by the Solicitor General through the Deed of Release dated 28 February 2003.

That being the case, it is obvious that the Plaintiff never gave the section 5 notice of his claim as set out in the Court Proceedings

(WS654/00), which is totally different to an application for Judicial Review, which was the basis of their letter of 1st February 2000.

Despite that, the Solicitor General accepted and acknowledged the Plaintiffs Lawyers' letter of the 1st of February 2000 as the letter giving the appropriate notice required by the *Claims By and Against the State Act*, 1996.

Frauds & Limitations Act 1988

The cause of action arose on or about 25th December 1999, when the Plaintiff was recalled and his appointment revoked by the NEC; and the Plaintiff filed these proceedings in 2000. Therefore, there is no issue as to the validity of the claim under this heading.

Attorney- General Act 1989

Similar to the other claim by Tau Liu in Court Proceedings-WS 501 of 1999, Mr, Gelu, the Solicitor General at the relevant time, without giving much consideration to the validity of the claim, or the fact that, the matter was already been set down for assessment of damages in court, acted to the State's detriment when it signed the Deed of Release, which is an act outside the role and or the function of the Solicitor as stipulated in the *Attorney Generals Act* 1989.

NEC Decisions

As in the other case (WS 501 of 1999) the Deed of Release was signed on 28 February 2003 at which time NEC Decision NG 07/2002 (***Decision***) was in place. Clauses 10 and 12 of the Decision:

- (i) Clause 10 - directed that there be no more out of court settlements by any State body or authority, including the Attorney-General and the Solicitor-General, without the approval of the NEC, acting on advice from the CACC and
- (ii) Clause 12 - directed that no public officials, including Ministers and heads of departments and public bodies, are to commit the State to any new contractual obligations through agreements beyond the approved amounts in the 2002 supplementary budget.

Again, like the other matter, there does not appear to be any approval sought or obtained from the NEC nor any advice from the CACC to legitimize the Deed of Release by which the Plaintiffs claim was finally settled. Accordingly, it is arguable that the Deed of Release was improper.

Recommendations

Amendments to relevant Legislations

Claims By and Against the State Act & Attorney General Act

- Amend both legislations to include specific provision as to:
 1. The type of matters that can only be determined by the Courts
 2. The type of matters that can be settled out of Courts
 3. The Officer who would be authorized to settle claims of Courts
 4. The amount, the Officer with the authority to settle can settle on
- In addition include provisions to:

1. Make it compulsory for the State officer handling a claim consider preliminary issues, such as Standing and time limitation.
2. Require the claimant to also give a copy of the section 5 notice to the head of department responsible for the claim.
3. The Departmental Head/his delegate must be required to provide instructions within 30 days to the SG.
4. Make provision for offences/charges to be laid on officers of both SG and the respective Government or Department, who fail to comply with the requirements to give instruction.
5. If a matter is to be settled out of Court, the appropriate Officer/Officer with authority must get written consent of the Departmental Head to settle.

SG must always consult the AG and/or report to the AG for all claims against the State.

If a matter is to be settled out of Court on agreement by parties, such claim must be sanctioned by the Court first.

The Deed of Release must be signed and sealed with the Seal of the State to be endorsed by both the SG and the Action Officer of SG.

Re: Finance, payment must be only made on advice of the SG on production of all necessary documents.

(c) Soiat Williams

PARTIES

For The State:

- (a) Solicitor General and Attorney General
- (b) Department of Personnel Management **For**

the Defendant

- (a) Soiat Williams Others
- (a) Department of Finance
- (b) Ministry of Public Service
- (c) Office of the Prime Minister

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCES

The matter falls within the Terms of Reference ("TOR³). The value of this claim is in excess of K300,000.

The applicable terms of reference are TOR a (1), 2, 3, 4 & 5 THE MATTER

Mr. Soiat Williams, former Secretary for Department of Personnel Management claimed damages for the unlawful revocation of his appointment as Departmental Head for Personnel Management on 30 November 2000.

Mr. Williams signed a Contract of Employment as Departmental Head for PS on 28th July 2000 with the Governor General, Sir Silas Atopare, on behalf of the State. Mr. John Kali, Deputy Secretary-DPM signed as witness. The contract was for term of 4 years.

On the 16th of November 2000 (*3.5 months in to the term*) the Minister for Public Service then Philemon Embel suspended the newly appointed Secretary -Soiat Williams from duties with full pay taking effect on the day of his letter.

On the 17th of November 2000 Soiat Williams responded to the letter by Minister for Public Service in regard to his termination. *Letter to Minister is marked as 207-*

On 22nd November 2000, Patterson Lawyers acting on instructions of Mr. Williams served on the Office of the Attorney General, notice pursuant section 5 of the *Claims by and Against the State Act, 1996*

On 23rd November 2000, Patterson Lawyers filed Originating Summons 689 of 2000 in the National Court seeking declaration that

1. the purported suspension of Mr. Williams by the Minister for Public Service on 16th November 2000 was invalid, null and void and of no legal effect; and
2. Mr. Williams was the legal Secretary for DPM

On 18th January 2001, the State through the Office of the then acting Solicitor General, Mr. Gelu filed its Notice of Intention to Defend the claim (Ref 134)

Whilst the matter concerning the proceedings was on going, Mr. Kawi (former SG) in response to Mr. Tsiamili's request for an opinion on the legality concerning the revocation of the employment of Mr. Williams advised as follows;

" prior to a Departmental Head been terminated by the Head of State acting on advise from the National Executive Council, without notice it is imperative that disciplinary procedures under section 27 of the Contract of Employment must be complied with.

From the allegations made by the Plaintiff (Soiat Williams), it appears we have the daunting task of explaining to the Court why the disciplinary procedures under Section 27 of the Contract of Employment were not complied with, prior to the termination of the Plaintiffs Contract of Employment."

By letter dated 15th May 2001, the Office of the Secretary, DPM provided specific advice and instructions to the Attorney General and Solicitor General to defend the allegations under OS proceedings 689 of 2000. The Department advised that Mr. Williams was terminated in the interest of the State and not under the allegations of misconduct because the then Minister for PS had withdrawn the charges.(See 69-DPM)

Records obtained from the Department of Personnel Management indicate that on 29th April 2002 DPM advised Mr. Williams on the final pay out on his contract. Mr Williams acknowledged and accepted the payment of K407, 003.63 (DPM 5) as final clearance and deed of release to acknowledge receipt of final contract terminations benefits. Mr. Williams acknowledged the letter on 2 May 2002 with the notation. *"I have signed the letter at the request of its employer."*

Despite the letter containing specific advice and instructions from the DPM to defend the claim, the then Acting Solicitor General, Mr. Gelu executed a Deed of Release on behalf of the State with Mr. William for the sum total of K500, 000.00 on 17th February 2003.(Ref 37DOR). This payment is considered to be a double payment of the moneys already accepted to be the final payment for the termination of contract.

Compliance with Claims By & Against The State Act

On the 22nd of November 2000 Patterson Lawyers on behalf of the plaintiff wrote to the Attorney General advising of Soiat Williams, notice pursuant to claim by and against the State.

Action by Solicitor General/Attorney General

The Deed of Release dated 17th February 2003 was highly irregular, illegal and improper

- > Prior to executing the said DoR by Zacchary Gelu he failed to take instructions from the employer, acting on behalf of the state, in this case the Acting Secretary for the Department of Personnel Management, who is specifically responsible for the administration of the Departmental Heads Contracts of employment.

- > Further, Mr Zacchary Gelu chose to proceed with his own DoR in the absence of any Court Order or instruction for the Secretary for DPM on this matter.

Settlement

On the same day the DoR was signed, a letter was written to Thaddeus Kambanei - Secretary for Finance attention to Mr Boas Hembehi to raise a cheque to settle the claim in the sum of K500,000 and have it made payable to Soiat Williams ,P O Box 3762,Boroko,National Capital District.

According to the information provided to the commission, DPM paid in full final entitlements in the sum K407,003.60 (*Cheq No. 22030688*). Reference is copy of cheque made to Soiat Williams.

Department of Finance payments

As per the cash book one payment was made, cheque No. 793025 - K52,320.46 on the 19th of October 2004 in relation to this claim during the period covered in the terms of reference and the subsequent years (2007 & 2008). According to Mr Williams this payment was in relation to his vehicle allowance whilst with DPM. No payment was made on the second DoR for K500,000

Department of Personnel Management

The second DoR signed was improper and to make (if any) payment without the consent of the Department of Personnel Management (DPM) who is the only authority on the calculations for Salary & Wages and Public Service Payouts was considered ILLEGAL. Knowingly that the initial DoR was signed between DPM and the plaintiff, was accepted and received in May 2002.

Findings

- On the 02nd of May 2002 a Deed of Release was signed by DPM and Soiat Williams, whereby he (Soiat Williams) accepted final receipt of termination of contract as Secretary in the sum of K407,003.63. *Marked as is the initial DoR.*
- The 2nd DoR of K500,000 signed by Zachery Gelu (former SG) was without the consent of Department of Personnel Management (DPM). By law DPM are the only authorised agents on the calculations for the Salary & Wages and Public Services Pay outs. In this instance DPM did not endorse the principle claim of K500,000 or more. Further, the claim was never brought to the attention of DPM according to information provided and on file.
- The claim had a OS No. 689 of 2000, however, the court was never informed of the second DoR signed between Solicitor General -Zacchary Gelu and Soiat Williams.
- The Registrar-Supreme & National Court — Ian V Augerea in a letter on the 23rd March 2007 wrote to Mawa Lawyers advising the OS No 689/2000 was listed for summary determination on the 20th of April, 2007. *Marked this letter as*
- *Mr Williams advised the Commission that a jull bench Supreme Court has ruled in Mr Williams favour. Copies of Supreme Court ruling have been provided and filed.*
- The court's ruling was due to no defence filed by the state for its action.

Recommendation

The Solicitor General to institute proceedings to set aside the Deed of Release dated 17th Febraury 2003 and to recover the full amount of K500, 000.00.

1. Isaac Lupari v. Department of Finance and the State
2. Isaac Lupari v. Department of Defence and the State
3. Isaac Lupari v. Department of Personal Management and the State
4. Isaac Lupari v. Dept of Transport & Civil Aviation and the State

Mr. Isaac Lupari sued the State for breach of four separate contracts that were entered into as Secretary for the Departments of Finance, Defence, DPM and Transport in that order. He claimed that he had been unlawfully terminated from all those positions after serving short stints in each and claimed the balance of all pay and entitlements for the unexpired period of all four contracts. It will be clear from the evidence gathered so far that Mr. Lupari never suffered any loss of pay and entitlements and was adequately remunerated by the State for the whole time that he claimed for and beyond. In fact up to July 2009 he was still on the Government payroll.

In an analysis done by DPM it was said that ... "The real life period covered by the contracts on which Mr. Lupari was engaged is a 6 year 9 month period from start of first contract 17/ 09/ 97 through to the end of last contract 28/06/04. Compared to the 6 year 9 months period he is in fact making claims for a total 14 year period, by placing the contract periods end to end, when in fact they overlap. Apart from being contrary to public policy and the contractual provisions, the claims are clearly improper because they result in triple and sometimes quadruple payments for the same period of time. Mr. Lupari has received salaries, allowances and benefits continuously from 17/09/97 to the present day. He has lost no remuneration and has been paid a total K1,294,133 for the 4 year period 17/09/97 to 17/04/02".

The above analysis is a succinct statement of what is wrong with Mr. Lupari's claims against the State. Mr. Lupari had been transferred from one department to another and had not uttered a single word in protest until after the last contract of employment as Secretary for Transport and Civil Aviation. Even then he was far from being destitute as

he was still engaged by the Government of PNG in various capacities and paid very well in various Advisory roles.

A. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE?

The matter falls within the following Terms of Reference No 1,2, 3, 5, 8, 9 and 12.

The claim was improper, was for an amount exceeding PGK300,000.00 and was paid out between 2000 and July 2006. It resulted from failure of the Solicitor General to properly defend the State and was settled out of court. Payments were also not made out of lawfully available funds.

B. SOURCES OF INFORMATION AND DOCUMENTATION

This brief comprises of facts and findings from the files and records of:

Department of Finance

Department of Personnel Management.

Department of Prime Minister and NEC

Governor General's office.

Mr. Isaac Lupari himself

Newspaper reports and paid advertisements by Mr. Lupari.

Letters written by concerned citizens

Evidence of Ms. Margaret Elias (Secretary for DPM)

Evidence of Mr. John Kali (Deputy Secretary for DPM)

Evidence of Mr. Ian Augerea (Registrar of National and Supreme Court)

Evidence of Ms Winnie Kiap (Secretary for NEC)

Evidence of Mr. Eric Kiso (Assistant Registrar National Court)

Evidence of Mr. Billy Bonner (File Manager, Paul Paraka Lawyers)

BACKGROUND: RELEVANT FACTS

THE MATTER

Mr. Lupari first filed four Writs of Summons No. 1788, 1789, 1792 and 1793 of 2001. All four Writs were filed on the 11th of December 2001. The Solicitor General failed to file a Defense and default judgment was entered against the State with damages to be assessed.

In 2002 Mr. Lupari reached an understanding with the newly installed Somare Government that he would be appointed as the new Ambassador representing Papua New Guinea at the European Union based in Brussels. In gratitude Mr. Isaac Lupari agreed to drop all four court actions he had filed. Mr. Lupari instructed his lawyers to discontinue the four court actions and this was done in August 2002.

Having secured the job of European Union Ambassador, Mr. Lupari reneged on the above deal in which he had promised not to pursue his claims against the State. A short five months after he had withdrawn the first lot of claims he instructed his lawyers to file the same court actions again. The four Writs of Summonses were numbered consecutively from 88 to 91 of 2003. The claims were exactly the same as those filed in 2001. The writs were filed on the 13th of January 2003 by Paul Paraka lawyers_____—

Less than two months after the second lot of Writs were filed, a Deed of Settlement was signed on the 03rd of March 2003 by Mr. Zachary Gelu acting on behalf of the State. See Certificate of taxation filed on the 04th of March 2003 and Zachary Gelu's endorsement of the Instrument of consent dated 03rd March 2003 (annexure NC-36). Even after the matter was settled, a Notice of Intention to Defend was filed by the Solicitor General on 11th March 2003. A day later on the 12th March 2003, a Notice of Withdrawal was filed by Paul Paraka lawyers.

5. Under the four Deeds the State was made liable to pay amounts allocated as follows;

PGK 949,233.94 for breach of Employment Contract as Finance Secretary.

PGK 949,233.94 for breach of Employment Contract as Defence Secretary

PGK 1,174,494.79 for breach of Employment Contract as DPM Secretary

PGK 630,498.64 for breach of Employment Contract as Transport

Secretary

Total **K3,703,461.31**

CHRONOLOGY

Isaac Lupari began his career in the Public service on the 18th of February 1988 (see clause 6 of employment contract as secretary for Transport). Nine years later in 1997, it appears that he had made it into the top echelons of the civil service. He was appointed Secretary for department of Finance on 17th September 1997 by the Skate government. A contract was signed on the 10th October 1997. He says that he was sacked five months later on the 15th January 1998.

If he was sacked, he was not out of work for very long. In fact he was reappointed on the very same day to the position of Secretary for Defence. No contract of employment was in fact signed by Mr. Lupari. He concedes this in volume two of his reply to the COI and asserts that the contract was a deemed contract and the signing bit was a mere formality. In fact there is a reference made by Peter Tsiamalili that Lupari was acting as Defence Secretary and never signed a contract for the position.

3. One year and three months later on 17th March 2000 he was appointed Secretary for Department of Personnel Management (DPM) by the newly installed Morauta government. Lupari lasted a very short four months as Secretary for DPM.

The last of the contentious senior positions he was appointed to was as Secretary for the department of Transport and civil Aviation for a term of three years (clause 3). He was appointed on the same day as his term as Secretary DPM came to an end on the 29th of June 2000. Mr. Lupari claimed full pay and entitlements for the unexpired term of his contract as Secretary for DPM. Out of Court settlement was reached by signing of the DOR and an amount of PGK 1,174,494.79 was specifically awarded for the alleged breach of this contract. He was actually paid PGK 1 million by Finance on the 17th September 2004 by cheque No. 790468.

The above payment should never have been allowed in the first place by the SG and later approved by Mr. Damem as AG. The terms of the contract of employment as Secretary Transport explicitly declare in the first recital that:-

"THIS AGREEMENT is made to be effective on and from the 29th June 2000 (to vary the agreement entered into on the 17th day of March 2000 by the parties)". ..

4.1 - The first clause of the agreement reiterated this condition. It also made provision for Mr. Lupari to be paid on the same terms and conditions as in his previous position at DPM, a Central Agency department. Clause 1 reads ...

"This Agreement varies and replaces the Agreement entered into by the Departmental Head on 17th March 2000, provided that the Departmental Head shall continue to enjoy the unchanged terms and conditions of a departmental Head of a Central Agency." (emphasis added).

4.2 Further proof that Mr. Lupari's contract as Secretary for DPM was not unlawfully terminated also comes from the Recitals. It shows that when Mr. Lupari signed the contract as Transport Secretary he did so knowing that he would be moved from his position as Secretary DPM to the position of Secretary Transport and Civil Aviation. The Pertinent part states;

WHEREAS

The State has created the position of Secretary ... Transport... and

and

The Departmental Head is employed on a contract of employment executed by the Head of State effective on and from 17th March 2000, by virtue of his appointment as Secretary for the Department of Personal Management, Head of a Central Agency."

Clause 3 of the Agreement prescribed the period that the contract for Transport Secretary would run for. It stated that the new contract would run from the date Mr. Lupari was appointed as Secretary for Department of Personnel Management, being 17th March-2000 and expire on 16th March 2004, 4 years hence. Effectively this meant that Mr. Lupari's earlier contract was now subsumed under the new contract. In other words the two became one contract and not two separate contracts under which Mr. Lupari could claim for damages, separately.

The Commission is unable to make a conclusive finding as whether Mr. Lupari was unlawfully terminated as Secretary for Transport. There is evidence that shows that Mr. Lupari was not idle after being "sacked". He was employed as a consultant in two positions between 2002 and 2003

before being appointed as Ambassador to the European Union (EU) on the 15th December 2003.

The first of these consultancies was as Project coordinator for the Waigani office development project aimed at refurbishing the condemned Marea Haus better known as the Pineapple building and the Central Government Building. He was engaged on the 30th of July 2002 and paid PGK306,490.00 per annum. The consultancy contract was terminated by the State on 19th March 2003, four months before completion by the Acting Secretary for DPM, Mr. John Kali. Mr. Lupari was paid out for the remainder of his contract term, by now a normal conclusion to Mr. Lupari's contracts with the State.

He was next appointed as Economic Advisor to the Prime Minister on the 30th September 2002. This appointment was made when Mr. Lupari was still legally contracted to DPM up to March 2003 [refer annexure OD 17]. This meant that he was concurrently employed. But no contract was signed for this later consultancy as Economic Advisor. Despite that he was paid out the full fees for the purported consultancy agreement as Economic Advisor before he was appointed as Ambassador to the EU. It is not known when he was recalled but he was appointed Chief Secretary on the 20th July 2007.

From the documents furnished by the Department of Personnel Management, it is clear that Mr. Lupari was continuously employed by the State between his first appointment as Secretary (17/09/97) right up to the date when his last contract was to expire (28/06/04). Set out below are the various jobs he held during that period:

Finance Secretary

- 17/09/97 to 15/01/98 -

Defence Secretary

15/01/98 to 09/12/98

Acting Secretary for Works	- 09/12/98 to
18/02/99	
Special Advisor to Prime Minister	- 19/02/99 to
19/07/99	
Special Advisor to Pub. Serv. Minister	- 20/07/99 to 17/04/00
DPM Secretary	- 17/03/00 to 29/06/00
Transport Secretary	- 29/06/00 to 14/04/01
Special Projects officer DPM	-14/04/01 to 14/04/02
Coordinator - Waigani Building project	-30/07/02 to 19/03/03
j) Economic Advisor to Prime Minister	- 30/09/02 to 15/12/03
k) Ambassador to European Union	- 15/12/03 to ?
l) Chief Secretary to Government	- 20/07/07 (still on full pay)

Referring to the above, the only time he was not working in any capacity was between h) and i) for a period of five months. His contract as project coordinator for the Waigani office project was terminated four months before completion and he was paid the balance of his consultancy, but while still serving out that term, he was appointed as Special Advisor to the PM which was also not served to its end although Mr. Lupari received full pay for that final consultancy prior to taking up the Ambassadorial job.

In instructions given to the Solicitor General to defend the claims, the late Mr. Peter Tsiamalili, then DPM Secretary said the following in his letter to the Solicitor General.

In his statements of claim, Mr. Lupari has not declared the 6 months severance payment as Special Advisor to the Prime Minister (5 months -
I paid K173,871.00), the 18 months ex-gratia payment on termination as
Secretary for Transport (paid K508,723.00).

Mr. Lupari suffered no loss. He has enjoyed full employment moving from one position to another and receiving full payment as head of a

central agency department. He has received an estimated K1,294,133-00 in salaries, allowances and benefits, (para 13)

- Furlough Leave - plaintiff claimed separate amount for furlough leave in each of the writs., thereby compounding his claims fourfold. The total amount claimed K1,027,530 is equivalent to over 10 years of furlough leave which could only be earned with 300 years of continuous service. Money in lieu of furlough leave accrual for 15 years of completed service to date is worth 6 months' salary or K50,000.00 (then).

Paul Paraka Lawyers who acted for Mr Lupari claimed for and were paid K200, 000 as costs for each matter totalling K800,000 for the four matters.

In spite of the matter being settled so soon after Writs were filed for the full amounts claimed in each matter, Paul Paraka Lawyers filed an application for Taxation. The application was filed on the 03rd of March 2003, the same day all four Deeds were signed. There is nothing to indicate that there was disagreement between plaintiff and defendant (State) over costs.

The taxation of costs was dealt with promptly, a day after the application was filed. Mr. Eric Kiso issued a "Certificate of Taxation" stating that ... "the plaintiffs costs have been taxed and allowed at K200,000". Mr. Zachary Gelu had signed an "instrument of consent" on the 03rd of March 2003 the same day that he signed the four Deeds of Settlement.

The way this particular matter was supposedly taxed is peculiar indeed and the Commission finds that it was a charade to legitimise excessive costs. It was done so easily because the taxing officer was so incompetent he did not know what was asked of him and what taxation of costs was all about.

14. EVIDENCE RECEIVED

To date evidence has been received from the following witnesses and Organisations:

- **Ms. Margaret Elias** - Secretary for DPM.

She produced two thick bundles of documents that for the first time revealed the extent of deception carried out by the claimant..... and his lawyers.

Mr. John Kali - DPM Deputy Secretary.

He was responsible for advising the Secretary for DPM, particularly on matters related to the appointment and termination of departmental heads. In February 2002 as Deputy Secretary for Policy he advised the then Secretary, the late Mr Tsiamalili, that Mr Lupari's claims were unlawful and without merit and that a vigorous defence should be mounted in the courts to defeat the claims, in view of the serious implications for integrity of the contract system and also the Financial consequences of the flow on effect

Mr. Vagi as Acting Secretary for DPM wrote to the Attorney General, Mr Francis Damem and delivered Mr Tsiamalili's draft affidavit, which set out in great detail all the reasons for opposing the claims by Mr. Lupari. That letter to Mr Damem was very clear that he was to mount a vigorous defence against the four claims.

Despite the instructions given to the Attorney General to have Mr Lupari's claims defended Mr. Kali said he learnt later that the claims were all settled out of Court by Mr. Zachary Gelu.

- **Mr. Ian Augerea** - produced four court files WS 88, 89, 90 and 91 of 2003.

Eric Kiso - Assistant Registrar for Mt. Hagen gave evidence of presiding over taxation of costs in which Mr. Gelu 'consented' to Paul Paraka lawyers claim of K200,000.00 per matter. He said that he approved the costs after he sighted the instrument consenting to the amount signed by Mr. Zachary Gelu. Mr. Kiso was not able to explain satisfactorily the question put to him that if the costs were agreed to then there was no need to go through the process of taxing costs. Mr. Kiso did agree in his evidence that he had very little experience in matters of taxation and had no guidance whatsoever from any officer in the Court system. He said basically that he made up the rules as he went along.

Mr. Zachary Gelu

Mr. Gelu was the Solicitor General at the time Mr. Lupari's four claims were settled. He gave evidence of signing four (4) Deeds of Release for the four (4) claims based only on material provided by Paul Paraka lawyers. The Deeds were signed less than two months after the four claims were filed and on the day he was suspended from office.

Mr. Gelu said that he never consulted the Department of Personnel Management to seek instructions. He said he was satisfied-on the material provided to him by Paul Paraka Lawyers that Mr. Lupari had a valid claim. He denied ever sighting previous instructions from the Department of Personnel Management.

Mr. Gelu also agreed for K200,000.00 to be paid as legal fees for each matter. When asked if he thought the work put in (minimal) justified the costs he said yes.

Mr. Francis Damem

Mr. Francis Damem was the Secretary for Justice Department at the time Mr. Lupari's four claims were settled. He gave evidence on oath and confirmed that the Department of Personnel Management had written to him as Attorney General with instructions to defend the matters. He testified that he had passed this on to the Solicitor General's office. However he refused to accept that he had later signed a letter to Finance requesting payment on all four (4) Deeds of Settlement.

Mr. Damem appeared with Mr. Paul Othas, a lawyer from Paraka lawyers when he gave evidence to the Commission. Mr. Othas did not say much but on at least one occasion handed written material to Mr. Damem while he was still giving evidence in the witness box without first obtaining permission from the Commissioner or consulting the Counsel Assisting. To this day Mr. Othas, has not apologised for his disrespect to the Commission of Inquiry.

Mr. Guguna Garo

Mr. Garo is a senior Associate with Paul Paraka Lawyers. He gave evidence that he drafted and filed the first lot of Writs WS 1788, 1789,1792 and 1793 of 2003. He emphasised right from the start that after the four claims were withdrawn the file was taken away from him and he had nothing further to do with the four claims until it seems the matters were investigated by the Commission of Inquiry. Throughout his evidence he was evasive about the conclusion of the four claims. When asked by the Commission he denied knowing even that the four claims had been settled for the full amount claimed in the court actions he had drafted. The Commission does not find Mr. Garo's evidence on this aspect to be credible.

As to the merits of the claim itself, Mr. Garo placed great reliance on the case of Peter Aigilo when he was sacked as Commissioner of Police by the newly formed Morauta government. In evidence he avoided

commenting directly on whether Mr. Lupari had in fact suffered any loss in pay and entitlements and the resultant stress, illness and embarrassment that Mr. Aigilo had suffered. He did agree in evidence though that for at least one claim based on the contract of employment as Secretary for DPM there was no breach of contract because the contract specifically said that it had been varied. The Commission finds that Mr. Garo would have had full knowledge of the strength of all of Isaac Lupari's four claims from documents provided to draft the four court actions. In spite of his knowledge of the variation clause Mr. Garo still went ahead and filed the claim. This in itself is serious culpable conduct by a lawyer whose first duty is always to the Court. By filing the claim knowing it to be baseless, Mr. Garo deliberately and knowingly misled the court right from the start and this serious breach of duty is not remedied by his contention in evidence that it was up to the State Solicitors office to pick this out and use it to defend the State when the matter went to trial.

• Mr. Billy Bonner

If the evidence of Mr. Bonner is to be believed, then he is the star in settling Mr. Lupari's four claims. It would seem that he was the person who drafted four quantum submissions that so convinced the Solicitor General that Mr. Zachary Gelu agreed to sign four Deeds of Settlement within three days of receiving Billy Bonner's quantum submissions. The fly in the ointment though is the fact that Mr. Billy Bonner was not even a lawyer when he wrote the quantum submissions. Instead he was the file manager in the firm of Paul Paraka Lawyers with no legal qualifications whatsoever when he did such wondrous legal work.

Mr. Billy Bonner testified that his principal Mr. Paul Paraka had given him the four claims and asked him to draft quantum submissions.

Bonner could not explain why Mr. Paraka gave him, a file clerk, the four files worth millions to handle and not to one of the many lawyers that worked in the firm. Mr. Bonner said further that he did not consult any lawyer within the firm to see whether he was doing the right thing.

Of great significance is the admission by Mr. Bonner that with his quantum submissions four draft Deeds of settlement were sent to Mr. Gelu as Solicitor General to consider. The evidence confirms the Paul Paraka Lawyers drafted and in so doing, dictated the terms of the Deeds even before the Solicitor General had received the quantum submissions. This evidence directly contradicts Mr. Zachary Gelu's testimony that it was him who drafted the Deeds in Isaac Lupari's four claims.

Right to the end of his sworn evidence Mr. Billy Bonner was a very evasive witness. He claimed to have a short memory and did not know what happened to the matter after he had sent off the quantum submissions to the State Solicitor's office. When pressed he finally admitted that he was present and had witnessed the signing of the Deed of Settlement by Mr. Zachary Gelu and Mr. Isaac Lupari.

Mr. Isaac Lupari — Through his lawyer Paul Othas of Paraka lawyers handed up a bound volume of documents to GOI on 28th November 2008. Contained among other papers 4 Deeds of Release which could not even be located at the Solicitor General's office. On 06/04/09 under great protestation handed up to COI five separate bound documents in response to Summons No. 327 dated 18th March 2009.

Ms. Winnie Kiap- Former NEC Secretary. Assisted COI in trying to locate contracts of employment entered into by Mr. Lupari.

PAYMENTS BY THE DEPARTMENT OF FINANCE.

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According to the extract of payments shown above, taken from Department of Finance Cash Book, two payments made to Lupari was paid out of Trust fund suspense account. He was paid K1 million for breach of contract. The Commission does not know at this stage whether he has since been paid the balance of K2,703,461.31.

D. FINDINGS

(a) Claim - Liability and Quantum

Cause of Action in Law

- There was no termination of employment contract. In two of the contracts i.e., Finance and DPM there was no termination but only variation of contract. Therefore Mr. Lupari did not have a cause of action seeking damages for unlawful termination in those two contracts.

Mr. Lupari did not suffer any loss to entitle him for damages. This is because for the whole time period that he claims for, he was on the Government pay roll earning the same and at times more pay than his usual salary and entitlements. His claim for damages therefore lacks foundation.

- Mr. Isaac Lupari knew full well that his claims amounted to triple and quadruple dipping. Yet he went ahead and instructed his lawyers to file claims against the State in the National Court. Even

knowledge of the law Mr. Lupari would have known that he had suffered no loss and the money received from the claims would be a windfall.

Mr. Guguna Garo of Paul Paraka Lawyers filed the affidavits knowing that Mr. Lupari had suffered no loss. His affidavit is a willful misleading of a Court of law and he acted in his position as an officer of the Court.

Paul Paraka Lawyers drafted the four Deeds of Settlement in Isaac Lupari's four claims against the State. These four Deeds were sent to Zachary Gelu with the Quantum Submissions three days before Mr. Gelu signed the Deeds of Settlement.

Quantum

The total amount claimed is excessive and constitutes **enrichment**. On the face of it Mr. Lupari's claims (without special damages, costs and interests) are four times what his entitlements would normally be.

Attorney-General & Solicitor-General

Zachary Gelu as Solicitor General was recklessly negligent in not seeking instructions from the Department of Personnel Management before signing the four Deeds.

There were detailed instructions on the Solicitor General's file that was ignored by Zachary Gelu when he signed the four Deeds of Settlement less than a month after the four court actions were filed.

- Non compliance with NEC directive NG 07/2002 by both Mr. Zachary Gelu as SG and Mr. Francis Damem as AG.

COMPLIANCE ISSUES

Public Finance (Management) Act 1995

No Ministerial approval sought before DOR for amount far in excess of K100,000.00 prescribed under s.61 PF(M)A.

Some payments were made out of Trust fund suspense account and not from "lawfully available funds".

Claims By & Against the State Act 1996

NEC Decisions

Directive 10 of NEC Decision NG 07/2002 which specifically prohibited any further out of court settlements was ignored by Mr. Zachary Gelu when he signed the DOR on 28th February 2005.

Other Findings

Mr. Lupari was not entitled to the K3,703,461.31, either legally or morally.

Paul Paraka lawyers engaged in deceptive conduct when filing Writs in the order they did.

The Solicitor General's file on Isaac Lupari's four claims against the State only contained 4 Writs filed in 2003. There were no correspondence, Instructions from DPM, Quantum submissions or other documentation.

- Paul Paraka Lawyers did not submit quantum submissions. Purported quantum submissions later produced to the Commission were fabricated after the Col summoned same from Mr. Guguna Garo of Paul Paraka Lawyers.

- Mr. Zachary Gelu signed the four Deeds contrary to clear instructions by DPM to defend claims in court.

If Gelu did not in fact sight the Instructions he failed to seek instructions himself from DPM. When he signed 4 Deeds he was in fact acting on material supplied by Isaac Lupari's lawyers.

Mr. Zachary Gelu signed the four Deeds in haste very soon after the court actions were filed and on the day he was to be suspended from office.

- r • Paul Paraka lawyers were paid K200,000.00 for each matter totaling K800,000 for doing a minimal amount of work. That work consisted only of drafting the four Writs of Summons. There were no appearances in Court and no protracted negotiations before agreement was reached to settle the four matters out of Court.

j

RECOMMENDATIONS

4s Isaac Lupari is referred to the Fraud Squad for investigations with view to laying criminal charges for fraud.

Isaac Lupari is referred to the Ombudsman Commission for investigations on whether he breached leadership code.

Mr. Guguna Garo be referred to the Police fraud squad for investigations for part he played in lodging fraudulent claim on behalf of Lupari

4s Mr. Guguna Garo is referred to the Lawyers Statutory Committee for further investigations.

& Zachary Gelu is referred to Police fraud squad for conspiring with Paul Paraka Lawyers to facilitate a fraudulent claim.

<4 Billy Bonner is declared as not a fit and proper person to be admitted to practise law.

£ That in future, Deeds of Settlement should not be left to the discretion of one official like the Solicitor General or even the Secretary for Justice. Instead some oversight must be had by having both sign before the Deed can become legally binding on the State.

«\$■ Paul Paraka Lawyers be referred to law society for charging excessive fees of K200,000 for doing very little work.

«®i Further to the above, clear directions must be issued stating all necessary steps to be taken before a Deed of Settlement can even be contemplated. The very first and paramount consideration is that instructions are sought and received. If instructions are not forthcoming, the Solicitor General must consult with the Secretary to ascertain the next step.

& A limit to the amount that the Solicitor General can sign on. Any amount over K50,000.00 must go to the National Executive Council for approval.

4» Court action is taken to have the 4 Deeds declared illegal or invalid as based on fraud.

4s That amounts paid under Deeds of Release and Settlement be taxed by Internal Revenue Commission.

Consequential Legislative Reform

Attorney Generals Act to set out requirements needed to be taken before Deeds of Release and Settlement can be entered into. Provision must be made that AG and SG must agree before Deeds are executed. Where either disagrees, matter must be defended in Court.

Public Service (Management) Act, 1995. Amendments are made to clearly spell out that where contracts are varied and the officer takes up another job on

the same or higher pay and entitlements, he has no further legal right to claim for the balance of his/her old contracts).

(e) Isidore Kaseng

PARTIES:

For the State:

Department of Justice and Attorney General ('DJAG')

Department of Finance (T)of')

Fly River Provincial Government ('FRPG')

Claimants:

- (a) Isidore Kaseng, Gonene Kurokuro, Charles Hesaboda, Ambrose Maleveka, Yoto Biaguni, Semai Atowai, Martin Semenabe, Philip Kaseng, Oburo Taruai, Bill Kirokim, Dina Gabo, Damoi Dai'i, Gariga Iakoe, Sali Subam, Aino Keiba, Kukinae Kukane, Banabas Uako, Diglus Fitfot, Nalaba Kanupa, Daniel Atmayok, Mainu Kaworo, Peter Mugudia, Roger Iwanekeile, George Badiam and Vincent Karo ('Claimants').

NATURE OF CLAIM:

The claimants were former elected members of the Fly River Provincial-■ Government, which was suspended by the National Executive Council and subsequently abolished by the National Parliament through enactment of a new organic law on provincial governments.

2. The claimants commenced proceedings (WS No. 1070 of 1998) in the National Court against the Acting Administrator of Department of Western province; Fly River Provincial Government; Secretary, Department of Provincial Affairs and the State ('State parties') seeking damages for loss of entitlements and office, respectively.

C. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

On 18 March 1999, the claimants obtained default judgment against the State except the other defendants, one of whom was the Fly River Provincial Government, which had filed a defence denying liability.

On 21 April 2004, Acting Solicitor General, Francis Kuvi, settled the claim on behalf of the State parties by a consent order. On 30 April 2004 and 7 May 2004, Powes Parkop Lawyers filed separate Certificates of Judgment each in the sum of K20.25 million, totaling K40.5 million.

On 10 April 2005, the National Court, upon application by the State, set aside the consent orders and both Certificates of Judgment.

On 31 July 2007, the Supreme Court dismissed WS No. 1070 of 1998 for not disclosing any cause of action.

No payment has been made by the Department of Finance (DoF).

In the circumstances, this matter falls within Terms of Reference No. 2, 3, 4, 5; 8,10 and 12¹³ and 14.

D. SOURCES OF INFORMATION AND DOCUMENTATION

1. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

Registry

National Court original file referenced WS No. 1070 of 1998

Supreme Court original file referenced SCA 85 of 2005

Department of Justice & Attorney General -

Solicitor General file

Francis Kuvi, former Acting Solicitor General (iii)

Claimants —

(i) Evidence of—

o Gonene Kurokuro o

Roger Iwaneke o

Robert Hui

The relevant transcripts of proceedings are provided with this Brief.

The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

CHRONOLOGY OF EVENTS

1992

In 1992, Claimants were elected into office in the Fly River Provincial Government.

On 16 October 1992, National Executive Council suspended Fly River Provincial Government pursuant to Section 187(e) of the Constitution. The reason was for misuse of funds and misconduct. This was in accordance with the old Organic Law on Provincial Governments ('OLPG').

On 16 October 1994, National Executive Council lifted the suspension of Fly River Provincial Government.

On or about 19 July 1995, the State through the National Parliament enacted the new Organic Law on Provincial Governments and Local Level Governments. Consequently, the claimants⁵ respective offices were made redundant and abolished under the old OLPG.

1998

On 29 October 1998, Powes Parkop Lawyers filed a Writ of Summons endorsed with a statement of claim on behalf of the claimants. The claimants sought various declaratory relief together with a liquidated claim totaling K2,148,834.00.

On 10 November 1998, Henaos Lawyers filed a Notice of Intention to Defend on behalf of the Fly River Provincial Government ('FRPG').

On 19 November 1998, Henaos Lawyers filed a Defence on behalf of the FRPG.

On 20 November 1998, Acting Solicitor General filed a Notice of Intention to Defend on behalf of all the defendants ('State parties').

On 4 December 1998, the Provincial Legal Officer, Bubi Gamogab, filed a Notice of Intention to Defend on behalf of the Provincial Administrator, Department of Western Province.

On 18 March 1999, the National Court entered default judgment against all the State parties with damages to be assessed.

2001

On 16 February 2001, on application by the FRPG, the default judgment was varied as being entered against the State only. Hence, no judgment was entered against the three (3) other State parties.

On 21 August 2001, the FRPG through Henaos Lawyers filed an Amended Defence in which the FRPG asserted that the claimants had been overpaid K788,988.58 constituting service leave, leave, loss of office, damages and interest

contrary to the Salaries & Remuneration Commission determinations. The FRPG also brought a cross-claim seeking recovery for that amount.

On 16 December 2003, the Deputy Governor of Fly Provincial Government, Hon. John Malom MPA, wrote to Mr John Kumura to settle the claimant's claim at K16,035.00. In the following year on 14 January 2004, the Governor of the FRPG, Hon. Bob Danaya wrote to their then lawyer, Henaos Lawyers, informing them of a termination of their services and the appointment of the Solicitor General as lawyers for the FRPG as well. A copy of this letter was issued to the Acting Solicitor General, John Kumura, and the Provincial Administrator, Nelson Hungrabos.

On 4 February 2004, Hon. Bob Danaya wrote to the FRPG's in-house lawyer, Sinclair Gore, instructing him to liaise with Francis Kuvi of the Solicitor General's Office to settle the claimants' claim "in full and in a manner requested by the claimants". This letter was also copied to Francis Kuvi. In that same letter, Governor Danaya also said, "I endorse the submission by the claimant's lawyers to the office of Solicitor General" without mentioning any specific amount(s).

Following those correspondence, the Court entered judgment by consent in the following terms on 21 April 2004:

1. *"That the Defendants settle the Plaintiffs' claim as between the Plaintiffs and the Second and Fourth Defendants.*
2. *That by consent, interest, costs and CPI adjustments be included for the period 30th June 2003 to the date of agreement.*
3. *That by consent, the Second and Fourth Defendants facilitates (sic) all documentation necessary to facilitate the immediate settlement of the judgment debt in full.*

The judgment debt be paid in full into the Plaintiffs Lawyers Trust Account to enable all the Plaintiffs creditors including legal and consultants costs and fees are satisfied before individual plaintiffs (sic) are paid.

No order as to costs of motion."

No specific amount(s) in damages or otherwise, constituted part of these consent orders. It only endorsed an agreement between the parties to settle the claim.

On 30 April 2004, the claimants' lawyers filed a Certificate of Judgment incorporating a sum of I<20,250,000 as the judgment debt. The certificate was duly endorsed by the Solicitor General.

On 7 May 2004, the claimants' lawyers filed a second Certificate of Judgment which did not specify a liquidated amount and instead annexed to it a schedule which incorporated the sum of K20,250,200 as the judgment debt. The Solicitor general did not endorse this Certificate of Judgment unlike the previous one.

On 22 September 2004, Posman Kua Aisi Lawyers filed a Notice of Change of Lawyers for the State.

On 26 November 2004, the National Court, upon application by all the State parties through Posman Kua Aisi Lawyers, set aside both Certificates of Judgment dated 30 April 2004 and 7 May 2004, respectively. The Court found that both Certificates of Judgment were defective and invalid because neither had a Kina sum judgment or order on which they could stand. The order by consent made 21 April 2004 did not include any specific order for a specific amount of money. Further, the latter Certificate of Judgment did not contain the Solicitor General's endorsement.

On 31 January 2005, a Notice of Change of Lawyers was filed by Paul Paraka Lawyers for the Secretary, Department of Provincial Affairs and the State, effective 6 October 2004.

On 30 June 2005, the National Court set aside the Consent Orders dated 21 April 2004; Default Judgment made 18 March 1999; and Order varying Default Judgment made 16 February 2001. Further, the State and another were granted leave to file their Defences within twenty-one (21) days. To the extent the Court found there was a cause of action disclosed, the State parties' application to dismiss the claim was refused.

2007

On 31 July 2007, the Supreme Court upheld the State's appeal from part of the National Court order made 30 June 2005 and dismissed the claim in the National Court (WS 1070 of 1998) for not disclosing any cause of action. The Supreme Court found that the claimants were duly compensated as determined by the Salaries and Remuneration Commission. As to the claim for loss of office, the claimants had been paid six (6) months entitlements for loss of office in accordance with Section 122 of the OLPLLG. With respect to their claim for payment of allowances during the period of suspension, the claimants had received their basic salaries and were not entitled to all other allowances including house or vehicles, which were withdrawn immediately upon suspension.

F. FINDINGS

I. Liability In Issue

(a) Non-compliance with Section 5 - Claims By and Against the State Act

1996

1. The Commission has examined the claimants' lawyers letter dated 12 October 1998 to the Solicitor General giving notice of their intention to make a claim against the FRPG and the State ('Notice of claim⁵).

The claimants' Notice of claim asserted that their cause of action accrued from October 1998 when they were advised by the FRPG that their entitlements would not be paid.

However, the Commission finds that the Notice of claim did not disclose any cause of action for the reasons found by the Supreme Court. That is, the claimants were duly compensated as determined by the Salaries and Remuneration Commission. As to the claim for loss of office, the claimants had been paid six (6) months entitlements for loss of office in accordance with Section 122 of the OLPLLG. With respect to their claim for payment of allowances during the period of suspension, the claimants had received their basic salaries and were not entitled to all other allowances including house or vehicles, which were withdrawn immediately upon suspension. All this information was available to the claimants, their lawyers and the Solicitor General at the time of giving the Notice of claim.

Therefore, the Commission finds that the Notice of claim was invalid for purposes of Section 5 of the *Claims By & Against the State Act 1996* ('Claims Act?').

In the circumstances, the claimants' claim under WS 1070 of 1998 was not enforceable as against the State for want of compliance with Section 5 of the Claims Act.

(b) No merits nor reasonable cause of action disclosed against State

The Commission finds that the statement of claim endorsed to WS 1070 of 1998 did not disclose any cause of action for the reasons found by the Supreme Court. That is, the claimants were duly compensated as determined by the Salaries and Remuneration Commission. As to the claim for loss of office, the claimants had been paid six (6) months entitlements for loss of office in accordance with Section 122 of the OLPLLG. With respect to their claim for payment of allowances during

the period of suspension, the claimants had received their basic salaries and were not entitled to all other allowances including house or vehicles, which were withdrawn immediately upon suspension. All this information was available to the claimants, their lawyers and the Solicitor General at the time of commencement of those proceedings.

7. In the circumstances, the claimants' claim under WS 1070 of 1998 was not enforceable as against the State for failing to disclose any cause of action.

(c) Cross-claim for recovery of overpayment - K788,988.58

The Commission finds that FRPG's cross-claim against the claimants seeking recovery in the sum of K788,988.58 for over-payment was neither considered nor determined by both National Court and Supreme Courts. This was apart from the fact that the FRPG was not named as an appellant in the appeal nor heard by the Supreme Court at all.

The payments made by the FRPG to the claimants for the period of their suspension consisted of entitlements (service leave, leave, loss of office, damages and interest). These entitlements were all withdrawn by determination of the SRDC upon the suspension of the FRPG.

In the circumstances, the Commission recommends that the State take all steps necessary to pursue the cross-claim pursuant to the Amended Defence filed by FRPG through Henaos Lawyers on 21 August 2001.

II. Assessment of damages

The Commission has found that on 26 November 2004, the National Court, upon application by all the State parties through Posman Kua Aisi Lawyers, set aside both Certificates of Judgment dated 30 April 2004 and 7 May 2004, respectively.

The Court had found that both Certificates of Judgment were defective and invalid because neither had a Kina sum judgment or order on which they could stand. The order by consent made 21 April 2004 did not include any specific order for a specific amount of money. Further, the latter Certificate of Judgment did not contain the Solicitor General's endorsement.

II. Steps taken (or not taken) by Solicitor General in defence of the claim

Although the National Court has set-aside the said Certificates of Judgment and Consent Orders, the Commission finds that there is ample evidence of serious failures on the part of the then Acting Solicitor-General, Mr Francis Kuvi in the performance of his professional duty as lawyer for the State.

a. Processing of claim and Pay-out

There has been no payment in respect of this matter. Further, no payment should be made in respect of this matter in view of the decision of the Supreme Court dismissing the claim in its entirety.

G. RECOMMENDATIONS

The Commission recommends that:

Referral to the Lawyers Statutory Committee

1. Francis Kuvi for dishonourable, improper and unprofessional behaviour in that he failed to conduct due diligence prior giving clearance to the Department of Finance clearing payment based on the said Consent Order and Certificates of Judgment

Referral to the Secretary, Department of Finance

2. Refuse any claim for payment regarding this matter

3. Refer any such claims made to the Attorney General for advice

Referral to the Attorney General

4. Direct Solicitor General to take all steps necessary to pursue the cross-claim

pursuant to the Amended Defence filed by FRPG through Henaos Lawyers on 21 August 2001.

5. Advise the Secretary, Department of Finance to refuse any claim for payment regarding this matter

E. Procurement of Good and Services

The Commission reported on five (5) matters that related to the alleged supply of goods and services to agencies of the State. The claims were pursued either in the National Court or through negotiated settlements with the Solicitor General.

In a number of instances, the procurement processes as prescribed by the *Public Finances Management Act 1995* were completely ignored. It has become an obvious trend for the State agencies to enter into ad hoc arrangements in the procurement of goods and services without due regard of the prescribed procurement process.

The Commission finds that there is immediate need for greater co-ordination between Departmental Heads and Department of Finance to ensure -

- y compliance with the rules on procurement
- ^ procurement occurs on there being funding available through budgetary appropriation
- y claims for payment are not lodged directly at Finance Department where procurement is by self-accounting departments or agencies of the State
- y payments by Finance Department are done in consultation with relevant heads of departments or agencies of the State
- the Tenders Boards do not exceed the limits of its financial delegation on contracts awarded
- y contracts are only awarded to suppliers with financial capacity, resources and experience
- the contract to supply is performed and payment is not based on proforma or dummy invoices

^ there should never be payments in advance

claims are authentic

corrupt practices involving senior officers of the State are detected and dealt with decisively.

In defence of claims against the State, the Commission finds there was-

Gross failure by Solicitor General to effectively seek instructions

y Failure by departmental heads to provide instructions to Solicitor General within time, or at all

Despite the comprehensive and widely recognized processes, the Solicitor General and Department of Finance failed to consult the relevant heads of Departments and State agencies when considering the authenticity, price and payment of the claims. This was the trend in all matters investigated. These are all in addition to the other defences identified in each report.

The Commission finds that certain Solicitors General have been grossly negligent in protecting the State's interests.

The Commission recommends the following:

Review composition of tenders board and its operations to ensure compliance with *Public Finances (Management) Act 1995*

Investigation and prosecution of officers implicated

Investigation and prosecution of officers who have failed to comply with requests (investigations) and recommendations of Auditor General

(a) Pacific Paradise Corporation Ltd

Pacific Paradise Corporation (PPQ a company owned by Mr. Tom Rangip, was paid a total K14,850,105.97. PPC claimed that the State had not paid for food it supplied to PNGDF soldiers based at all Military barracks around the country. The company had previously tendered for and was awarded contracts to supply food to the PNGDF in the years 1996 and 1997.

The claim by PPC was among several claims which were being pursued against the State for alleged wrongs done by the PNG Defence Force and Department of Defence. Among those claims was one claiming compensation for the burning down of the Germania club by soldiers in 1993. Other claimants including PPC sought payment for supply of goods and services. In December 1998 the Prime Minister Honourable Mr. Bill Skate, directed the Auditor General and the Attorney General to investigate the various claims. Both officials were directed not to make any settlements until each and every claim was verified as authentic.

Evidence gathered so far by the COI indicate that PPC's claim for the supply of food to the PNGDF was fraudulent in nature based on falsified invoices. Goods claimed as supplied were either not supplied at all or was short supplied. A report done after investigation conducted by the Financial Inspection Services division of the Department of Treasury and Planning (as it was then) summarised its findings as follows:

1. Rules on tender procedures, consideration of tenders and on awarding of contract were not followed.

The Defence Tenders Board exceeded the limits of its financial delegation on contracts awarded between 1996 and 1997.

Twice, PPC was awarded supply contracts although it had no financial capacity, facilities and experience in servicing large volume of transactions

Most payments to PPC appear to have been fraudulent, based on fictitious supplies

Goods covered by K5,390,855.99 outstanding claim under 9 invoices endorsed by James Melegepa appear not to have been supplied

Most payments to PPC were based on proforma or dummy invoices

PPC dealings in supply of foodstuff to PNGDF characterized by advance payments, oversu

There are clear suggestions of corrupt practices done in connivance with senior officers of the Department (of Defence) and the Force.

The 1996 board failed to determine that PPC had a managing director Tom Rangip who had been declared insolvent on 27th October 1995 by the National Court.

- An Audit Report compiled by the Auditor General's office in 1999 also found gross irregularities and concluded that: 1. K7,597,782.16 worth of invoices was under dispute

K481,351.55 worth of food arose from 7 containers of food supplied to troops of Bougainville. These goods were not accepted by PNGDF because the order had previously been cancelled, in fact 4 days after it had been made. It was also noted that quantities in the invoice materially differed from details of suspended order.

Only K260,000.00 was confirmed as being due and owing to PPC

The rest of the claims could not be established as in order because of the absence of documentation in respect of ordering, receipting of foods or other corroborative evidence thereof.

After receiving both of the above Reports Mr. Michael Gene the Attorney General then briefed the matter out to Mr. Moses Murray of Murray and Associate Lawyers. In his advice to the Attorney General Mr. Murray advised that the State was liable in relation to several containers of food held at the Port Moresby and Rabaul Wharves. The food was supplied under the 1997 contract and had been sitting at the Wharf until the year 2000 when Mr. Murray advised that even if there was oversupply the State was still liable to pay. In evidence Mr. Gene conceded that after the long period of time most of the food had gone bad, but the State still had to pay.

Based on the above advise a Deed of Settlement (DOS) for the sum of K5,125,183.00 was signed on 02nd May 2000 by Mr. Michael Gene on behalf of the State. Soon after he executed the Deed Mr. Gene was replaced as Attorney General. His successor Mr. Sao Gabi (now Hon. Justice Gabi) questioned the validity of the claim and fired Mr. Murray as lawyer and instructed Warner Shand Lawyers to instigate recovery action.

When request was made to Finance dept to pay out on the Deed of settlement it refused saying that the claim was partly bogus. To enforce the agreement reached in the Deed, lawyers for PPC filed Writ, WS 862 of 2000 on the 17th July 2000. It claimed the amount that had already been awarded in the DOS of 02nd May.

The Writ was filed on the 18th July 2000. At the same time a Notice of motion was filed seeking to enter Summary judgment. The returnable date was the next day 19th July 2000. Negotiations were entered into and Mr. Toop agreed to forego K656,122.87 which the Finance dept claimed to be fraudulent. On the 09th of August 2000 Mr. Murray who was acting for the State consented to a Court order for the sum of K4,469,060.13.

Mr. Toop still managed to get the K656,122.87. He filed separate motion and on 06th April 2001 "consent default judgment" was obtained for the payment of I-C656,122.87.

Further to the above two payments consent order was endorsed by the National Court on the 11th of September 2002 for the State to pay the interest component on the principal sum of K5,125,138.00. Interest was awarded in the sum of K2,405,392.27.

On the 10th of August 2000, WS 1032 of 2000 was filed claiming K4,981,580.35 for non-payment of sums owing under various other invoices which were not specifically mentioned in the Deed. This appears to be in breach of the agreement reached in the Deed of Settlement of 02nd May 2000 whereby it was agreed that the State would pay a total of K5,125,183 in full and final settlement of its claims in relation to the claims for food supplied to the PNGDF.

PPC pleaded in WS 1032/00 that it had previously won a tender in 1996 to supply food to various Army barracks throughout PNG. On 19th November 2001 the Solicitor General consented to a court order for K4,981,580.35 to be paid by the State.

Another consent order was obtained on 11 September 2002 for the State to pay Interest of K2,337,995.35 and K150,000.00 in costs.

It seems that Tom Rangip, owner of PPC is not done yet with the State. On the 26th June 2006 Habuka lawyers filed Writ WS 896 of 2006 claiming a total K 25.75 million broken up into the following heads of damages.

K3.25 million for loss of contract with PNGDF for further 5 years K15 million for loss of contract with National Disaster Authority K 7 million for "loss of possible other contracts". WS 896 has not been determined yet. The Director of National Disaster Center (not "Authority") has advised the Commission of Inquiry that the NDC never entered into a contract with PPC to supply food.

This Report was sent to the Attorney General, Mr. Michael Gene who summarized the Audit report in the following terms. "The audit report quite unequivocally raise serious issues on the authenticity of the various invoices because of the following reasons:

Inability of the officers of the PNGDF to provide relevant invoices/documents, Accounting system and record keeping maintained at Murray Barracks were not up to expected standards,

In the majority of instances the placements of orders were not in writing. Receipt of stock records maintained in Murray Barracks did not, in many instances, show receipt of goods, and

There was complete lack of compliance and respect for law in the procurement and engagement of suppliers for service."

Mr. Gene concluded that with respect to liability, his advise was that the State was not liable to pay. Mr. Gene did go on to say that ... "I require further and better instruction and documents to formulate a firm view.

Mr. Gene next briefed Mr. Moses Murray of Murray and Associates to handle the matter on behalf of the State. Mr. Murray advised that although there were no legal contracts and in some instances there was over-supply of food, the State was still liable on a Quantum Meriut basis. According to statements provided to the COI by Mr. Murray, Gregory Toop, lawyer for PPC got wind of this advise and called Mr. Murray.

Negotiations were entered into with Toop asking for amounts as high as I<18 Million and not less than K12 Million. According to Mr. Toop in a statement he provided to the COI, he wasked for K13 Million because ... "it was as good a figure as any to start with". Finally an amount of K5,125,187.97 was agreed upon and Mr. Murray drafted the Deed which Mr. Gene and Mr. Toop signed on 02nd May 20000.

Cash book extracts show that a sum of K14,850,105.97 has already been paid out to PPC.

(b) Pacific Engineering Ltd - Defence Force

Parties

For the State:

(a) Attorney-General & Solicitor -General

For the Claimant:

(a) Pacific Engineering & Repairs

Others (if any)

Directorate of Supply, PNGDF

Secretary, Department of Defence

Department of Finance

Terms of Reference ("TOR")

The applicable reference concerning this claim is TOR 2, 3, and 4.

Documents and investigations conducted at:

The documents the subject of review and examination are File No. SG 151/04 (Office of the Solicitor General/Attorney General) and, Writ of Summons No. 309 of 2004 (National Court Civil Registry)

Attorney-General (AG)

Solicitor-General (SG)

Department of Finance (FD)

The Matter

This claim relates to unpaid invoices for spare parts, repairs and maintenance of military vehicles and equipment numbering a total of 64 claims in 2003. The unpaid invoices amounted to a total sum of K1, 456,700.00. The Plaintiff Company instructed Warner Shand Lawyers to institute proceedings against the State for the unpaid invoices on 25th March 2004.

Warner Shand lawyers gave section 5 notice pursuant to the *Claims By and Against the State Act 1996*. In the same letter dated 10th February 2004 extension for time to file a claim was also sought from the Solicitor General. The Solicitor General and the action officer failed to respond to the request for extent time to file a claim against the State.

Following that letter, the Writ of Summons was filed on 25th March 2004 and named the Independent State of PNG as the Defendant. The writ does not name the Secretary, Department of Defence or the Commander of PNGDF. In the Statement of Claim, the Plaintiff claims non payment of repairs and maintenance of defence force vehicles and equipment for the unspecified dates on the invoices for the total amount of K1,456,700.00 plus interest and costs of the proceedings

Despite numerous correspondence to the Solicitor General over the proceedings, the Court made orders pursuant to section 5(2) (c)(ii) of the *Claims By and Against the State Act 1996* confirming the section 5 notice and the extension for time to file the claim. That order was made on 26th August, 2004.

The National Court file reveals that the State had not filed any Notice Of Intention to Defend nor any Defence. The Plaintiff obtained default judgment against the State on 25th August 2004. The Court made orders in favor of the Plaintiff for the sum of K1, 456,700.00 and interest on that sum accruing at the rate of 8% per annum from 25th March 2004 until payment.

6 Certificate of Judgment pursuant to subsection 13(2) of the *CBASA Act* was filed by the Plaintiff on 30th August 2004 basically certifying that the Plaintiff obtained default judgment in the sum of K1 ,456,700.00 and interest plus costs

The Court file notations indicate that at the court hearings relating to applications for default judgment, Mr. Mundua Kua failed to attend the hearings at Court and no explanations were provided.

On 29th November 2004, Paul Paraka Lawyers were instructed to act for the State and provide a review on the proceedings.

With regard to the payments arising out of the judgment order of 18th August 2004, it is important to take note of the concerns raised by the current acting Solicitor General. His concerns were directed to the Secretary of Defence dated 27th February 2008 and one which summarizes the state of affairs concerning the judgment order. The letter reads;

a

I advise the Plaintiff in this case obtained a default judgment (copy attached) on the 18th August 2004 in the liquidated sum of K1,456,760.00. Since the date of the order to date, my record shows that no payment has been done on this judgment.

I have noted this mth great concern that if no payments are done on this judgment t date, the interest will accumulate to over K400,000.00

I have inquired at the Department of Finance but their records also indicated the same.

Please cause an investigation into this issue and advise as to whether this judgment has already been settled by your Department."

10. Mr. John Liu the Company Secretary, Pacific Engineering & Repairs Ltd confirmed with the Commission that no payments have been made with respect to the default judgment since 25th August, 2004 (Refer to FD"24")

REVIEW OF MATERIALS RELATED TO THE CLAIM

The Commission commenced hearings and the calling of evidence and materials with regard to this claim on 6th October 2008. During that period a number of persons were summonsed and appeared personally or have provided statements and other documents to assist with our inquiry. Based on the evidence and materials that have been provided, the following observations and findings reflect the general evidence that was availed to the Commission for its assessment with respect to the TOR.

NON COMPLIANCE WITH STATUTORY PROCUREMENT PROCESS

The Commission's observation with regard to this claim is the fundamental disregard of the procurement process lawfully provided for under *Public Finances (Management) Act*

There was a breach of the procurement process by the Papua New Guinea Defence Forces either through 'absolute disregard' or 'the short cut' mentality to procure goods and services. The explanation that the PNGDF provided to the Commission was the urgency to ensure that the vehicles were maintained as a result of the Bougainville Crisis.

The Commission's collective view is that the Bougainville Crisis required the presence of PNGDF personnel, vehicles and equipment on Bougainville. The magnitude of the civil conflict was such that the appropriate course for the PNGDF to take in procuring services was to comply with the procurement process under the *Public Finances (Management) Act, 1996*. The procurement process provides for *value for money, transparency, effective competition, fair and ethical dealing and efficiency and effectiveness* as fundamental to good governance, financial discipline and accountability.

²¹ Refer to Part 11-Procurement-Framework and Principles, Financial Management Manual

Assessment of the Evidence (Sworn Testimony and Documents)

Witnesses

The following persons gave evidence on oath; •

Mr. John Liu

(Corporate Secretary of Pacific Engineering and Repairs Limited)

Assisted the Inquiry by his attendance and informed the Commission that PNGDF had not settled the default judgment. By the same token, the Solicitor General had not issued a Certificate of Judgment which was outstanding for almost 4 years.

(Transcript of Proceedings COIFINANCE 13th October 2008 at pp 879 to 882)

Further to that appearance on 13th October 2008, Mr. Liu provided farther information to the Commission on the status of the payment/settlement of judgment.

"The outstanding were incurred from in or about 1997 to 2002 for repairs/maintenance of motor vehicles and supply of spare parts to the PNGDF. Most of them related to the Bougainville Crisis, and the reason that was given by PNGDF for not settling the debt was that during that period they were having cash flow problems.

It is our understanding that two internal audits and one external audit were carried out to verify the outstanding debt.

As of today, we still have not received the amount nor the interest payments from the State despite numerous correspondences and meetings with the Department of Defence, Department

of Treasury, Department of Finance, Department of Justice and Attorney General and ourselves (Pacific Engineering and Repairs Ltd). "(My addition) (Refer to Document No. PER "25")

On 19th November 2008, he provided to the COI a bundle of documents under the heading **"Outstanding Owing by PNGDF"** which is the break-up of all the invoices relating to the Court Proceedings. Those payments remain outstanding and no paid by the Department of Defence. (Refer to Document No. PER "26")

- Mr. Mundua Kua

(Former Senior Legal Officer-Solicitor General's Office)

Mr. Kua gave evidence that he was assigned with the file concerning the claim against the PNG Defence Force. The Court records indicated that no State Lawyers (especially the action officer assigned with the file) was present at the time default judgment was entered against the State and despite the lack of attention given to the application for default judgment at the Office of the Solicitor General, Mr. Kua was adamant that he had not sighted any of the documents hence his absence at the hearings. Mr. Kua however gave evidence that "lawyers were at fault.. .not appealing or taking any measures to review the summary judgment or default judgment "[as required under section 12 of *CBAS Act*]

He also expressed his views on the procedures involved in the management of files, the legislation dealing with claims against the State and the procurement issue.

He also expressed concern that the court had allowed the application for Section 5 notices and extension of time to be granted despite objections raised by Mr. Kua. He had advised Mr. Kuvi to appeal against the decisions but there

was no action taken. There are also no file notes on this recommendation noted by the Commission on the SG records.

He also denied that he had sighted Mr. Kuvi's memo to him directing him to provide an explanation on why a default judgment was entered for K1.2million against the State.
(Transcript of Proceedings COIFINANCE 32 dated 13th October 2008 (pages 879 to 884; and COIFINANCE 60 dated 27th January 2009 at pages 1452 to 1461 especially page 1459 and Document Reference MK"27")

• Mr. Francis Kuvi

(Acting Solicitor General (Suspended)-Solicitor General's Office)

He said in evidence that he had no authority to discipline Mr. Kua and by that time Mr. Kua had not turned to work at the Office until his resignation letter was submitted to the Department sometime in early 2005.

(Transcript of Proceedings COIFINANCE 28th January 2009-pages 1527 to 1530)

STATEMENT AND PRODUCTION OF DOCUMENTS

These are witnesses summonsed and produced statement and documents to assist the Commission in its inquiry into the claim.

> Lieutenant Colonel Joseph Ben DMS

He was the then Director of Transport. PNGDF HQ, and provided by way of a written statement dated 10th October 2008 with the following explanation.

The claims originated from audited outstanding accumulative bills for services rendered to the PNGDF by PER over a number of years.

He confirmed that no legal contract existed between PER and Defence which was a direct contravention and non compliance with PFMA Act 1996

"The said claims are accumulative claims incurred by PNGDF over a period of time, and not a one-off payment for services rendered. Should, this be the case PNGDF would have followed the public tendering process and procedures as required by law".

The reasons why PNGDF entered into the "open credit facility arrangement with Pacific Engineering & Repairs Ltd

"In early 2003 the Acting Defence Secretary intervened by setting up an audit team to audit all outstanding claims for service rendered to the Defence Organisation (DO). This intervention was to ensure that Finance Department pay genuine claims for services rendered to DO. The creation of the Defence audit team was sanctioned by the then Defence Minister (Mr. Mathew Gubag). It took the audit team approximately eight months to audit hundreds of claims for services rendered by our known clients, inclusive of Pacific Engineering & Repairs Limited. All audited claims were approved and forwarded to the Department of Finance for payment in December 2003.

The audit team discovered that the PNGDF committed Pacific Engineering and Repairs Limited hence has failed to honour its part of the arrangement thus allowing the accumulation of outstanding bills.

The audit team confirmed that the arrangement between the DO and the said client was on an ad-hoc basis, which basically means an open credit facility. All invoices audited did not exceed the amount of K100, 000.00 which requires a formal contract.

During the audit it was discovered that the most services rendered was in support of the PNGDF vehicle fleet of approximately seventy (70) vehicles in Bougainville during the crisis and the maintenance of the Port Moresby unit's vehicles over a period of time.

The audit team identified that there were couple of reasons as to why PNGDF committed Pacific Engineering & Repairs Limited to supply vehicle parts and accessories and or repair of PNGDF vehicles on a credit facility arrangement:

Urgent demands for vehicle parts from the Bougainville Operations during the crisis;

PNGDF did not have the funds at the time of these urgent demands;

Value for Money (as oppose to genuine parts supplied by other motor dealers);

Existing understanding with the supplier to supply render services based on priority demands due to DO financial constraints; and

The willingness by the supplier to render services to PNGDF in credit.

In conclusion, the audit team recommended that Finance Department settle the outstanding bills owed to their clients, inclusive of Pacific Engineering and Repairs Umited. I believe to date Finance Department has not settled the said claim which is now before the Commission of Inquiry.

(Refer to Document No. "OD25")

Findings

From the evidence received by the Commission, the findings are as follows :-

Solicitor General & Attorney General

(Claims by and Against the State Act & Attorney Generals Act)

Section 5 notice given with request for the grant of extension of time to file claim against the State.

The Solicitor General failed to respond to the request for extension of time.

The Solicitor General failed to file the 'Notice of Intention to defend' the proceedings including the 'Defence' on time.

The State had sufficient ground to defend and challenge the claim

The claim was out of time by more than 2 years

PNGDF was not named as the Defendant and therefore the Statement of Claim was defective having named the State as the only defendant The Statement of Claim related to the unpaid invoices accumulated over a period of 6-12 months against the PNGDF and not the State.

The Solicitor General failed to challenge the application for default judgment on the basis of section 12 of the *CBSA Act*.

The Solicitor General failed to file an appeal against the order for default judgment on the basis of section 12 of the *CBSA Act*.

The Solicitor General failed to consult and obtain instructions from the Department of Defence with the view of settling the claim. That failure to settle the payment has now costs the State to settle the liabilities including interest accruing and costs.

Papua New Guinea Defence Force

The PNGDF and Department of Defence ad hoc arrangement with the Pacific Engineering & Repairs Limited on the open credit facility has allowed for the

debts to accumulate over a period of time culminating in a huge liability on the State to settle the debt.

The ad hoc arrangement created a huge burden on the PNGDF Budget given the fact that the arrears have now affected the appropriations for the following years.

The PNGDF failed to comply with the Procurement process under the *Public Finances (Management) Act, 1996*.

Recommendations

The Solicitor General to take appropriate measures to review and file an appeal to the Supreme Court against the default judgment pursuant to Section 12 (3) of the *Claims by and Against the State Act, 1996*.

The Department of Defence/PNGDF failed to comply with procurement procedures by calling for public tenders in the procurement of goods and services.

The ad hoc open credit facility arrangement with the Pacific Engineering & Repairs Limited provided an avenue for abuse and was not in the best interest of the State. The crisis on Bougainville Island was in our view sufficient reason for the PNGDF to call for public tender for the provision of a service provider in the maintenance, repairs and spare parts for PNGDF vehicles and equipment.

Mr. Mundua Kua was in our view negligent with regard to the management of the case at the time he was assigned, with the file. The claim involved a substantial amount of K1, 456, 700 and he failed to undertake all necessary research to ensure that the claim was properly tested in court.

Mr. Francis Kuvi as the then acting Solicitor General failed to file an appeal against default judgment despite the lack of explanation from Mr. Kua who absconded from duties after the default judgment was entered by the Court against the State.

► There is a need to ensure that the key positions within the Department of Justice are approved and filled by competent lawyers. The continuous and long delays in the appointment of Lawyers on acting capacity has created an uncertainty in decision making, discipline, proper instructions and re-organization of the Office to deal with the volume of work.

(c) Pacific Engineering Ltd - Police Department

PARTIES

For the State:

(b) Attorney-General & Solicitor —General

For the Claimant

(b) Pacific Engineering & Repairs

Others (if any)

(a) Office of the Commissioner of Police **Terms of Reference**

("TOR")

The applicable Terms of Reference are TOR 2, 3, and 4.

Documents and investigations conducted at:

The documents the subject of review and examination are File No. SG 151/04 (Office of the Solicitor General/Attorney General) and, Writ of Summons No. 307 of 2004 (National Court Civil Registry)

Attorney-General (AG)

Solicitor-General (SG)

Department of Finance

Relevant Facts: •

The Matter

The Claimant claims that between May to December 2002 at the request of the Defendant the Plaintiff carried out repairs and maintenance to vehicles belonging to the Royal PNG Constabulary. The Claimant made numerous representations to the Commissioner for Police demanding payment of the debts. The **unpaid** invoices between May to December 2002 totaled K2,074,169.64. The claims under this Writ are for the unpaid invoices, interest and costs of the proceedings. (Refer to OD"3" and NC"4")

- Payments by Finance

To verify with Department of Finance as to payments. There is a letter from the acting Solicitor General Mr. Devette who has expressed concern about the payments on the default judgment which has not been settled by the Department [Refer to SG"19"]

Below is a schedule of payments made to Pacific Engineering and Repairs Ltd as derived from the Cash Book for periods 1 January 2000 and 1st July 2006.

23-12-2004	14055	207	4201	4123	135 Pacific Engineerin	O/S arrears ICQ	799848!	269,942.71
nfISEi	811427	2074	201	2101	135 Pacific Engineerin	IPolice ICQ	669611!	241,767.63
BM21	811421	2074	201	2101	135 Pacific Engineerin	Police ICQ	6696111	223,320.05
12/31/2001	811270	2074	201	2101	135 Pacific Engineerin	Pol O/S payment	CQ	668912!
	811422	207 4	201	2101	135 Pacific Engineerin	jPolice ICQ	669611!	147,322.82
* 1/1/2002	811424	2074	201	2101	135 Pacific Engineerin	IPolice	CQ	669611'
W2002!	811423	2074	201	2101	135 Pacific Engineerin	jPolice l	CQ	669611
aoUZOOi	811284	2074	201	2101	135 Pacific Engineerin	Pol O/S payment	CQ	668912
i	811269	2074	201	2101	135 Pacific Engineerin	jPol O/S payment ;CQ	668912	95,499.94
mom	811419	2074	201	2101	135 Pacific Engineerin	(Police	CQ	669611
-002!	813800	2074	201	2101	135 Pacific Engineerin	jPolO/S	CQ	670455
1281/2001	811275	207 4	201	2101	135 Pacific Engineerin	jPol O/S payment	CQ	668914
1/1/2002)	811420	2074	201	2101	135 Pacific Engineerin	IPolice	CQ	669611
Yi/24/200	740365	207	4201	4123	135 Pacific Engineerin	IPolBce-ofstrm.829	CQ	634126
O	811274	2074	201	2101	135 Pacific Engineerin	[Pol O/S payment iCQ	668914	63,703.27
lawoil	740367	207	4201	4123	135 Pacific Engineerin	iPolice-o/s Inv.843	CQ	634566
wmw	811266	2074	201	2101	135 Pacific Engineerin	fPol O/S payment	CQ	668912
©1/2001i	811277	2074	201	2101	135 Pacific Engineerin	l Pol O/S payment	CQ	668914
'oswomi	7403631	207	4201	4123	135 Pacific Engineerin	IPoicce - o/s Inv. 19	CQ	634126
12/31/01T1;	811276	2074	201	2101	135 Pacific Engineerin	IPol O/S payment	CQ	668914
23-12-5004	13628	207	4201	4123	135 Pacific Engineerin	O/SaneaisPmt[M	CQ	79898T
mMCOO		207	4201	4123	135 Pacific Engineerin	lwCD Pol.O/S Invoices	CQ	631746
1182002	813849	2074	201	2101	135 Pacific Engineerin	IPolO/S	CQ	670455
r vifioof	811426	2074	201	2101	135 Pacific Engineerin	IPolBce	CQ	669611
11/4/2000	735622	207	4201	4123	135 Pacific Engineerin	IPOL-O/S Pymnts for 1 ;CQ	631746	43,50576j
!	735648	207	4201	4123	135 Pacific Engineerin	IPOLO/SClaims fori	CQ	631746
11/4/2000)								42,263.30!
*21-12-2004	13634	207	4201	4123	135 Pacific Engineerin	lPmt for O/S invoices ICQ	798732	40,525.15!
12/31/2001	811271	2074	201	2101	135 Pacific Engineerin	(Pol O/S payment	CQ	668912
! lif/2000	735653	207	4201	4123	135 Pacific Engineerin	jNCD Pol.O/S Invoices	CQ	631746
!!	735638	207	4201	4123	135 Pacific Engineerin	jPOL-O/S Pymnts in 19	CQ	631746
1/4/2000*								39,588.45
1	735639	207	4201	4123	135 Pacific Engineerin	IPOL-O/S Pymnts in 19	CQ	631746
twCOO								39,154.39 j
i lif/2000	735654	207	4201	4123	135 Pacific Engineerin	iNCD-Pol.O/S Invoices	CQ	631746
12/31/2001'	811285	207 4	201	2101	135 Pacific Engineerin	IPol O/S payment	CQ	668912
i 11/4/2000	735661	207	4201	4123	135 Pacific Engineerin	jNCO-POL:O/s Invoices	CQ	631746
12/31/2001	811287	12/07 4	202	2101	135 Pacific Engineerin	IPOL O/S Payment	CQ	668912
11/4/2000	735662	i 207	4201	4123	135 Pacific Engineerin	IMCD-Pol O/S Invoices	CQ	631746
11/4/2000	735664	207	4201	4123	135 Pacific Engineerin	jMCD-Pol:O/S Invoices	CQ	631746
11/2000	735656	207	4201	4123	135 Pacific Engineerin	iNCD-Pol:O/S Invoices	CQ	631746
23-12-2004	13531	207	4201	4123	135 Pacific Engineerin	O/S Arrears Pmt (Def	CQ	798987
11/4/2000	735650	207	4201	4123	135 Pacific Engineerin	IPol:O/S Invoices for	CQ	631746
1V4/2000	735657	20	4201	4123	135 Pacific Engineerin	INC-POL:O/S Invoices	CQ	631746
25-12-2001	798856	2074	201	2101	135 Pacific Engineerin	JPOUCE-O/S Arrears p	CQ	670138
I 102002	813339	2074	201	2101	135 Pacific Engineerin	JDEF-O/S Repair /Parts	CQ	638528
112/31/2000	749346	2074	4201	4123	135 Pacific Engineerin	JDEF-O/S Repair /Parts	CQ	638528
mm	811273	2074	201	2101	135 Pacific Engineerin	jPol O/S payment	CQ	668911
i216/2006	1068655	207	1906	1101	127 Pacific Equities J.	Jan-Mar06 (Rent Ind	CQ	831288

and maintenance conducted between May and December 2002 for the vehicles belonging to the Royal PNG Constabulary and the Commissioner of Police. They claimed that despite repeated demands to the Office of the Commissioner of Police, the Police was unable to make the payments as verbally agreed to between the Company and the Police. That letter also referred to section 5 notice

requirements under the *Claims By and Against the State Act*, 1996. The letter in part reads;

. In these circumstances we believe our client is able to satisfy the requirements to show cause pursuant to section 5(2) (c) of the Claims By and Against the State Act, 1996 for the principal legal advisor to extend the period within which to give notice of this claim.

We therefore seek your approval to treat this correspondence as notice of our clients claim pursuant to section 5 of the Act and look forward to your confirmation in 30 days." (Refer to OD"3")

Attached to that letter was correspondence between the General Manager of the Company and Sam Inguba, Commissioner of Police including computer generated printout of the invoices issued for the Company's Spare Parts and Workshop for all jobs conducted on Police Vehicles from May to December 2002. **(Refer to OD"3")**

The Writ of Summons No. 307 of 2004 was registered and filed at the Waigani National Court Registry on 25th March 2004. The party named to this proceeding was the Independent State of PNG as the Defendant. The Commissioner of Police was not named as a defendant. **(Refer to NC"4")**.

The Statement of Claim and the pleadings lack substance as it does not relate the complaint to the State. The omissions noted are:-

- a. No reference as to the state's responsibility to be vicariously liable to the complaint made against the Commissioner of Police for non-payment on the provision of work performed under a verbal agreement to provide maintenance and spare parts to its vehicle.

The pleading does not disclose what the State has incurred as a result of the failure by its agent namely the Royal Papua New Guinea Constabulary ("RPNGC") to settle the debts.

The relevant parts in the pleadings (See paragraph 2, 3, 4, 5, &6 of WS) relate to the correspondence and matters raised between the Commissioner of Police and the Company.

The request to maintain and service all police vehicles is not supported by any contractual arrangement where State Entity such as the Police Force must comply with the Tender requirements for the procurement of goods and services.

The pleadings also include reference to section 5 notice requirements and the State's failure or refusal to acknowledge the written request to extend time. In fact there is no correspondence or notation sighted to indicate that the State had in fact responded given the nature of the quantum of the claim which is over K1 million.

Warner Shand Lawyers (per Mr. Frizzell) filed Notice Motion on 25th March 2004 seeking orders that "the proceedings are deemed to have been issued upon notice pursuant to section 5(2)(c)(ii) of the *Claims By and Against the State Act 1996*. There is also a prerequisite that sufficient cause be shown by the Plaintiff that the Principal Legal Adviser i.e. the Attorney General has not given his/her approval to grant further extension to file a claim against the State. Mr. John Liu, Financial Controller for the Claimant Company provided Affidavit in support of the application restating the work done on police vehicles and the demand for payment of the debt.

It is noted that the Solicitor General (Mr. Kuvi as acting Solicitor General) filed its Notice of Intention to Defend the Claim on 13th May 2004. That was done in

accordance with, section 9(a) (i) of the *Claims By and Against the State Act, 19%* which requires 60 days after the writ has been served on the State. No further documents titled Defence was sighted as filed by the State in relation to the matters pleaded in the Statement of the Claim.

On 28th July 2004, Mr. Mark Vara, Clerk employed at Warner Shand Lawyers deposed in his Affidavit of Service filed with the Court to the effect that a letter dated 16th July 2004 addressed to the Solicitor General advising application will be made to enter judgment in default in accordance with National Court Practice Directions. (Refer to NC"8")

A Draft Order filed on 8th September 2004 and ordered by the Motion Court Judge on 18th August 2004 confirmed compliance with section 5(2)(c)(ii) of the *CBSA Act*. The Order was entered by the Registrar on 26th August 2004. (Refer to NC"9")

Default Judgment was filed by the Plaintiff on 8th September 2004 as ordered by the Court on 25th August, 2004 and entered by the Registrar on 3rd September 2004. The Order related to the failure of the Defendant to file its notice of intention or defence and the judgment in default was ordered in favor of the Plaintiff in the sum of K2,074,169.64 and interest on that sum accruing at the rate of 8% per annum from 25th March 2004 until payment. (Refer to NC"4" & NC"10").

Certificate of Judgment pursuant to subsection 13(2) of the *CBSA Act* was filed by the Plaintiff on 13th September 2004 basically certifying that the Plaintiff obtained default judgment in the sum of K2,074,169.64 and interest. The Registrars certification also included the following clause:-

the judgment maybe satisfied; or

the State proposes to take further action in this matter and satisfaction of judgment cannot take place.

15. Pursuant to section 14 of the *CBSA Act*, Mr. Francis Kuvi, then acting Solicitor

General expressed his concern over the Certificate of Judgment to Mr. Mundua Kua, the lawyer having carriage of the matter. Those concerns were expressed to Mr. Kua in an Internal Minute dated 14th September 2004. Mr. Kuvi's Minute states as follows

.. You are the action officer in this matter on behalf of the State.

I will not endorse this Certificate of Judgment for payment until I receive a detailed brief from you explaining how this judgment of more than two (2) million Kina has been allowed to go through by you by not filing both Notice of Intention To Defend and Defence within time.

You must also note that we are still within the 40 days appeal period as of the 25th August 2004 in case there may be grounds for lodging an appeal or applying to set aside this default judgment if it has been obtained by way of ex parte application." (Refer to SG"13").

The same Minute also contains a handwritten note from the Secretary & Attorney- General dated 27th September 2007 with the directive to Mr. Kuvi *"Pis get the explanation from Mr. Kua and if it is not satisfactory the officer must be charged. (Signed)."* (Refer to SG"13")

It seems that the Minute and direction from the Attorney General & Secretary for Justice [including that of the Solicitor General] to Mr. Kua did not provoke an immediate response from Mr. Kua. Mr. Kua was not concerned about the urgency and the fact that the State was to pay almost K1.5 million for the debt. Mr. Kuvi wrote to Mr. Kua by Minute dated 5th October 2004 and stated;

"I refer to my minute to you dated 14th September 2004 regarding the above matter. You have not responded to that Minute.

You are to provide an explanation as to how a Default Judgment was entered against the State in excess of ₦2 million in this matter.

This is a substantial amount of money and we need to do something about the judgment." (Refer to SG"14")

The records from the SG file indicate that no further action was taken against Mr. Mundua Kua and that he was not charged by the acting Solicitor General for insubordination and professional recklessness as a practicing lawyer in the State Office. However in the interest of the State, the then acting Solicitor General did not take it upon himself as the chief litigation officer of the State to institute an appeal upon review of the Certificate of Judgment in order to properly deal with the issues of liability and quantum with the Plaintiff/Claimant.

The State engaged the services of Paul Paraka Lawyers as evidenced by the Notice of Change of Lawyers acting for the Defendant State filed with the Court on 30th November 2004. Mr. David Dusal of Paraka lawyer wrote to the Commissioner of Police relating to the issue of the debt owed to the Company and invited the Commissioner of Police to comment on the allegations raised in the Plaintiffs Statement of Claim.

On 8th August 2005, Paul Paraka Lawyers through its lawyer Mr. David Dusal provided its brief to the acting Solicitor General outlining its review on the file. The lawyer concluded as follows;

"Upon receiving instructions, we conducted a file search on the 29th of November 2004 and ascertained that the Plaintiffs Application for Default Judgment was granted in favor of the Plaintiff in the sum of K2,074,169.64 per annum from 25th March 2004 until payment

for failure of the Defendant to file Notice of Intention to Defend and Defence. There was no appearance on behalf of the Defendants. Also a Certificate of Judgment Pursuant to Subsection 13(2) of the Claims by and Against the State Act was filed by the Plaintiff on the 13th September 2004.

We have closed our file and have the matter referred back to your office as the matter was concluded prior to us receiving instructions."

The Law firm ceased acting for the Solicitor General on 1st August 2005. It is obvious from the beginning that the matters reviewed by Paul Paraka lawyers was clearly raised by Mr. Kuvi in his memo to Mr. Kua on two separate occasions weeks apart. There was no reason for the brief out to Paul Paraka Lawyers as the worst was already a known fact in the Office when the Certificate of Judgment was served on the Office. The significant findings by Mr. Dusal were that "*non appearance on behalf of the Defendant*" at the hearings was the factor culminating in the orders made against the State. (Refer to **SG"18"**)

On 5th March 2008, Mr. Neville Devette, acting Solicitor General sought advise from the Commissioner of Police as to the payment of the liquidated sum of K2,074,169.64 and that office record indicated that no payment has been made since 25th August 2004. (Refer to **SG"19"**)

list of Relevant Documents

Ref No. Document (WS 307 of 2004 or SG151/04) NC"1" National Court Writ of Summons

File Cover Notations

SG "2"	SG 151/04 File Cover Notation
OD "3"	Letter from Warner Shand Lawyers to Solicitor General dated 10* February 2004 re: Notice of Claim against the State Pacific Engineering & Repairs (PER).

Attachments:

Letter to Sam Inguba dated 23 January 2003 from Pi-Na LuLiu, General Manager, PER on outstanding payments of Invoice
Outstanding Invoice for May to December 2002.

- NC "4" Writ of Summons
- NC "5" Notice of Motion filed 25/03/04-section 5 notice
- NC "6" Affidavit of John Liu dated 23rd March 2004 re: outstanding debts and section 5 notice and correspondence between Commissioner of Police and the company on the debts
- NC "7" Notice of Intention to Defend dated 11th March 2004 filed 13th May 2004 by Solicitor General.
- NC "8" Affidavit of Service by Mark Vara (Warner Shand) filed on 25th July 2004 re: *default judgment and Attachment "A" in relation to the document served states; "Letter from Warner Shand Lawyers to the Solicitor General dated 1st July 2004 advising application will be made to enter judgment in default in accordance with National Court Practice Directions."*
- NC "9" Draft Order filed 8th September 2004 and signed by his honor Gabi AJ on 25^h August 2004 in relation to confirmation of section 5 notice
- NC "10" Order as per Draft Order of 25th August 2004 and filed in court on 26th August 2004.
- NC "11" Default Judgment ordered 25th August 2004 and filed on 8th September 2004.
- NC "12" Certificate of Judgment pursuant to Subsection 13(2) of the Claims By and Against the State Act 1996. filed on 13th September 2004.
- SG "13" M[^]te dated 14th September 2004 from Mr. Kuvi (a/SG) to Mundua Kua re: K2, 074, 169.64 Default Judgment-Pacific Engineering & Repairs limited-WS No. 307 of 2004. Attachment:

1. Certificate of Judgment with directions from AG re: brief on the order.

- SG "14"** Minute dated 05th October 2004 from Mr. Kuvi (a/SG) to Mundua
Kua re: K2, 074, 169.64 Default Judgment-Pacific Engineering &
Repairs limited-WS No. 307 of 2004
- NC "15"** Notice of Change of Lawyers filed on 30th November 2004 by Paul
Paraka Lawyers re: acting for the State as Defendants lawyers
- SG "16"** Letter by Mr. David Dusal of Paraka Lawyers to the Commissioner
of Police dated 29th November 2004, re: WS 307 of 2004 and
payments
- SG "17"** Letter or brief to SG by Mr. Dusal on 08th August 2005 on review
and conclusion on the Judgment Order of 25th August 2004
- NC "18"** Notice of Ceasing to Act filed by Paraka Lawyers on 1st August 2005.
- SG "19"** Letter by Mr. Devette to Commissioner of PoEce dated 5th March
2008 re: payments on the Judgment Order of 25th August 2004.

indings

Claim liability and Quantum

The claim for liability is solely the responsibility of the Department of Police with respect to the unpaid invoice. The delay in payment is also caused by the Department of Finance though it very much the fault of Police Force that no valid contract exists to enforce such a claim.

• Claimant

The Plaintiff/Claimant has no valid cause of action against the State as it does not show as to how the State can be held liable for the arrangement that existed between the Department of Police and the Claimant without a lawful contract in existence.

- **Attorney-General and Solicitor General**

The Office of the Attorney General and Solicitor General failed to file the NOID and defence on time therefore allowing the Claimant with the right to obtain a default judgment. The State had sufficient grounds to deal with the claim in respect of section 5 notice requirements as the claim was well out of time.

Compliance issues

Claim By and Against the State Act, 1996

The claim was out of time but State failed to file defence thereby allowing the claimant to get order of the court as to extension of time to file claim.

NEC Decision 150 of 2003

The claim was in excess of K1 million but no payment has been made to date. There is a high likelihood that contempt proceedings can be instituted by the Claimant to enforce the judgment against the State.

Statute of Frauds and Limitation Act

Not considered as it is not applicable to the matter under review.

Public Finances (Management) Act, 1996

The Department of Police failed to comply with tendering procedures and that no valid contract exists where it involves State Institutions such as the police force in terms of procuring services such as maintenance and spare parts for vehicles and equipment.

The Commission however notes that despite our requests for further information from the witnesses namely Sam Inguba (former Commissioner of Police); Tom Kulunga, Hodges Ette (Royal PNG Constabulary) were not able to attend the hearings nor provide any further information. The Commission only refers to evidence and documents it has on hand to make certain findings.

THE REVIEW OF FURTHER AND ADDITIONAL INFORMATION

33. The file was opened on 13th October 2008 and the Transcript of Proceedings is attached for ease of reference (See pages 875 to 883 of the Transcript). A review of all the responses either by telephone, personal interviews conducted and correspondences with documents have been collated and filed for reference. The relevance of these materials based on our assessment and review to date reveals that:-

The Pacific Engineering and Repairs Limited have provided services to the Police on a daily basis. Payments by the Police were not forthcoming and thus accumulated into the claim which was ordered by the Court under a default judgment for liquidated sum of **K2,074,169.64** and interest plus costs for the proceedings.

The default judgment was properly entered by the National Court in 2004. Confirmed by Paraka Lawyers who reviewed the files and that Mr. Kua was negligent in the discharge of his duties as a lawyer having carriage of the matter on behalf of the State. The Solicitor General at that time, Mr. Kuvi refused to sign a Certificate of Judgment because Mr. Kua did not comply with the direction to furnish a brief to his Office on the default judgment. It is important to note the concerns of the then Solicitor General, Mr. Devette on 5th March 2008 to Mr. Hodges Ette, Principal Legal Officer, Commissioner of Police on the payments though no response was received and recorded. (Refer to Document "**SG 19**")

Due to our persistence to obtain information and data in relation to the payments by the Police, the Commissioner of Police has furnished to the COI computer printout of payment that have been made to PER to discharge the liability for the 2002 claims. The Commissioner of Police

provided evidence of such payment though it does not include the interest that has accumulated on the default judgment ordered by the Court on August 2004. That was confirmed by *Superintendent Orlando A. Iware*^ DPS, Director Transport. The appropriate documentation is on file, and that indicates that some payments have been made to reduce the debt. The Company through Mr. Liu has advised that it does not intend to pursue the claim due to the receipt of payments, but it has not indemnified the Commissioner of Police on the default judgment which is now outstanding for 4 years.

d) From our reconciliation of the invoices and payments made by RPNGC and based on the records of Pacific Engineering and Repairs Limited a total amount of K1,503,499.86 has been paid to PER. The break of payments received is indicated below. **(Refer to the bulk documents supplied by PER to COI on 19th November 2008)**

125, 522.75

279, 086.58

A 419, 940.01

A 338, 638.28

A 340.262.24

K1. 503. 499.86

That outstanding amount is **K570,719.78** plus interest that has accumulated since September 2004 and the costs of the proceedings.

Transcript of Proceedings

- COIFINANCE 32 dated 13th October 2008

COIFINANCE 59 dated 26th January 2009 - Mr. Mundua Kua's evidence as to his failure as state counsel on record to attend court hearings and entry of default judgments.

COIFINANCE 61 dated 28th January 2009 - Mr. Francis Gambu Kuvi's evidence on the Minutes he wrote to Mr. Kua requesting an explanation of the default judgment.

Findings

From the evidence received by the Commission, the findings are as follows:-

There was non-compliance with section 5 of the *Claims by & Against the State Act* and the State's failure to promptly advise the Claimant that the claim was out of time.

The Statement of Claim under the proceedings disclosed no cause of action against the State but the Commissioner of Police,

The Solicitor General and/ or his officers failed to conduct due diligence on the claim in consultation with the Commissioner of Police.

The Commissioner of Police did not give due regard to the provisions of tendering and procurement' under the *Public Finances (Management) Act, 1996*.

Payments made by the Commissioner of Police to the Company amount to K1,503,719.78 with the balance of K570,719.78 remaining and including the interest having accrued to date.

Recommendations

The Solicitor General in consultation with the Office of the Commissioner of Police and the Department of Finance to take necessary action to settle the balance of default judgment (in arrears) and interest accrued to date.

The Commissioner of Police to consider procurement and tendering procedures when engaging service providers at the expense of the State.

Consequential Legislative Reforms

- > *Public Finances (Management) Act*- provisions to deal with offending Departments and State Entities for non compliance and blatant disregard of the government '*procurement and tendering*' process.

(d) Pacific Helicopters Ltd

Parties

For the State

(a) Solicitor General & Attorney General

For the Plaintiff

Pacific Helicopters Limited

Pacific Properties & Investment limited

Shepherd Aviation Limited

Others (if any)

Department of North Solomons (WS 345 of 1997)

Department of National Disaster & Emergency (WS 346 of 1997)

Department of Defence (WS 347 of 1997)

Department of Civil Aviation (WS 1200 of 1997)

Department of Village Services (WS 1209 of 1997)

The State (WS 1210 of 1997), (WS 1710 of 2000)

Douglas John Rosser, CEO, CAA (WS 1439 of 2003)

Eric Arni (National Disaster & Emergency) (WS 1302 of 1997)

Terms of Reference

The applicable Terms of Reference to this claim is **TOR 2,3 and 4**

Documents and Investigations conducted at

The documents the subject of review and examination were conducted at

National Court
Department of Finance
Pacific Helicopters Limited

The Relevant Facts

PACIFIC HELICOPTERS LIMITED operated helicopter services in PNG and is based at Goroka, Eastern Highlands Province. The Company provided its helicopters for charter and hire to various government line agencies of government (Police, Prime Ministers Department, Electoral Commission, Civil Aviation, Department of Village Services and Provincial Affairs, Department of Defence, Department of North Solomon's).

The company instituted several court proceedings between 1996 and 2000 against the State and its line agencies due to the moneys owing for helicopter services provided to the various government agencies amounting to an aggregate of over K5 million. The proceedings are summarized below have been acknowledged and admitted by the State as having no defence at all to the claim.

*WS 345 of 1997 of 1995 Pacific Helicopters -v- Department of North Solomons
& State*

Summary judgment for K1,236,111.85 together with interest at the rate of 8% per annum from the date of filing of the Writ to date of payment of judgment debt in full.

**(Judgment entered on 24 July 1998 per Sawong J at Goroka)
(Certificate of Judgment entered 26th August, 1998)**

*WS 346 of 1995 Pacific Helicopters PL -v- National Disaster Surveillance &
Emergency Services & State*

Claim for providing helicopter charter for use of the NDS&ES from June 1993 to July 1994, the total sum of the unpaid invoices totaling K1,539,626.47.

Summary judgment for K1,539,626.47 together with interest at the rate of 8% per annum from the date of filing of the Writ to date of payment of judgment debt in full.

(Judgment entered on 24 July 1998 per Sawong J at Goroka)

(Certificate of Judgment entered 26th August, 1998)

WS 347 of 1995 Pacific Helicopters P/L -v- Department of Defence & State

Claim for providing helicopter charter for use of the DoD from July 1994 to August 1994, the total sum of the unpaid invoices totaling K10,566.16.

Summary judgment for K10,566.16 together with interest at the rate of 8% per annum from the date of filing of the Writ to date of payment of judgment debt in full.

(Judgment entered on 24 July 1998 per Sawong J at Goroka)

(Certificate of Judgment entered 6th August, 1998)

WS 1200 of 1997 Pacific Helicopters P/L -v- Sam Geno, Director General for Civil Aviation & State

Claim based on various agreements made between the parties for providing helicopter charter for use of the CAA, August 1994, May 1996 and November 1996

Default judgment for K185,284.24 together with interest at the rate of 8% per annum from 20th November 1997 until full payment of judgment debt in full.

(Judgment entered on 20 October 1999) (Certificate of Judgment entered 7th June 2002)

WS 1209 of 1997 Pacific Helicopters P/L -v- Colin Travertz, Secretary, Department of Village Services & Provincial Affairs & State

Claim based on various agreements made between the parties for providing helicopter charter for use of the Department of Village Services & Provincial Affairs

Final judgment for K51,045.98 together with interest at the rate of 8% per annum from 28th November 1997 until full payment of the debt. (Judgment entered on 3rd September 1999) (Certificate of Judgment entered 24th February 2000)

WS 1439 of 2003 Pacific Helicopters Ltd -v- Douglas John Rosser, Director of CAA, CAA of PNG and State.

A claim that PHL entered into an agreement with Turner Aviation of Australia for the purpose of assisting in firefighting operations in Australia for a period of four months. PHL agreed that it would hire to TA its PNG registered Bell 212 helicopter (registration No, P2-PAX) for the sum of AUD\$1,500 per hour for a period of four (4) months. In order for PHL and TA to perform the purpose of the agreement, it was necessary for PHL to have permission from the Australian Civil Aviation Safety Authority (CASA) to operate the said helicopter in Australia. TA applied to CASA on behalf of PHL for permission for PHL to operate the said helicopter in Australia. On 2nd December 2002, CASA did not approve the routine operations of PNG registered aircraft in Australia due to difficulties with

entry certification and the conduct of continuing safety surveillance of PNG registered aircraft by PNG CAA. PHL sued the Director of PNGCAA and the State for its failure or neglect of duty to carry out their duties of inspections and surveillance to the standard required to demonstrate compliance with International Civil Aviation Safety Requirements.

PHL is claiming damages for breach of contract in a sum equivalent at the date of judgment to AUD\$360,000.00 with interest according to statute and costs.

An Order was made by the National Court on 17th December 2003 and entered by the Registrar on 22nd December 2003.

The Order of the Court is as follows:

That PHL be at liberty to enter judgment in the sum of Kina equivalent to AUD360,000.00 at the official BPNG exchange rate as at date of judgment.

That the State pay interest for date of issue of the Writ according to statute.

That the State pay the Plaintiffs costs of an incidental to this application.

The Certificate of judgment was issued by the Registrar on 6th August 2004 for the sum of I<922,367.41 being the sum awarded to PHL.

WS 1302 of 1997 Pacific Helicopters Ltd -v- Col. Eric Am, OBE as the Director General for National Disaster, Surveillance and Emergency Services and State.

Default judgment entered against the Defendants jointly and severally for the sum of K610,194.37 including legal costs incidental to the proceedings.

CLAIMS BY PACIFIC PROPERTY LIMITED AND SHEPHERD AVIATION LIMITED AS PART OF THE PACIFIC HELICOPTERS GROUP OF COMPANIES

Our examination of the court proceedings related to PHL, two particular matters were also listed as being part of the PHL proceedings. The two matters are discussed below;

(1) WS 1210 of 1997 Pacific Property P/L trading as PBF -v- State

A claim made against the Department of Health and National Judicial Staff Service respectively. The Plaintiff entered into an agreement or various agreements with the government agency at Goroka in April 1995, August, 1995, October 1995, August 1996, September 1996, October, 1996 and November 1996 for provisions of building and maintenance services identified by the Agents.

-The service provided to the Department of Health was to upgrade the STD clinic at Goroka Base Hospital.

-The service provided to NJSS was for the building of Kainantu Court House. The accumulated costs on the unpaid invoices totaled K13,286.58 with interest accrued at the agreed rate of 1.5% at I<2,870.72.

It was noted by the Commission that section 5 notice was pleaded in the WS (paragraph 2 of the Statement of Claim).

It was noted on the court documents that Final judgment for K1 6,157.32 together with interest at the rate of 8% per annum from 28th November 1997 until full payment of the judgment debt was entered by the court on 15th July 1999.

**Certificate of Taxation dated 18/10/99 and Bill of Costs taxed on 5th October 1999 at K1,914.55-
(Certificate of Judgment filed 11th November 1999)**

(2) W5T710 of 2000 Pacific Helicopters Ltd -v- State

f (Millennium Robbery incident involving a helicopter)



A claim made against members of the Royal PNG Constabulary (RPNGC) for unlawful damage caused to aircraft owned and operated by PHL, namely an Aerospatiale Ecuviel Helicopter AS 350 BA, Serial Number 1181 bearing registration Mark P2-PHA (the Aircraft). On or about the 17 December 1999, the Aircraft was hijacked by armed criminals. At that time, members of RPNGC were alleged to have intentionally damaged the Aircraft by gunshot, whilst it was in flight without the consent of the owner.

PHL claimed various heads of damages by claiming that due to the /, negligence of the members of the RPNGC taking reasonable care to avoid causing damage to the aircraft, the unlawful discharge of firearm thus rendering the Aircraft a total loss to the Company.

It was also noted from the court documents that section 5 notice pleaded in the WS (paragraph 2 of the Statement of Claim).

The claim by PHL;

a. sum of USD737,375.00 being damages for loss of the Aircraft."

The sum of K50,500.00 being damages and consequential loss and expense.

The sum of AUDI2,036.00 being loss paid to BP PNG Ltd and CCR by PHL.

Interest upon all the damages awarded to the PHL at the rate of 8per centum per annum payable on and from the date of the service of the Writ.

Costs

Other orders

Judgment that (1) the State pay PHL US\$1,622,401.82, A\$27,896.04 and K2,803.42 and (2) The Defendant pay the Plaintiffs costs of the proceedings concluded on 3 September 2004, to be agreed or taxed. The judgment endorsed by the Registrar to take effect on 17th December 2004. The Orders made on 17th December 2004 was entered by the Registrar on 31st January 2005.

The Company successfully obtained default judgments on each of the proceedings filed with the National Court. Certificate of Judgment was authorized by the Solicitor General and submitted to the Department of Finance for payments. The Department of Finance commenced payments by installments commencing May 2000 amounting to K4,360,000.00. A payment in excess of Kl million was paid out of *Trust Fund Suspense Account No. 2*.

**CONSOLIDATED PROCEEDINGS UNDER ORIGINATING SUMMONS NO
793 OF 2004**

(Refer to the decision of Justice Davani in OS 793 of 2004 Pacific Helicopters Limited & Pacific Property & Investment Limited & Shepherd Aviation Limited -v- Thaddeus Kambanei, Secretary for Department of Finance and the Independent State of PNG (2007) Unreported 29th November 2007)

The proceedings were instituted by PHL to enforce outstanding judgment and to deal with the State's failure to pay judgments. The plaintiff .obtained separate

judgments against the defendants for amount in excess of K14 million. The State paid approximately K8.4 million. The sum outstanding on 11 judgments is K8,437,094.44.

The proceedings relate to WS 347 of 1995, WS 346 of 1995, WS 345 of 1995, WS1209 of 1997, WS 1305 of 1997, WS 1200 of 1997, WS 1210 of 1997, WS 1056 of 1999, WS 316 of 2000 and WS 1439 of 2002 where Certificates of Judgments were served upon the Solicitor General.

The Court observes at page of the judgment that "11 judgment debts have been outstanding/ or more than 3 years and clearly a very unreasonably long period of time. Interest has continued to run on all outstanding amounts. Section 14(5) of the CEASA recognises the plaintiffs right to apply for Mandamus. The plaintiff is entitled to apply for Mandamus and other appropriate orders, the other appropriate order being for the first defendant to appear and be examined as to budgetary appropriations towards payment of judgment debts, if they have applied and if not, to explain the order in which these monies were applied and when the plaintiff will be paid out."

Her honor (Davani J) draws attention to lack of management and professional oversight by the Office of the AG/SG which has caused the State with the burden of settling huge debts due to the neglect and don't care attitude of the state lawyers. Some aspects of her judgment are relevant to the inquiry.

PAYMENTS BY THE DEPARTMENT OF FINANCE

The State commenced paying the plaintiff in May 2000 by instalment and so far paid K4.360 million by 1 July 2006.

On 16th October 2000, the Managing Director wrote to Sir Mekere Morauta, then Prime Minister and Treasurer seeking his personal intervention in the matter of outstanding debts owed to Pacific Helicopters Limited by a number of

Government departments and institutions. On 5th December 2000, the then Prime Minister and Minister for Treasury, Sir Mekere Morauta, wrote to Secretary, Department of Finance and Treasury in reference to the letter of 16th October 2000 directing the Secretary to settle the claim by end of 2000.

The ministerial direction was seen to be in direct conflict with the roles and responsibilities of the office of the Solicitor General under the CBAAS Act.

Mr. Zacchary Gelu, then acting Solicitor General advised the then Secretary for Finance, Mr. Kambanei by letter dated 5th September 2002 that the Company had successfully secured judgments against the State and its various departments and that the State was indebted to the Company by way of judgments in a total sum of K5,128,024.00 inclusive of costs and interests to date. Copies of all the relevant judgments were attached including a reconciliation of amounts owed less the amounts paid to date.

The letter further stated that the principal sum was K3,411,805.00 and the accrued interest was K1,716,218.00. The total sum K5,128,024.00 less paid K1,218,599.93 on 16th January 2002 left with the balance outstanding at K3,901,817.93 to be paid as of the date of the letter.

The Department of Finance cashbook shows that payments by instalment were made between 2000 and 2006 totalled **K9,495,359.02** (inclusive of judgment debts). We refer to Table 1 below;

Table 1

Date	Account				Details	Cheque No.	Payments
19/05/2000	207	4201	2101	135	Re: Pacific Helicopter	617891	47,379.92
30/05/2000	207	4201	2101	135	SAR-Hire of Helicopter	618817	25,096.50
23/11/2000	207	4201	4123	135	DEF-O/S payment on arr	633820	701,621.00
19/12/2000	207	4201	2101	135	Pmnt of Invoice Nos.	636621	43,513.95

5/01/2002	207	4201	2101	135	O/S Judgment Debts-	670055	226,205.07
5/01/2002	207	4201	2101	135	Balance of Payment (670259	1,000,000.00
17/06/2002	207	4201	2101	121	206(VM) hire of Helicopter	688579	44,572.00
17/06/2002	207	4201	2101	121	206(VM)hire of Helicopter	688579	44,472.00
2/07/2002	207	4201	2101	135	Hire to cater for El	690141	2,000,000.00
12/07/2002	207	4201	2101	135	Services rendered due	691216	1,000,000.00
25/09/2002	207	4201	2107	135	C/Order W.S.N0.347 o	697561	500,000.00
23/10/2002	207	4201	2107	135	Part Pay. WSNol305o	700346	201,817.93
29/11/2002	207	4201	2107	135	C/Order	704308	50,000.00
25/01/2003	207	4201	2107	135	Part Payment-Outs. Co	710196	230,000.00
17/02/2003	207	4201	2107	135	Payment for O/S Judgment	712250	80,000.00
30/05/2003	207	4201	2107	135	P/Pymt of Court Judgment	722463	150,000.00
28/07/2003	207	4201	2107	135	Pmnt o/s c/order. In	728499	80,000.00
23/09/2003	207	4201	2107	135	Pmt o/s c/order (par	734229	80,000.00
27/11/2003	207	4201	4123	135	Certificate of Judge	740919	20,000.00
4/02/2004	207	4201	4123	135	Pmt of replacement c	768173	20,000.00
24/06/2004	207	4201	2107	135	Being for o/s judgment	782286	100,000.00
8-12-2004	207	207	1104	144	Charter Helicopter F	797342	47,520.00
26/07/2005	207	4201	2107	135	Payment of O/S Court O	816101	250,000.00
31/08/2005	207	4201	2107	135	Pmt for o/s court or	818849	100,000.00
25/10/2005	207	4201	2107	135	O/S Court Orders cla	822375	200,000.00
26/10/2005	410	3	0	0	O/S Court Order	822397	1,086,017.00
23/12/2005	207	4201	2107	135	O/S C/Order 349/02	827182	100,000.00
3/02/2006	207	4201	2107	135	O/S C/Order claim	830543	300,000.00
23/03/2006	207	4203	1104	144	Pmt hire of helicopter	833348	75,636.00
23/03/2006	207	4203	1104	144	Pmt hire of helicopter	833348	75,636.00
27/03/2006	207	4201	2107	135	O/S C/Order	833715	100,000.00
11/05/2006	207	4201	2107	135	O/S C/Order Pmt	836499	50,000.00
13/06/2006	207	4201	2107	135	O/S C/Order Pmt	838293	200,000.00
4/07/2006	207	4201	2107	135	O/S C/Order Pmt	839501	236,017.65
10/08/2006	207	4201	2107	135	Chopper Hire for Hon	841817	29,854.00
							9,495,359.02

The payments shown under Table 2 indicate that all successful proceedings between periods 1995-2000 varied from about K1 0,000 to over K1.0 million.

The following payments which are extracted from Table 1 and referred to under Table 2 reflect payments for judgments debts against the State which amount to K4,360,057.65 for the period under our review.

Table 2

	Date	Account				Details	Cheque No.	Payments
1	5/01/2002	207	4201	2101	135	O/S Judgment Debts-	670055	226,205
2	25/09/2002	207	4201	2107	135	C/Order W.S.NO.347 o	697561	500,000
3	23/10/2002	207	4201	2107	135	Part Pay.WS Nol305 o	700346	201,818
4	29/11/2002	207	4201	2107	135	C/Order	704308	50,000
5	25/01/2003	207	4201	2107	135	Part Payment-Outs.Co	710196	230,000
6	17/02/2003	207	4201	2107	135	Pymt for O/S Judgment	712250	80,000
7	30/05/2003	207	4201	2107	135	P/Pymt of Court Judgment	722463	150,000
8	28/07/2003	207	4201	2107	135	Pmnt o/s c/order. In	728499	80,000
9	23/09/2003	207	4201	2107	135	Pmt o/s c/order (par	734229	80,000
10	27/11/2003	207	4201	4123	135	Certificate of Judge	740919	20,000
11	4/02/2004	207	4201	4123	135	Pmt of replacement c	768173	20,000
12	24/06/2004	207	4201	2107	135	Being for o/s judgment	782286	100,000
13	26/07/2005	207	4201	2107	135	Payment of O/S Court O	816101	250,000
14	31/08/2005	207	4201	2107	135	Pmt for o/s court or	818849	100,000
15	25/10/2005	207	4201	2107	135	O/S Court Orders cla	822375	200,000
16	26/10/2005	410	3	0	0	O/S Court Order	822397	1,086,017
17	23/12/2005	207	4201	2107	135	O/S C/Order 349/02	827182	100,000
18	3/02/2006	207	4201	2107	135	O/S C/Order claim	830543	300,000
19	27/03/2006	207	4201	2107	135	O/S C/Order	833715	100,000
20	11/05/2006	207	4201	2107	135	O/S C/Order Pmt	836499	50,000
21	13/06/2006	207	4201	2107	135	O/S C/Order Pmt	838293	200,000
22	4/07/2006	207	4201	2107	135	O/S C/Order Pmt	839501	236,018
								4,360,057.65

The following were noted in respect of Payment No.16 in Table 2 as payments made out of funds not legally available i.e. Trust Funds Suspense Account # 2.

RECONCILIATION OF PAYMENTS-OVERPAYMENTS

The volumes of documents sighted seem to indicate that the Department of Finance and the Office of the Solicitor General had a very difficult task with record keeping and there was a very serious possibility that over payment of the claim was to have exceeded court judgments, interest and costs.

The Commission take notes that the lack of proper accounting of the payments has contributed to massive loss to the State in terms of excessive overpayments and fraudulent misappropriation of state monies. The Department of Finance and the Office of the Solicitor General's lack of coordination over scrutiny of the payments is a major area of concern and requires urgent scrutiny by both offices. The concern was raised by Mr. Kumura (then acting Solicitor General) in 2003 by letter dated 21 October 2003 to then Secretary for Finance, Mr. Kambanei with the advise that

"...the claim be reviewed immediately in light of our assessment and that you instruct your personnel to conduct a reconciliation of the payments made to date and provide an updated schedule showing all payments made to Pacific Helicopters from 1999 to 2003.

In the event that these calculations may not be in agreement\ I would be obliged if your Department does a reconciliation of the payments made to date and forward a copy for my records.

...I would be grateful indeed if measures are taken to ensure that PAYMENTS made to Pacific Helicopters are checked against the details above to avoid double payments."

The Commission takes notes that "overpayment" of the judgment orders may have been paid out by the Department of Finance. There was a lack of proper accounting and reconciliation on the payments.

INFORMATION PRODUCED FOR EXAMINATION

Documents were produced for examination by way of summons from the following

1. **Hafŷ Malcolm Smith - Kela, MP, Managing Director (MD) of Pacific**

Lelicopters

The Managing Director, Hon, Malcolm. Smith - Kela, MP produced to the Commission copies of Court Orders and Judgement Debts pertaining to the payments made by DoF, a reconciliation of the payments he received against the Court Orders and a bound volume with a covering brief containing reconciliation showing payments received against the judgement debts.

The Managing Director of Pacific Helicopter confirmed by letter dated 6 October 2008 that payments made by Department of Finance did not clearly state which particular judgment debt was paid and therefore it was difficult to identify which judgments were paid and which judgment remained outstanding.

Significant materials sighted from the documents reveal;

I. -that the total judgment debts was about K14 million and by 2007 K9,1 96,197.40 was outstanding. The outstanding amount included K4,820,564.45 in statutory interest accrued over the 15 years period. Some payments were made over the years but the interests were not paid which are included in the outstanding interests;

-that the MD was unable to perform a reliable reconciliation since judgment debtors paid by DoF over the years were irregular and not made in sums that represent any particular judgement debts; and

-that the DoF had not honoured the Court orders and were reluctant to pay the judgment debts in full. In 2007 the company went to court to enforce the DoF to pay for the outstanding to- date, which was about K8.4 million for 11 judgments. The company successfully obtained the judgments as handed down by Davani J on 29 November 2007 that the judgments be enforced and that the DoF to make every effort to settle the debts. Payments made after that Court order are outside our TOR.

Ian Augerea — Registrar of the Supreme Court and National Court

The Registrar produced only one file related to WS 1056 of 1999 which was a claim for K845,534.00. Our review of the files indicated that the court proceedings were in order and default judgment was obtained by PHL.

Documents

Letter from the MD of PHL and current sitting Member for Eastern Highlands Regional to the then Prime Minister, Sir Mekere Morauta (and also Minister for Treasury) requesting to settled out debts arising from court proceedings dated 16 October 2000.(Ref: **3DoF**).

The letter by the Prime Minister, Sir Mekere Morauta and also as Treasury Minister requesting his Secretary in a letter dated 5 December 2000 to settle the outstanding judgment debt

3. A letter dated 21 October 2003 by the then acting Solicitor General, Mr. John Kumura to then Finance Secretary, Mr. Thaddeus Kambanei requesting reconciliation on the payments made to PHL.(Ref: **DoF 4**)

FURTHER AND ADDITIONAL INFORMATION AND MATERIALS REVIEWED

The file was opened on 21st October 2008.

The matter was the subject of hearing on 21st October 2008 (COIFINANCE38 dated 21/10/08) and 26th November 2008 (COIFINANCE43 dated 21/11/08). A review of all the responses either by telephone, personal interviews conducted, correspondence and documentation received have been collated and filed for references. The relevance of these materials based on our assessment and review so far indicate that:-

no documentation has been forthcoming and that renewed requests will be made to Finance on payment aspects and the Supply and Tenders Board for tendering of the use of the Helicopters.

Judgment orders have been obtained for each of the unpaid invoices and that the payments aspects have yet to be verified by the Finance Department.

With respect to the claims for unpaid invoices, is the result of non payment accumulated over a period of time which is of concern where the State Agencies have not complied with appropriate tendering procedures to engage PACHELI to provide air services.

Status of the Inquiry into PHL Claim

Ho witnesses were called. The Managing Director of the Company provided documentation on the payments received in satisfaction of the judgment

Findings

Evidence of gross abuse of the *Trust Fund Suspense Account #2* as an expenditure vote for settling court ordered payments by the Department of Finance. Settlement of claims by Department of Finance made through the Trust Fund Suspense No. 2 Account There is no evidence that the payment of K1 million has been reimbursed to TFS#2 accounts based on the express approval of the Secretary for Finance.

The government Agencies named in the court proceedings instituted by the PHL had committed the State to enormous expenditure in contravention of the procurement process under the PFMA. There was evidence that the government agencies have not observed the procurement provisions in the *PFM Act* and committed the State to a huge liability, especially the lack of ability of the State to make prompt payments for hire and charter of helicopter from PHL.

Pacific Helicopters Limited had successfully obtained judgments against those debts by default judgments since State failed to defend or had consented to the most of the orders for the debt incurred by the agencies named in the proceedings.

Recommendations'

The Office of the Solicitor General should keep a record of the payments made by the Department of Finance for the purpose of reconciling payments. In effect, it is recommended that the installment payments processed by the Department of Finance be collected by the SG and paid to Claimants.

The Department of Finance maintains a proper register of all payments for the purpose of reconciling the account where the Claimant has a number of claims against government agencies and the State.

The various government agencies, statutory bodies and instrumentalities are lawfully bound to procure goods and services, through the established tendering process under the PFMA.

The government to take drastic actions against offending state agencies for noncompliance of the tender and procurement process under the *PFMA*.

P. Consequential Legislative Reforms

Public Finances (Management) Act- Enactment of provisions to deal with offending government Departments, agencies, statutory bodies for non compliance of the procurement and tendering process.

(e) Wilfred Bongali t/a Hela Night Patrol

**r.OT File Ref: Matter No. 25 - WILFRED BONGALI & HELA NIGHT
PATROL PTY LTD**

B. Parties

For the State:

Health Department/ Laloki Hospital
Central Supply & Tenders Board (CSTB)
Attorney General

For the Claimant:

Wilfred Bongali
Hela Night Patrol Pty Ltd

Others (if any)

(b) Yama Security Services Ltd

B. Matter

Claimant awarded contract to supply security services for one (1) year
Laloki Hospital

Claimant alleges unlawful termination of contract

State - no breach of contract

No proceedings in Court

Claim settled by Deed of Release for K1 .2Million

Payment of K1 .2 Million by Department of Finance (payment in full)

C- Recommended Findings

No contract as it was not renewed and extended, as such no breach of contract

No lawful basis for settlement

Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the terms of reference of this inquiry. All the terms of reference are relevant and applicable to this case, however, this case falls squarely within *Terms of Reference No.s, 1 (xii), 2 and 5 (i) to (vii)*. Also attached is the list of matters (including this matter) published in the newspaper.

Documents and investigations conducted at:

Attorney-General (AG)
Solicitor-General (SG)
Registry of National Court (NC)
Department of Finance (Finance)
Central Supply & Tenders Board (CSTB)
Department of Health (Health)
Laloki General Hospital (Laloki)
Area Medical Store, Konedobu (AMS)
Registry of Companies (Reg/Co.s)
PNG Law Society (PNGLS)
Internal Revenue Commission (IRC)

Brief facts/Evidence

1. Wilfred Bongali ("WB") is the owner (sole shareholder/director) of Hela Night Patrol Pty Ltd ("HNPPL"), a security company. State through the

National Supply and Tenders Board (NSTB⁵) advertised the tender for provision of security services at Laloki Hospital. HNPPL together with Yama Security Services applied for the tender and were successful. Yama Security Services and HNPPL were awarded a joint contract for provision of security services at Laloki Hospital.

2. There is no evidence of the actual contract on the Solicitor General file. The contract is identified as 'Contract No. G 3947'. The contract was awarded in July 1993 for a period of 12 months commencing on the 12th July 1993 and ending on 31st July 1994. The contract provided an option for renewal for two further periods of 12 months each, if the Board approves the extension.
3. Because there is no evidence of the actual contract on file, we do not know the actual value of the contract. Wilfred Bongali states the contract was valued at K97,090.00 for the first twelve months (i.e. from July 1993 to July 1994). However, the total value of the contract contradicts that of the 1995 to 1996 value, as Mr Bongali claims it was for K51,788.40 (from 31 July 1995 — 31 July 1996, if the contract was renewed and extended). The question is how could it be decreased to K51,788.40 when the previous year was valued at K97,090.00? (Difference of I<45,301.60).

Further, the amount (value of the contract) is contradicting his own quantum submission (see letter dated 2 September 1998 from Wilfred Bongali to Dr. Puka Temu - paragraph 8, No. 3 which is marked '1 - SG*).

5. The National Supply and Tenders Board also do not have records of the contract been awarded to HNPPL. Attached hereto and marked "2 - SG" is a letter dated 27 January 1999 from Babaga R. Naime, Secretary to the Board (presumably Secretary to the Tenders Board) addressed to Dr Puka Temu, then Secretary Department of Health.

6. Parts of the said letter reads (quote),

Despite the absence of proper records, I do confirm that Heila Night Patrol P/L was awarded a portion of the above contract being for the Laloki Hospital.

From the only record available, the contract was awarded in 1993 for a three (3) year term of which the first (1st) twelve (12) months expired on the 31st of July, 1994.

Whilst I have no records on whether or not formal renewal was granted, the contractor claims that the services were continued from July, 1994 until sometime in early 1995.

If the contractor's allegations are correct and despite the fact that no formal renewal was granted the contractor is legally entitle for payment of services rendered.' Underlined my emphasis.

The contract expired on 31st July 1994 as it was not renewed.

This was a "combined contract" and both Yama Security Services and HNPPL were paid for the services they each performed.

Prior to the expiry date of the contract, Mr Pokarup Narakou wrote an Inter Office Memo dated 5th July 1994 to the Assistant Secretary, Mental Health Services recommending renewal of HNPPL contract for a further term. (Copy of the memo is marked, '3 - SG').

9. On 26th January 1995, Mr Paul B. Songo, then Secretary for Health Department wrote to the Chairman of National Supply and Tenders Board advising termination of the said contract (Contract No. G 3947) citing reasons for lack of funds to maintain the contract. The Chairman was advised to inform HNPPL and Yama Security Services. (Marked '4 - SG' herewith is the letter dated 26 January 1995.

On 12 April 1995, Mrs Rossa Pahau, then Acting Assistant Secretary, Mental Health Services wrote to HNPPL and advised that the contract expired on 31 July 1994 and was not renewed for a further twelve (12) months as such was terminated as per letter from Paul B. Songo. The letter also advised HNPPL that its services will no longer be required as of the 21st April 1995 (the letter is marked £5 - SG').

On 19 April 1995, Dr Puka Temu in his capacity as the then First Assistant Secretary again wrote to the Chairman, National Supply and Tenders Board following up on the letter of Paul B. Songo dated 26th January 1995 and again advising the termination of the said contract (letter marked, '6 - SG').

HNPPL disregarded the termination notice of the contract and continued to provide security services resulting in Mr Pokarup Narakou writing a letter to HNPPL on 25 April 1995 to withdraw its security personnel advising they were supposed to leave on 21 April 1995 as per letter by Rossa Pahau (letter marked, '7 - SG').

Again on the 22nd June 1995, Dr Puka Temu wrote to HNPPL to vacate the premises (the letter is marked, £8 - SG'). The content of the letter reads, (quote) :-

.You are advised that as per our previous correspondence, your services were to be withdrawn from the Laloki Psychiatric Hospital in February of 1995. As you have defied these instructions you are advised that your services provided after our deadline will not be awarded.'

After the termination of the contract, it appears HNPPL was retained on a temporary basis to provide security services. See letter dated 12 March 2000 from Pokarup Narakou which is marked '9 - SG'. Note this was on a

temporary basis and the engagement was more or less on a as is needed basis and payments were made directly from Laloki Hospital funds as such all services provided on a temporary basis where paid in full.

On 9th February 1995, (after expiry of the contract and termination), Wilfred Bongali wrote to the chairman acknowledging receipt of letter dated 6th September 1994 from National Supply and Tenders Board ("NSTB") purportedly extending the contract for a further twelve (12) months (marked '10 - SG'). There is no evidence of the letter dated 6th September 2004 from the NSTB which is acknowledged by Wilfred Bongali in his letter. This is despite numerous letters from the Health Department advising the termination of the contract. If the contract was renewed and extended by the National Supply and Tenders Board, then it was done without the authority of the contracting (client) Department (i.e. Health Department).

The truthfulness of the said letter from Wilfred Bongali is questionable for two main reasons.

Firstly, he (Wilfred Bongali) responds to the letter after four (4) months have already passed although he states that he received the letter some months later. There is no evidence from the National Supply and Tenders Board renewing and further extending HNPPL contract for a further twelve months from July 1995 - 1995. See letter by Babaga R Naime marked '2 - SG'.

Secondly, the said letter from Wilfred Bongali (9/2/95) appears to contradict terms of the meeting minutes of the National Supply and Tenders Board - No. 08/95 dated 1 June 1995. Wilfred Bongali's letter is dated 9th February 1995, whilst the meeting minutes is dated 1st June 1995. The meeting minutes indicate that [quote]:-

4.2 Contract No. G3947 - Provision of Combined Security Services

Department : Health

Date : 1st May 1995

Companies : (a) Hallet Security Services,

Boroko

Hella Night Patrol, Boroko

Yama Security Services, Boroko

Lama Security Services, Boroko

Subject : Renewal of Contracts for their 01st optional

periods of a further twelve (12) months each.

Decision : Deferred 01 / 06 / 95

Reason : Client, Department of Health be asked to give

their views in regards to the option of renewal.

Meanwhile, Secretary of the Board is to

provide a full report on the status of the

contracts, refuting client's (D.O.H) allegations

that this board had independently gone ahead

and

made decisions without consulting them.

Marked with <11 - SG' is the copy of minutes.

19. From the minutes it appears the renewal and extension of the said contract was deferred for the reasons that Department of Health did not provide their views on the continuation of the contract.

20. This is contradictory, as evidence clearly shows that the Health Department have advised both Mr Bongali and the National Supply and Tenders Board ('NSTB') of the termination of the said contract. The NSTB was advised by the Department of Health to advise HNPPL of the termination however, NSTB never advised HNPPL.

On 15 February 1999, Wilfred Bongali wrote to the Solicitor General advising of the alleged unlawful termination of the contract and requesting that the matter be settled for K534,434.36. (Letter marked '12 - SG')

On 11 March 1999, Mr John Kawi, former Solicitor General advised Mt Bongali that they would seek instructions from the Health Department before a formal response is made. (Letter marked '13 - SG').

On 30th March 1999, Bill Oscar Emos Lawyers wrote to Mr John Kawi, then Solicitor General on behalf of HNPPL requesting that the matter be settled for K534,434.36. The letter states that if the State fails to respond within seven (7) days proceedings will be filed in Court without any further notice (letter marked '14 - SG').

On 9th April 1999, the Solicitor General wrote to the Health Secretary attaching copy of Bill Oscar Emos Lawyers letter seeking instructions (letter marked '15 - SG').

On 16th November 1999, Dr Puka Temu in his capacity as Secretary, Department of Health wrote to the Solicitor General advising that based on the State Solicitors advice (State Solicitors letter not on file), the Health Department paid all its outstanding dues including damages on the principle of quantum meruit. As such HNPPL was paid all its dues and the Health Department was not indebted to HNPPL. The letter also stated that for some unknown reasons, K12,945.60 was paid directly to Wilfred Bongali instead of HNPPL on 19 September 2007 (letter marked '16 - SG').

The said letter states and (quote):-

Following this review, I have established from the records held by the Department of health that all payments due to Hela Night Patrol Ltd for services rendered have already been paid. According to the Department records the following payments were made to Hela Night Patrol Ltd since 1993 pursuant the terms of the contract.

- K15,873.00
- K63,989.00
- K65,496.80
- K7,307.00 (up to 29/02/96)
- K12,945.60 (payment date 19.09.97)

A total of K1 65,611.40 was paid to HNNPL (Wilfred Bongali).

On 1 May 2001, the Solicitor General wrote to HNPPL advising that the State did not owe HNPPL but instead HNPPL owed the State for excessive payments. The Solicitor General alleged that HNPPL owed the State K10,803.60 for over payment and threatened recovery action (letter marked '17 - SG').

On 16 May 2001, Wilfred Bongali responds to Solicitor General's letter of 1 May 2001 and advised this time apart from the security contract at Laloki Hospital, HNPPL was also awarded a contract to provide security at Area /
Medical Store (AMS) Konedobu. Note there was never any mention of the security contract at Konedobu and this was the first time it was mentioned. We are not sure if AMS is covered in the same contract (Contract No. G3947) as the copy of the contract is not on file. However, there is ample evidence to show the contract was only in relation to provide security services to Laloki Hospital. This time the claim was assessed at K5,570,983.53 from K534,434.36 (initial offer to settle) the previous assessment by Wilfred Bongali (letter marked '18 - SG'). (An increase of about K5,036,549.17 from the initial offer)

It appears Mr Kawi then Solicitor General did a notation on the said letter from Wilfred Bongali to the lawyer having carriage to advise HNPPL that State will not settle the claim and HNPPL was at liberty to pursue the matter in court. The notation is dated 21 May 2001.

The notation states (quote), . . . Advise this person that we will NOT settle. Hi can go to Court if he wants. P Kawi 21/5.'

On 15th August 2001, Dirua Lawyers on behalf of HNPPL wrote to Solicitor General seeking extension of time to give notice pursuant to s. 5 of the *Claims By and Against The State Act* (letter marked '19 - SG').

On 8th October 2001, Mr Francis Damem, then Secretary and Attorney General wrote to Dirua Lawyers refusing extension of time and at the same time advising that the claim was statute barred (letter marked '20 - SG').

On 31st July 2002, HNPPL filed OS proceedings (OS No. 424/2002) seeking extension of time to give section 5 .Notice. On 11th September 2002, His Honour Justice Kandakasi dismissed the O.S proceedings for want of prosecution. Marked with '21 - SG' is the copy of the Originating Summons and marked with '22 - NC' is the copy of the court endorsement confirming that the O.S proceedings was dismissed for want of prosecution. Following are the documents filed together with the Originating Summons. They are:-

Notice of Motion filed on 31st July 2002 - marked '23 - SG';

Affidavit of Wilfred Bongali filed on 31st July 2002 - marked '24 - SG';

Notice of Appearance by Powes Parkop Lawyers filed - 9th August 2002-
marked'25-SG';

Affidavit in Support by Pokarup Narakon filed 7th August 2002 -marked '26-
NC';

Affidavit of Service by Wilfred Bongali filed 8th August 2002 - marked '27-
NC';

Further Affidavit of Wilfred Bongali filed 7th August 2002 - marked '28 -
NC';

On 31st October 2002, Peter Pena & Associates on behalf of HNPPL submitted a without prejudice quantum submission to the Solicitor General to settle the claim for K5,263,490.00 (letter marked '29 - SG').

On 26th November 2002, Mr Zacchary Gelu wrote to Peter Pena & Associates acknowledging letter of 31 October 2002 and making a counter offer on a without prejudice for K346,587.75. (Letter marked '30 - SG) It appears after Mr Kawi left, Mr Gelu succeeded him.

On 12th December 2002, Wilfred Bongali on behalf of HNPPL enters into a Deed of Release with the State to settle the claim for K1.2 million. Mr Gelu signs on behalf of the State. Note that Mr Gelu made a counter offer for K346,587.75, however, settled for K1.2 million.

Note: The original Deed of Release does not have Gelu's signature and the date. However the copy of the Deed of Release has Gelu's signature and the date. (Marked with '31 - SG' and '32 - SG' are copies of Deed of Release which has and does not have Gelu's signature, respectively.

On 17th December 2002, Gelu wrote to Finance Department to pay the claim for K1.2 Million (letter marked '33 - SG').

On 7th April 2004, Mr Andrew Numbasa, First Assistant Secretary - Public Accounts Division from Department of Finance wrote to Mr Francis

Kuvi advising that as per the instructions for stop payment on all deeds of release, the said claim by HNPPL (Wilfred Bongali) was put on halt until further review. Mr Numbasa also stated that whilst this was the case on at other deeds, the Solicitor General gave 'speedy clearance' to some deed of release claims. Mr Numbasa then sought instructions for clearance of Mr Bongali's claim. Mr Numbasa's letter is marked '34 - SG'.

Mr Numbasa's letter may have being prompted by the NEC Decisions numbered NG 07/2002 and 150/2003. More particularly NEC Decision No. 150/2003, paragraph 7 which states :-

7. 'approved that out of court settlement payment of any claims against the State in excess of K1 million must at all times be deferred unless Solicitor General in consultation with the Attorney General furnishes in writing to the Secretary for Finance that in his deliberate judgment, State has no Defence or no reason to challenge the claim or appeal against the amount awarded.'

Marked '35-' and '36-' are copies of NEC Decisions referred above in paragraph 40.

On 17 May 2004, Mr David Lambu a senior legal officer with the Solicitor General's Office wrote a note to Mr Kuvi on the said letter from Mr Numbasa stating (quote):-

Is it in order for payment? Otherwise cancel the deed and renegotiate or proceed to trial How much money is involved in this case? 17105j04 —D Lambu'

Refer to '34-SG'.

43. On 22nd June 2004, Mr Kuvi wrote to the Secretary Department of Finance advising/giving clearance of the payment to Mr Wilfred Bongali and

advising to settle the claim and raise a cheque for K1.2 million payable to Patterson Lawyers as soon as possible to avoid any court action. Marked >37 - SG' is letter dated 22 June 2004.

Finance Department made the following payments:-

1.	Chq No. 715394 -	K100,000.00 -	20/03/03
2.	Chq No. 716795 -	K100,000.00 -	04/04/03
3.	Chq No. 782427 -	K1 00,000.00 -	25/06/04
4.	Chq No. 786252 -	K200,000.00 -	05/08/04
5.	Chq No. 796519 -	K200,000.00 -	30/11/04
6.	Chq No. 797363 -	K300,000.00 -	09/12/04
7.	Chq No. 804829 -	K200,000.00-	10/03/05

A total of K1. 2 million was paid, effectively settling the claim (deed of release) in full. Copies of all the cheques are attached and all marked '38 to 44 - **FD**'.

Also attached are copies of relevant Financial Forms (FF3 & FF4) in relation to the payments (cheques) referred to above in paragraph 43 & 44.

- Requisition for Expenditure (FF3) - K300,000.00 - 04/12/04 - 45 - **FD**;
- General Expenses (FF4) - K300,000.00 - 08/12/04 - 46 - **FD**;
- Requisition for Expenditure (FF3) - K200,000.00 - 26/11/04 - 47- **FD**;
- General Expenses (FF4) - K200,000.00 -26/11/04-48- **FD**;
- Requisition for Expenditure (FF3) - K200,000.00 - 05/08/04 - 49- **FD**;
- (vf) General Expenses (FF4) - K200,000.00 - 05/08/04 - **50 - FD**;

Requisition for Expenditure (FF3) - K1 00,000.00 - 24/06/04 - 51-FD;

General Expenses (FF4) - K1 00,000.00 - 24/06/04 - 52 - FD;

General Expenses (FF4) - K1 00,000.00 - 04/04/03 - 53 - FD;

Requisition for Expenditure (FF3) - K100,000.00 - 54- FD;

General Expenses (FF4) - K100,000.00 - 20/03/03 - 55 - FD.

46. It appears some or if not all the cheques were paid to Patterson Lawyers Trust Account.

Wilfred Bongali wrote to the Solicitor General advising that all payments should be made directly to him and not Patterson Lawyers. As a result Wilfred Bongali wrote to Mr Kuvi (then Solicitor General) on 4th July 2004 to advise Finance Department not to make any payments to Patterson Lawyers as the firm never act for Mr Wilfred Bongali/HNPPL (see letter marked '56 - SG')

Mr Kuvi's letter reads (quote),

'Re: Wilfred Bongali v. The State

I make reference to the above matter and my letter to you dated the 22nd of June 2004 regarding the same. Mr Bongali has now approached my office again and claimed that his claim should not be paid c/- Patterson Lawyers Trust Account, as they never acted for him at any stage. I have also perused the file and the said lawyers never acted for Mr Bongali. Mr Bongali, has instead requested that future payments be made directly to himself, c/ - Solicitor General's Office, Department of Attorney General, P.O Box 591, WAIGANI, National Capital District. I trust you will accede to this request.'

Following the letter from the Solicitor General all cheques were then written directly to Wilfred Bongali. Note that this were for .services

rendered by Hela Night Patrol Ltd as such cheques should have being drawn in the name of Hela Night Patrol Ltd.

Evidence of Witnesses

The following persons were called to give evidence. They are:-

Wilfred Bongali (claimant);

Peter Pena, Principal of Peter Pena Lawyers;

Zacchary Gelu, lawyer and former Solicitor General;

Mundua Kua, lawyer.

I will address the evidence of each of the above persons.

Evidence — Peter Pena. Principal of Peter Pena Lawyers

Mr Pena basically provided documents under cover letter dated 31st March 2009 essentially advising that his firm was only involved in assisting the claimant negotiate settlement. Mr Pena states that he did not have all necessary documents at the time of drafting the letter to the Solicitor General proposing K5.6 million but the assessment was based on instructions from the claimant.

Mr Pena stated that the proposal to the Solicitor General for K5.6 million was made on a "without prejudice" basis as such the Solicitor General still had the authority to consider the legitimacy of the proposal (or the claim itself). Mr Pena further stated that after the drafting of the letter of proposal to the Solicitor General, the claimant withdrew instructions and as such his firm nor Mr Pena was involved in the drafting and signing of the deed of release.

It is submitted that whilst Mr Pena is deemed to be bound by instructions of his client, he is also duty bound to advise his clients of the propriety and or otherwise of the claim. Mr Pena should have insisted on obtaining copies of all necessary documents before the drafting the offer letter. In essence there was no basis at all for the assessment of K5.6 million.

Evidence - Wilfred Bongali ("claimant")

Mr Bongali provided a written statement dated 20th January 2009 and also appeared on several occasion(s). Essentially, Mr Bongali maintained that his claim was genuine and confirmed that he had a joint contract with Yama Security Services for provision of security services. Mr Bongali confirmed that the claim by Yama Security Services was settled as a result of NEC

and as such the same should be done to his claim although his / claim was settled at K1.2 million half the amount settled in Yama Security Services claim.

It is submitted above, there was no basis at all for the settlement.

Evidence — Mundua Kua. lawyer

Mr Mundua Kua was formerly a lawyer with the Solicitor General's Office. He was asked by Mr Gelu to have carriage of the file to provide a response to the letter of offer by Peter Pena. Mr Kua confirmed that he provided a counter offer for the sum of K340,000.00. Asked what the basis for such assessment was, he was not able to provide any legal basis but basically stated that the claim was settled at K1.2 million despite his assessment of the case.

43. He also confirmed that he witnessed the signing of the deed of release. He stated that he was not present during the signing but the deed was only

brought to him asking him to sign as a witness. He confirmed that it was a practice in the Solicitor General's Office whereby anybody can sign a deed as witness.

Mr Kua admitted in evidence that if the claim was settled at K346,000.00 he would accept full responsibility otherwise the matter was settled at K1.2 million which he had no knowledge of.

Despite the grave anomalies surrounding this matter, Mr Kua failed to bring up this issues either with the Solicitor General (at that time Mr Gelu) or otherwise with the claimant (or its lawyers). This is confirmed by the fact that Mr Kua without any legal basis at all made an offer for K346,000.00. It is evidenced from the fact that the letter he drafted failed to even state the basis upon which such assessment was made, no mention of case laws etc. Mr Kua failed in his duty as a lawyer to protect the interest of the State.

Evidence - Zacchary Gelu. lawyer and former Solicitor General

Mr Gelu gave evidence admitting that despite lack of section 5 notice, claim being statute barred and no basis at all for the settlement, settled the claim for K1.2 million. When asked if his actions were grossly negligent and was bordering on fraud, stated that it was not fraud, but basically noncompliance with the laws.

Mr Gelu's actions may amount to fraud and unreasonable conduct as a lawyer. Mr Gelu failed to protect the interest of the State and appeared to abuse his powers as the Solicitor General at the material time.

Findings

Firstly, in this case there is no evidence of the actual contract on file as such the exact value of the contract cannot be ascertained. Wilfred Bongali states the contract was valued at K97, 090.00 for the first twelve months (i.e. from July 1993 to July 1994). However, the total value of the contract contradicts that of the 1995 to 1996 value, as Mr Bongali claims it was for K51, 788.40 (from 31 July 1995 - 31 July 1996, if the contract was renewed and extended). The question is how could it be decreased to K51,788.40 when the previous year was valued at K97,090.00? (difference of K45,301.60).

There is no evidence of the contract been renewed and extended. However, there is evidence (as is submitted above) that the contract was terminated after completion of the first 12 months (i.e. from July 1993 - July 1994). Commissioners despite the lack of information in relation to the value of contract for the first 12 months (initial contract period), we submit that the Commission can safely conclude that the contract was valued at **K97,090.00**. The Commission can also safely find that the contract was terminated after the first 12 month period and was not renewed and extended.

There is also evidence that after termination of the contract, HNPPL was engaged on a temporary basis by the Laloki Hospital. This would mean that after July 2004, all engagements were on temporary basis. However, there is evidence showing that HNPPL was advised in no uncertain terms that HNPPL services will no longer be required as of 21st April 1995. As such services provided after 21st April 1995, cannot be honoured. Further, evidence indicates that payments in relation to the engagement of HNPPL on a temporary basis were fully paid from Laloki Hospital funds. As such HNPPL was not owed any money for its temporary engagement

Secondly, if the contract was valued at **K97,090.00** (i.e. for the first 12 months, from July 1993 to July 1994), then HNPPL was fully paid for

A

services rendered. Health Department records showed that HNPPL was paid a total of K165,611.40. This would mean the balance of K165,611.40 from K97,090.00 (which is K68,521.40) is payment for services rendered on a temporary basis after expiration of the contract.

There was no basis for the claim as there was no contract. The contract states that the contract must be renewed after the lapse of the first 12 months, in this case, evidence clearly show the contract was not renewed and extended for a further 12 months, as such, there was never a breach of contract, as the contract was never renewed and extended for a further 12 month. The contract was completed after the first 12 months as the client department (Health Department) refused to renew and extend the contract.

This is a clear case of fraudulent conduct of the lawyers/officers of the Solicitor General who were involved in the facilitating of this payment. The basis of the allegations of fraud are that:-

there was sufficient evidence on file showing that HNPPL was not owed any money at all. Further, if there is a claim for damages for unlawful termination or if HNPPL is still owed by the Health Department for services rendered but were not paid, then the appropriate action was to have the matter dealt with by the court.

HNPPL⁵ s (Wilfred Bongali) request seeking extension of time to give notice pursuant to section 5 of the *Claims By and Against the State Act* by Dirua Lawyers was refused by the then Attorney General. Further, the Attorney General found that the claim was statute barred and therefore cannot be enforced or brought in a court of law. As result, HNPPL (Wilfred Bongali) filed O.S proceedings seeking extension of time to give notice to the State which was dismissed for want of prosecution.

Also, the then Solicitor General, Mr Kawi and the lawyer having carriage M Tuva stated that the claim will not be entertained and if HNPPL (Wilfred Bongali) insisted the matter should go before the court.

Despite the advice or position taken by the Attorney General and the Solicitor General, it appears after Mr Gelu became the Solicitor General, Mr Gelu and Mr Mundua Kua (presumably after the file was transferred from Tuva to Kua), both Messrs Gelu and Kua elected to settle the claim.

Further, following the letter from Peter Pena & Associates proposing to settle the matter for K5,263,490.50, Mr Gelu replied making a counter proposal for K346,587.75. Mr Gelu states in his letter (quote), *..All in all I am offering to settle your client's claim at K346,587.75.'*

Although, Mr Gelu made a counter offer for K346,587.75 and despite the advice and position taken by the Attorney General and Mr Gelu's predecessor (Mr Kawi), a deed of release was entered into and signed on 12 December 2002 settling the claim for K1.2 million. How could Mr Gelu make a counter offer for K346,587.75 and later settle the claim for K1.2 million kina?

The actions of Messrs Gelu and Kua amount to fraud and an act to defraud the State.

Further the Commission, will note that following signing of the deed of release on 12 December 2002 and the letter from Mr Gelu to the Finance Department to settle the claim for K1.2 million pursuant to the deed of release, the first payment was made in 2003 prior to the decision to halt all payments as per NEC decision No. 150/2003 dated 25 July 2003. Following the NEC decision, all payments were put on hold

until further clearance from the Attorney General or his nominee (see Item No. 3, NEC Decision No. 150/2003)

(i) With respect we submit that Mr Kuvi's actions amount to fraud as he acted contrary to the NEC Decision 150/2003, Item 8 - which states (quote) 'approved that the Attorney General immediately apply to the court for Judicial Review of any questionable claims or out of court settlement in excess of K500,000.00

0 In this case, there is ample evidence (documentation) on Solicitor General's file (as referred above) showing that the deed of release should not have been signed and entered into as evidence clearly shows that the State is not indebted to HNPPL (Wilfred Bongali). In this case, as stated (noted) by Mr Lambu to Mr Kuvi, Mr Kuvi could have applied to the court

to set aside the deed of release.



54. Wilfred Bongali's actions amount to fraud, as how could he allege that he was awarded to provide contract/for the AMS when clearly (evidence) shows that he was only awarded/contract for the Laloki Hospital. Further, how could Mr Bongali claim up to K534,434.36 (initial offer to settle) and then later up to K5, 570, 983. 53 (an increase of about K5,036,549.17 from the initial offer) when the contract was only valued at K97,090.00. Furthermore, there was never any renewal and extending of the contract, as such how could a breach occur as there was never any contract? The contract was completed after the first 12 months as Health Department refused/declined to renew and extend the contract.

Recommendations

1. An investigation must be carried out in relation to the payments to Security Services as they relate to the same contract totalling K3 million. Yama
Yama

Security Services was paid due to an NEC submission allegedly sponsored by the then Minister for Justice. There is evidence of the matter been raised in the Parliament during debate but it is not clear if the matter was pursued further. Newspaper evidence provided by Mr Bongali showed that the former Prime Minister, late Bill Skate when queried of the NEC decision approving payment to Yama Security Services stated that he was not aware of the NEC decision. The matter should be investigated.

2. Mr Gelu and Mr Kua be referred to the Lawyers Statutory Committee for investigation. A further recommendation be made that both Messrs Gelu and Kua should never be employed as heads or otherwise of any Government or Statutory Organizations.

N 3. Persons involved in this matter must be referred to appropriate authorities such as the Police Fraud Squad for possible investigation.

The Claims By and Against the State Act, 1996 must be amended to include, that any out of court settlements must be approved by the Attorney General. Section 5 Notice must also be served on the Primary Defendants.

An investigation must be conducted into the reasons why the NSTB failed to act on the advice by the Health Department ("client Department") to terminate the contract. Health Department advised NSTB to terminate the contract, however, NSTB acted without the instructions from the client Department.

Solicitor General to file recovery action. **INDEX TO DOCUMENTS**

TENDERED AS EVIDENCE

Document Name

Identification

letter dated 2 September 1998	1 - SG
letter dated 27 January 1999	2- SG
Inter Office Memo dated 5 th July 1994	3- SG
letter dated 26 January 1995	4- -SG
letter dated 12 April 1995	5- •SG
letter dated 19 April 1995	6- SG
letter dated 25 April 1995	7- ■SG
letter dated 22 nd June 1995	8- SG
letter dated 12 March 2000	9- •SG
letter dated 9 th February 1995	10 -SG
Meeting Minutes of the CSTB	11 -SG
letter dated 15 February 1999	12 -SG
letter dated 11 March 1999	13 -SG
letter dated 30 th March 1999	14 -SG
letter dated 9 th April 1999	15 -SG
letter dated 16 th November 1999	16 -SG
letter dated 1 May 2001	17 -SG
letter dated 16 May 2001	18 -SG
letter dated 15 th August 2001	19 -SG
letter dated 8 th October 2001	20 -SG
Originating Summons	21 -SG
Court Endorsement	22 -NC
Notice of Motion filed on 31 st July 2002	23 -SG
Affidavit of Wilfred Bongali filed 31 st July 2002	24 -SG
Notice of Appearance	25 -SG
Affidavit in Support by Pokarup Narakon	26 -NC
Affidavit of Service by Wilfred Bongali	27 -NC
Further Affidavit of Wilfred Bongali filed 7 th August 2002	28 -NC
letter dated 31 st October 2002	29 -SG
letter dated 26 th November 2002	30 -SG

Deed of Release dated 12 th December 2002	31 - SG
Deed of Release dated 12 th December 2002	32 - SG
letter dated 17 th December 2002	33 - SG
letter dated 7 th April 2004	34 - SG
Copies of NEC Decisions (NG 07/2002)	35 -
Copies of NEC Decisions (NEC 150/ 2003)	36 -
letter dated 22 nd June 2004	37 - SG
copies of cheques confirming payments	38 — 44 FD
copies of Financial Forms (FF3 & FF4)	45 - 55 FD
letter dated 4 th July 2004	56 - SG
COI letter to Central Supply & Tenders Board	57 - COI
COI letter to Laloki Hospital	58 - COI

F. Decisions of the National Executive Council

The Commission examined five (5) matters, which concerned and/or arise from decisions of the National Executive Council CNEC).

Joel Aundambui

Thomas Murowo

Mathew Pawen

Moale Haus and Sambra Haus

AOG Jubilee University

The Commission's findings specific to each matter are contained in the respective investigation reports. Generally, the findings are:

5> Processes to be strengthened to avoid fabrication of documents emanating from
NEC (decisions, minutes, letterheads, instruments etc)

^ NEC refrain from making decisions that concern the merits of claims against the
State without consultation with the Attorney General

y State-owned institutions should not be established without the full consultation
with the key agencies concerned

y There is immediate need for improved processes and procedures for monitoring
and implementation of NEC Decisions in a timely manner

^ Appropriate action is promptly taken where there is non-compliance with
Decisions of the NEC

(a) Joel Aundambui

PARTIES:

For the State:

Department of Justice and Attorney General ('DJAG')

Department of Finance ('DoF')

Department of Prime Minister & NEC ('DPMNEC')

Post (PNG) Ltd ('PPL')

Claimants:

(a) Joel Aundambui, Ivo Aundambui, Felix Tambui, Mathew Tambui, Philip Boindu, Robert Tangapi and Eric Tambui ('Claimants')

NATURE OF CLAIM:

The claimants alleged that their copyright to certain clay pot images was breached by PPL on 22 January 2003 when PPL issued postage stamps featuring those clay pot images.

The claimants commenced proceedings (WS No. 584 of 2004) in the National Court against PPL and another for damages for breach of copyright. The State is not named as a party and the claim is still pending.

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

1. On 23 February 2003, PPL's Managing Director, Peter Maiden, referred to this Commission by way of a brief, PPL's file on the claim, particularly to

inquire into the authenticity of a purported *NEC Decision No. 172 of 2008 at Special Meeting No. 29 o/"2008* dated 19 September 2008.

Although the State was not named as a party to the court claim, commenced by the claimants on 24 May 2004, the purported *NEC Decision No. 172 of 2008* directed PPL to pay K52 million in settlement of the claim.

The claim is still pending determination on liability and damages.

No payments made by PPL.

No payment has been made by the Department of Finance (DoF).

In the circumstances, this matter falls within Terms of Reference No. 1, 2, 3, 5, 8 and 12.

SOURCES OF INFORMATION AND DOCUMENTATION

1. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

National Court Registry — original Court file referenced WS No. 584 of 2004

Department of Justice & Attorney General -

- a. Evidence of Dr Allan Marat, Minister for Justice & Attorney General

(c) Post (PNG) Ltd -

(i) Evidence of Peter Maiden, Managing Director

National Executive Council - (i)

Evidence of—

- o Winnie Kiap, former Secretary

Claimants —

(i) Evidence of—

- o Sam Kemaken, lawyer, Kemaken Lawyers

The relevant transcripts of proceedings are provided with this Brief.

The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

CHRONOLOGY OF EVENTS

1997

On 1 January 1997, Post (PNG) Ltd (TPL) was corporatized becoming a separate legal entity from the State.

2003

On 22 January 2003, PPL issued postage stamps featuring clay pot images on K0.65 and K4.00 stamps.

On 25 November 2003, Joel Aundambui of Kolmang Claypot Products offered in writing to David Pank, Post Master, PPL, Wewak, K200,000.00 as commission for providing research, investigation and supply of information in relation to the quantity of production and sale of the K4.00 and K0.65 stamps currently sold in the last 12 months ('Offer'). The Offer was payable within 4 weeks subject to the outcome of the court proceedings and payment received from PPL ('Offer').

4. On 25 November 2003, David Pank, Retail Manager, Wewak, PPL confirmed his telephone conversation with Kent Pato, Legal Officer, PPL earlier that day in which he:

(a) Reported his conversation with an Ivan Hurst of Wewak Tourism Office at approximately 1:35 p.m. in which he was rejected a K200,000.00 offer for information about IC0.65 and K4.00 clay pot stamps;

Provided 3 signed copies of the Written Offer, which was left with

(b) PPL counter-officer, Sixtus Juavi, by Ivan Hurst

on 24 November 2003 and 25 November 2003 prior to (a) above and without his knowledge.

On 26 November 2003, David Pank, Retail Manager, Wewak, PPL confirmed his telephone conversation with Kent Pato, Legal Officer, PPL earlier that day in which he:

Reported the counter-officer, Sixtus Java, told the Assistant Retail Manager, Robert Yahimbu ('ARM⁵') that two (2) male adults, who did not disclose their identities, were out at the counter waiting to see him;

Reported the ARM to attended to the counter and a person who identified himself as Jerome Mot, a terminated PPL employee, requested the return of the Written Offer

2004

On 24 May 2004, Bayam Lawyers filed Writ of Summons No. 584 of 2004 endorsed with a statement of claim on behalf of seven plaintiffs. The plaintiffs named are Joel Aundambui, Ivo Aundambui, Felix Tambui, Mathew Tambui, Philip Boindu, Robert Tangapi and Eric Tambui ('Claimants'). The defendants are PPL and Tony Sipa trading as Grafox Studios.

By letter dated 24 July 2007 to PPL, Apo & Co Lawyers offered settlement of WS 584 of 2004 for a sum between K39,060,000.00 and K42,315,000.00 representing 12% and 13% respectively of the earnings from the sale of the postage stamps by PPL.

On 24 July 2004, PPL filed a Defence in WS 584 of 2004 denying liability. **2008**

By letter dated 4 April 2008 to Hon. Arthur Somare, Minister for IPBC, Joel Aundambui requested his political support to get PPL to consider the claimants' proposal and for settlement of the court proceedings.

By letter dated 15 May 2008, PPL's Legal Officer, Kent Pato briefed Sumasy Singin, Chairman, IPBC on the status of WS 584 of 2004 and the basis for defending the claim.

By letter dated 31 August 2008, Joel Aundambui instructed Kemaken Lawyers to represent the plaintiffs in WS 584 of 2004 as Jimmy Apo of Apo Lawyers practicing license had expired.

By letter dated 21 October 2008 to Hon. Patrick Tamur, Minister for Communication & Information, Kemaken Lawyers provided to PPL copy of a purported *NEC Decision No. 172 of 2008 at Special Meeting No. 29* /2008 dated 19 September 2008. PPL was circulated a copy of this letter. The purported NEC Decision read as follows:

"Subject: Payment of claim for Kolimangh Clay Product for K52 million Kina - On 19th September 2008, Council: 1. Referred the above mentioned claim to Post PNG Ltd for payment to the claimant.

Approved and directed that claim payment of K52 million be paid in full to Kolimangb Clay Product by Post PNG Ltd (claimant) within the next 21 days.

Approved and advise the claimant to submit proper legal documents for payment to Hon. Patrick Tammur, Minister for Communication and Information."

By letter dated 27 October 2008 to Ms Winnie Kiap, Secretary, NEC, PPL's

Managing Director, Peter Maiden, requested a copy of *NEC Decision No. 172 of 2008* via special meeting number 29/2008 and supporting submissions. Copies were circulated to Managing Director, IPBC; Legal Counsel, IPBC; Secretary, Minister for Communications & Information.

By letter dated 28 October 2008, Winnie Kiap, Secretary, NEC informed

PPL that

the *NEC Decision No. 172 of 2008* does not relate to payment of K52 million resulting from WS 584 of 2008 between Joel Aundambui & others v PPL & others;
the document *NEC Decision No. 172 of 2008* is fraudulent;

She would refer the matter to the Commissioner of Police for investigation.

By letter dated 28 October 2008 to Apo & Co Lawyers, PPL's Legal Officer, Kent Pato, sought confirmation on whether the plaintiffs had changed legal representation in view of correspondence received from another law firm purporting to represent the plaintiffs.

By letter dated 28 October 2008 to Kemaken Lawyers, PPL's Managing Director, Peter Maiden, confirmed their telephone conversation earlier that day requesting a **formal** notice of change of lawyer be filed and served on PPL.

18. By letter dated 30 October 2008 to Kemaken Lawyers, PPL's Managing Director, Peter Maiden, sought to ascertain the source from which the *NEC Decision No. 172 of 2008* was obtained.

By letter dated 30 October 2008 to the Chairman, PNG Lawyers Statutory Committee, PPL's Managing Director, Peter Maiden, lodged a formal complaint against Sam Kemaken of Kemaken Lawyers on three (3) grounds:

Purporting to act for the plaintiffs in WS 584 of 2004 without filing and serving an appropriate notice;

Supplying a fraudulent NEC Decision No. 172 of 2008

Requesting payment of K52 million when the fraudulent *NEC Decision No. 172 of 2008* directs PPL to make payment to Kolimangh Clay Product.

2009

On 1 February 2009, Post Courier published a report on the *NEC Decision No. 172 of 2008*.

By letter dated 18 February 2009, PPL's Managing Director, lodged a formal complaint with Mathew Damaru, Detective Superintendent, Fraud & Anti- Corruption Unit to investigate the source of the fraudulent *NEC Decision No. 172 of 2008*.

By letter dated 18 February 2009 to Apo & Co Lawyers, PPL's Legal Officer, Kent Pato enquired whether that firm was still acting for the plaintiffs in WS 584 of 2004.

By letter dated 18 February 2009 to PPL, Apo & Co Lawyers confirmed they still acted for the plaintiffs in WS 584 of 2004.

24. By letter dated 23 February 2009, PPL served on Apo & Co Lawyers sealed copy of an Amended Defence and Cross-claim filed 9 October 2007.

On 23 February 2003, Post Courier published another report on *NEC Decision No. 172 of 2008* as informed by lawyers for the plaintiffs in WS 584 of 2004.

On 2 March 2009, Post Courier published another report on *NEC Decision No. 172 of 2008* as informed by the office of the Attorney General.

On 20 March 2009, the National Court made consent orders transferring WS 584 of 2004 from Madang to Waigani.

F. FINDINGS

(c) Liability In Issue

(d) Non-compliance with Section 5 - Claims By and Against the State Act 1996

The claimants did not give notice of their intention to make a claim against the State in accordance with Section 5 of the *Claims By & Against the State Act 1996* ('*Claims Act*'), or at all.

The claimants' cause of action accrued on 22 January 2003 when PPL issued the postage stamps. The claimants had six (6) months from that date to give notice of their intention to make a claim against the State. That is, by 22 July 2003.

However, PPL is a separate legal entity from the State. As such, the claimants were not required to give such notice under Section 5 of the *Claims Act* for purposes of the claim.

Nevertheless, to the extent the court proceedings were purportedly settled by the alleged *NEC Decision 172 of 2008* on 19 September 2008, the claimants may seek enforcement of that decision for which their notice of their intention to make a claim was to be done no later than 19 March 2009.

No such notice was ever given nor was extension sought to give such notice, as confirmed in evidence by the Attorney General JDr Allan Marat, and Sam Kemaken of Kemaken Lawyers for the claimants.

Therefore, NEC Decision No. 172 of 2008 is not enforceable as against the State.

Rb It is recommended that the Solicitor General and Attorney General refuse any notice given, or extension to give such notice, by the claimants under Section 5 of the Claims Act to enforce purported NEC Decision No. 172 of 2008

(e) No merits in claim against State

a. No reasonable cause of action disclosed against State

The State is not named as a party to WS 584 of 2004. The Statement of Claim endorsed to WS 584 of 2004 purely relates to alleged breaches of copyright by a State-owned entity that has separate legal personality from the State.

There is no reasonable cause of action disclosed against the State.

*p3 It is found that there is no reasonable cause of action
disclosed against the State*

a. Fraudulent NEC Decision 172 of 2008

The claim was purportedly settled by *NEC Decision No. 172 of 2008* in which PPL was directed to pay K52 million in settlement of the claim.

Dr Allan Marat, Attorney General & Minister for Justice gave evidence that he was the Minister for Justice & Attorney General at that time. He denied knowledge of the claim. Further, there were no records on the proceedings in the offices of the Attorney General or Solicitor General's office, including no Section 5 notice. Moreover, he was neither aware of nor privy to any submissions to, or decision by, NEC recommending settlement of the matter, including by another Minister to NEC at all. He also commented that the purported NEC Decision:

"was a very good attempt forging the Prime Minister's signature. I am not a forensic expert but Prime Minister does not sign like this, I know."

There was also written evidence by Ms Winnie Kiap former Secretary, NEC that her signature on the purported *NEC Decision No. 172 of 2008* is forged, not genuine and that NEC never made a decision to that effect.

Sam Kemaken pursued payment for the claimants on the basis of the *NEC Decision No. 172 of 2008* without conducting due diligence in ascertaining its authenticity. Further, the *NEC Decision No. 172 of*

2008 directed payment to be made by PPL to "Kolimangh Clay Pof and not "Kemaken Lawyers".

pb It is found that Sam Kemaken was grossly negligent in not conducting due diligence to ascertain the authenticity of the fraudulent NEC Decision No. 172 of 2008

ft) It is recommended that Sam Kemaken's referral to the Lawyers Statutory Committee by PPL's Managing Director be pursued pb It is recommended that Joel Aundambui should be referred to the Royal PNG Constabulary for fraud investigation

Assessment of damages

The claim under WS 584 of 2004 is an active matter in which both liability and damages have yet to be determined. Nevertheless, the State is clearly not a party to which the claim relates.

However, despite PPL's separate legal status from the State, it is a State-owned enterprise. Thus, the State must assist PPL in ensuring that any claim based on the fraudulent NEC Decision No. 172 of 2008 is vigorously and successfully defended.

ft) It is recommended that the Solicitor General assist PPL in ensuring that any claim based on the fraudulent NEC Decision No. 172 of 2008 is vigorously and successfully defended

Steps taken (or not taken) by Solicitor General in defence of the claim

29. This aspect does not arise for consideration as the State is clearly not a party to which the claim relates.

Settlement

The State is not named nor joined as a party to WS 584 of 2004. However, those proceedings were purportedly settled by *NEC Decision No. 172 of 2008* in which PPL was directed to pay K52 million in settlement of the claim.

The Commission adopts the findings and views expressed above in respect of the fraudulent *NEC Decision No. 172 of 2008*.

R) It is recommended that the Solicitor General assist PPL in ensuring that any claim based on the fraudulent NEC Decision No. 172 of 2008 is vigorously and successfully defended

(a) Processing of claim and Pay-out

There has been no payment in respect of this matter. At this stage, this aspect does not arise for consideration.

RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

Referral to the Attorney General

Instruct Solicitor General not to entertain clearance on claim for payment based on fraudulent *NEC Decision 172 of 2008*, and ensure any future claim

on this matter is pursued in accordance with *Claims By & Against the Stats Act 1996*

Referral to the Royal PNG Constabulary

Joel Aundambui in seeking payment relying on fraudulent NEC Decision 172 of 2008

Sam Joseph Kemaken for being an accomplice in seeking payment on behalf of his client, Mr Aundambui, based on fraudulent NEC Decision 172 of 2008

Referral to the Lawyers Statutory Committee

Sam Joseph Kemaken for dishonourable, improper and unprofessional behaviour by seeking payment on behalf of his clients' based on a fraudulent NEC Decision 172 of 2008 without conducting due diligence

(b) Thomas Murowo

Parties

For the State

Police

University of Papua New Guinea

Solicitor General

For the Claimant:

James Towa

James Mobie Genaboro

Paul Paraka Lawyers

Blake Dawson Waldron Lawyers

Others (if any)

None

Matter

James Towa submitted a claim on behalf himself and the family of late Thomas Moruwo, one of the persons killed by Police during the 2001 student led anti-privatisation campaign

The NEC approved the submission by then Minister for Justice to compensate the death of late Mathew Pawen and Thomas Moruwo. NEC submission stated that K1 million be approved and be paid equally amongst the relatives of the deceased. The submission was approved but the amount of compensation was to be determined following proper consultation

A Deed of Release was signed on 3 September 2002 for the sum of K800,000.00

Recommended Findings

K800,000.00 is very excessive. No proper assessment of damages

Claimants asked for compensation of K500,000.00

Solicitor General failed to comply with NEC decision

Solicitor General failed to take note (comply) with the CACC recommendations/advice to the NEC

Mr Zachary Gelu's actions were unreasonable and amount to a conflict of interest

Other persons benefitted from this claim. The immediate family may have benefitted but most were received by some other persons.

Terms of Reference

Attached herewith is the copy of the Terms of Reference. This is a case which falls within the terms of the reference of this inquiry. The relevant and applicable terms of references in respect of this case are *Terms of Reference No.s' 1 (i-iii, vii & ix) and 5(i-iii)*. Also attached are copies of abstracts of relevant statutory legislation and NEC Decisions pertinent to this case.

Documents and investigations conducted at:

Office of Clerk of Parliament (OCP)

Office of the Secretary to NEC (SNEC)

University of PNG (UPNG)

Department of Finance (DF)

Other Sources relevant this case (OD)

Brief Facts /Evidence

1. This is a claim by one James Towa on behalf of the family of late Thomas Moruwo. James Towa claims to be the cousin of late Thomas Moruwo. It

is alleged that late Thomas Moruwo was killed by Police during the student led anti-privatisation campaign conducted between 21 to 26 June 2001.

As a result of the UPNG student led protest, it is believed that four people were killed, several persons injured and there was widespread destruction of properties. A Commission of Inquiry headed by Justice Sir Robert K. Woods was established to inquire into the student unrest. Annexure '1- **OCP**' is the copy of the Commission of Inquiry Report tabled in Parliament on 22 February 2002 by then Prime Minister Rt Hon. Sir Mekere Morauta.

The Commission of Inquiry Report highlighted that on 25 June 2001 the fifth day of protesting, the students' refused to present their Petition to a deputation of Ministers without the Prime Minister having to accept the petition himself.

The Report indicated that the students after refusing to present their Petition went into destroying public properties and caused disruptions to the community along the University Campus vicinity and the main road past the University to Gerehu was blocked. Several vehicles were forcefully removed from their owners and destroyed.

The Report highlighted that there were some non-students amongst the students and gun shots were allegedly fired within the campus. Couple of students were believed to be seeing holding firearms.

Police were called in to quell the situation. However the mass of students together with some non-students took their frustration out on the Police by throwing missiles and petrol bombs. The Police having realised of being outnumbered by the frenzied mob fired their rifles into the air. In the process some students were hit by shotgun pellets and fell injured and there were two cases of mortally wounded.

The Report further revealed that on 26 June 2001 the students and their supporters continued to destroy or loot properties and also attacked shops, which was spurred by rumours of fatal confrontation at the University Campus the previous day. Police resources were stretched throughout the city to disperse crowds assembling to further protest. Serious confrontations were reported around the Waigani area resulting to a police barracks building being set alight and destroyed, two police were injured by thrown missiles and several people injured by gunshot pellets.

Several witnesses giving evidence in the Commission of Inquiry made references to two people being allegedly killed on 26 June 2001. However the Report stated that no relatives or friends came forward before the Commission of Inquiry to confirm the deaths. As such Justice Sir Woods in his summary of the Report concluded only two deaths.

Annexure **'2-UPNG'** are copies of relevant documents provided by University of PNG Registrar, Mrs Jennifer Popat as requested by the Commission to confirm the legitimacy of the following:

- number of students killed
- names of the students killed
- documents proving the alleged killed students' registration with the University at the time of death
- other relevant documents

The documents provided only confirmed Simon Noki and Steven Kil as the only legitimate students killed during the protest. Records of the other UPNG institutions in respect of EduAdmin (formerly Centre of Distance Education) and Open College also reveal that the claimant was not registered with them.

Significant reference should be made to the letter dated 28 June 2001 by Professor Mathias Sapuri Executive Dean School of Medicine and Health Science UPNG addressed to the Vice Chancellor, Professor Leslie Eastcott In the letter Professor Sapuri reports a list of the deaths and injuries sustained during the unrest, which was confirmed by himself and Dr. Kaptigau senior surgeon at Port Moresby General Hospital. The letter is pertained to part of the annexure '**2-UPNG**'.

The deaths or fatally wounded are identified in the list are as follows:

Steven Kil - UPNG student from WHP. Died prior to arrival

at PMGH from chest gunshot wound

Simon Noki - UPNG student from WHP. Died in operating

theatre from chest gunshot wound. He was in severe

haemorrhagic shock.

Thomas Maino - Not a student from Asaro EHP. Died prior to

arrival at PMGH from gunshot wound.

Mathew Pagun - Not a student from WNB. Admitted with left

chest gunshot wound. Arrested from internal bleeding and

fortunately responded to resuscitation and later had a left

pneumonectomy. He is in ICU in critical condition.

Note that the claimant's second name was spelled as Maino and not Moruwo as identified in this claim.

On 23 April 2002 the then Minister for Justice, Hon. Puri Ruing, MP filed a Policy Submission No. 94/2002 to NEC. The submission was made to advise compensation claims lodged by the relatives the students allegedly killed by Police and sought NEC approval for compensation payments. Annexure '**3-SNEC**' is the copy of this Policy Submission.

The Policy Submission recommended NEC to approve and direct the Secretary for Treasury to make ex-gratia payment of K1 million to be equally shared between the next of kin of the late Simon Noki and **Steven Kil**.

On 29 April 2002 the Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1 deliberated on Policy Submission No. 94/2002 and advised NEC that the claim of the dead students' relative was knocked out of court and hence the State should not concede liability as there was no basis to make the ex-gratia payments. In addition the Solicitor General was cited to having advised against the payment as the amount recommended was excessive and the law does not allow this payment. Where the State was to admit liability the appropriate amount would have to be K50,000.00 up to K100,000.00. Annexure '4-SNEC' is the copy of the CACC Meeting No. 15/2002 Paper. No. 2.1.1.

Following the CACC advice, on 2 May 2002 NEC in its Decision No. 142/2002 Special Meeting No. 19/2002 agreed to make ex-gratia payments to the parents of the two deceased students. It was decided that the Prime Minister in consultation with the Minister for Privatisation & Corporation and Justice & Attorney General will determine the level of the ex-gratia to be paid in consultation. Annexure '5-SNEC' is the copy of the NEC Decision No. 142/2002 Special Meeting No. 19/2002.

No further correspondence were received by the Office of the Secretary to NEC to ascertain the Prime Minister's decision on the level of ex-gratia payments made to the two deceased students' parents. However the Commission's review of the Department of Finance cash book listings revealed the following:

Steven Kil — no payments noted

Simon Noki - K300,000.00 on 9 May 2002 on cheque ref# 638770.

Despite the findings of the Commission of Inquiry, UPNG Administration and the Minister for Justice and Attorney General having confirmed that Thomas Moruwo was not a student at the time of his death and NEC having endorsed to pay ex-gratia to only two students. The Solicitor General, Zacchary Gelu in his letter dated 18 September 2002 to the then Acting Secretary for Department of Finance, Thaddeus Kambanei advised that Thomas Moruwo was one of the deceased students. Clearly, Mr Gelu mis-lead the Finance Secretary. Annexure '6-DF' is the copy of this letter.

Parts of the said letter reads (quote) as follows:

*"...The UPNG students leadprotest against Government Privatisation program in June 2001. The four (4) students were shot dead by Police. The National Executive Council have already approved and settle payment for two (2) students from Mount Hagen but not **Thomas Moruwo** and Mathew Paven for Compensation claim.*

Parties decide to negotiate a settlement and agreed to settle at K800,000. There will be no further claims on this matter...

Following the death of Thomas Moruwo, sometime in November 2001 a letter of demand was addressed to the Prime Minister and the UPNG SRC President seeking compensation. They demanded that K500,000.00 be paid by the State whilst the other K500,000.00 be paid by the UPNG SRC body (or the UPNG). A second letter of demand was again addressed to the Prime Minister on 10th May 2002 requesting approval of K500,000 or an the Government (State) offered to the two UPNG students.

On 20th August 2002, another letter of demand was addressed to the Solicitor General, Mr Zachaary Gelu stating (quote), "...Our demand for K500,000.00 still stands or we would consider accepting an amount the Government would offer to the two Western Highlanders already approved by the NEC."

A Deed of Release was signed on 3 September 2002 for the sum of K800,000.00. Annexure '7-DF for copy of the Deed of Release. The parties involved in the signing of the Deed of Release are as follows:

Releasor - James Towa acting for Thomas Moruwo.

Releasee - Zacchary Gelu being the Solicitor General

So far K710,000.00 has been paid.

The following persons were called to give evidence in respect of this claim. They are:-

James Mobie Genaboro;

James Towa;

Francis Kuvi;

WaiHerumaho;

Thaddeus Kambanei; ix. John Kawi.

Evidence-James Mobie Genaboro

Mr Genaboro was engaged by the claimant, James Towa to assist pursue the claim. He is not related to the deceased or the claimant. Asked how is he (Genaboro) related to the deceased, he answered:-

"A: In fact I am well known in Daulo. Because I am a Public Servant and they know who I am, the relatives in here found it very difficult to communicate, to get through into Waigani. They are finding it very difficult so even though they wrote their petition to the Prime Minister, no response were forthcoming.

Q: You mean this is the petition, the first—

A: The first one.

Q: Yes, it is dated November 2001?

A: Yes. So in one of my campaigns while I was up in upper Asaro, I met the relatives there, they asked for me and I said I will look into it and that is how I got myself involved after the voting. That is why I came down and I started making contacts, enquiries.

Q: So you are not related by blood in any family connection?

A: No."

It is clear that apart from James Towa (claimant) who holds himself out as the brother of deceased, all the persons who had signed the petition are not related to the deceased but are said to be from the same village. Asked about their relationships, he answered:-

j2-' Then you are saying James Towa, community church leader, Morata, and you say James Towa - what is James Towa's relationship to the deceased?

A: He is the deceased's blood brother.

Q: You mean to say they share the same mother and father, is that correct? A: Yes.

Q: The other four are all from the same village, but you cannot say whether they were related by blood, that is fine. I also note from some of the documents that Mr Thomas Murowo was described as being married?

Asked if the deceased, he fksdy answered "yes" but later stated that bride price was no paid and they were just living together. He did not know the name of the wife and further stated that they had no children.

Asked as to why the deceased Thomas Moruwo and James Towa (claimant) had different surname although they come from the same parents, he answered, "...I do not know, I cannot explain."

In relation to the assessment of damages to be paid, that is how was the figure K500,000.00 arrived at? He answered there was no method of calculation but a person had died. Mr Genaboro was further asked:-

"Q. I am curious to see that you are askingfor KJ00,000, yet Mr Gelu signed a deed to say K800,000. Why was that an increase of K300,000, you only asked for ¥500,000?"

A: No, we askedforK1 million.

THE CHAIRMAN: Your letter of 20 August says, "we are demanding for K500,000, still stands and that we would consider accepting an amount tk government offered to the other two already approved by the NEC." That was K500,000. So you were askingfor K500,000 and even if you did not know, you are saying we would accept whatever the NEC approved. So how did it jump to K800,000?

A: Through ourpetition we askedfor K500,000 each from the State.

f): Butyou were working for the Prime Minister's Department, you know tk difference between the students union at University and the Government, that is not the -you said K500,000. In other words you are going to take it on both accounts. When you went to Mr Gelu, you are still writing in your letter K500,000. You are not

saying, by the way you are responsible for the students as well at the University.

How did it jump from K500,000 to K800,000?

A: We asked for a million in our petition, K500,000 from JTRC President—

Q: We have moved on from the petition, the petition is way back. From the time you were talking to Gelu, it was 20 August, September coming up. You are about to get paid out and you still talking about K500,000, you are not talking about millions anymore.

A: We also said K500,000 or any amount that the government would offer to the two Western Highlands.

Q: What did thy offer to the two Western Highlanders?

A: I do not know so I assume that the Western Highlanders were probably paid a million.

O: Thy were not.

MR KASSMAN: So the jump from K500,000 to K800,000, you cannot explain?

A: We were asking for any amount that the government would offer.

Q: Anything?

*A: Any amount that would apply to the Western Highlanders. So I assumed, if we were offered K800,000 and then probably the Western Highlanders were offered **K800,000.***

Q: Did Mr Gelu invite you to ask for more?

A: No, he never. We fought for it, the relatives fought for it to get what we wanted.

Q: Did he ever tell you why he was agreeing to pay K800,000 and not K500,000.00? Did Mr Gelu ever tell you why he was going to commit the State to K800,000 and not K500,000, which is what you have claimed?

A: As I have said, we really fought to get what we wanted apart from what we believe the Western Highlanders were already paid. So we fought for it and eventually we agreed to that K800,000 that was offered so we accepted it. Q: The Western Highlanders only got K500,000.

A: Then we are happy.

Q: Sorry?

A: We are happy. I mean if they were offered K500,000 and we were offered K800,000 then what is wrong? We are happy because we are asking for compensation from the State.

Q: By that I am making reference to what you said in your letter to the Trims Minister Sir Mekere and then to Mr Gelu. You said we will tab K500,000 or whatever the Western Highlanders get, and they got ¥500,000.

THE CHAIRMAN: So on what you say, you should have got K500,000 because you have been asking for K500,000. You said, "we will take K500,000", it is in your letter. A demand for K500,000 still stands or we will consider accepting the amount the government offered to the two Western Highlanders already approved by NEC for K500,000. So where did the actual K300,000 come from? I mean you went into the meeting wanting K500,000.

A: As we said we lost a life and we have to - we fought with Mr Gelu and—

Q: There was no incentive offered at all to up the price or you did not get a bit more because you had an agreement to pay out other people?

A: No Commissioner.

Q: You see, the Commission of Inquiry is looking into how it happened and we know that the NEC approved K500,000 for each student, not for anybody else so there was no NEC decision that said K500,000 for non students. So we ask the questions of the Solicitor General's office, why they are settling at all for anybody outside of the NEC approval, and we asked the Solicitor General, why this K300,000 more as well. So we are asking you the same question and you do not seem to have come up with any answer either. So the process of the claim does not look very good, does not look as though it followed reasonable procedures. Suddenly there is a K300,000 gap which nobody seem to quite understand - can explain.

A: As I have said in our petition, we asked for K1 million.

Q: But you did not ask for K1 million from the State?

A: No, in our first petition.

Q: I know but even then you did not ask from the State.

A: We wrote to Sir Mekere because of the NEC decision that any amount they offered to the Western Highlanders, and we believed that K800,000 is what was offered to the Western Highlanders.

MR KASSMAN: Who offered that?

A: *The State.*

Q: *Who?*

A: *Government.*

Q: *Who, a person?*

A: *The NEC.*

THE CHAIRMAN: *Who offered the K800,000 to you?*

A: *The Solicitor General of Papua New Guinea.*

MR KASSMAN: *You mean Zacchary Gelu?*

A: *Yes.*

Q: *He offered K800,000?*

A: *Yes.*

Q: *Did he offer that in writing?*

A: *No the deed of release.*

Q: *Sony, before you signed the deed, you had a discussion?*

A: *We had a discussion, we had to meet to fight to pursue our claim.*

Q: *Who came up with the figure of K800,000?*

A: We agreed with the Solicitor General because we were asking for K1 million.

Q: Mr Genaboro, who put forward the figure K800,000, did you put it forward, did Mr Gelu put it forward?

A: Mr Gelu for K800,000.

Q: He offered K800,000?

A: Yes."

Mr Genaboro confirmed that K710,000.00 was paid. About K80,000.00 was paid to or received by Mr Genaboro for what he claimed as services provided to the claimant.

It is submitted that Mr Genaboro was not sure of most of evidence in relation to the claimants (i.e. persons who spearheaded the claim) relationship to the deceased. On most occasions he appeared to assume and was asked by Counsel not to assume provided evidence that he is aware. He also was evasive. Further, it is clear from the evidence that Mr Genaboro was actively used to pursue the settlement because of the various positions he held within the public service. He was instrumental in pursuing the claim because of the people whom he know. This is confirmed by an email from Mr Ron Ganarafo, former member for Daulo electorate.

It is submitted that the claim was pursued by persons not directly related to the deceased as such other persons like Genaboro benefitted from this claim. This is because when the matter was listed for hearing in Mt. Hagen, Wai Herumaho called the Commission expressing concern why the matter was listed for hearing Mt. Hagen and stated that all relatives of the deceased

live here in Port Moresby and copies of all the documents have already been provided so there was no real reason for the matter to be called in Mt. Hagen.

Furthermore, Mr Genaboro confirmed that they asked for K500,000.00 or whatever that was paid to the two UPNG students. The K800,000.00 was offered by Mr Gelu. The claim should be referred to the Police for further investigation as clearly, persons directly related to the deceased never benefitted from the claim. If they did ever benefitted, it would be minimal as most of the monies were paid to persons not directly related for instance Mr Genaboro admitted receiving about K80,000.00. It is submitted that Mr Genaboro received more than K80,000.00 because he appeared he evasive and further he was not comfortable answering the question.

Evidence - James Towa ("claimant")

James Towa is the claimant. He advised that the deceased was his small brother. Asked why there was a difference in the surname of the deceased and his, he answered:-

"Q: Sorry, full name of your father?"

A: Tongi Murowo.

Q: The full name of your mother? You said your brother's name, the deceased is

Thomas Murom and your name is James Towa. Why is it that, that you btm two different surnames?

A: My names are James and Towa is my grandfather's name. They named nt after my grandfather, my old man. Thy put his name. My name is James, Tow\ is my grandfather and he is already dead.

Q: What about Thomas? Thomas's surname is Murom? A: Thomas

Murowo, is my father."

It is submitted that when questions were asked in relation to the names of his father, mother, small brother, James Towa appeared confused. It is submitted that this is a claim pursued by persons (including James Towa) who are not even directly related to the deceased. He stated that there are only three of them, James, late Thomas and Towa Dongi. It is submitted that these names are all fabrication and appears to be no real connection with the deceased.

James Towa confirmed that he had no meetings with Mr Gelu. The only meeting was when he went to sign the deed of release. Mr Genaboro in his evidence stated that he met Mr Gelu about 3 — 4 times. This confirms that Mr Genaboro was the person who actively pursued the matter resulting in the payments.

James confirmed that some of the cheques were collected directly from the Finance Department, from one Boas Hembahi an officer with Finance Department.

It is evident from the evidence of James Towa that other persons benefitted from the payments received as he was not able to properly account for the monies received. This resulted in the difference between James Towa and Wai Herumaho.

Evidence — Wai Herumaho

Wai Herumaho stated that the late Thomas Moruwo and him are first cousins. Wai's evidence contradicts the evidence of James Towa (and Genaboro). They are:-

James said late Thomas and him are blood brothers (one father and one mother), but Wai said they are cousins not blood brothers;

James said they were only three in the family, i.e. himself, late Thomas and Towa Dongi, small brother living in the village. But Wai's evidence is that late Thomas had only one brother, James Murowa (not Towa Dongi, confusing names) and he lived in the village;

Wai said late Thomas has some sisters but they may have all got married and are currently live in the village. Again contradicting evidence by James that there were no sisters only three of them, contradictory;

Wai stated that Genaboro received about K100,000.00. This confirms our submission that Mr Genaboro was evasive and looked un-easy when answering the question. It is submitted that Mr Genaboro received K100,000.00 (or more) and not IC80,000.00. Mr Genaboro may have misled the Commission as such was not a truthful witness.

It is submitted that the claimants in this case are not directly related to the deceased. The question is how can you mix up/confuse the names of your brothers, sisters, cousins, father, and grandfather. Clearly, all these persons were not related to the deceased. It may have been the case that the deceased was living with the Asaro (Goroka) community at Morata during his demise. The claimants took it upon them to make a claim without the knowledge of the immediate relatives.

Mr Herumaho stated that he instructed Narokobi Lawyers to stop any further payments to James Towa or otherwise appoint Wai Herumaho instead of James Towa as the claimant. As a result, a Memorandum of Understanding was signed between Wai Herumaho and James Towa

effectively replacing James Towa as the claimant. Mr Herumaho was asked about the MOU.

"Q} Mr Herumabo, I will refer you to the memorandum of understanding. During signing of this document, the memorandum of understandings did the lawyer explain to you - did you understand the contents of this memorandum of understanding?

A: Yes.

jQ: Did the lawyer explain to you?

A: Yes, he did.

Q: What was the basis for entering into this memorandum of understanding? Sorry, Mr Herumabo for purposes of Mr Geroro to translate, you will have to speak more or less in sequence. Speak then Mr Geroro can have the time to translate.

A: This MOU was to basically removed James from pursuing the claims. So whatever monies that were received from Department of Finance would then be distributed. So this MOU was basically to remove James from pursuing the claim on our behalf so we could deal with the claims in person.

Q: What was the basis to remove James from pursuing this claim?

A: The monies that were paid by Finance were not paid out to the rightful beneficiaries. So by way of illustration K200,000 was paid out but only K100,000 was received by the intending beneficiaries or the rightful beneficiaries. That was the reason why we had to remove James from pursuing the claim so that we could recover the balance of the entitlements outstanding."

There is sufficient evidence to show that other persons (persons not directly related to the deceased) benefitted from this claim as such the matter be referred to the Police for further investigations. This is a clear case were the relatives or families of the deceased live in the village whilst some other relatives or distant relatives take advantage of the circumstances to unjustly enrich themselves. It could amount to fraud.

Mr Francis Kuvi in evidence basically stated that he had no knowledge of this claim nor did he have any carriage of this matter whilst been employed by the Solicitor General's Office.

It is clear from this case that the National Executive Council ("NEC") played a major part in the settlement of this matter. It may be a political decision. It is submitted that clearly this is a dependency claim. The laws adequately address issues arising from dependency claims. In this case, it is submitted that the NEC should not interfere with the work of the relevant State agencies, such as the Solicitor General's Office and Public Curators Office perform their roles in such circumstances.

John Kawi in his evidence also commented that this was a dependency claim and the figure proposed in the NEC submission was way above the amount awarded in a dependency claim. When asked what he knew about the claim, Mr Kawi stated (quote, only part):-

"..... So I said, until I am satisfied I am sorry but this is one instance where I will have to defy the NEC direction to settle for K500,000. I made that very clear. I said I will not settle this for K500,000 because although I sympathise with the death of the students which was at the hands of police, we also got in touch with police to give us instructions on this. Assuming that police would be responsible, this was the line I was taking that we do not settle the amount, these two deaths in the amount of K500,000 each. My thinking was that it must be properly calculated using dependency claims. As a

dependency claim using the three per cent tables, if it was not a dependency meaning if the students who died did not have any families on their own, kids on their own, this at its best could be treated as a contingent type of customary dependency. That is how I viewed it and so I made a file notation on this. It is true there was no court proceedings issued in these two matters. But my file notation I recall was that these matters must be looked at from the line I was advocating and so that is the reason why I said I will defy NEC instructions to settle at K500,000 each. That is my only against in this matter. As you pointed out Gelu, I do not know how he could justify this but he comes in and settles it from an amount higher than the NEC directive."

In regards to payments made, Mr Thaddeus Kambanei stated that it would be unusual to change the name of payee half way through or that is after some payments had already been made, because once the name of the payee is changed the "system" cannot pick-up how much has so far been paid in respect of the same claim the payments have been made.

Mr Kambanei was asked:-

"Q: In relation to obviously the same incident was the claim of Thomas Murovo, and again here the deed of release signed this time by a James Towa for Thomas Murovo. The records - again the deed of release for it was for a sum of K800,000. You can see from the sheet that we have handed over and in addition to that what is stated in the summons itself, in this case it was settlement again for K800,000. The records of the Department of Finance indicate that the sum of only K30,000 has been paid to Thomas Murovo. Again, I note here the payee on the cheque is the deceased person himself. That again would be strange or unusual issue of the cheque.

A: Correct. It is very unusual, yes."

Findings:

James Towa is not the blood brother of the deceased nor is he directly related to the deceased.

James Mobie Genaboro, Wai Herumaho and others are not directly related to the deceased.

Other persons benefitted from this claim.

Deceased is not a UPNG student.

No proper assessment of damages. Damages awarded by Mr Gelu is very excessive.

Claimants asked for K500,000.00.

Zacchary Gelu failed to properly assess the claim. Mr Gelu acted in contravention of the NEC decision. Further, Mr Gelu acted beyond his powers because the claimants only asked for K500,000.00 yet he offered K800,000.00 (K300,000.00 more than what was claimed).

James Mobie Genaboro used his influence to pursue this claim.

Recommendations

1. Matter be referred to Police for further, investigations as other people benefitted from this claim.

James Towa, James Mobie Genaboro , Wai Herumaho and those persons involved in pursuing this claim be referred to Police for further investigations.

Zacchary Gelu must be referred to the Police Fraud Squad for possible investigation and charges to be laid. Further, Me Gelu be referred to the Lawyers Statutory Committee for unprofessional conduct.

Since all claims against the State are reviewed and sanctioned by the a Solicitor General, it is recommended that all payments processed by the Department of Finance should be forwarded to the Office of Solicitor General to effect settlement to respective claimants/plaintiffs or their agents.

Department of Finance prior to processing any payments being advised by the Solicitor General should request for the Solicitor General officially authenticated/ sealed documents as in the cases of Consent Orders, Certificate of Judgements and Deed of Releases.

All payments requested by claimants or their legal representatives and or agents should be forwarded to the Office of the Solicitor General for authentication prior to being processed for settlement.

Immediate instructions be given to Finance Department to stop any further or balance of the payments.

Solicitor General file proceedings to set aside the Deed of Release as soon as possible.

9. Mr Gelu be banned from ever holding onto or been appointed to any public service position in the future.

Index of Relevant Documents

- OCP - Copy of the Commission of Inquiry Report into the 2001 UPNG student-led unrest.
- UPNG - Copies of confirmatory documents provided by UPNG Registrar as requested.
- SNEC - Copy of Minister for Justice, Hon. Puti Ruing, MP filed a Policy Submission No. 94/2002 to NEC
- SNEC - Copy of Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1
- SNEC - Copy of NEC Decision No. 142/2002 Special Meeting No. 19/2002
- DF - Copy of letter dated 18 September 2002 from Solicitor General to Acting Secretary for Department of Finance.
- DF - Copy of the signed Deed of Release
- DF - Copy of FF3 form
- DF - Copy of FF4 form

(c) Mathew Pawen

A. Parties

For the State

Police

University of Papua New Guinea

Solicitor General

For the Claimant:

Josepha Pawen

Tony Pawen

Patterson Lawyers

a. Others (if any)

None

B. Matter

Claim by one Josepha Pawen for and on behalf of her family for the death of Mathew Pawen (younger brother) killed by the Police during the UPNG student unrest.

The NEC approved the submission by then Minister for Justice to compensate the death of late Mathew Pawen and Thomas Moruwo. NEC submission stated that K1 million be approved and be paid equally amongst the relatives of the deceased. The submission was approved but the amount of compensation was to be determined following proper consultation.

No court proceedings were taken out against the State.

- A *Deed of Release* was signed on 3 September 2002 for the sum of K800,000.00.

Findings

K800,000.00 is very excessive. No proper assessment of damages

Solicitor General failed to comply with NEC decision

Solicitor General failed to take note (comply) with the CACC recommendations/advice to the NEC

Mr Zacchary Gelu's actions were unreasonable and amount to a conflict of interest

Gilbert Maki and Zacchary Gelu actions amount to unprofessional conduct

Patterson Lawyers costs issued to Tony Pawen are very excessive

Patterson Lawyers and Zacchary Gelu benefited from the claim

Terms of Reference

Attached herewith is the copy of the Terms of Reference. This is a case which falls within the terms of the reference of this inquiry. The relevant and applicable terms of references in respect of this case are *Terms of Reference No.s' 1 (i-iii, vii & ix) and 5(i- iii)*. Also attached are copies of abstracts of relevant statutory legislation and NEC Decisions pertinent to this case.

Documents and investigations conducted at:

Office of Clerk of Parliament (OCP)

Office of the Secretary to NEC (SNEC)

University of PNG (UPNG)

Department of Finance (DF)

- Other Sources relevant this case (OD)

Brief facts /Evidence

This is a claim by one Josepha Pawen on behalf of her family for the death of Mathew Pawen. Mathew Pawen was shot by the Police during the UPNG student led anti-privatisation campaign conducted between 21 to 26 June 2001.

Following the Student un-rest, a Commission of Inquiry headed by Justice Sir Robert K. Woods was established to inquire into the student unrest. Annexure '1-OCP' is the copy of the Commission of Inquiry Report tabled in Parliament on 22 February 2002 by then Prime Minister Rt. Hon. Sir Mekere Morauta.

The Commission of Inquiry Report highlighted that on 25 June 2001 the fifth day of protesting, the students' refused to present their Petition to a deputation of Ministers without the Prime Minister having to accept the petition himself.

The Report indicated that the students after refusing to present their Petition went into destroying public properties and caused disruptions to the community along the University Campus vicinity and the main road past the University to Gerehu was blockaded. Several vehicles were forceful removed from their owners and destroyed.

The Report highlighted that there were some non-students amongst the students and gun shots were allegedly fired within the campus. Couple of students were believed to be seeing holding firearms.

Police were called in to quell the situation. However the mass of students together with some non-students took their frustration out on the Police by throwing missiles and petrol bombs. The Police having realised of being outnumbered by the frenzied mob fired their rifles into the air. In the process

some students were hit by shotgun pellets and fell injured and there were two cases of mortally wounded.

The Report further revealed that on 26 June 2001 the students and their supporters continued to destroy or loot properties and also attacked shops, which was spurred by rumours of fatal confrontation at the University Campus the previous day. Police resources were stretched throughout the city to disperse crowds assembling to further protest. Serious confrontations were reported around the Waigani area resulting to a police barracks building being set alight and destroyed, two police were injured by thrown missiles and several people injured by gunshot pellets.

Several witnesses giving evidence in the Commission of Inquiry made references to two people being allegedly killed on 26 June 2001. However the Report stated that no relatives or friends came forward before the Commission of Inquiry to confirm the deaths. As such Justice Sir Woods in his summary of the Report concluded only two deaths.

Annexure '2-XJPNG' are copies of relevant documents provided by University of PNG Registrar, Mrs Jennifer Popat as requested by the Commission to confirm the legitimacy of the following:

number of students killed

names of the students killed

documents proving the alleged killed students' registration with the University at the

time of death

other relevant documents

The documents provided only confirmed Simon Noki and Steven Kil as the only legitimate students killed during the protest. Records of the other UPNG institutions in respect of EduAdmin (formerly Centre of Distance Education)

and Open College also reveal that late Mathew Pawen was not registered with them.

11. Significant reference should be made to the letter dated 28 June 2001 by Professor Mathias Sapuri Executive Dean School of Medicine and Health Science UPNG addressed to the Vice Chancellor, Professor Leslie Eastcott. In the letter Professor Sapuri reports a list of the deaths and injuries sustained during the unrest, which was confirmed by himself and Dr. Kaptigau senior surgeon at Port Moresby General Hospital. The letter is pertained to part of the annexure '2-UPNG'.

- 1-2. The deaths or fatally wounded individuals are identified in the list are as follows:

Steven Kil - UPNG student from WHP. Died prior to arrival at PMGH
from chest gunshot wound

Simon Noki - UPNG student from WHP. Died in operating theatre from
chest gunshot wound. He was in severe haemorrhagic shock.

Thomas Maino — Not a student from Asaro EHP. Died prior to arrival at
PMGH from gunshot wound.

Mathew Pagun - Not a student from WNB. Admitted with left chest
gunshot wound. Arrested from internal bleeding and fortunately
responded to resuscitation and later had a left pneumonectomy.
He is in ICU in critical condition.

13. Note that the claimant's second name was spelled as Pagun and not Pawen as identified in this claim. It may have been a typographical error.

Following the death of late Mathew Pawen, as mentioned above, Josepha Pawen issued what appeared to be a Section 5 notice pursuant to the Claims By and Against the State Act 1996 to make a claim against the State for the death of Mathew Pawen. Mr John Kawi, then Solicitor General acknowledged receipt of the section . 5 notice and advised Josepha Pawen that he would seek instructions and provide a response by way of a letter dated 25th January 2009.

Letters were also written to the then Prime Minister Sir Mekere Morauta and Mr Augustine Molongos, then UPNG SRC President for some form of compensation to assist with the funeral arrangements etc. It must be noted that in all the letters seeking compensation and the notice of claim lodged with the Solicitor General, no amount was sought by the claimant. During evidence, Josepha Pawen was asked if any amount was proposed and she stated that "...no amount was proposed."

On 23 April 2002 the then Minister for Justice, Hon. Puri Ruing, MP filed a Policy Submission No. 94/2002 to NEC. The submission was made to advise compensation claims lodged by the relatives the students allegedly killed by Police and sought NEC approval for compensation payments. The submission also noted that apart from the two UPNG students killed there were also two non-students, presumably referring to Mathew Pawen and Thomas Moruwo. However, the NEC submission stated that no compensation demand was received from the relatives of the two non-students. The submission noted that the relatives of the two UPNG students demanded K800,000.00. Annexure '3-SNEC' is the copy of this Policy Submission.

The Policy Submission recommended NEC to approve and direct the Secretary for Treasury to make ex-gratia payment of K1 million to be equally shared between the next of kin of the late Simon Noki and Steven Kil, the two UPNG students.

On 29 April 2002 the Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1 deliberated on Policy Submission No. 94/2002 and advised NEC that the claims of the dead students' relative was knocked out of court and hence the State should not concede liability as there was no basis to make the ex-gratia payments. In addition the Solicitor General was cited to having advised against the payment as the amount recommended was excessive and the law does not allow this payment. Where the State was to admit liability the appropriate amount would have to be K50,000.00 up to K1 00,000.00. Annexure '**4-SNEC**' is the copy of the CACC Meeting No. 15/2002 Paper. No. 2.1.1.

Following the NEC meeting, it was decided that the Prime Minister shall determine the level of the ex-gratia to be paid in consultation with the Minister for Privatisation & Corporation and Justice & Attorney General. Annexure '**5- SNEC**' is the copy of the NEC Decision No. 142/2002 Special Meeting No. 19/2002.

No further correspondence were provided by the Office of the Secretary to NEC to entail the Prime Minister's decision on the level of ex-gratia payments made to the two deceased students' parents. However the Commission's review of the Department of Finance cash book listings revealed the following:

Steven Kil — no payments noted

Simon Noki -K300,000.00 on 9 May 2002 on cheque ref# 638770.

Despite the findings of the Commission of Inquiry, UPNG Administration and the Minister for Justice and Attorney General having confirmed that Thomas Moruwo was not a student at the time of his death and NEC having endorsed to pay ex-gratia to only two students. The Solicitor General, Zacchary Gelu in his letter dated 18 September 2002 to the then Acting Secretary for Department of Finance, Thaddeus Kambanei advised that Mathew Pawen was

one of the deceased students. Clearly Mr Gelu misled the Finance Secretary.

Annexure '6-DF' is the copy of this letter.

22. Parts of the said letter reads (quote) as follows:

*"...The UPNG students lead protest against Government Privatisation Program in June 2001. The four UPNG students were shot dead by Police. The National Executive Council have already approved and settle payment for two (2) students from Mount Hagen but not Thomas Morumo and **Mathew Pawen** for Compensation claim.*

Parties decide to negotiate a settlement and agreed to settle at K800,000.00 There will be no further claims on this matter...

Date	No	Acc	Progrm	Act	Item	Payee	Details	Ty	Ref#	Payments]
25/1/03	890402	207	4201	4123	135	Mathew Pawen	Part Pay.- SG 1227/0	CQ	710215	30,000.06
4/4/03	903047	207	4201	4123	135	Mathew Pawen	Reimbursement Chq.Co	CQ	716817	30,000.01
17/10/03	940865	207	4201	4123	135	Mathew Pawen	Being Payment for O/	CQ	736901	30,000 00
1/4/04	972626	207	4201	2107	135	Mathew Pawen	Repl Chq. No. 736901	CQ	774166	30,000 GO
25/5/04	982007	207	4201	2107	135	Josepha Pawen Suvu	Replmnt chq#774166 a	CQ	779313	30,000.66
7/12/04	11011	207	4201	2107	135	Josepha Pawen Suvu	O/S comp balance(dec	CQ	797254	300,000.00 — —
29/3/05	1024803	207	4201	2107	135	Mathew Pawen Suvul	Pmt for o/s deed of	CQ	806532	210,000.00
2/8/05	1042763	207 4	201	2107	135	Mathew Pawen	O/S DOR claim Pmt	CQ	816796	50,000.00 am

Suvul

Total 710,000.00

A Deed of Release was signed on 3 September 2002 settling the claim for K800,000.00. The deed was not affixed with the seal of the Solicitor General's Office seal as required. Annexure '7-DF' for copy of the Deed of Release. The parties involved in the signing of the Deed of Release are as follows:

Releasor - Josepha Pawen Suvulo acting for Thomas Moruwo.

Releasee — Zacchary Gelu being the Solicitor General

Following tabulate illustrates payments made to the claimants by Department of Finance as being abstracted from the electronic Cash Book listings provided:

Annexes '8-DF', '9-DF' and '10-DF3' are the only supporting payment vouchers provided in the Department of Finance file. Note that annexes 8-DF and 10-DF are in respect of FF3 whilst annexure 9-DF consist of FF3 and FF4 for a payment of K300,000 which is marked as cancelled on the remittance advice. Despite the cancellation of this cheque, there is no reference on the Department .of Finance cash book listing highlighting such a cancellation in respect of this payment.

Also note on annexure 8-DF that Thomas Moruwo being identified for payment of K30,000.00 is the other non-student allegedly killed by Police during the unrest for which the Solicitor General had also endorsed dependency payment of K0.8 million.

Annexure 8-DF relates cheque ref# 710215 of K30,000.00 was made payable to the claimant/ plaintiff but annexes 9-DF and 10-DF3 are for cheques ref# 797254 of K300,000.00 and ref# 806532 of K210,000.00 both being made payable to Patterson Lawyers.

Note that all settlement payments between 25 January 2003 to 1 April 2004 totalling K120,000.00 were made to the claimant during which time Zacchary Gelu was still the Solicitor General and the claimant had no legal representative. However the settlement payments between 25 May 2004 to 2 August 2005 totalling K590,000.00 were made payable to Patterson Lawyers, in which time Mr Gelu had apparently resigned as Solicitor General and was presumably a partner with Patterson Lawyers. As such the claimant also began using Patterson Lawyers as legal representative.

Annexure '11-DF' is the copy of the letter from the Solicitor General, Zacchary Gelu to the Secretary for Department of Finance dated 19 February 2003 advising that the cheque ref# 710215 was not accepted by the Bank due to the misspelling of the name of the payee. However the Commission is unable to verify whether the Department of Finance had actually cancelled the cheque ref# 710215 and issued a replacement cheque.

In spite of a total of K120,000.00 being purportedly paid by the Department of Finance as verified in paragraph 28 above between January 2003 to May 2004, the Acting Solicitor General, Francis Kuvi (successor to Zacchary Gelu) wrote to the Secretary for the Department of Finance on 24 June 2004 advising clearance for settlement payment of K800,000.00 to be made payable to the claimant's lawyer, Patterson Lawyers Trust Account based on item 3 of the NEC Decision No. 150/2003. Annexure **T2-DF** is the copy of the subject letter.

Note that item 3 of the NEC Decision No. 150/2003 does not specifically relate to this case but declares the rescinding clause 10 of NEC Decision No. NG 07/2002. Clause 10 of NEC Decision No. NG 07/2002 directs no more out of court settlements by any State body or authority, including by the Attorney General and Solicitor General, without the approval of NEC, acting on CACC advises.

On 14 December 2004 the Acting Solicitor General, Francis Kuvi again wrote a follow-up letter to the Secretary for the Department of Finance, reiterating the

settlement of Mathew Pawen's total claim of K800,000-00 as noted in paragraph 29. Mr Kuvi disputed this letter in evidence and stated that the letter was a fabrication (see paragraph 48 below). Annexure '13-DF' is the copy of the subject letter.

Note that payments between 25 January 2003 to 1 April 2004 totalling K120,000.00 were allegedly paid under the payee name Mathew Pawen whilst the payments between 25 April 2004 to 2 August 2005 totalling K590,000.00 were allegedly paid under the payee name Mathew Pawen Suvulo. Such circumstances together with two different Solicitor General facilitating clearances of the same claim in totality during their respective terms of their appointment amounts to fraud.

Apart from the material (documents) evidence received, evidence were received from:-

Josephah Pawen Suvulo, claimant;

Tony Pawen, claimant;

Francis Kuvi, former Solicitor General;

Zacchary Gelu, former Solicitor General;

Michael Steven Wagambie, Principal M.S Wagambie Lawyers.

John Kawi.

Evidence - Josephah Pawen Suvulo ("Josephah")

Josephah is the elder sister of late Mathew Pawen. Josephah confirmed having lodged her intention to make a claim against the State. Several letters were also written to the then Prime Minister Sir Mekere Morauta and the then UPNG SRC President, Mr Augustine Molongos. In evidence, she stated that no amount was proposed to the State (or in the letters written).

It appears the amount of K800,000.00 was suggested by Mr Gelu as Josephah said she was not aware of how much she was claiming but at the material time, she

admitted attending at Office of the Solicitor General and was asked to sign some documents which appear to be the deed of release.

After the signing of the deed of release she was called to pick up a cheque for K30,000.00. The said cheque was presented at the bank but refused as such was returned to one John Sam an Officer with Finance Department. The cheque was written to Mathew Pawen (deceased) as such it was refused. Josepha stated that this happened about three times on all occasions, either the name was misspelt or it was made payable to a deceased person, Mathew Pawen as such all three cheques for the sum of K30,000.00 were all returned to one John Sam. This would mean a total of K90,000.00 was returned (i.e. K30,000.00 x 3 cheques).

It was only on the fourth occasion when the cheque was written correctiy for the sum of K30,000.00 of which she received and deposited the cheque in her account In evidence she stated that was the only monies she received and was distributed *amongst* her families.

Sometime later she was advised by Tau Tau from the Solicitor General's Office that a cheque of I<210,000.00 was collected by Patterson Lawyers. She attended at Patterson Lawyers asked to see Mr Gelu but on all occasions she was advised that Mr Gelu was not available. She then attended at Finance Department and obtained a copy of K210,000.00 cheque from one Boas, an officer with Finance Department The Cheque was made payable Mathew Pawen, C/- Patterson Lawyers and picked up by one Gabriel Dusava, a Consultant with Patterson Lawyers.

In evidence, Josepha stated that she never gave instructions to Patterson Lawyers to act for her. As result, Josepha wrote a letter dated 28th April 2005 to Jack Patterson of Patterson Lawyers threatening to refer the matter to the Law Society, Police and relevant Authorities. In the letter Josepha demanded that K210,000.00 be repaid forthwith.

As a result Patterson Lawyers issued proceedings against Josepha for defamation. As a result, Josepha instructed M.S Wagambie Lawyers to defend her against the

proceedings. In the meantime, M.S Wagambie Lawyers filed an application seeking to have the sum of K210, 000.00 be deposited into the National Trust Account pending determination of the entire proceedings. Mr Wagambie in his evidence confirmed acting for Josepha and the filing of the said application. Mr Wagambie confirmed that he had spoken with Mr Gelu to have the matter resolved out of court but never materialised. Mr Gelu had advised Mr Wagambie that he would call him for discussion on the possibility of an out court settlement proposal but never did so. The application together with the entire proceedings is still pending.

Josepha confirmed that she received only K30,000.00.

Evidence - Michael Steven Wagambie

Mr Wagambie confirmed receiving instructions to act for Josepha on 14 June 2005. Mr Wagambie advised that on instructions, Notice of Intention to Defend and a Defence and a Cross-Claim was filed for the sum of K210, 000.00. An application was also filed to have K210,000.00 removed from Patterson Lawyers Trust Account and placed in the National Court Trust Account pending determination of the entire proceedings.

In relation to the further conduct of the defamation proceedings and the application seeking to have the monies put in the National Court Trust Account, Mr Wagambie stated:-

"...Even after we have filed the Notice of Motion, every time we go to court, the matter is either not on the list or the file is not in court. That has been the case up until about 2007, when I lost contact with my client but I actively, still have the file with me and so far as the instructions are concerned, I still have instructions to act for her, I have not filed a notice of ceasing to act as yet. That amount of money has not been returned to my client. Further, during the course of our going to court for the prosecution of the Notice of Motion, Mr Zacchary Gelu intimated to me and to my client which I relayed the information to my client that he intends to settle this matter out of court...."

The terms of settling of the matter would be that he would refund the money to her and that he would withdraw the proceedings for defamation of character against her. Despite the suggestion, Chief Commissioner, nothing that eventuated to date. Not that I am aware of. If any, my client would have informed me. From the court's record up until now, our motion is still pending in court....

... The last time we communicated with Mr Gelu would be on 30 June 2006. If you look at their letter to my firm on 4 July, it says, 'We acknowledge receipt of your letter of 30 June 2006, together with the notice of motion and affidavit and support filed on 29 June 2006 where the motion is fixed for bearing on 17 July. We have taken note of paragraph 4 of your letter, we are happy to discuss this matter with you to consider options to settle the matter. We are also considering to discontinue the proceedings, a matter, we will discuss together with you.' Formally, on record that would be the last communication."

In relation to payments received, Mr Wagambie confirmed that according to his instructions, his client (Josepha) had only received K30,000.00. Further, they (i.e. Mr Wagambie and Josepha) were not aware of any other payments apart from the IC30,000.00 she received and the K210,000.00 paid to Patterson Lawyers (subject of court proceedings).

Mr Wagambie also expressed concern in relation to the conduct of Mr Gelu when the question was asked:-

Q. Mr Wagambie, you mentioned something that Mr Gelu was the Solicitor General at that time when settlement was made and then when he moved over to Patterson Lawyers, it appears the file was then - he then took up the matter. You have any comments to comment on the manner in which—?

A: Yes, I feel in my own personal view, I feel this would be highly inappropriate for Mr Gelu to be requesting funds to be diverted to the firm of Patterson Lawyers where he is part of, because prior to him joining Patterson Lawyers, he was with the office of the

Solicitor General, holding the position of Solicitor General, and therefore in my view, personal view, it would not be appropriate for such a thing to be done unless of course the funds have been properly acquitted or otherwise received and given to the beneficiaries of those who are entitled to receive the funds. Further, one thing to note would be that the funds went into was picked up directly from Finance Department and my years of practice, I understand that any funds that has to be by way of State settlement, would go to the office of the Solicitor General to be picked up by the claimant at the office of the Solicitor General In this particular instance, the cheque of K210,000 was picked up at the Finance Department by one of their consultants called Gabriel Dusava, and in my view, I personally think that is not the proper way of doing things; that is not the proper way of doing things in the sense of accountability and as professionals, that is not a proper way of doing things, and Mr Gelu being the former Solicitor General knows this procedure very well"

Evidence - Francis Kuvi

Mr Kuvi gave evidence stating that he had no knowledge of the claim until he was appointed as Acting Solicitor General and upon receipt of a letter from Mr Suvulo, the National Statistician on behalf of Josepha following up on the claim. He advised that the deed of release was signed prior to his appointment as the Acting Solicitor General.

Asked if he was the author of the letters to the Finance Secretary dated 24 June 2004 and 14 December 2004, Mr Kuvi denied any knowledge of having drafted the letters sighting serious discrepancies and stating that his name and signature was forged. Further, Mr Kuvi stated that the assessment of K800, 000.00 may have been excessive. Furthermore, a search of the Solicitor General's file revealed that it had no copies of these two letters purportedly written by Mr Kuvi. It is submitted that the letters were a fabrication and certainly.

Both of these letters were attached to the Affidavit of Zacchary Gelu filed on 17 June 2005 in the defamation proceedings they (Patterson Lawyers) filed. It is submitted that the letters emanated from Patterson Lawyers as clearly the letters were drafted with a view to diverting all the payments to Patterson Lawyers Trust Account. The letter clearly stated, "...make the cheque of K800, 000.00 payable to the claimant's lawyers, PATTERSON LAWYERS TRUST ACCOUNT..." The letter was never copied to Patterson Lawyers yet, Mr Gelu had a copy of the said letters.

Furthermore, records show that some payments were already made, as such there was no basis at all to state that make a cheque of K800,000.00 payable to Patterson Lawyers. It is submitted that this was clearly an intention to defraud the State. As lawyers, in this case if the letter was written by Mr Kevin, he is required to confirm/ verify with his file as to the amount still outstanding and that could have been stated clearly as the amount still outstanding and not K800,000.00. It is submitted that the letter emanated from Patterson Lawyers. It is further submitted that Mr Gelu may have took with him copies of the Solicitor General's letter head.

Evidence - Tony Pawen

Tony Pawen is the younger brother of Josepha Pawen, the claimant. Tony stated that he gave instructions to Patterson Lawyers following his discussions with Zacchary Gelu as to how to go about following up on the balance of the payments from Finance Department. Tony stated that he was not happy with Josepha's handling of the first payment being K30,000.00 as such issued instructions to Patterson Lawyers. Asked if he had obtained the consent of Josepha before issuing instructions to Patterson Lawyers, he answered in the negative. Clearly, he had no lawful instructions as Josepha is deemed to be the claimant. Josepha initiated the claim from the outset on behalf of her family (i.e. including Tony Pawen). All the documents bear Josepha name. If it was a

case of mishandling of K30, 000.00 it was a family issue that could be resolved amongst the Pawen family.

It is submitted that Zacchary Gelu was instrumental in having Tony Pawen to issue instructions to Patterson Lawyers. Tony admitted that it was Zacchary Gelu ("hereafter known as 'Gelu") who advised him to see Patterson Lawyers. This is further confirmed by the fact that Tony Pawen lived with Gelu for three years during the time in which the claim was lodged and subsequent settlement of the claim by way of deed of release. Certainly, Gelu had an influence to remove the file without the consent of Josepha (claimant).

Tony confirmed that the only payment from the claim he is aware of is the payment of K30,000.00 paid/received by Josepha and K210,000.00 paid to Patterson Lawyers. Note that this is the payment (K210,000.00) that is the subject of court proceedings between Josepha and Patterson Lawyers, Gelu & Others. In evidence, Tony said he only received K1 10,000.00. The balance, K100,000.00 was retained by Patterson Lawyers.

The K1 10,000.00 was paid in three lots, two cheques from Patterson Lawyers one for the sum of K37,000.00 (pay cash) and the other cheque for K70,000.00 pay Gelu Zacchary and Tony Pawen. K3000.00 was paid in cash to Tony Pawen.

Tony stated that the K37,000.00 was cashed and paid into his personal account at Westpac Bank, Waigani. Asked what happened with the K70,000.00 cheque payable to Gelu and Tony Pawen he stated that it was paid into his personal account. Tony was asked that to have deposited into his personal account it certainly may have problems as it is made payable to two people (Gelu/Tony). He later stated that they (i.e. Gelu/Tony) had a "join bank account" at BSP Boroko. Asked what was Gelu's share from the K70,000.00 he said Gelu did not receive anything. It is submitted that there is a real possibility that Gelu

received some monies from this payments. This must be further investigated further as Tony seemed uncomfortable in the witness stand during question time when questions were asked along the issue of who benefited from the payments received'.

56. During evidence, Tony provided a copy of a letter from the Lawyers Statutory Committee.

Asked what was it about, he answered:-

A: I wrote to the Statutory because of that K165,000, the cost of the (inaudible). J was not happy about the amount that is why I wrote to the lawyers Statutory Committee.

Q: You were charged K165,220 by Patterson Lawyers for their services?

A: They were going to charge me that amount.

Q. And that was the reason you —

A: I wrote to the Lawyers Statutory body.

Q: As a result of your complaint to the Lawyers Statutory Body, was the fees revised? Did Patterson lawyers say, put the fee down?

A: Never.

Q: So it is correct to say that as at today —

A: I still owe them that amount.

jg: You still owe them K165,220?

A: Yes.

Tony had not received any response from the Lawyers Statutory Committee in regard to his complaint. Asked what happened to the K1 00,000.00 that was retained by Patterson Lawyers, Tony answered:-

"A: K100,000 was in Patterson Lasers' trust account. I am not sure if that K100,000 is going to pay for this cost but what thy told me was that this K100,000 sitting in that trust account is going to be for my security and their security. Thy did not mention anything concerning the payment of their costs.

Q: It is still in the trust account?

A: Yes.

Q: At Patterson Lanyers? Who told you that? A: Jack Patterson."

Tony advised that often he saw Jack Patterson instead of Gilbert Maki.

In relation to some "other payments apart from K30,000.00 and the K210,000.00, Tony was asked:-

"..Q: Apartfrom the K210,000 and the K30,000 which you are aware of brings the total to K240,000, are you aware of any other payments that have been made ly Finance to Patterson Lanyers or which were--

A: Never. After that payment, we have not received any payment and I never know of any payments made.

Q: Mr Pawen, as you may have heard during the course of hearing, our record show that a total of K710,000 has been paid, that is including the K210,000 and the K30,000 which you are aware of. Do you still confirm—

THE CHAIRMAN: K500,000 unaccounted for. Did you know that your family received K500,000?

A: No.

f): It had been paid out.

A: I never know of any payment after that K240,000.

Q: If the extra K500,000 was made up, what are those cheque amounts?

MR GORUA: Our records show that the first payment that was made was on 25 January 2003, the cheque number being 710215 for K30,000; second cheque was on 4 April 2003, cheque number 716817 for K30,000; third cheque 17 October 2003, cheque number 736901 for K30,000; another cheque on 1 April 2004 cheque number 774166 again for K30,000; another cheque for the sum of K30,000 on 25 May 2004, cheque number 779313; a cheque for the sum of K300,000, cheque number 797254 on 7 December 2004; another cheque for K210,000, which you have confirmed that is cheque number 806532 on 29 March 2005; and another cheque of K50,000 that being on our records being the last payment made in respect of this claim, that cheque number 816796 on 2 August 2005. You confirm you or even your family never received any?

A: This is a surprise to me.

THE CHAIRMAN: *And the evidence says that Mrs Josepha Suvulo, she has not received them either.*

A: *No.*

Q: *The money has not gone to anybody in your family, not Josepha or anybody?*

A: *No.*

j2' *Yes, you might care to think about that because it seems that money that had been paid out. According to the Finance Department, there is a lot of it has to your family. been paid out*

A: *My family never received any more payment after this R240,000, never.*

MR GORUA: *That has been confirmed by Josepha who appeared before the Commission. The family has not received any other payments. Commissioner, I have no further question."*

What is even more serious in this case, is that a cheque for the sum of K300,000.00 was made payable to Josepha Pawen Suvulo who is the claimant, yet it is not clear as to how Patterson Lawyers were able to collect the cheque and deposit it into Patterson Lawyers Trust Account when the cheque was made payable to Josepha Pawen who is the claimant and when no instructions were ever received from Josepha. An investigation be conducted into who actually benefited from this payments.

Evidence - Zacchary Gelu ("Gelu")

Mr Gelu appeared twice before the Commission following serious issues raised in relation to his conduct as the former Solicitor General and as a private

lawyer having carriage of this matter whilst been the Solicitor General. He confirmed that Tony lived with him for three years during the time in which the claim was pursued.

Gelu confirmed that Patterson Lawyers received instructions from Tony Pawen following what he described as the alleged failure by Josepha to properly account for the first payment of K30,000.00. He confirmed that they (Patterson Lawyers) never contacted Josepha about the instructions by Tony Pawen.

Gelu confirmed that they (Gelu/ Tony) had a joint account but stated that it was not at BSP Boroko but Westpac, Waigani. It is submitted that either Tony or Gelu may have mislead the Commission or it was simply a case of coming up with an answer that was false. Further, investigation be conducted into this issue, if they both maintained a joint bank account.

Asked in relation to the creation of the joint bank account. Mr Gelu was asked:-

"...Q: Was it with the consent or were the family members aware of such a joint account being created between you and Tony Pawen?"

A: The family members from home were in contact with Tony that was the arrangement they wanted. Mr Tony Pawen —

THE CHAIRMAN: With pardon?

A: Mr Tony Pawen.

Q: Yes, who gave you instructions? So he has got a claim by Josepha, has already by the Solicitor General's office through the Finance Department and then you get instructions

from a member of the family, so he says, was there any contact with Josepha to say, 'we are intervening' or?

A: Yes, that happened, she in fact objected.

Q: Yes, but now, has she objected after you had already done — your firm had taken over the claim?

A: Yes.

jQ: Without any notice to her?

A: We were more or less acting on the instructions —

Q: I know you were, you were very much acting on the instructions to purely of one person only. Did you have any information that he was acting for the family other than the fact that he said so?

A: From the information instructions he gave was that —

Q: Yes, I know but did you have any confirmation that he was representing the other family? You see, I am just looking at what you have got. She gets the first R30,000. He comes in and gets the next ¥37,000 and then you decide you will have a joint account. It is two sides of the family obviously chasing the money at this stage, did you give any notice to the Solicitor General's office that you were acting against the interest of Josepha? Or taking over her role?

A: If I may recall, I think there was a letter made, in fact, I did not personally handle the matter in Patterson Lanyers. It was Gilbert Maki, who was handling that matter, Mr Maki."

Mr Gelu confirmed that proceedings were filed against Josepha Pawen but was not aware if the proceedings were discontinued.

In relation to the payments received from Finance Department, Mr Gelu was asked:-

Q: Mr Gelu, Mr Pawen advised the Commission that up until now he was aware of only two payments been made. First being the K30,000 that was paid to Josepha and other one being K210,000 and he advised that he was only aware of that payment. When there any other payments made apart from those two payments to Patterson lawyers?

A: I have checked with our Accounts, there were three payments made in fact; first one was the K210,000.

Q: Sorry?

A: K210,000.

Q K210,000?

A: Yes, the second payment was K50,000 and the third payment is about K300,000. That is the payments that I confirm from the Accounts, our Accounts section.

THE CHAIRMAN: K210,000, K50,000 and K300,000?

A: Yes.

Q: That is to your firm?

A: To Patterson lawyers, yes.

MR GORUA: *And how much was paid to Tony or the family?*

A: There were legal fees to be paid and then there were cash advances requested by Tony whilst awaiting payments from Finance. I have to verify that with our Accounts, if I can recall about K170,000. Q: ¥170,000?

A: Yes, paid to Tony.

£): Mr Gelu, Mr Pawen advised the Commission that he was only aware of, like I said, only two payments; one or which was made payable to Josepha. The other payment of which he is aware of ¥210,000 that means - what effectively he said he is not aware of the ¥50,000 payment and the ¥300,000 payment. From the ¥210,000 he advised the Commission that he only received ¥110,000.

A: Chief Commissioner, I have to verify that with the accounts but if I may be able to recall about ¥170,000 was paid - ¥170,000.

Q: Mr Gelu, to back him up those are the cheque copies which he provided to say that those are the only payments he received and his evidence to the Commission is that as to the balance - that is the ¥210,000 we are talking about - as to the balance he was advised that that money will be retained by Patterson Tayyers for what he said was security. He may have meant legal fees and all those but up to date he said that he has not received the balance of the amount of money that was retained. That is, only ¥100,000, we are not talking about the ¥300,000 and ¥50,000?

A: Commissioner, if I could come back to the Commission sometimes next week to assist the Commission in producing the accounts from the accounts section. I would not be in a position right now to assist very much in the payments.

Q: Mr Gelu, when do you think you will be able to provide records?

A: Monday, Tuesday, depending on your time.

Q: Tuesday?

A: Yes, Tuesday."

Mr Gelu never provided any response or the information as he undertook to do so. In relation to the fees charged by Patterson Lawyers, Mr Gelu was asked:-

Q: Are you saying the fee is justifiable ?

A: That is the amount, as I said, Gilbert Maki may have estimated but just looking at it, it may be a bit more, meaning the assessment is done by Mr Maki himself so my view is \$ the amount is excessive, I may not say on behalf of Mr Maki but looking at the amount, it may be unreasonable.

Q: You say it is unreasonable?

A: Yes, it may be unreasonable.

Q: Mr Gelu, that could be the reason why Mr Paven actually referred this matter to lawyers' Statutory Committee.

A: Yes.

Q: You are aware of that referral by Mr Paven?

A: Yes, I am aware of that referral, yes Commissioner,

Q: Was the matter resolved or did the Lawyers' Statutory Committee respect of the complaint?

make a decision in

A: If I may recall it has not been deliberated on by the Lawyers' Statutory Committee.

JQ: Did you or Mr Maki ever do a response to the Tanyers' Statutory Committee in respect of the complaint?

A: Chief Commissioner, I cannot really recall now whether a response was made but that can be—I will check that one out.

Q: Could you provide a copy together with those documents by Tuesday, the response to Tanyers' Statutory Committee?

A: Yes, I will check the response."

Mr Gelu has not provided any response despite his undertaking to the Commission. Mr Gelu was then asked in relation to the issue of whether or not he received any payments from Tony Pawen (or benefited from this matters) and as to his conduct in relation to this matter. He was asked:-

"...Q: That would in essence more or less provide the details of all the work that was done. Mr Gelu, we come back to that cheque that was made payable to you and Mr Pawen. Did you receive any money from these payments?

A: If any monies are to be received by me, it would be through the cost that is payable to Patterson Lawyers. Chief Commissioner, it would be improper for me to receive any monies that are paid into a joint account or to any that is paid by way of cash. In relation to the joint account, I am only facilitating the process of payment to go to the family. In receiving the amount directly from Mr Pawen, no, that would be double dipping if I do that because we have already received our cost, when the cost was paid and as a relative it would be bad for me to get monies from him directly in relation to this particular case.

Q: On that aspect I am just thinking as you would appreciate from the start you bang as the former Solicitor General was involved in the settlement, and then if you like towards the end, you have now created a joint account with Mr Pawen, this time if you like to facilitate the payments, would that be proper?

A: That may not be seen proper but I joined Tony Pawen to the joint account basically in a balance and check that Tony should not misuse this money. We paid directly to Us account and then to the family and I made sure that he goes home to the family to make sure this money reaches the village, basically that is the whole idea."

69. It is submitted that Mr Gelu knew very well that his involvement into the further conduct of this matter raises serious issues that amount to unprofessional conduct as a lawyer and may border on fraud. The reasons are:-

He was involved in the settling of the case. He signed the deed of release;

He admitted in a similar case (Thomas Moruwo) that the amount of K800,000.00 may seem unreasonable. Furthermore, he deliberately refused to take note of the NEC decisions and the CACC advice of which the Solicitor General/ Attorney General is a member of the CACC; It is possible he came up with the amount of K800,000.00 as Josepha never claimed a specific amount;

Tony lived with him for three years, he certainly played a part in getting Tony to issue instructions to Patterson Lawyers;

The letters purportedly written by Mr Kuvi, how did they come into his possession and attached to his affidavit;

The letter asked for a cheque of K800,000.00 to be paid when evidence clearly indicate some payments were already made;

Created a joint account with Tony Pawen;

Cheque was made payable to Gelu and Tony;

Patterson Lawyers never got instructions from Josepha;
A cheque for the sum of K300,000.00 was made payable to Josepha Pawen yet
Patterson Lawyers picked it up and deposited the cheque;
Court proceedings were filed against Josepha simply to frustrate her attempts to
recoup K210,000.00.

The above are some of the issues relating to the conduct of Mr Gelu. It is submitted that Mr Gelu, Patterson Lawyers and other persons may have benefited from this payments as evidence clearly indicate that the immediate family members only received K140,000.00. The rest is unaccounted for.

It is clear from this case that the National Executive Council ("NEC") played a major part in the settlement of this matter. It may be a political decision. It is submitted that clearly this is a dependency claim. The laws adequately address issues arising from dependency claims. In this case, it is submitted that the NEC should not interfere with the work of the relevant State agencies, such as the Solicitor General's Office and Public Curators Office perform their roles in such circumstances.

John Kawi in his evidence also commented that this was a dependency claim and the figure proposed in the NEC submission was way above the amount awarded in a dependency claim. When asked what he knew about the claim, Mr Kawi stated (quote, only part)>

".....So I said, until I am satisfied I am sorry but this is one instance where I will have to defy the NEC direction to settle for K500,000. I made that very clear. I said I will not settle this for K500,000 because although I sympathise with the death of the students which was at the hands of police, we also got in touch with police to give us instructions on this. Assuming that police would be responsible, this was the line I was taking that we do not settle the amount, these two deaths in the amount of K500,000 each. My thinking was that it must be properly calculated using dependency claims. As a dependency claim using the three

per cent tables, if it was not a dependency meaning, if the students who died did not have any families on their own, kids on their own, this at its best could be treated as a contingent type of customary dependency. That is how I viewed it and so I made a file notation on this. It is true there was no court proceedings issued in these two matters. But my file notation I recall was that these matters must be looked at from the line I was advocating and so that is the reason why I said I will defy NEC instructions to settle at K500,000 each. That is my only against in this matter. As you pointed out Gelu, I do not know how he could justify Ms but he comes in and settles it from an amount higher than the NEC directive."

In regards to payments made, Mr Thaddeus Kambanei stated that it would be unusual to change the name of payee half way through or that is after some payments had already been made, because once the name of the payee is changed the "system" cannot pick-up how much has so far been paid in respect of the same claim the payments have been made.

Mr Kambanei was asked:-

"Q: Mr Kambanei, if you go to page 2 under the schedule it says, "the releasor is Josepha Pawen Suvulo", and in fact the signature appears on the third page apparently is that of Josepha Pawen Suvulo. From your experience of the practice in the office of the Department of Finance, is this an item that you expect your officers to cross check to ensure that the payee on your cheques that you release is consistent with what is set out in the deed of release? That is really the crucial document as far as law is concerned or liability of the State is concerned, put it that way. I guess, just generally speaking would this be one aspect that you would expect your officers to check with?"

A: Absolutely, yes.

Q: So the fact that mid way through payments of -first off, we have the payee on the cheque being the name of the deceased person, Mathew Pawen — sorry, as stated in the summons. That is obviously very unusual?"

A: It is very unusual, yes.

Q: It is not the releasor, the person that is releasing the State off responsibility?

A: No.

Q: But your recollection, you have no recollection of this ever passing through your desk? A: No, not at

all."

Findings:

Zacchary Gelu's actions amount to conflict of interest. Further, actions amount to unprofessional conduct. Failed to comply with NEC decision.

Mathew Pawen was not a UPNG student.

K800,000.00 was far in excess.

The two letters purportedly written by Mr Francis Kuvi were a fabrication and act to defraud the State. Mr Kuvi denied having any knowledge of this matter nor did he draft and or sign the two letters. Fraud.

Patterson Lawyers had no instructions from Josepha Pawen as such had no authority to act on behalf of her. Tony Pawen had no lawful authority to give instructions as it was Josepha who had initiated the claim as such she was the legitimate appointee to pursue the claim. No application was made to remove Josepha to continue to represent the family of late Mathew Pawen.

Gilbert Maki or Patterson Lawyers had no lawful instructions to act for Josepha.

Patterson Lawyers bills were far excessive.

Recommendations

Zacchary Gelu be referred to the Lawyers Statutory Committee for unprofessional conduct. Further, he be referred to the Police for further investigations if he actually benefited from this claim.

Furthermore, Zacchary Gelu be banned from been employed by the State or any of its Statutory bodies.

Patterson Lawyers be referred to the Law Society for acting without lawful instructions and receiving payments from the Finance Department.

Investigations be further conducted into the conduct of Gabriel Dusava. Mr Dusava had no instructions to collect the cheque of K210,000.00 from the Finance Department.

Patterson Lawyers bills were very excessive.

Payments to this claim were purportedly made payable under two different payee names by the Department of Finance, which might be fraudulent in nature. Investigation be further conducted in relation to the cheques that were returned. Were they cancelled?

Matter be referred to the Police to further investigate the beneficiaries of this claim.

89. No more payments be made.

Index of Relevant Documents

1-OCP	Copy of the Commission of Inquiry Report into the 2001 UPNG student-led unrest.
2-UPNG	Copies of confirmatory documents provided by UPNG Registrar as requested.
3-SNEC	Copy of Minister for Justice, Hon. Puri Ruing, MP filed a Policy Submission No. 94/2002 to NEC
4-SNEC	Copy of Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1
5-SNEC	Copy of NEC Decision No. 142/2002 Special Meeting No. 19/2002
6-DF	Copy of letter dated 18 September 2002 from Solicitor General to Acting Secretary for Department of Finance. Copy of the signed Deed of Release
I	Copy of FF3 form for payment of K30,000
F	Copy of FF3 & FF4 forms for payment of K300,000
I	Copy of FF3 form for payment of K210,000
F	Copy of letter dated 19 February 2003 from Solicitor General to Secretary for Department of Finance.
F	Copy of letter dated 24 June 2003 from Acting Solicitor General to Secretary for Department of Finance.
I	Copy of letter dated 14 December 2003 from Acting Solicitor General to Secretary for Department of Finance.
13-DF	General to Secretary for Department of Finance.

(d) Moale Haus and Samba Haus

Investigation Report on Moale Haus (Tripoli Building) lease and fit-out - by Paul Paraka Lawyers and Acanufa & Associates Lawyers 20 May 2004

Investigation Report on Samba Haus lease — by Pacific legal Group Lawyers 13 September 2006

By letter of 11 May 2009, the Attorney-General referred to this Commission the abovementioned Reports and the two NEC Decisions that concern the said Reports:

NEC Decision No. 296/2003 made 18 December 2003 and dated 19 December 2003;
and

DEC Decision No. 94/2005 made 18 May 2005 and dated 20 May 2005.

The Commission also received copies of the following correspondence that are relevant:

Letter dated 13 May 2009, Hon. Dr Allan Marat MP, Minister for Justice & Attorney-General to Hon. Peter O'Neill CMG, MP, Minister for Public Service - with copy of NEC Decision No. 220/2008 made 15 October 2008 and dated 17 October 2008; and

Letter dated 14 May 2009, Hon. Peter O'Neill CMG, MP, Minister for Public Service to Hon. Dr Allan Marat MP, Minister for Justice & Attorney-General.

The exchange of correspondence between the Minister for Justice & Attorney-General and the Minister for Public Service suggested there had been no (or

limited) follow-through of directions of the National Executive Council following consideration of the said investigation reports which were both commissioned by the NEC at different times.

This brief comprises three (3) arch lever folders:

Counsel's Brief of documents and the transcript

Investigation Reports and documents from Attorney-General

Payment Vouchers from Finance Department and Briefs from Alfred Vele

Relevance to the Commission's Terms of Reference

On 18 December 2003, the NEC approved the fit-out cost of Moale Haus (Tripoli Building) at an amount of K12,684,549.00.

On 18 May 2005, NEC resolved:

that Department of Finance further negotiate the cost below K8 million.

Department of Justice & Attorney-General refer the Investigation Report to relevant authorities including the Ombudsman Commission for investigation of leaders implicated

Payments had been made by Department of Finance in part settlement of the said fit-out costs. It is clear the claim exceeds K300,000, the claim was made within the period of the TOR 1 January 2000 to 31 July 2006 and payments have been made by Department of Finance

Essential background for purpose of investigation

At the request of the NEC, investigations were conducted into the lease and fit-out of the two buildings that accommodate departments of the State.

Controversy surrounds claims by the Attorney-General that despite directions of the NEC for referral for prosecution of those implicated, no action has been taken to make such referral to the Ombudsman Commission, police or such other appropriate authority.

This is all now referred to this Commission of Inquiry for inquiry by the Attorney- General and the Commission has also received a copy of the letter from the Minister for Public Service.

The following persons were invited to assist the Commission:

Hon. Dr Allan Marat MP Attorney-General and Minister for Justice - as to his letter to the Commission dated 11 May 2009 and his exchange of correspondence with the Minister for Public Service

Hon. Peter O'Neill, CMG, MP Minister for Public Service - as to his letter to the Attorney-General dated 14 May 2009

Mr Gabriel Yer, Secretary Department of Finance - as to payment vouchers for all payments made in respect of these claims

Secretary to NEC — as to the NEC decisions referred to above and compliance (if any) with the same — by whom, when and what etc.

This matter was opened on 19 August 2009 and the Commission took evidence on 27 August 2009 from:

1. Hon. Dr. Allan Marat MP, Attorney-General and Minister for Justice

Mr Manly Ua, Acting Secretary, National Executive Council

Mr Alfred Vele, Investigator and Account with the Commission

By the NEC Decision No. 94/2005 dated 20 May 2005, the NEC after noting the findings and recommendations of the Investigation Report:

"3. directed the Department of Personnel management in consultation with the Department of Justice and Attorney-General, to take appropriate disciplinary action against public servants implicated in the Investigation Report in accordance with the Recommendations in part "G" of the Report"

"4. noted that the Office fit-out cost has been negotiated downward from K12,684,549 to K8 million and that part-payment has been made, however, directed the Department of Personnel Management to further negotiate the cost below K8 million "

y "6 directed the Department of justice and Attorney-General to refer the Investigation Report to the relevant authorities including the Ombudsman Commission for investigation of leaders implicated under the leadership Code."

In evidence, the Attorney-General and Minister for Justice confirmed that there had been no action taken by his Office and his Department in compliance with the abovementioned NEC directions. Dr Marat also stated he was not aware of any other officer of the State referring the persons implicated to any law enforcing agency for further investigation or prosecution.

When asked generally as to systems and processes for the dissemination of NEC Decisions and monitoring compliance with same, Dr Marat said "I think it is an area that needs to be monitored, not only monitored but there needs to be some mechanism in place to ensure that ministers and their departmental heads are actually carrying out any directives by NEC."

Mr Manly Ua, Acting Secretary NEC said there was no record as to compliance or otherwise of the abovementioned NEC directions. Up until 1989, the role for monitoring compliance with NEC Decisions was the responsibility of the NEC Secretariat but that was shifted to the Department of Prime Minister in the Performance Management Unit. It was also suggested the Central Agencies Coordinating Committee played a role. The Commission has also received the following:

Payment vouchers from the Department of Finance.

A file from Dr Marat containing a brief on a Writ recently filed in the National Court seeking CPI adjustments on rent on Moale Haus.

Documents from Manly Ua Acting Secretary NEC being the policy submissions and NEC Decisions

On 7 September 2009, Mr Joshua Mule, Manager Government Office Allocation Committee (GOAC) and Mr Sam Koim, Legal Officer Solicitor-General Office (SG) attended in conference with Counsel Assisting and Technical Counsel.

The GOAC:

y is established and functions in accordance with "General Order 20". Mr Mule was to provide the Commission with a copy of this General Order.

is chaired by the Secretary Department of Personnel Management

membership includes State Solicitor, Secretaries of Lands & Physical Planning, Finance, Works, National Planning.

> is located within the Department of Personnel Management

The Commercial Lease (prepared by the State Solicitor) was dated 27 September 2002 and executed under common seal by the Lessor (landlord) and by the "Minister for Lands" for the Lessee (tenant). The term of the lease is ten (10) years and rental payable is K3,300,750 per annum.

It was not disclosed whether the document was lodged at Stamp Duties Office and registered with Registrar of Tides. The lease terms appear normal with one exception and that is Clause 3.3(d) which requires the State to paint the interior once every three years.'

The building "Moale Haus" is occupied by divisions of a number of Government Departments including Migration (Foreign Affairs), Labour, Commerce & Industry and Co-operative Societies.

The management of the State Departments' occupation of the building and the payment of rent is a major problem area. GOAC merely facilitates arrangements to occupy the building and have nothing to do with receipt and payment of rental invoices.

GOAC say that function is performed by Finance Department Corporate Services Division. Clearly there is no auditing of invoice records prior to and after payments are made. Neither GOAC nor Finance Department can conclusively say that invoices have been correctly raised by the Lessor and then audited and paid by the Lessee (State).

In the Writ of Summons WS 539 of 2009 filed 14 May 2009, the Lessor (now known as Moale Enterprises Limited) claims CPI adjustments on rental for the period January 2003 to September 2007. The Plaintiff claims a total of K2,371,301.67.

From the Commission's analysis of payment vouchers obtained from the Finance Department:

CPI adjustments have already been made by the Lessor in 2005 and 2007 invoices which have been paid.

There may have in fact been an overpayment on CPI adjustments to rental payable.

The Lessor invoiced and the State paid for car parking in the period 2002 to 2006 totalling K469,333.33 which is not provided for in the lease. The State is entitled to a refund of such payments.

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The Solicitor-General's Office has advised that the State was out of time to file a Defence and has applied for leave to file or to extend time. The application has yet to be listed and the Court file cannot be found in the National Court Registry. Options discussed included:

^ State to pursue recovery of payments for car parking and excessive CPI adjustments on rent by filing a Defence and Cross-Claim or commencing fresh proceedings or seeking adjustment on the next rental invoice

^ State to insist on the Lessor providing full and complete particulars of the claim and discovery of documents and the Lessor establishing its case as to liability and damages.

Findings

On the documents produced and the evidence provided, the Commission makes the following findings:

There is no system in place that tracks compliance with decisions and directions of the NEC. That function was performed by the Secretariat to the NEC and was then transferred in about 1989 to the Department of Prime Minister in what is now known as the "Performance Management Unit" which is within the Policy Division.

The non-compliance with Decisions of the NEC does not appear to be cause for discipline or other corrective action with or concerning Departmental Heads or other agencies of the State.

The claim filed in the National Court on 14 May 2009 by Moale Enterprises Limited against The State WS 539 of 2009 must be defended. On examination of the payment vouchers obtained from Finance Department, CPI adjustments appear to have been factored into invoices raised and payments made in 2005 and 2007. As such, there is no basis for the claim.

y There is immediate need to have rental claims and payments reconciled periodically. Unless monitored by the GOAC, payments may be made over and above what is payable by the State (through Finance Department).

Recommendations:

1. The Department of Prime Minister and National Executive Council immediately improve its systems and processes to ensure that

Decisions of the NEC are complied with fully and in a timely manner.

Appropriate action is promptly taken where there is non-compliance with Decisions of the NEC

The Solicitor-General and Government Office Allocation Committee must take all necessary steps to defend the claim filed in the National Court on 14 May 2009 by Moale Enterprises Limited against The State WS 539 of 2009 as there is no legal basis for the claim and to take necessary action as discussed above.

The Government Office Allocation Committee and the Department of Finance shall immediately improve all processes and systems to ensure that all rental claims and payments are reconciled periodically so as to avoid payments being made over and above what is properly payable by the State (through the Finance Department).

(e) AOG Jubilee University

1. Introduction

Investigations in this matter were not completed fully before the Commission's term came to an end. However, the Commission has sufficient evidence from which certain clear conclusions and findings can be made. At the end of the day, there is little doubt that the AOG Jubilee University began with very good intentions but a lot of short cuts and outright illegality was committed along the way, leaving no doubt that in this instance, the means did not justify the end.

Up to the date of this report, the AOG University is still not recognised as a University or Tertiary institution. Despite this fact, K4.5 million of tax payers' money has already been spent on what is essentially a privately run institution. The K4.5 million was used to build classrooms (K1.7 million) and even to pay the fees of chosen students (K2.8 million) to study courses on Finance. Very senior executives of the AOG church, including the current General Superintendent Reverend Phillip T Dalaka, gave evidence to the Commission of his bewilderment as to where all the money supposedly given to the AOG University had gone to.

Dr. William Tagis, the Director of the office of Higher Education, told the Commission that he had advised the 'chancellor' of the institution, Mr. Thadeus Kambanei, not to proceed with the inaugural graduation that took place in mid 2009. Earlier in 2005, when moves were made to establish the University, Dr. Tagis also advised the National Executive Council that the submission done by Mr. Kambanei, who was also Finance Secretary at the time, was not a convincing one because of factual errors and weaknesses in other areas, including the finances of the University and how exactly it would source funds to run its programmes. Dr. Tagis told the Commission that there was a lot of political pressure at the time the submission to NEC was done.

Source of Information & Documents

This brief is based on information and documents from the following:

NEC Decisions No. 191/2005 of Special Meeting No: 44/2005;

NEC Decision No. 34/2006 of Meeting No: 04/2006;

Various Reports in the Newspapers;

Department of Finance Cashbook, Ledgers and Payment Vouchers;

Publicity in print medias by AOG Spokes Man, OHE and General Superintendent of AOG Church

Dept of Finance Cashbook, payment vouchers and correspondences.

Evidence given by Dr. William Tagis on the 09th of July 2009,

Evidence given by Reverend Phillip Tony Dalaka on the 09th July 2009. Facts

The NEC in its Decision No. 191/2005 of Special Meeting No. 44/2005 held on 24th August 2005, approved in principle the establishment of Jubilee University and also approved the drafting instructions for the Jubilee University Bill- [Refer Exhibit NEC 1].

On 15th February 2006, the NEC made Decision No. 34/2006 in Meeting No. 04/2006 - [Refer Exhibit NEC 2]. The NEC deferred consideration of the Policy Submission No.219/2005 and referred it to the Central Agencies

Coordination Committee (CACC). It directed the CACC in collaboration with the Office of Higher Education and Secretary for Education to thoroughly vet the submission and determine the National Government's commitment in terms of finance towards the Jubilee University.

No Financial commitment was ever made by the Government Despite that a total of three (3) payments aggregating K3 million were made from three (3) different Trust Accounts that were never intended for AOG Jubilee University, thus breaching Sections 14 and 17 (a) of the *PFMA Act*.

The first payment of K500,000.00 made out of Trust Fund Suspense Account No. 2 on 18th November 2003 was for the construction of classrooms at the University. The Decision to commit funds was made even before the two (2) NEC Decisions - [Refer Exhibit DF 21].

A letter dated 11th April 2005, from the Prime Minister (Grand Chief Somare) addressed to Secretary for Finance (Mr Thaddeus Kambanei) that was attached to the payment vouchers for the payment of K1.2 million, asked the Secretary to identify funds to fund projects in East Sepik Province - [Refer Exhibit FD 26]. The projects mentioned in the Prime Minister's letter included the Sepik Agriculture College and the Westbrook Technical College to be funded with K500,000.00 each. Despite the request for K1 million to be identified, K1. 2 million was accessed from the Sepik High Way Trust Account (Account Code 450 - 448) and paid to Jubilee University on 7th December 2005, for the establishment of that University.

The Requisition for expenditure (FF3) was approved by the Acting Deputy Secretary Operational Services Mr George Gwina as Section 32 Officer on 6th December 2005.

This approval for expenditure was made based on a Brief dated 5th December 2005, received from the Acting FAS Cash Management & Expenditure Mr Otto Wangillen - [Refer Exhibit DF 26]. Mr Wangilkn recommended in his Brief to the Deputy Secretary Operations that a formal approval be given for the transfer of K1.2 million from Sepik Highway Trust Account to Jubilee University as per the Government's decision. He even stated that the K1.2 million has been approved as Government grant for the University to develop the run down facilities at Sepik Agriculture College and Westbrook Ganba Technical College at Hayfield in Maprik to become School of Agriculture and School of Education respectively for the University and located in East Sepik Province whilst School of Business and School of Bible & Theology are located in Port Moresby.

The sourcing of funds out of the Sepik Highway Trust Account to fund the establishment of the University was done in breach of Section 17 (a) of PFM Act which clearly states that "Moneys may be paid out of a Trust Account only for the purposes of the Account or as authorised by law ..." Also the payment was made despite there being no decision by the Government to allocate funds to AOG Jubilee University.

The Sepik Highway Trust Account consisted of monies contributed by Members of Parliament from East Sepik Province. The funds were intended to be used as counterpart funding for upgrading and sealing of the two (2) Sepik Highways, bridges and other roads in the Province. On 29th December 2006, the misuse of funds in that Trust Account were referred to by the then MP for Wewak Open Electorate Mr. Kimson Kare and was reported in the National Newspaper - [Refer Exhibit COR 16].

On 31st December 2005, an amount of K1 ,500,000.00 was drawn out of the Cash Adjustment Account Code 410-03 on cheque No. 829208 and described as *Course fees for District Treasuries Officers'* [Refer Exhibit DF 24].

This cheque was then described as been cancelled and credited back into the accounts through Journal Entry No. 349/05 on the same day - [Refer Exhibit DF 24].

On the same day a replacement cheque for a lesser amount of K1,300,000.00 was drawn out of the same Cash Adjustment Account through cheque No. 829256 - [Refer Exhibit DF 21]. As the payment was made from the Cash Adjustment Account, it is in breach of Section 14 of the *PFM Act*, as that account was exclusively intended to facilitate payables and receivables adjustments at year end during the preparation of the Public Accounts Financial Statements. Therefore the action is deemed as accessing funds in the Government's bank account (Waigani Public Account) illegally and without authority through Appropriation Act legislated by Parliament.

Originally it was planned that 89 public Servants would be enrolled at Jubilee University and have their course fees paid for by the Government. As there were only 49 enrolled instead of 89, in effect it had cost the State K26,531.00 to enrol one of its District Treasury Staff as Student (that is dividing K1.3 million by 49 Students). This amount is excessive compared to those enrolled at the recognised Universities in the Country.

The three (3) payments aggregating K3 million made to Jubilee University out of Public Funds as discussed above, were done without proper and clear basis of authority, thus breached Section 14 of the *Public Finance Management Act*. The details of these payments as noted from the cashbook are disclosed below:

Date	Cheque No.	Account	Transaction Description	Amount K
18/11/2003	740063	TFS Account No.2	Construction of Classrooms Jubilee Uni	500,000.00
07/12/2005	4	Sepik H-wy Trust	Establishment of Jubilee University	1,200,000.00
31/12/2005	829208	Cash Adj Account	Pmt DT students, Banking studies	1,500,000.00
31/12/2005	J/E No. 349/05	Cash Adj Account	Chq # 829208 cancelled	(1,500,000.00)
31/12/2005	829256	Cash Adj Account	Payment of C/Fees(89 DT Officers)	1,300,000.00
Total				3,000,000.00

The payment vouchers for the cancelled cheque No. 829208 drawn for K1.5 million only was furnished. Request has been made with Department of Finance to furnish vouchers for the other payments were made — [Refer Exhibit DF 22], To date the requested vouchers were not furnished.

D. Findings

The AOG Jubilee University is not established by Law as is required.

The AOG Jubilee University is not recognised by the Office of Higher Education

Government Funds were used to establish and pay running costs of the AOG Jubilee University without any money being appropriated through the normal budgetary process.

Payments accessed were derived from the East Sepik Highway Trust Fund and so was illegal transfer of monies appropriated for a specific purpose.

Mr. Thadeus Kambanei abused his position as Secretary for Finance to access funds illegally from monies legally set aside for other purposes.

F.. Recommendations

Mr. Thaddeus Kambanei be referred for investigations by the Police.

G. Bougainville Crisis

The Commission examined five (5) matters, four (4) of which were claims against the State for losses that are alleged to have occurred during the Bougainville crisis and one (1) concerned claims for consultancy services which were alleged to have been provided to the State.

Angela Dyra Morgan

NakituLtd

Kareana Estates

Jimendi Enterprises

John Jaintong & Joseph Bare Onguglo

The Commission's findings specific to each matter are contained in the respective investigation reports. Essentially, the findings of the Commission were that all claims were settled despite -

being time-barred

Lack of notice pursuant to section 5 of the Claims By & Against the State Act 1996

No cause of action disclosed — all alleged breach of duty on the part of the State in failing to protect their property and business interests that were destroyed

Claimants failure to identify wrongdoer primarily responsible

Solicitor General accepting documents provided by claimants only

Gross failure by Solicitor General to effectively seek instructions

In one (1) matter, the claimant sought payment for consultancy services to the State allegedly rendered at the time the claimant was a serving Member of Parliament. The Acting Solicitor General denied having executed the deed of release.

The Commission recommends the following:

Investigation and prosecution of officers implicated
Recovery of proceeds

(a) Angela Dyra Morgan

Parties

For the State:

(a) Attorney-General & Solicitor -General

For the Claimant:

(a) Angela Dyra Morgan

Others (if any)

1

Eda Ruma Pty Ltd

Tuluan Enterprises Pty Ltd

Mr. Henry Onsa (Director of Tuluan Enterprises-Director & Shareholder)

Terms of Reference ("TOR")

The applicable Terms of Reference to this claim are TOR a (1), (5), (7), (8), (9)
(12) and (14)

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Documents and investigations conducted at:

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The documents were accessed from the SG file No. 491 of 2002. The matter was settled by the Solicitor-General and that no proceedings were ever filed in the National Court. In addition the team also conducted investigations into the other aspect of the claim on the following State/Corporate institutions:-

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I

Attorney-General (AG)

Solicitor-General (SG)

Department of Finance
Department of Lands & Physical Planning (DOL)
Registry of Companies-IPA

The Matter

Mrs. Angela Dyra MORGAN submitted a claim to the State by way of a letter addressed to Mr. Damem, Attorney General and dated 12th January 2002 (SG "1") for the sum of **K6S6,800.00**. Mrs. Morgan sought compensation for loss of rental and business between periods August 1986 to October 1996. Mrs. Morgan alleged that both her property and facilities on Buka were used during the Bougainville crisis and that "*the State was the custodian of her people and property*". That was the major substance of her claim against the State and included two (2) Invoices.

Invoice 1 of the claim related to the loss of rental and land charges for the period 1st January 1989 to 31st August 1994 for the property known as *Buka Lodge* and situated on **Portion 301 Milinch of Buka**. An amount of **K117,800.00** was claimed against the State

Invoice 2 of the claim related to the loss of wharfage, rental and land charges for the period 26th October 1989 to 21st July 1996 for the use of the facilities on the property known as *Kokopau Passage* which is situated on **Portion 316, Milinch of Buka**. An amount of **K539,000.00** was claimed against the State.

The period of which the claim was submitted and payments made in respect of the claim are within the COI TOR.

REVIEW OF MATERIALS RELATED TO THE CLAIM

The Commission's review of the file(s) held at the Office of the Solicitor General, the Department of Finance, IPA and Department of Lands disclosed material facts that are of significance to the findings of the Inquiry.

The Claim had no supporting documentation to show that the State and/or its agents had ever used the facilities/properties on the said land during the Bougainville Crisis.

There was no section 5 notice made by the Claimant to the State was sighted on the records of the Solicitor General's file.

There was no application made to the SG or the Principal Legal Advisor to extend time to file the claim.

No proceedings were commenced in the National Court by the Claimant to pursue the claim lawfully.

5> Despite the lack of compliance with the provisions of the *Claims by and Against the State*, 1996, the then Acting Solicitor General, Mr. Zachary Gelu executed a **Deed of Release** [on behalf of the State] with Mrs. Morgan on 7th September 2002 without admitting liability, for the full and final settlement of K656,800.00.

Mr. Gelu also failed to consult the then Attorney General and Secretary for Justice Mr. Damem as required by section 13 of the *Attorney General's Art.*

That commitment made by the State on the Deed of Release was settled by way of five (5) installment payments made by the **Department of Finance** either to Mrs. Morgan directly or through the Solicitor Generals Office. The payments made are:-

No	Date	Cheque No.	Amount ("K")	Details
1	24.12.02	707315	10,800.00	See GE 883923 (Refer to "FD 22")
2	25.12.03	710209	31,000.00	See GE 890397 (Refer to "FD 23")
3	07.04.03	717119	100,000.00	Refer to "SG 18"
4	17.08.04	787309	315,000.00	See GE 996323(Refer to "FD 24")
5	14.12.04	797900	200,000.00	Refer to "FD 24A"
		Total	656,800.00	

> Despite the effect of NEC Decision 150.of 2003 to the Solicitor General on conducting review of settlements of claims against the State, part payments of the claim was processed and paid by the Department of Finance.

y There was however stop- payments directives issued by Mr. Kumura on his appointment as Acting Solicitor General. The stop payments were later reviewed and cleared by his successor Mr. Kuvi on the final two payments which was settled by the Department of Finance.

The Department of Lands

The Department of Lands provided information to the Commission on the land described as Portion 316. The information provided shows that

^ **Eda Ruma Pty Ltd** (from documents sighted on the SG File and provided by the Claimant) was the registered legal lessee of the land known as Portion 301 Milinch of Buka (Buka Lodge) .Portion 301 Milinch of Buka was leased to Eda Ruma PL on 8th August 1986 and up to 08th September 1994. **The land was later sold to Hamamas P/L on 8th September 1994. (Refer to "SG 1.3 & 1.4")**

Tuluan Enterprises Pty Ltd was and is currently the registered legal lessee of Portion 316 Milinch of Buka (Kokopau Buka Passage). According to documents attached to the Claimants submission, Portion 316 Milinch of Buka (KOKOPAU BUKA PASSAGE) was leased to Tuluan P/L on 26th October 1989 and up to 21st July 1996. The records indicate however that the land was sold by PNGBC [when the company defaulted on its PNGBC mortgage payments] to Selau Corporation on or about May 1996. The former Managing Director of BSP, Mr. McIlwraith confirmed that no mortgage sale was conducted by PNGBC on Bougainville during crisis and therefore any sale transaction including that of Portion 316 was illegal. The Registrar of Titles has confirmed that Tuluan Enterprises is the legal lessee.

Investment Promotion Authority

Investment Promotion Authority documents show that:-

Eda Ruma Pty Ltd was incorporated as a Company on 23rd June 1981. The shareholders are Angela Marisse Morgan, Leo Robert Morgan, Leonora Beta Morgan, Robert Polomi Morgan, Brigitte Takoi Morgan and Winifred Vavine Morgan.

The Directors of the Company include Leonora Morgan, Angela Dyra Morgan (also named as the Company Secretary), Leo Robert Morgan and Michael Newall WILSON.

The Company was de-registered on 12th September 1996.

Tuluan Enterprises Pty Ltd was incorporated as a company on 3rd January 1979 and was *de-registered* on 19th December 1996.

The Shareholders to the Company include Leo Robert MORGAN (1000 issued ordinary shares) and Henry Peter ONSA (1000 issued ordinary shares)

The Directors of the Company are Henry Peter ONSA, Leo Robert Morgan and Angela Dyra Morgan (also named as the Secretary of the Company).

Witnesses

The following persons gave evidence on oath;

- **Mrs. Angela Dyra MORGAN**

(The Claimant)

She confirmed that she had filed a claim against the State but did not institute any proceedings in the National Court. She also did not engage a lawyer to pursue her claim with the State. She confirmed that she received the full amount of K686,800.00 from the Department of Finance.

(Refer to 'Transcript of proceedings COIFinance32 dated 13 October 2008 from pages 850 to 884)

- **Mr. Zacchary GELU**

(Former acting Solicitor General)

He said in evidence that the basis for settling the claim was the fact that the Bougainville crisis was due to the failure of the State to negotiate the Bougainville Copper Agreement. Based on humanitarian consideration he did not undertake any due diligence on the claim despite the lack of compliance with the provisions of the *Claims by and Against the State Act*. It was his opinion that because these were claims for services rendered the claim based on Invoices, therefore should be settled without going to court and that section 5 notice was not required.

(Refer to COIFINANCE 57 dated 21st January 2009 and COIFINANCE 58 dated 22nd January 2009)

Mr. Francis KUVI
(Former acting Solicitor General)

He confirmed issuing instructions to the DoF to uplift Mr. Kumura's stop payment and directed Finance to make the final installment payment. The reason for this decision was that the claimant had provided sufficient documentation to the SG which was satisfactory and acceptable, though it was quite clear that the claim did not meet the statutory requirement of *CBAS Act*.

Mr. Kuvi also confirmed that Mrs. Morgan had contacted not only the Attorney General but also the Prime Minister and others in government on her claim, and that there was numerous times the Department of Finance was pressuring the Office to clear the matter for payment (after Mr. Kumura's stop payment directive. (See pages 1515-1516 of COIFINANCE61).

(Refer to COIFINANCE61 dated 28th January 2009)

Mr. Andrew Numbasa
(Former acting First Assistant Secretary-DoF)

He confirmed that the full amount of K686, 800.00 was paid to Mrs. Morgan. **(Refer to Transcript of Evidence dated 13th October 2008 COIFINANCE 32)**

Mr. Francis Damem

Former Attorney General and Secretary for Justice at the time the claim was submitted to the Department by Mrs. Morgan. His evidence was that in 1992 there was a policy initiated by the Mr. James Baker, then first Solicitor General not to settle claims arising out of Bougainville because of the crisis. Under the policy, State Lawyers were required to seek instructions and

defend the claim concerning Bougainville. (Refer to COIFINANCE 72 dated 18th February 2009-pages 2011 to 2016).

Mr. Henry Onsa

Mr. Onsa provided information to the Commission and informed the Commission he wrote to the Attorney General and the State Solicitor advising not to entertain the claim. He further advised the office that she (Angela) was neither a shareholder nor a director and had no authority and power to make decisions and act for Tuluau Enterprises Ltd. He confirmed that no claims have been filed by his company or personally against the State with respect to the use of the facilities on Kokopau. In his letter to the Commission he said that the claim was false, because the Defence Force [Royal PNG Constabulary and other government agencies] had never used the facilities or properties as claimed by Mrs. Morgan. *(IPA records indicate that she was both Director]Secretary of the Tuluau Enterprises Uimited)*

Mr. John Kawi

Mr. Kawi said in evidence that section 5 of the *CBAS Act* does not provide any 'discretion' to the Solicitor General or Attorney General to negotiate a settlement without going to court or initiating proceedings as required under section 5 of the *Act*. **(See his evidence at COIFINANCE 74 dated 24th February 2009 at pages 2133 to 2136)**

Findings:

The Deed of Settlement (*Attorney Generals Act*)

The Deed of Settlement was executed without the consent and approval of the then Attorney General, Mr. Francis Damem. There was a standing policy that all Bougainville claims were to be defended by the lawyers within the Office of the Solicitor General. (Refer to the evidence of Francis Damem and John Kawi above).

The Office of Attorney General/Solicitor General

(Claims by and Against the State Act and Attorney Generals Act)

The Claim was not filed in accordance with section 5 of the *Act*.

y There were no proceedings instituted by the Claimant in the National Court.

The claim was filed with the Office of the Solicitor General well outside of the statutory six months time period as required by *CBASA Act*.

The claimant failed to seek extension of time to file its claim against the State.

Due Diligence

The then acting Solicitor General (Mr. Gelu) failed to liaise and consult the PNGDF on the claims made by Mrs. Morgan that the property was used by members of the security forces during the period of the crisis. The Invoice was not scrutinized by the State and accepted on its face value without any inquiries carried out as to its authenticity.

There is no cause of action alleged against the State for the use of the property under any contract.

The State failed to carry out a search of the Investment Promotion Authority to ascertain the registration and directorship of the two companies. The records of the company show that these companies have been de-registered and thus all the assets are vested in the Registrar of the Company until all outstanding fees/returns owed to IPA are discharged. (See **Transcript of Proceedings COIFINANCE 55 19/12/08 at pages 1293 to 1295**).

The State also failed to carry out a land titles search of the two properties to ascertain the ownership of the property.

NEC Decision 150 of 2003

Clause 3, 5, 9 and 12 of NEC Decision 150/2003 was not complied by the Solicitor General and the Attorney General. The claim was subject to the Decision and that Mr. Kuvi failed to institute proceedings in the National Court for a declaration that the Deed of Release was null and void and to commence full recovery of the amount paid by the DoF to the Claimant.

Statute of Limitations and Fraud Act

The claim was time barred pursuant to the *Statute of Frauds & Limitations Act*

F. Public Finances (Management) Act., 1996

The Office of the Solicitor General failed to refer the claim to the Ministry of Finance for approval as required by section 61 of the *PFMA*. The claims have budgetary implications on funds lawfully available on the claims in excess of K500,000.00.

Recommendations

Attorney General and Solicitor General

The Solicitor General to institute proceedings to declare the Deed of Release null and void and to recover K686,800 from Mrs. Morgan.

Mr. Zacchary Gelu

Mr. Gelu should not be considered for any future appointments in the public service having being negligent in the manner he handled the claim without having regard for statutory provisions dealing with claim against the State.

(b) Nakitu Ltd

Does the matter fall within the Terms of Reference?

The matter does fall within several Terms of Reference of the inquiry. Firstiy, it relates to the Deed of Release ("Deed") which was the basis on which settlement of K7 million was negotiated with the State and signed on the 10 September 2002. Secondly it relates to the continuous defiance of various NEC Decisions by the Solicitor General's office, Attorney General's office and the Secretary-Department of Finance, to obtain approval and clearance before making payments to the Claimant. Thirdly, it relates to the NEC Decision, authorizing the engagement of private law firms by the Attorney General to issue recovery proceedings against fraudulent claimants.

This matter is therefore covered under the Terms of Reference: 5, 6, 7, 8, 9, 10 and 12.

Source of Information and Documentation

This brief comprises of facts and findings from the files and records of:

The Attorney-General's Office

The Solicitor-General's Office

Department of Finance &

Evidence given at Hearings, including Statements from various people happy to assist.

Background: Relevant Facts

The Matter

On 05th January 2002, Claimant by a letter to the Attorney General purportedly gave Notice of Intention to make a Claim against the State, (Doc: 1-AG)

By another letter dated 4th March 2002, the Claimant wrote to the Minister for Finance, Planning and Rural Development, and copying Minister for Justice, Attorney General's Office and Secretary for Finance, alleged that since the State had failed in its duties to the claimant by failing to curtail the Bougainville conflict in 1998, he had sustained loss to his trucking business and service station and other property and assets and therefore the State should be held liable for his loss.

Attached to the said letter were: a bound document titled "A Claim for Compensation against the Independent State of Papua New Guinea for Loss of Business due to the Bougainville Rebellious Uprising" & "Nalritu Financial Projection Notes & Assumptions". (Doc: 2-AG)

The Claimant claimed a total of K13.1 million, as the "projected" loss suffered.

Zacchary Gelu, then the Acting the Solicitor-General at the time, entered into an agreement with the Claimant's Lawyers to settle the claim out of Court and by signing a Deed of Release on the 10th September 2002, (Doc: 11-SG) settled the claim by Nakitu in the sum of K7,000,000.00.

Following the settlement by Deed of Release, a number of part payments were made to Nakitu by the Department of Finance.

Payments by the Department of Finance.

The record of payments to Nakitu kept by the DoF indicates that Nakitu has been paid a total of K3.259 million. These part payments are as follows:

10/03/2005	102258	207	4201	2107	135	Nakitu Ltd	Pmt for o/s Dor Clai	CQ	804832
10/05/2005	8	207 207	4201	2107	135	Nakitu Ltd	Settlement of Debts	CQ	810030
1/08/2005	103088	4 207 4	201	2107	135	Nakitu Ltd	Pymntof CHS SettLo	CQ	816745
31/08/2005	5	207 4	201	2107	135	Nakitu Ltd	Pmt for o/s court or	CQ	818838
25/01/2003	104236	207 4	201	4123	135	Nakitu Ltd Trading	Part Pay.-SG344/02	CQ	710211
12/02/2003	7	207 4	201	4123	135	Nakitu Ltd Trading	Deed of release debt	CQ	711710
20/03/2003	104678	207 4	201	4123	135	Nakitu Ltd Trading	Pmt for O/S deed of	CQ	715414
4/04/2003	8	207 207	201	2107	135	Nakitu Ltd Trading	Paymnt O/Standing De	CQ	716807
3/06/2005	890353		4201	2107	135	Nakitu Ltd Trading	Pmt for o/s DOR sett	CQ	812545
3/06/2005	892642		4201	2107	135	Nakitu Ltd Trading	Pmt for o/s DOR clai	CQ	812570

Total **K 3259000.00**

Chronology

Claimant claims that prior to the Bougainville Crisis which started in 1988, it had a successful trucking business which had just entered into a contractual agreement with Bougainville Copper Limited (BCL) to lease its 12 trucks, when the crisis started, which then forced the Claimant to abandon the business and leave Bougainville for Lae.

Thirteen years after Kandaso Napi left Bougainville, he wrote to the Attorney General's office on 5th January 2002, giving his intention to make a claim against the State for compensation for loss of his business in Bougainville.

About two months later, the Claimant wrote to the Minister for Finance and in that letter, which is dated 4th March 2002, the Claimant amongst other things, stated his claim to be K13.1 million and requested settlement of same.

In pursuing the claim, the Claimant relied on compiled documentations titled, "Nakitu Pty Ltd Financial Projection Notes and Assumptions" and "A Claim for Compensation against the Independent State of Papua New Guinea For Loss Of Business Due To The Bougainville Rebellious Uprising".

By a letter dated 17 April 2002, and again on 29th May 2002, the Claimant, through their lawyers Harricknen Lawyers, sought from the Attorney General, extension of time for their Ghent to give the relevant Notice pursuant to the *Claims by & against the State Act 1996*. (Docs: 7-AG & 8-SG)

On 5th June 2002, in response to a request by the Attorney General to provide an advice on the State's position on the claim, to the Minister for Finance, John Kumura, as the Acting Solicitor General at that time, wrote to the Minister For Finance, essentially advising the Minister that there was no basis for such claim, however, taking into account the State's inability to address the landowner issues, Mr. Kumura added that the Claimant should be compensated by way of an exgratua payment. (Doc: 9-SG).

Despite this advice, a Deed of Release was signed on 10th September 2002, by the Claimant and Mr. Gelu, who was the Solicitor General at that time, effectively settling the claim for a sum of K7 million.

Following the signing of the Deed of Release, Mr. Gelu wrote to the Secretary - Finance, then Mr. Kambanei, advising him of the settlement and requesting settlement of same. (Doc: 12-SG)

By this time, NEC Decision No. NG 07/2002 had been made, but it seemed, Mr. Gelu gave no consideration to it and proceeded with the settlement. (Doc: 10-AG)

On 25th July 2003, NEC Decision No. 150/2003 was made and amongst other matters, it gave approval to the Attorney General to apply to the Court for Judicial Review of any questionable claims or out of Court settlements in excess of K500,000.00. (Doc: 17-AG)

The same decision also gave approval to the Attorney General to engage a private law firm to institute recovery proceedings against persons or corporate entities that have made questionable or fraudulent claims and have been paid by Finance Department through out of court settlements.

In compliance with the NEC Decision .No. 150/2003, Mr. Damem, then the Attorney General, wrote to the Secretary - Finance, requesting the Secretary to refrain from making payment to any out of court settlements, unless cleared by his office. (Doc: 18-AG).

Also in accordance with the said NEC Decision, Attorney General, Mr. Damem, gave instructions to Paraka Lawyers to issue proceedings challenging the validity of the Deed of Release and pursue recovery of the money already paid pursuant to the Deed of Release. (Doc: 20-AG)

Paraka Lawyers filed a Writ of Summons (WS 1006/04) on 30th July 2004 in accordance with Attorney General's instructions.(Doc: 21-SG)

8th September 2004 - Prime Minister, Sir Michael Somare wrote to Attorney General, Damem, and directed immediate settlement of the claim. (Doc: 23- AG).

However, in another letter, dated 8th October 2004, the Prime Minister withdrew his instructions of 8th September. (Doc: 25-AG)

On 30th December 2004, Acting Solicitor General, Mr. Kuvi, writes to Finance Secretary, Mr. Kambanei and amongst other matters, advised that, he had reviewed the claim and found no plausible reason for further delay of payment and directed Finance Secretary to pay the balance of the claim to the Claimant's Lawyer's Trust Account. (Doc: 26-SG).

Following this letter, several part payments were made on: 10th March 2005 10th May 2005, and 3rd June 2005. (refer to record of payments above)

24th August 2005, Paraka Lawyers obtained a restraining order (Doc: 30-SG) against the Finance Department from making further payments. In support of the application, Mr. Kuvi, who was the Acting Solicitor General then, put on an affidavit (Doc: 27-SG) stating amongst other things that:

He was aware of the facts giving rise to this matter and further stated that Mr. Gelu, then the Solicitor General had purportedly entered onto a Deed of Settlement with the Claimant for and on behalf of the State, following purported negotiations with the Claimant.

Despite, court proceedings being filed, the Claimant was still pursuing further payments of the balance of the claim, which he believed had to be stopped, hence his support of the application.

Following the filing & service of the Writ of Summons, the Claimant through Harricknen Lawyers filed a Defence on 24th October 2005 (Doc: 31-SG).

Whilst that is the case with this proceedings (WS 1006 of 2005), the Claimant filed Court Proceedings WS 1182 of 2006, (Doc: 37-SG) essentially seeking specific performance of the Deed of Release dated 10th September 2002 and in addition claimed that, had the Bougainville crisis did not come about, the Claimant would have prospered up to 2005, but because there was the crisis, it made a loss of profit up to 2005. Based on this allegations, the Claimant made a claim for K53 million.

After the proceedings, WS 1182/06 was filed, the Attorney General withdrew instructions (Doc: 38-AG) from Paraka Lawyers and the matter was taken back to the Solicitor Generals Office to deal with.

31. To date, both matters have been consolidated are pending before the Court with progress to trial and the State is now represented by Greg Manda Lawyers.

List of Documents

	DATE	DOCUMENT	COMMENTS
1 AG	5 January 2002	Letter from Kandaso Napi, Managing Director, Nakitu Trading Limited to Attorney General	Notice of Intent to claim Against the State pursuant to section 5 <i>Claims By and Against the State Act</i> .
2. AG	4 March 2002	Letter from Kandaso Napi, Managing Director, Nakitu Trading Limited to Minister for Finance	Setting out claim history and stating value of K13.1 million and requesting minister to deliberate on his claim,(including enclosures)
3. AG	14 March 2002	Letter from Nakitu Limited to Minister for Justice & Attorney General	This was to further provide further notice of intention to claim against State and seeking assistance in settling the claim
4. AG	28 March 2002	Letter from Hon. Andrew Kumbakor, MP, Minister for Finance, Planning and Rural Development to Attorney General	Advise of receipt of claim by the claimant and request legal advise before settlement
5. AG.	28 March 2002	Minute by Minister for Finance to the Secretary Department of Finance	Request for advice on whether similar claims have been settled before and the criteria employed to settle
6. FD	8 April 2002	Letter from Lionel Manua, Harricknen Lawyers to the Attorney General	Provide notice of legal representation to the AG and setting out claimants claim and inviting the A.G to consider their claim in light of the Peter Goodenough matter with a view to settle
7. FD	17 April 2002	Letter from Lionel Manua, Harricknen Lawyers to the Attorney General	Refers to their letter of 8 April 2002 seeking extension of time to give notice Pursuant to CBASA. They also set out the claimant's clam again
8. AG.	29 May 2002	Letter from Lionel Manua, Harricknen Lawyers to the Acting Solicitor General, John Kumura	Referring to meeting between the lawyer and the Solicitor general on the 28/5/02 and enclosed copies of document entitled: A

			Claim for Compensation Against the State....,
9. AG.	5* June 2002	Letter from John M. Kumura Acting Solicitor General to Hon. Andrew Kumbakor, MP Minister for Finance, Planning & Rural Development	Refers to, the Minster's letter to A.G of 21/3/02, and advised that A.G has referred to him, (Acting Solicitor General) to provide advice on State's position regarding ckim, Kumura Advises that after considering various correspondences, the State's position would be that all claims arising from the Bougainville Crisis were to be denied. He mentions that though the claim may be genuine, the State was not responsible for the acts complained of by the claimant He further mentions that he is aware of settlement of the Department of Finance of similar claims and states that under the circumstances an ex gratia payment would be appropriate.
10.. SG.	28 th August 2002	NEC Decision No. NG 07/2002	Setting out among other things a direction that, there be no more out of court settlement by any State body or authority including any by the A.G and Solicitor general without the approval of the NEC acting on advice from the CACC.
11. SG	10 th . .September 2002	Deed of Release Between: Nakitu Limited trading as Kandaso Napi and the Independent State of Papua New Guinea	Setting out terms of settlement, and agreeing not to issue proceedings against State for same subject matter
12. AG.	17 th September 2002	Letter from Zacchary G. Gelu, Solicitor General to Mr. Thaddeus Kambanei, Acting Secretary, Department of Finance	Advice to Secretary that claim was genuine and that parties had agreed to settle the matter for K7million and requesting that a cheque in that amount be raised and paid to the claimant care of Harricknen Lawyers
13. SG	5 th March 2003	Letter from Napi Kandaso, Managing Director, Nakitu Trading Limited to Mr. Thaddeus Kambanei, Secretary, Department	This was an urgent request for payment of the claim

		of Finance	
14. SG.	26 th March 2003	Letter from Napi Kandaso, Managing Director, Nakitu Trading Limited to Mr. Thaddeus Kambanei, Secretary, Department of Finance	Follow up letter further requesting urgent payment of claim
15. FD	2 nd April 2003	Letter from Napi Kandaso, Managing Director, Nakitu Trading Limited to Nino Sarufa, First Secretary — Budget, Department of Treasury	Follow up letter further requesting urgent payment of claim
16. FD	16 th April 2003	Letter from Katherine Kakaraya Agiru, Southern Consultancy Limited to Mr. Thaddeus Kambanei, Secretary, Department of Finance	Follow up letter further requesting on behalf of claimant urgent payment of claim
17. FD.	25 th July 2003	NEC Decision No. 150/2003	<p>Among other matters was directive:</p> <p style="padding-left: 40px;">That, all out of court settlement including consent orders are to be reviewed and cleared by the A.G or his nominee.</p> <p style="padding-left: 40px;">Also directed that all out of court settlement in excess of K1 million are to be approved by the NEC prior to any payments by Finance;</p> <p style="padding-left: 40px;">and further approved that out of court settlement payment for any claims against the State in excess of K1million must at all times be deferred unless S.G in consultation with the A.G furnishes in writing to Secretary Finance that in his</p>

			<p>deliberate judgment State has no Defence or no reason to challenge the claim or appeal against the amount awarded.</p> <p>approved that A.G immediately apply to the court for Judicial review of any questionable claims or out of court settlements in excess of K500,000.00</p>
18. FD	11 th September 2003	Letter from Francis Damem, Attorney General to Secretary Department of Finance	<p>Provides that in compliance with NEC decision 150/2003, a review of all out of court settlement by suspended S.G Gelu be reviewed.</p> <p>Further states that he has commenced review of some major questionable settlement effected by Deed of Release by suspended A.G. and amongst other files found the claim by Nakitu Limited a questionable settlement and stated that Finance cease payments forthwith until it was cleared by his office</p>
19 AG	20 September 2003	Letter by Kathy Kakaraya Agiru to Secretary Finance, Thaddeus Kambanei	Alleges among other things that the A.G has lied to the Deputy Prime Minister and Mr. Dusava intending to induce the secretary to pay claimant's claim
20 AG	16 th February 2004	Letter from Francis Damem, Secretary and Attorney General to Paul Parka Lawyers	Instruction to issue proceedings to challenge the legality of the Deed of Release and recover all monies paid out to the claimant
21. FD	28 th July 2004	Writ of Summons WS NO. 1006 OF 2004, Filed: 30/07/2004	Statement for claim issued by Paraka Lawyers seeking to declare Deed of release illegal and void
22. AG	27 th August 2004	Letter from Lionel Manua, Harticknen Lawyers to the Right Honourable Prime Minister	Request to Prime Minister to direct A.G to pay the balance of the claimant's claim and that further the claimants had met with the A.G who advised the claimant to send the request to the Prime Minister who would then authorize payments

23. SG	8 th September 2004	Letter from M T Somare GCMG KStJ CH, Prime Minister to Mr. Francis Damed, Attorney General	This states he has received a request from claimant and letter states that PM is aware of adverse legal implications if it failed to comply with the Deed of release. He also directed the A.G to immediately notify Finance to release payments and setde payments of K6.3 million
24 AG	4 October 2004	Minute from John Kumura DSG to Francis Kuvi Acting SG	Kumuar states that he has carriage of the claimants matter and that the file has been with the AG since 2002. He further states that he has responded to the PM's letter on behalf of the AG and that Francis should take the matter up with the AG
25. AG.	8* October 2004	Letter from M T Somare GCMG KStJ CH, Prime Minister to Mr. Francis Damed, Attorney General	This is a request by the PM to the A.G advising that the letter he signed on the 8/9/04 to setde the claimants claim was done in error, and was withdrawn and that they not take further notice until further instructions
26. SG	30 th December 2004	Letter from Francis G. Kuvi, Acting Solicitor General to Mr. Thaddeus Kambanei, Secretary, Department of Finance	Advice that matter was settled by a Deed of Release and further stating that after first payment a stop was issued. He further states that he saw no reason why the matter could not be settled as the only controversy surrounding the matter were certain allegations made against officials of the Department He also stated that he reviewed the claim and found no reason for delaying" payment any further.
27. AG.	20* July 2005	Affidavit of Francis Kuvi; WS NO. 1006 OF 2004, Filed: 21" July 2005	States that he was aware of the background of the matter, and that it was settled by a Deed of Release on the 10/9/02. He goes on to outline the process for payment of claims, where he says that he checks the claims and when satisfied approves same. He also states that he was aware of two payments made to the claimant before the recovery action was commenced, and that at the time of swearing the affidavit, was aware that the claimant was seeking further

			payment, and accordingly sought to stay any payments to maintain the "status quo".
28. SG.	14 th July 2005	Affidavit In Support By Dickson Gwainas, WS NO. 1006 of 2004, Filed: 21 st July 2005	Deposes the inability of Paraka Lawyers to serve WS and SOC on the claimant as he was not resident in Lae.
29. SG.	27 July 2004	Finance Department Minute from Otto Wangillen Acting FAS, Public Accounts Division to Deputy Secretary Operations	Outlines a list of matters including the " claimants claim earmarked for payment by Finance
30 SG.	24 th August 2005	Court Order WS NO. 1006 OF 2004, Entered 31 st August 2005 by Paraka Lawyers for State	Restraining the Secretary Finance from making any payments on the Deed of Release, and further for substituted service of the Statement of claim
31 FD	24 th October 2005	Defence WS NO. 1006 OF 2004	<p>Stating that</p> <p style="padding-left: 40px;">the state had a policy to setde claims arising from the Bougainville Crisis, which was endorsed by Acting SG Kumura; and by Sir Peter Batter in a statement to the Government.</p> <p style="padding-left: 40px;">Accordingly the Claimant issued its notice of intention to claim from the State;</p> <p style="padding-left: 40px;">Whilst litigation remained an option negotiations were pursued and accordingly the Deed was signed;</p> <p style="padding-left: 40px;">Illegality of the deed, statutory time bar issue, and lack of the SG powers to setde matters is denied</p>
32 FD	4 th January 2006	Letter from Lionel Manua, Lionel Manua Lawyers to Paul Paraka Lawyers	Serving Notice of change of lawyers and providing copies of the PM's letter of 8 September 2004 (withdrawn by PM <i>in</i> 8/10/04) and SG letter to Finance Secretary (later denied in his affidavit). And advising the State to discontinue the action.
33	31 st July 2006	Letter from Paul Paraka Lawyers to	Report to Attorney General setting out the

SG		Acting Attorney General	basis of the claim and the manner in which the claim was settled by the Deed of Release and the options available to the State and the chances of success it had of declaring the Deed void.
34. SG	18 th July 2006	Consent Notice to Set Down for Trial, W.S. NO. 1006 OF 2004, Filed: 2 nd August 2006	
35 AG	9 th August 2006	Brief from Hitelai D. Polume-Kiele, Acting Solicitor General	Setting out the background of this matter, and the legal position faced by the State and the issues raised in the brief inter alia, provided, was the status of a void agreement. The brief essentially states that with all NEC directives in place it was highly improper for the settlement to take place between the claimant and the State. Accordingly it was the State's duty to recover the money or if to be settled in accordance with the S.61 of the Public Finance (Management) Act and or by the approval of the NEC.
36 SG	11 August 2006	Letter from Fred M Tomo, Acting Attorney- General to Mr. Paul Paraka, Paul Paraka Lawyers	Advising Paraka Lawyers to continue pursuing the action commenced and not to settle the claimants claim until the proceedings were determined in the State's favor
37 SG	15 August 2006	Writ of Summons, WS NO- 1182 OF 2006, Filed: 15.8.06	Statement of Claim by claimant seeking relief for breach of Constitutional rights by reason of the State's failure to provide police etc.. by reason thereof the Claimant sustained losses to his business.
38 AG	15 November 2006	Letter from Fred M Tomo, Acting Secretary & Attorney General to Mr. Paul Paraka, Paul Paraka Lawyers	Withdrawal of instructions from the State to Paraka Lawyers
39 SG	19 March 2007	Letter from Hitelai D. Polume- Kiele, Acting Attorney General to Mr. Aaron Mirana Nawason	Hitelai Polume's explanation to Aaron Mirana on the claimant's claim, that nature of the claim was dubious, the Deed being illegal and the settlement was orchestrated and facilitated

			persons without lawful authority. ~
40 AG	4 May 2007	Affidavit of Neville Devette WS NO. 1182 OF 2006, Filed: 04.05.07	That a Writ Of Summons was served on~the~ State but since no section 5 Notice was issued the State was not aware of the impending claim
41 AG	Undated /unsigned	Draft Defence, WS NO. 1182 OF 2006	<p>ing issues that.</p> <p>No section 5 Notice was given under the CBASA for the claim;</p> <p>The entire claim is statute barred;</p> <p>The onerous duty placed on the State which it could not have reasonably been expected to achieve.</p>
42 SG		Finance Department Cash Book Record and Payment Advice / Vouchers	
43 SG	24 th January 2008	Letter from Mr. Kandason Napi, Managing Director, Nakitu Fast food & Restaurant Ltd to Hon. Dr. Allan Marat, Minister for Justice & Attorney General	Request by Napi Kandaso for approval to setde part payment of claim on the basis that he had been paid K2.9 million with the balance of K4.1mn still outstanding. And that he had commenced an action purportedly to enforce the Deed of release in proceedings WS 1182/2006, hence the request for intervention by the Minister.

D. Findings

Cause of Action/Claim

1. As can be seen from the documentation compiled by the Claimant, their claim is essentially based on projections and assumptions for their alleged loss of business arising from the forced closure of the Bougainville Copper mine as a result of the crisis.

In other words, the Claimant is saying that, it had been operating a successful business, largely based on contracts from BCL and that due to the State's failure in handling the landowner issues properly the crisis forced BCL mine to close, consequently the claimant suffered a loss which the State is now somewhat responsible.

Obviously from these claim one can see that there is no cause of action known at law to support such claim and to link the State and make the State liable for loss of business which the claimant claims as suffered. The losses, if any at all, which the claimant claims has suffered, arose as a result of an act of war on Bougainville caused by the rebel elements. In the circumstances the State cannot be blamed for such losses which in the legal sense are extremely remote and that the cause was by the intervention of a third party.

On examination of Mr. Gelu, as the Solicitor General on this issue, he essentially agreed that there was no cause of action, (see transcript of proceedings no. 81, pp2677-2678) but yet he proceeded to settle the claim.

Compliance with Statutory Requirements (Preliminary issues)

> Fraud & Limitations Act 1988 (The Act)

The Commission's first finding as set out above is that, the claimant does not have a cause of action.

However, assuming that there is one based on Tort, as claimed by the claimant's lawyer, Mr. Manua (see Transcript of Proceedings No. 16, p.468), the cause of action would accrue from 31st December 1989 and continued till 31st December 1995.

The finding by the Commission that the cause of action would accrue from 31st December 1989, is based on the evidence by the claimant who says that the said date was the start of the Bougainville crises that forced him to leave Bougainville and eventually destroyed what he owned on the island.(see Deed of Release-Doc: 11-SG)

In light of this, the notice by the claimant of his intention to make a claim against the State given on 5th January 2002 was time barred.

In spite of this, and the fact that there was no cause of action, Mr. Gelu, as the Solicitor-General at the relevant time, still went ahead and accepted the Claimant's offer and settled the claim for K7 million.

> Claims By & Against the State Act 1996(CB&ASA)

By 31st December 1989, Section 21(2) of the CB&ASA had not been enacted. This would mean that the requirement for notice of intention to make a claim against the State did not exist then.

However, after the enactment of the current Act, which includes Section 21(2), which came into operation on 20th February 1997, two situations were created in respect of a cause of action that accrued against the State as at the time of the enactment and the commencement date of this Act

The first situation relates to cases in which proceedings had already been instituted whilst the second relates to cases in which no proceedings had yet been issued.

The claimant in this matter had until 20th August 1997 to give the required notice or in the event that he is out of time, to seek leave to give notice out of time, but he failed to do that and after, almost 13 years had passed and he sends his letter of 5th January 2002.

The said letter by the claimant which the he relies upon as the Section 5 Notice under the Act, cannot be accepted as the required Notice, for the simple reason that, no leave was given to the claimant to give his notice out of time.

Actions/Steps taken to Defend Claim & Outcome

This is one of the matters that clearly show that, State was not properly represented by its lawyers, the Solicitor General in particular. In other words, no steps were taken by Mr. Gelu to defend the claim.

It is very clear that by his conduct in not questioning the claim put forward and the preliminary issues as referred to above, he was not acting in the best interest of the State.

At all relevant time, Mr. Damem was the Attorney General, who after becoming aware of Mr. Gelu s actions, took steps to correct the errors by Mr. Gelu.

Consideration of relevant NEC Decisions

1. Both NEC decisions numbered 7 of 2002 and 150 of 2003, were not complied with by the Solicitor General, in particular Mr Gelu and Mr Kuvi and the Secretary of Finance, Mr Thaddeus Kambanei

By the time the Deed of Release in this matter was signed, there was already in place the NEC Decision, Decision No. NG 07/2002 which directed inter alia matters that:

- That there be no more out of court settlements by any State body or authority, including by the Attorney General and Solicitor General, without the approval of the NEC, acting on advice from the NEC;

Despite these clear directive, the then Solicitor General moved to settle this claim and committed the State to K7Million without first obtaining the approval from the NEC or securing the necessary clearance from either the Attorney General and the Secretary for Treasury to make this commitment as required by NEC Decision No. NG 07/2002.

Payment

See paragraph 8 above.

Witnesses called & examined/produced statements or documents

Lionel Manua

Zachery Gelu

Francis Kuvi

Francis Damen

Hitalai Polume-Kiele

Thaddeus Kambanci

Recommendations

1. Amendments to relevant Legislations

Claims By and Against the State Act & Attorney General Act

- Amend both legislations to include specific provision as to:

The type of matters that can only be determined by the Courts

The type of matters that can be settled out of Court

The Officer who would be authorized to settle claims out of Courts

The amount, the Officer with the authority to settle can settle on

In addition include provisions to:

Make it compulsory for the State officer handling a claim consider preliminary issues, such as Standing and time limitation.

Require the claimant to also give a copy of the section 5 notice to the head of department responsible for the claim.

The Departmental Head/his delegate must be required to provide instructions within 30 days to the SG.

Make provision for offences/charges to be laid on officers of both SG and the respective Government or Department, who fail to comply with the requirements to give instruction.

If a matter is to be settled out of Court, the appropriate Officer/Officer with authority must get written consent of the Departmental Head to settle. In the absence of such approval, a claim must progress to Court.

SG must always consult the AG & or report to the AG for all claims against the State

If a matter is to be settled out of Court on agreement by parties, such claim must be sanctioned by the Court first.

- The Deed of Release must be signed and sealed with the Seal of the State to be endorsed by both the SG & the Action Officer of SG

Re: Finance, payment must be only made on advice of the SG on production of all necessary documents.

Possible Recovery Actions

The DoF has already made a total payment of K3.259 million to the claimant, who is still pursuing the balance.

In the meantime, Court Actions have been instituted by the State to have the Deed of Release set aside. If that action is successful, the State will stop making further payments and given that the claimant is operating a business in Lae, the State could also issue proceedings to recover the K3.259 million already paid to the claimant.

Prosecutions/Referral/Other

Action by Mr. Gelu — unacceptable for someone holding such position, who agreed that his action was wrong.

In the circumstances, he should not be considered to hold such positions ever again.

(c) Kareana Estates Ltd

For the State

(a) Attorney General and Solicitor General

For the Claimant

Nelson Wahune

Kareana Estates Limited

Others

(a) Department of Finance

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

Court documents show that a claim for K5. 441.369.00 was instituted by Nelson Wahune, Managing Director of Kareana Estates in the National Court on 2nd June 2003. On 3rd July 2003 Mr. Damem then Attorney General and Secretary for Justice by way of a letter to the Mr. Kambanei, then secretary for Finance cleared the amount of K4million for payment. On 24 May 2004, Department of Finance paid an amount of K2million to Mr. Wahune.

The claim falls within the TOR (a) (1) (2) (3) (4) and (5)

THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

The claimant Nelson Wahune from East Sepik Province married Rose Audrey Sipaiovi from Kareana village, Tinputz, Bougainville in 1997. He registered the Sipa family cocoa fermentary business which was operating in Tinputz. The Wahune family moved to Port Moresby in 1989 due to Bougainville crisis but Rose returned to her village in 2000. Nelson and Rose separated/divorce in 2002. Wahune remarried. Kareana estate belong to the Sipa family and not Wahune.

On 19th May 2003, Wahune intimidated to Mr. Mayberry that he owned a cocoa trading business in Tinputz. Mayberry confirmed that the claim appeared reasonable. On 2nd June 2003, Mr. Wahune initiated proceedings against the State claiming K5,441,369.00 for loss and destruction of business due to Bougainville crisis. On 7th July 2003, the State filed the Notice of Intention to defend and Defence within time. Then Attorney General and Secretary for Justice (F. Damem) initiated an Out of Court Settlement with Wahune at K4 million and gave clearance to Mr. Kambanei, then Secretary for Finance to process the payment. At the time Wahune filed the proceedings Kareana estates was deregistered on the IPA records.

Wahune's claim was processed in two parts. The first part was made by Cheque No. 779268 for K2,000,000.00 dated 24th May 2004 which was deposited into his Maybank Savings Account. The second payment made by Cheque No. 788313 for K2,000,000.00 dated 26 August 2004 was made payable in Wahune's name, payments were made out of the Trust Fund Suspense Account (TFS A/C 460-31)The second payment was stopped on instructions from the Ombudsman Commission.

It is to be noted that as a result of this claim, Nelson Wahune was charged by the police for making a false claim against the State. In that respect the following persons were also charged by Police for conspiring together with "Mr. Wahune to defraud the State namely *Francis Damem (former AG & Secretary for Justice)*, *Boas Hembehi*, *John Vailala (BSP)*, *Jacob Yafai, (DoF) Margoni Wamanimbo (Private Businessman)* and *Simon Maniba (Private Business Man)*.

DOCUMENTS PRODUCED FOR EXAMINATION AND REVIEW BY THE COMMISSION

A. The documents referred to below are significant to the findings of the inquiry into the claim. (Refer to SG 698/03-Supplementary File)

Payment Vouchers confirming the amount of K2 million was paid and deposited into Mr. Wahune's account.

Letter of 3rd July 2003 from Damem to Kambanei on the purported clearance to pay Wahune K4million.

Same letter (as above 2) from Damem to Wahune advising of his acceptance of the offer and settlement for K4 million. That very letter was later confirmed by Wahune as acceptance of the offer for settlement by the State and that to treat is as the Deed of Release. (Letter of response dated 8 July 2003)

Statements and Correspondence of Witnesses

Below is a summary of the statement and correspondence received from persons who assisted the Commission with information

1. Statement by Thomas Mane dated 7th July 2009

Tendered as Exhibit Mane 1 on 7th July 2009 (COIFINANCE 113)

He confirmed that he had acted as a Consultant for Mr. Nelson Wahune and had made representations to the then acting Solicitor General, Mr. Kumura to settle the claim at K1million. He submitted a submission on the quantum on 23 June 2003 for the SG to consideration and further discussion. No further negotiation took place until several months when he was informed that DoF had paid Nelson Wahune K2million. He expressed surprise that K2million was paid to Nelson Wahune. He expressed his concerns to the then Attorney General and demanded that investigations be conducted into what he considered as irregularities in the payment. He also found out that the file was "hijacked" and went missing. He states that "Nelson Wahune and Thaddeus Kambanei are relatives from the same area of Yangoru in East Sepik."

2. **Mr. Peter Pena**

Covering letter and Court Documents tendered as Exhibit "**PETER PENA 1**"

(COIFINANCE 113 dated 7th July 2009-Page 3926)

Mr. Pena stated for the record that after further instructions to file the WS, Mr. Wahune never came back to their Office and was uncontactable on telephone numbers he left with them. The firm ceased acting for Mr. Wahune soon after the filing of the writ and advised that the same on 6th October 2003. The Law Firm confirms that it was never a party to the settlement with the State. The Firm confirmed that it acted for Kareana Estates from 12th May 2003 to 6th October 2003.

Also confirms receiving States Notice of Intention to Defend and Defence on 30 July 2003.

3. **Ms. Evelyn Golman**

Finance Officer-DoF

Adopted the evidence presented to the Commission on 12th April 2007 pages 338 to 346.

(COFINANCE113 dated 7th July 2009 and COIFINANCE 12/4/07)

She was the Claims Examiner in the Public Accounts Division, DoF and gave evidence as to her duties as an examiner to ensure that all claims submitted for payment must comply with financial instructions and the PFMA.

She stated that she was instructed by her immediate superior to certify a blank FF3 and FF4 form with respect to the claim. She admits that there was a directive dated 24th August 2004 issued by Mr. Kambanei and Mr. Yer which approved the claim for payment out of Trust Fund Suspense Account #2 and despite her understanding that the claim did not meet the requirements she went ahead to certify the blank forms, (pages 341 and 342 of Transcript dated 12/4/07)

4, Mr. Andrew Numbasa

Then Acting FAS (Public Accounts Division)-DoF

Adopted the evidence presented to the Commission on 12th April 2007 pages 319 to 330. **(COFINANCE IB dated 7th July 2009 and COIFINANCE 12/4/07)**

He issued instructions for the officers to verify the claim and to seek legal clearance. On his perusal of the claim documents he sighted Mr. Damem's letter with any endorsement from Mr. Kambanei to pay half the claim to reduce the interest cost.

He also was not aware of the NEC Directive on settlements in 2002 and 2003 which was issued to DoF for processes to be approved by the Minister. (Communication gap between the DoF, Attorney General and Justice and NEC)

Nelson Wabune

Letter dated 6th July 2009 faxed to COI and read into records.

He advised the Commission that he was not able to appear as he was arrested and charged in November 2006 in Lae in relation to the same matter and was on bail condition which restricted travel out of Lae until the trial at Lae National Court

Thaddaus Kambanei

Former Secretary for Finance and Accountant COI Finance 113 dated 07 July 2009 at page 3926

Mr. Kambanei's responses to our questions are contained in his letter to the Commission dated 8th July 2009.

cc

"1. There was no reason for me to clarify with the Attorney General if the claim was settled by a Court Order or by a Deed of Release. From my professional judgment it was obvious that the claim was really a deed of release rather than a court order. As a paying office I expected all due diligence to have complied with by the Attorney General before it

was forwarded to the Department of Finance for payment. As a colleague department head it was not possible for me to question his signature because he is the Attnmg, General and his advice is final and binds the State.

I have never at any point in time accepted Mr. Nelson Wabuneletter as confirmation to settle the claim for payment. Mr. Wabune is not the authority and there was no way I could have process the payment without the clearance from the Attorney General The cc copy of the letterfrom Mr. Wabune to Secretary for Finance which was later referred to the Deputy Secretary to confirm with the Attorney General is the normal thing to do when correspondence are received from clients. There is nothing very unusual with such comments because it is normalprocess.

The payment out of the Trust Fund Suspense Account was meant to be a temporary expenditure intended to be cleared once the Warrant Authorities are received from the Department of Treasury. The trust instrument allows for such expenditures to be made as advised and cleared by the Attorney General..

It should be noted that when approvals are granted by way of a internal memo from the recommendations of the First Assistant Secretary it triggers off the check and balances and the internal control systems and processes. The approval is not a legal approval to circumvent the normalfinancial procedures as such.

There was no urgency to settle Kareana's claim. My comments on the claim with the notation "Pis action ASAP" is a common notation used to expedite the process without any time to it."

C. WITNESSES

1. John Kumura

Former Acting Solicitor General, Public Servant and currendy employed as a lawyer with Posman Kua Aisi Lawyers

Evidence on oath at pages 3926 to 3934 COIFINANCE 113 dated 7th July 2009

Mr. Kumura in summary said in evidence as follows :-

Directed Mr. Bokomi, State Lawyer in SG to defend the claim.

Confirmed that Mr. Mane did request through the Office to settle the claim and received the quantum submission.

The Notice of Intention to Defend and the Defence was filed within the time (90 days)

o Writ was filed on 2nd June 2003 o

NOID filed on 2nd July 2003 o

Defence filed on 7th July 2003.

Expressed surprise that Mr. Damem had approved and cleared the claim for payment. The letter which was later accepted as a Deed of Settlement by Mr. Wahune.

The file went missing at the time the settlement took place. He later heard that it was settled for K4million.

Francis Damem

Former Attorney General and Secretary for Justice

Evidence on oath at pages 3935 to 3938 COIFINANCE 113 dated 7th July 2009

Mr. Damem referred to an earlier application he made to the Commission by an application dated 12th April 2007 to maintain his silence with regard to the matter. He was actually charged for conspiring with Mr. Wahune to defraud the State of K4million and later discharged on a 'nolle prosequi'.

Jimmy Bokomi

Former State Lawyer with SG and now with Rageau Manua Kikira Lawyers

Evidence on oath at pages 3941 to 3947

Mr. Bokomi in summary said in evidence as follows:-

He was assigned with the file and was instructed by Mr. Kumura to file the NOID and Defence

He filed the NOID and Defence within time.

The Defence he states related to the section 16(1) of the Statute of Frauds and Limitations.

The file went missing and could not be located in the Office. The matter was settled at the time the file went missing and even though he was no longer in charge of the file, the file register was not amended.

OUR OBSERVATIONS ON THE FACTS AND EVIDENCE PRESENTED TO THE COMMISSION

Office of the Solicitor General & Attorney -General

(CLAIMS BY & AGAINST THE STATE ACT, 1996)

The Solicitor General had filed the Notice of Intention to Defend Defence within time.

and the

Section 5 notice was not pleaded in the Statement of Claim and extension was sought by the Claimant for filing the Writ some 14 years claim that the company suffered losses as a result of the crisis.

also no after the

The Claim was statute time barred

y There was no valid claim against the State.

No Deed of Release was ever signed between the State and Mr. Wahune, principal of Kareana Estates.

Mr. Damem had provided an advice on request by the Secretary for Finance on the clearance for the claim. Mr. Damem failed to consult the Solicitor General and had acted on his own free will to provide clear a claim that could have been dismissed by the National Court.

Mr. Damem's reference in the letter that the State had filed the Defence and NOID was out of time was misleading because the records sighted indicate that the claim was filed within time.

Section 61 of the Public Finances (Management) Act, 1996(PFMA)

This claim was settled for K4million and under Section 61 of the PFMA. Ministerial Approval was necessary to enable the State to enter into a legally binding and enforceable contract. There is no evidence that a Deed of Release was entered into between the parties

Department of Finance

(Public Finances (Management) Act, 1995

y The payment of the amount of K2million out of the Trust Fund Suspense Act No. 2 is highly irregular when the account was subject of scrutiny by the Office of the Auditor General and the Public Accounts.

y The request by Mr. Kambanei, then Finance Secretary to Mr. Damem, then Attorney General and Secretary for Finance for clearance was highly suspicious and irregular, given the fact that the process was reversed to facilitate the clearance for payment.

y The most important document for facilitating the claim was cleared even though the FF3 and FF4 was blank at the point where the claim had in fact satisfied the requirements including the need for evidence and documentation.

OUR RECOMENDATION

That the Office of the Solicitor General institute proceedings in the National Court to recover K2million (including interest and other costs associated with the claim) from the Mr. Wahune and Kareana Estates Limited.

That the Office of the Public Prosecutor and the National Fraud and Anti- Corruption Squad advise on the current status involving charges for "Conspiracy to defraud" against Francis Damem and others involved in facilitating the fraudulent claim.

That the conduct of the former Secretary of Finance, Mr. Thaddeus Kambanei in facilitating the fraud by issuance of instructions to his subordinates' be referred to the National Fraud and Anti Corruption Squad for further investigation.

That the Officers of the Department of Finance involved in facilitating the claim through the Waigani Public Accounts Section be dealt with under the disciplinary provisions of the *Public Services (Management) Act and the Public Finances (Management) Act*

(d) Jimendi Enterprises Ltd

PARTIES For the State

(a) Office of the State Solicitor

For the Claimants

(a) Mr. Jimmy Kendi

Any others (if any)

Department of Defence

Department of Finance

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

Mr. Jimmy Kendi claimed that the PNGDF had unlawfully used his heavy machinery and equipment during the Bougainville Crisis and made a claim for K4, 298,037.33 to the PNGDF. The claim was cleared and approved for payment based on the legal advice provided by the State Solicitor to the Department of Finance for settlement of the claim. The Department having obtained that advice processed and settled the claim for the full amount of K4, 298,037.33 on 14 November 2000.

The claim falls within the TOR (a), (1), (2), (3), (4) and (5).

THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

Mr. Jimmy Kendi (currently a prisoner of the State at Kerevat CIS) the principal of Jimendi Enterprises Limited instituted proceedings in the National Court for **K4,298,037.33** against the 'State' for the use of earthmoving equipments by PNGDF on Bougainville during the crisis.

Mr. Kendi operated an earthmoving company in Arawa. It leased, on hire basis, a number of heavy machinery and equipment from Credit Corporation, through a Lease Agreement dated 20 March 1984. The company failed to pay its monthly lease rates and Credit Corporation repossessed its machines in around July 1987. The company went into receivership. At the time of repossession and receivership, JIMENDI was working on a road project construction contract at Inus Plantation which was awarded to it by the then North Solomons Provincial Government. Credit Corporation completed the project. All earthmoving equipments and trucks including the ones leased to JIMENDI were on June/July 1987, shipped back to Moresby. In Port Moresby, the machines were refurbished and sold.

According to Credit Corporation, no machines were left behind on Bougainville before the crisis.

In 1999, by letter dated 14 December, 1999 under the letterhead of Jimendi Enterprises Limited, Mr. Kendi wrote to Mr. Vari Fore, the Secretary for Defence and lodged a claim for K4, 298,037.33 against PNGDF for the unauthorized use of heavy equipment by PNGDF during the Bougainville crisis. Heavy equipment alleged. This letter is important. He claimed that he had owned two machines, which PNGDF were using during the crisis and owing to misuse by soldiers, were rendered useless. This claim was false. The two machines were owned by Itakara Plant Hire (Toru Toru Transport), the owner was a Mr. Peter Goodenough. He fled Bougainville at the height of the crisis.

At the time Jimmy Kendi sent the letter referred to in the preceding paragraph, he knew that Jimendi Enterprises limited was deregistered around September 1996. It is evident that prior to sending the letter, Jimmy Kendi proceeded to register a new company- BAKANNOVI TRANSPORT Ltd on 16th April, 1999. Although, Jimmy Kendi initiated the claim against the State under Jimendi Enterprises Limited, he in a letter dated 18 October 2000 addressed to the Secretary for Defence wanted the cheque paid out under BAKANNOVI TRANSPORT Ltd.

The claim was processed but the cheque was paid under Bakanovi Transport Ltd. General Expense Forms No. 737643 dated 14 November 2000 were processed for payment of heavy equipment used by PNGDF during the crisis period 1991-1997. *[Jimendi went into receivership around July 1987 and the leased earthmoving equipments and machinery were repossessed by Credit Corporation]*. Payments were drawn from the Miscellaneous Vote 207-4201-4123-135. Cheque was raised in the name of Bakanovi Transport. Cheque No. 632311 dated 14 November 2000 for K4,298,037.33 was paid to Bakanovi Transport Ltd. The amount of K4,298,037.33 was paid to the credit of Bakanovi Cheque Account maintained with the then PNGBC. Bakanovi Transport is registered under Jimmy Kendi and his wife Norma Kendi.

The exercise of due diligence and financial prudence in the expenditure decision making process lies on the part of the Secretary of Finance, being the Chief Accountable Officer, in this, was wanting. It is his responsibility to ensure that all accounting and financial procedures in relation to the payment of public monies are strictly observed.

At the time of payment, there was no NEC Policy in place to monitor and control the management of payment of claims against the State. [On 22nd August 2000, NEC issued a directive prohibiting all State body or authority including Attorney General and Solicitor General in executing out-of-court-settlements, unless they obtain approval of NEC, (vide: Clause 10-Decision No (07 f2002), Special Meeting No. NG 05/2002]

The following persons/entities were paid out of the proceeds of the claim paid to Bakanovi Transport Limited:-

1. Michael Keni (Jim Kendi's brother)	250,000.00
2. Ambrose Vakinap	183,000.00
3. Nelson Wahune	117,000.00
4. Christopher Ningsis (Hanks Management)	420,000.00
5. Thomas Niniga	149,333.34
6. Philip Polewara	20,000.00
7. Frank Pomoso	5,000.00
8. David Nelson	12,000.00
9. Henry Hanimio	12,000.00
10. Robert Naris	60,000.00
11. Jason Naris	102,000.00
12. Rally Omoso	25,000.00
13. Koseng (PNG) Ltd	500,000.00
14. PNG Balsa Company	165,000.00
15. Toba Motors	78,000.00
16. Andersons Foodland	61,085.70
17. Ela Motors Ltd	43,949.99

Mr. Kendi was charged by the Police with the Misappropriation of K4,98,037.33. He pleaded not guilty and matter proceeded to a full trial. The National Court (Mr. Justice Lenalia) at Kokopo convicted Jimmy Kendi on the charge of misappropriation on 4th July 2006. On 26th April 2007 the National Court sentenced Jimmy Kendi to a term of 9 years IHL of which he is currently serving that sentence at the Kerevat goal.

FINANCIAL INSPECTION SERVICES DIVISION INVESTIGATION REPORT

The Commission has sighted the Report which was based on the investigation into breaches to the PFMA that rendered the payment highly irregular. The report was separate investigation conducted by the Financial Inspection Services Directorate of the DoF in 2003 and submitted to the Secretary of Treasury on 24 April 2003.

The Investigation Report recommended as follows :-

"1. Serious disciplinary action pursuant Section 52 of the Public Services (Management) Act 1995(PSMA) be initiated against the officers (Lt. Col G. Wiri, Mr. Vari Fore, It. Philip Polemra, It. Col. T.K Falaniki, Maj. Otto Pandum and Mr. Peter Siune) who have violated Section 102(f) & (i) of the Public Finances (Management) Act, 1995 (PFMA)

Minor disciplinary action pursuant to Section 51 of the PSMA against the officers (Mr. Ravu Paku, Mr. Ben Pokanau, Ms. Nino Saruva, Mr. Tailai, Yeme Kaiwila and Ms. Mary Martin) deemed to have committed offences under section 50(e) of PSMA.

Surcharge action pursuant to section 102 of PFMA for breach of subsection (f) & (i) be initiated against all the above officers (Mr. Ravu Paku, Mr. Ben Pokanau, Ms. Nino Saruva, Mr. Luiilai, Yeme Kaiwila, Ms. Mary Martin Lt. Col G. Wiri, Mr. Vari Fore, It. Philip Polemra, It. Col. T.K Falaniki, Maj. Otto Pandum and Mr. Peter Siune)) pending result of further investigation carried out by the National Fraud and Anti Corruption Squad.

Recovery of the payment of K4, 298, 037.32 made on 14th November 2000 should be dependent on the outcome of the Police Fraud Squad's Investigation. In any event, Solicitor General to initiate recovery action for the unauthorised interest amounting to K1, 423, 737.32 paid to Jimendi Enterprises/Bakanovi Transport.

5. *No further payment to Jimendi Enterprises, / Bakanovi Transport be entertained until such the Police have completed their investigation.*

6. *Improve internal control procedures as outlined in this report to ensure that proper payment procedures and verification have been followed.*

REVIEW OF EVIDENCE RELATED TO THE CLAIM

The Commission commenced hearings on this claim on 7th July 2009. A number of persons were invited to attend the hearings and assist the Commission with its inquiry into manner by which the claim was processed [by virtue of the *Claims by and Against the State Act*) through to the settlement of the claim by the Department of Finance.

WITNESSES

The following witnesses gave evidence on oath at the Commission hearing on 7th July 2009.

1. Mr. Ben Pokonau

(Unattached Officer-DoF)

At the time the Claim was processed, he was the Deputy Secretary Operations and had sighted and authorized the claim for payment. He also gave evidence as to the process by which the DoF processes the claims as soon as a written instruction sealed by the Solicitor General to effect payment is received from the SG/AG. Mr. Pokonau had authorized the FF3 (Requisition for Expenditure), though the claim was submitted to the Department of Defence. He states at page 264 of the Transcript dated 4th April 2007 that, *"on or about around 10 November 2000 the then Financial Controller, a Mr. Using who was also the financial delegate brought the claim that is the*

FF4, the FF3 and other supporting documents like the letter from the Secretary of Defence, who was Mr. Vari Fore. The letters from the ground commanders who admitted using the machineries in question, and of course the letter from the legal, Solicitor General's Office giving clearance to process the claim."... (page 265) Also attached to the claim was the legal clearance from the then Solicitor General Mr. Isikei Mesulam (He was the State Solicitor at the relevant time).

...Upon sighting the documents, I then of course having satisfied myself that all was in order, I signed as section 32 officer approving requisitioning of that expenditure.. At that point in time...I was never aware of the any fraudulent intentions either by my officers or from the documents from the Department of Defence. (Page 266).

(Refer to Transcript of Proceedings COIFINANCE 113 dated 7th July 2009-pages 3898 to 3901; Transcript of Proceedings dated 4th April, 2007 at pages 249 to 344).

Exhibit POKONAU1: Statement examined on and read into record on 4th April 2007 and accepted as part of his evidence on 7th July 2009.

Mr. Vari Fore:

Former Acting Secretary for Defence

He confirmed signing the FF3 giving rise to the claim by Jimmy Kendi but not the FF4 (not completed) on the basis of the legal clearance by the State Solicitor. The FF3 and FF4 was submitted to DoF but was not processed for want of form and the FF4 which was not completed by the Defence Department.

He was not aware that the claim was approved for payment by the DoF and the evidence of Mr. Pokanau confirms that another FF3 and FF4 was filled by DoF and approved by Mr. Pokanau for payment.

(Transcript of Proceedings COIFINANCE 113 dated 7th July 2009 at pages 3904 to 3907).

VARI FORE "1" Bundle of document including letter dated 14/12/1999 from Jimendi to Department of Defence, FF3 dated ^October 2000 and signed by Mr. Fore and the incomplete FF4. (Document Reference No. 146 to 153).

4. Ambrose Vakinap

Unattached Officer-Former Assistant Secretary-Liaison and Advisory to Provincial and District Treasuries-Department

Mr. Vakinap prepared a written statement dated 26th March 2007 and submitted to the Chief Commissioner under the subject "Statement of Circumstances heading To My Involvement With The Fraudulent Payment To Jim Kendi of Jimendi Enterprises" (Exhibit VAKINAP "1")

The records from the Bank indicate that Mr. Vakinap received K1 83,000.00 from Mr. Jimmy Kendi. His explanation is contained in the statement in which he denies neither colluding nor conspiring with Jimmy Kendi to defraud the State. The statement in part reads;

"...I categorically deny any claim that I yndicated the whole process of this claim payment. Any such claim can only be attributed to the ignorance of any individual of the financial accounting and claim processing sequence of activities that exists with the Government cash accounting procedures and processes.

(Transcript of Proceedings COIFINANCE 113 dated 7th July 2009 at pages 3901 to 3903).

WITNESSES UNAVAILABLE FOR FURTHER EXAMINATION

Mr. George Minjihau

Current State Solicitor

The records obtained from the DoF show that the legal clearance was authorized by the former State Solicitor Mr. Isikel Mesulam. The action officer was Mr. George Minjihau, then Deputy State Solicitor who had prepared the advice for Mr. Mesulam.

Mr. Minjihau was invited to come forward and assist the Commission with information, on the fact that the legal clearance allowed the DoF to make the one of payment to Bakanovi Transport which was owned by Jimmy Kendi. On 3rd July 2009, Mr. Minjihau replied and stated as follows: "I have been in poor health in the past few weeks and I have been under medication for the past three to four weeks and was in fact absent from work for these reasons in the past few days. This has compounded by the fact that I have been under immense pressure over the same period for my refusal to give legal clearance for execution of certain project agreements based on legal reasons.

I am requesting for an extension to respond to the notice in writing for up to maybe Wednesday, 8th July 2009.

The Commission reminded Mr. Minjihau on his undertaking to provide a statement to the Commission by letter dated 20 August 2009. Mr. Minjihau has not furnished any document and or statement to the Commission.

The Commission considers this to be very serious in particular where the principal of the company has been convicted of the offence of misappropriation pursuant to the Criminal Code. The actual clearance of the claim on hindsight provided the necessary means to authenticate the fraudulent claim

The Commission notes that Mr. Minjihau was previously examined by the Commission and the evidence is referred to **Transcript of Proceedings COIFINANCE 11 dated 11th April 2007 at pages 283 to 317.**

2. Jimmy Kendi

Inmate at Kerevat Jail

The Commission was unable to visit the prisoner at Kerevat Goal and to interview him due to the end of term for COI. This should also be the subject of further inquiry to determine if any other persons from within the offices of the State have colluded with Mr. Kendi to defraud the state.

Inclusive of the above hearings, reference is also made to a number of witnesses who have assisted the Commission in its inquiry on the claim in reference to giving evidence on oath. **See Transcripts of Proceedings COIFINANC 8 (3 April 2007); COIFINANCE 9 (04 April 2007); COIFINANCE 10 (10 April 2007) and COIFINANCE 11 (11th April 2007).**

THE LETTER OF 7th NOVEMBER 2000 FROM THE STATE SOLICITOR TO THE SECRETARY, DEPARTMENT OF FINANCE

The Commission considers the letter from the then State Solicitor Mr. Isikel Mesulam has contributed to the payment of this illegal and fraudulent claim. The letter also reflects the ignorance on the part of the State Solicitor to recognize it as a claim against the State and therefore a matter that should have been referred to the Solicitor General and its officers for their action.

The Commission was unable to collect further information and explanation from **Mr. Isikel Mesulam**, the former State Solicitor; **Mr. George Minjihau**, current State Solicitor and the then Deputy State Solicitor (Commercial) and the author of the legal advice signed by the Mr. Mesulam, **Lieutenant Philip P. K. Polewara**, then Officer

Commanding the small Boat Team on Taurato, Bougainville and **Mr. Thaddeus Kambanei**, Secretary for Finance, the letter is reproduced below. (Attachment "A") It is also confirmed from the decision of his honor Justice Lenalia that lieutenant Philip PK Polewara and Jimmy Kendi are brothers through their paternal genealogies. (See page 40 of the decision).

Letterhead of the Office of the State Solicitor

7th November 2000

Action Officer : George Minjibau

Deputy State Solicitor (Commercial)

The Secretary

Department of Finance and Treasury Vulumindi Haus

WAIGANI National Capital District

Dear Sir,

**RE: : SETTLEMENT OF CLAIM FOR UNLAWFUL USE OF
EQUIPMENT-JIMENDI ENTERPRISES**

I refer to your letter of 2nd November 2000 requiring our advice on the above claim by Jimendi Enterprises.

Before our advice is given on the validity of Settlement, I shall briefly outline the relevant facts, the basis of the claim, as disclosed from the appendices to your letter referred to above.

Prior to and during the early stages of Bougainville crisis Jimendi Enterprises was an Earthmoving National Company operating on Bougainville Island. We are also aware that the same company has been awarded various civil works contracts on Bougainville Island for which payments have been made with the blessing of the National Executive Council.

During the crisis its operations came to a standstill but with all its Heavy equipment intact and still remaining on the island. The Company did not have the time to take the equipment out of the island when the crisis erupted, In any case when the Military moved in, the evidence discloses that it took possession of these equipment and used it for its Military efforts and other Civic works programme in particular on Taurato island without any form of payment to the Company or its principal.

*The principal of the Company Mr. jimmy Kendi who moved to and now living in Rabaul made a claim to the Department of Defence in a letter dated 14th December 1999 **for use of and destruction of the subject equipment by personnel of the Defence Force** (Sea element) for the period specified.*

There is no evidence either from the Defence Force, the Department of Defence or from the Department of Finance and Treasury refuting the allegations. To the contrary all documents confirms the allegations and has in fact admitted liability and the use of the equipment as alleged (see Defence Secretary's letter dated 4th October 2000) and the statement by Lieutenant Philip P. K Polewara, officer commanding the small Boat Team on Taurato island dated 15th February 2000) and advised Department of Finance and Treasury to settle.

In view of the above, the State's liability is in my considered view a non — issue as there is no evidence to contest liability if the claim is to be contested at all. In fact all the documents attached to show a clear intention of these Agencies to settle the claim.

The only remaining issue would therefore be quantum of damages, an issue your Department and the Defence Department are better placed to ascertain as is your responsibility.

I assume this has been done as evidenced in your letter referred to above and moreover the attachment of the filled in 'Requisition for Expenditure Forms'. Based on all the above I am of the considered view the claim is in order for Settlement subject to funds being available. You may therefore proceed to organise settlement.

I trust the above is at some assistance to you. If you however, require further clarification on any aspect of this advice, please do not hesitate to contact the writer or myself.

Yours faithfully,

Original Signed **ISIKEL**

MESULAM

Acting State Solicitor

GM/kke

THE COMMISSIONS OBSERVATIONS AS TO WHAT WAS WRONG WITH THE PROCESSING OF THIS CLAIM BETWEEN THE DEPARTMENT OF DEFENCE, THE DEPARTMENT OF FINANCE AND THE DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL.

The Commission makes the following observations

- (1) The Department of Defence received a letter of demand from Mr. Jimmy Kendi for the use of his heavy equipment by the Defence Force. He demanded payment for the period of use.

The evidence at the criminal trial of Jimmy Kendi was that he had no heavy machinery on Bougainville, because it was repossessed by Credit Corporation (PNG) Ltd and taken back to Port Moresby for refitting and sold. (See *The State - v Jimmy Kendi* (2006) N3129)

Then acting Secretary for Finance, Mr. Vari Fore was advised that the PNGDF elements on Bougainville had used Company heavy equipment He signed the Requisition for Expenditure (FF3) but did not sign the General Expense (FF4) as it was blank. The documents accompanying Mr. Kendi's letter was submitted to the Department of Finance. The reason for this was that the Department of Defence was having problems with funding given the Bougainville Crisis

The claim was received by the Department of Finance and immediately actioned by the then Deputy Secretary of Finance (Operations) Mr, Ben Pokanau. The Department of Finance raises the Requisition for Expenditure and the General Expense Form. Mr. Pokanau signs the Requisition as Section 32 Officer and sets the process for raising the cheque. There is no letter from the Office of the Solicitor General with the relevant court orders or any Deed of Release (if any existed).

The Secretary for Finance, Mr. Thaddeus Kambanei, with reference to the request to the opening paragraph of the above letter which states, "*I refer to your letter of 2nd November 2000 requiring our advice on the above claim by Jimendi Enterprises*" refers the claim to the Office of the State Solicitor.

The State Solicitor having appraised itself of all the documents (the claimants) does not carry out any further inquiry with the Department of Defence nor do they consider it necessary to refer to the Office of the Solicitor General. The State Solicitor provides a legal advice clearing the claim to be processed for payment.

The State Solicitor has not consulted the Office of the Attorney General or the Solicitor General given the fact that this is claim against the State (Department of Defence) which involves consideration for the assessment of quantum. The letter merely overlooks that fact because there is no submission on quantum referred to the Office for consideration, which in the first place was the statutory function of the Solicitor General.

The Department of Finance relies on the legal advice provided by the then acting State Solicitor and processes the claim for payment.

The payment made to Mr. Vakinap would in our view indicate that other officers of the State within the Department of Defence, the PNGDF, the Department of Justice and Attorney General and the Department of Finance have worked as joint enterprise to defraud the state compromised their position. This matter requires further investigation.

FINDINGS

The findings following our observations are:

> *The Office of the State Solicitor/Department of Justice and Attorney General*

Mr. Isikel Mesulam, then acting State Solicitor had acted without authority when he provided the legal advice thereby allowing the State funds to be misappropriated. Mr. George Minjihau, then Deputy State Solicitor is equally responsible for not properly advising the State Solicitor on the request for legal advice, when the matter involved was a claim made against the State.

The State Solicitor should have referred the matter to the Office of the Solicitor General and advise the secretary of Finance accordingly

Further to that, the Commission's findings specific to this matter are that the claim was settled despite -
being time-barred

No cause of action disclosed - all alleged breach of duty on the part of the State in failing to protect their property and business interests that were destroyed — claimants failure to identify wrongdoer

***COMPLIANCE WITH PROCESS-REQUIREMENTS OF THE CLAIMS
BY & AGAINST THE STATE ACT, 1996-(CB&S Act, 1996)***

No court proceedings instituted by the Claimant as required by the *Act*.

No Section 5 notice was given to the Office of the Solicitor General

The Claim:

This claim was not processed through the National Court and that the Office of the solicitor General was never involved in the matter.

The State Solicitors Office (Minjihau/Mesulam) cleared the claim for payment.

Steps taken (not taken) by the Solicitor General in defence of the claim

The Solicitor General was not served nor advised on the claim requiring payment.

Steps taken (not taken) by the Attorney General in defence of the claim

None

Settlement

None considered as the State Solicitor cleared it without any due diligence nor refer the matter to the Solicitor General and or the Attorney General

Pay-out - Department of Finance compliance or otherwise with Public Finances Management Act and related process.

The Department of Finance was not careful enough to note that the clearance was done by the State Solicitor. The State Solicitor does not have the authority under the *CBAS Act* to clear claims made against the State. Clearly there was an abuse of the applicable law that led to the illegal payment.

RECOMENDATIONS

The Office of the Solicitor General initiate a review of the claim and institute proceedings under the *Claims by and Against the State Act* to recover the payment of K4,298,037.32 made on 14 November 2000.

That the recommendations made by the Financial Inspection Services Division dated 24 April 2003 to the Secretary for Treasury be implemented and in particular to initiate disciplinary actions and pursue surcharge action against the officers of the Department of Finance, Department of Defence & the PNGDF.

The Commissioner of Police to undertake further investigations on those suspected and implicated in the fraudulent misappropriation of state funds.

IX. RECOMMENDATIONS ARISING FROM INQUIRY

Term of Reference Number 13 - Further Recommendations Arising from the Inquiry

By its terms of Reference the Commission focus has been directed to the Department of Finance and the Department of Justice and the Attorney General.

But claims examined originate in disputes with Government Agencies across public administration. Some of the claims investigated have disclosed serious error, unlawful action or failure in capacity of a department, or misconduct by officers affecting operation of the department.

The Commission reports these as matters for further inquiry and or reform. **A.**

Department of Finance

In respect of the Department of Finance, the Commission recommends the following:

National Executive Council

- National Executive Council ('NEC') establish a team of professionals comprising of accountants, lawyers and others to immediately conduct a review of the Department and make recommendations for appropriate remedial actions to be implemented.

Audit Issues

- > NEC to direct the Department of Finance to immediately address all issues raised by the Auditor General in the Reports on the Public Accounts of PNG tabled in Parliament since the year 2000.

Auditor General to review and report to Parliament on all outstanding audit issues raised since the year 2000.

Systems & Procedures

Immediately install and implement a proper accounting and information management system that is able to accurately capture and maintain all financial transactions of the State and produce reports and records on a timely basis.

A Section is created within the Cash Management and Expenditure Division to cater for all filings and record management of the Department,

A appropriately skilled person is appointed with additional staff to take stock take of all existing files and establishment of proper filing system,

An appropriate building with proper lighting, ventilation, shelving and security is secured to store files for the minimum statutory period of seven years.

Immediately cease the operations of the Trust Fund Suspense Account and Cash Adjustment Account.

Immediately stop all payments out of the Arrears Vote for settlement of claims against the State.

Immediately establish a proper recording system of all claims against the State.

Settlements

In respect to settlement, the following should take place prior to cheque being drawn to settle claim;

y Finance Department keep a proper register of all claims received for settlement,

Check and verify with external parties such as Solicitor General, Registrar of Courts to ensure that the documents submitted in respect of any claim are genuine and there has been compliance with the *Public Finances (Management) Act* (TFMA⁷) and the *Claims By against the State Act 1996*.

All claims approved by be forwarded to the Minister for approval as required under the PFMA.

Further claims of K1.0 million and above, the Minister should seek NEC approval for settlement.

the Financial Instructions and Finance Management Manual be reviewed to incorporate the requirements of Section 47D of PFMA and Section 2A of the Claims By & Against the State Act.

Referrals

Finarfce Secretary Gabriel Yer be referred under Parts 6 and 14 of the Public Service Management Act to the Public Services Commission be referred for further investigation in respect of the matters raised above and throughout this Report.

Former Finance Secretary Thaddeus Kambanei be referred for further investigation in respect of the matters raised above and throughout this Report.

Review of current management

The Departmental head shall immediately review the performance and competence levels of all officers of the Department

Recruitment

The Department shall recruit qualified and experienced officers to perform competently in all functions as required.

All officers, particularly management, should have the following:

- o undergraduate degree in accounting
- o Associate membership of Certified Practising Accountants of PNG (CPA PNG)

- o Clearance from CPA PNG that he/she is fit and proper person for the to be employed by the Department
- o Obtain clearance from Police Fraud and Criminal Divisions stating the persons considered for employment has no record of conviction and is not subject to investigation for possible fraud or other criminal offence
- o Subject all candidates considered for the position of the Secretary to a Interview Committee comprising of accounting (from international accounting firms) and legal experts for assessment of their knowledge of the accounting standards and relevant laws such as the PFMA.

B. State Law Offices

(a) Attorney General

The Commission recommends that the Attorney General:

create and maintain a Register of notices received pursuant to Section 5 of the Claims By and Against the State Act 1996

improve communication and maintain constant dialogue between SG and in- house lawyers within State Departments, agencies etc

establish protocols and manuals for processing all claims, and out-of-court settlements, which shall include that the Attorney General upon receipt of a Section 5 notice shall forward a copy of the notice of claim to the Secretary, Finance; Commissioner General, Internal Revenue Commission; and Governor, Bank of PNG.

compile a register of all claims against the State in date order, which will be open to public scrutiny. The purpose of such a register is to: -

Establish priority of claims

Provide base data for budget forecasts.

That such Register record all judgments and settlements to establish priority for payment in date order together with protocol that provides that there be no deviation from that priority except by direction of the NEC.

The Case Management System now developed by the office of Solicitor General could constitute such a Register if developed as information system with public access on a 'read only' basis.

The Commission also recommends the following amendments to the *Attorney General Act 1989*. The Attorney General shall:-

- be a lawyer admitted to practise and has continued in practice for at least ten (10) years in PNG;
- not hold any other public office;
- be appointed on recommendation by the Judicial & Legal Services Commission;

(b) Solicitor General

The Commission recommends that the Solicitor General shall be:-

- called "State Counsel";
- a lawyer admitted to practise and has continued to practise in civil litigation for at least 5 years in PNG; and
- appointed on recommendation by Judicial & Legal Services Commission;

Notwithstanding that the Department of Justice & Attorney General is under course of restructuring pursuant to the White Paper sponsored by the former Minister for Justice, Hon Bire Kimisopa, and approved by the NEC in 2007, there should be an independent review of the operations of the Office of the SG to identify systematic failings and misconduct etc which continue to give rise to the following:

Absence of competent leadership and crisis management

Incompetence

Abuse and misapplication of the letterhead (both AG and SG)

Missing files

Missing court documents and correspondence

Ad-hoc creation of supplementary files (see Yama)

Unreliable filing system

Unreliable Registers

© Lack of co-ordination in filing of documents between offices (Waigani and regional offices) (J) Fraudulent creation of files

(k) Forgery of signatures of AG, SG and other officers etc

(I) Lack of due diligence

(m) Excessive taxation of costs

(n) Failure to attend for motions and trial

(o) Uncertainty with appointments for meetings generally

(p) Lack of supervision of lawyers and staff

(q) Failure to observe business hours

(r) Poor file management

File management is the professional responsibility of the lawyer having carriage of the matter and ultimately the Solicitor General. In the ordinary course, the file should contain instructions, all exchanges of correspondence, notes of telephone attendances, conferences, within and externally, court attendance notes, internal memos, court documents, process and other document collection/service forms, searches etc

The Commission examined five (5) Solicitors General who served in 2000 to 1st July 2006. They all spoke of a system or a practice that covered the above mentioned processes. This was not reflected in the files examined by the Commission.

Absence of file-notes, court attendance notes etc

Inefficient service at the front counter

Unreliable custody and movement of files

Failure to manage the release of cheques issued by Finance Department in settlement of claims

Failure to monitor and audit status of payments (partial and full) and the reconciliation thereof

Failure to enforce compliance with —

o Section 2A of the Claims By & Against the State Act o Section 47D & 61, of the Public Finances Management Act o NEC Decision NG7 of 2002 o NEC Decision No. 150 of 2003 o NEC Decision No. 21 of 2006

Failure to monitor and audit status of payments (partial and full) and the reconciliation thereof

Further, the Commission recommends that the following take place immediately:

y Officers implicated or involved to be suspended pending further investigation

^ Creation of manual for processes and procedures **(c) State Solicitor**

The Commission recommends that the Attorney General Act 1989 be amended to:

make provision for the Office of the State Solicitor and its functions; and

have the State Solicitor appointed on recommendation by Judicial Legal Services

Commission.

(d) National Court

(i) State Court

The National Court already has a number of "tracks" dealing with specific matters such as the Criminal Court, Commercial Court, Judicial Review and Appeals Court, and Election Petition Courts etc.

With the Solicitor General's office presently having a register of 11,000 claims and receiving some 1000 new claims each year, a court administering State cases alone will provide timely and consistent resolution.

The Commission recommends that a "State" Court track be established to exclusively deal with all claims made by and against the State and related agencies.

(ii) National Court Registry

With regard to the National Court Seal and National Court Imprest, the Commission recommends that the:

Court seal be custom made;

Court seal impressed on originating process, final court orders and certificates of judgment

Court stamp be used for all other ordinary documents

the Registrar, Deputy Registrar and Assistant Registrar shall:

o maintain the security, custody and possession of stamps and imprest o create

and maintain a "public register" of:

final Orders; and

Certificates of Judgment

In eight (8) matters examined, the Commission has found a common trend of events whereby there are documents purporting to be court orders awarding a judgment sum, Certificate of Judgment and clearance letters given by the Solicitor General to the Secretary, Department Finance for settlement. In all these matters, the Commission has found that there are no National Court nor Solicitor General files. As such, the following matters require further investigation:

1. IBK (PNG) Ltd;
2. Besalam Investment Ltd;
3. John Toa;
4. Dick Teman;
5. Wesley Aisora;
6. John Jaintong;
7. Rex Leo; and
8. Simon Wapo; and
9. David Imig.

The Commission therefore recommends that an independent inquiry be conducted into the operations of the Registry of the National Court to identify systematic failings and misconduct etc which gave rise to the following:

Abuse and misapplication of the Court stamps / seals

Missing court files

Missing court documents

Ad-hoc creation of supplementary files

Unreliable filing system

Unreliable Registers

Lack of co-ordination in filing of documents between Registries

Fraudulent creation of files

Forgery of signatures of Registrar etc

(j) Certificates of taxation on excessive costs

(k) Listing of matters for motions and trial without adequate notice

(l) Uncertainty with appointments for:

Taxation

Call-overs

Meetings generally

(m) Lack of supervision of Registry staff

(n) Failure to observe registry opening hours

- (o) Inefficient service at the Registry
- (p) Unreliable recording of information on court file:
 - Endorsements / notations (pronouncements of the Judge)
 - Index
- (q) Unreliable custody and movement of files

(e) District Court Registry

With regard to the District Court Seal and District Court Imprest, the Commission recommends that the:

- Court seal be custom made;
- Court seal impressed on originating process, court orders and certificates of judgment;
- Court stamp be used for all other ordinary documents;
- Secure custody and possession of stamps and imprest with the Clerk of Court.
- Clerk of Court create and maintain a "Public Register" of:
 - o final Orders; and
 - o Certificates of Judgment

In the matters examined, the Commission has found that there were lack of proper records to ascertain the reasons concerning the determination of liability, damages and costs. As such, the Commission recommends that the transcription services be introduced for recording of all District Court sittings.

Further, in respect of both Courts, the Commission recommends that the following take place immediately:

- That manual for processes and procedures of the Registry be created;
- That register of actions and process be accessible on-line.

C. Amendments to Claims By & Against the State Act 1996

(a) No Default Judgments against The State

The great majority of claims for which the State has become liable have occurred without contest - by default judgment. They constitute the most significant single factor in the loss of public funds. With the claim stamped as fact, the State law officials have assumed that the only role left to them thereafter is to "negotiate" the compensation. This is a disaster that is still happening. The Commission continues to be notified of present day settlement of default judgments in outrageous sums.

It can be stopped simply by excluding the State from the Court's default rules process.

It is clearly not appropriate that the State should by failure to defend in time or just by inaction of its officers, or agencies incur unspecified and unlimited liability. The State must always be a participant in the process of resolution of any claim against it.

It is therefore a recommendation for immediate implementation that the Claims By and Against the State Act be amended to provide that no judgment may be entered against the State by default. With such amendment the relevant Rule of the National Court Rules would cease to have effect (Section 184(4) Constitution)

This would effectively turn off the flow of uncontrolled settlements and return claims to actual resolution of fact, liability and damages by Court hearing or other transparent process. There is no reason why this action should not be taken forthwith.

Instead a procedure should be substituted that requires an order of the Court directing that the action proceed to trial on its merits including evidence of compliance with statutory process.

It is not required or suggested that the Courts should be compelled to take a particular role in protecting the State in such matters, but, in exercising their judicial authority of the State the Court does have the duty to see that the laws of the country are not flouted. That duty must include an obligation not only to see the Court's own rules are followed but that the statutory process of the *Claims By and Against the State Act 1996* is followed as well. The Supreme Court has in fact acknowledged such a duty of supervision.

In *NCDC -vs- Yama Security Services Pty Ltd* (2003) SC 7007 the Court said:

"As part of the Courts constitutional duty and mandate as guardian of the laws of the State, the Court has a public duty to protect the public interest sought to be protected by relevant statutes

3)

It is also a recommendation of the Commission that, that constitutional duty be manifested by requiring evidence of compliance with *Claims By and Against the State Act* be proved before the Courts before judgments and/or consent orders are made against the State.

Executive Action Required

With key findings of Departments and public officers failing to carry out functions 'and duties lawfully even in defiance of Government direction, it is the Commission's strongest recommendation that Government reassert authority and control under a programme of reform and integrity review. This is enlarged below.

Notice of Claim to be Served on Attorney General

Section 5 presently provides that service of notice of claim be served on the Departmental Head," or "the Solicitor General" and that the "Principal Legal Advisor" may, on cause being shown extend the time for notice.

Provision for service on three officials, (when two may also hold the same position) is and has been shown to cause confusion and error.

Evidence before the Commission has disclosed that there has been inadequate communication between the offices of the Attorney General, Secretary and the Solicitor General resulting in none being aware or certain or consulting on whether a notice had been served on another or at all.

The essential requirement for notice matter under the Act is that it be served, in time, on the legal representative of the State, the Attorney General. There is no need to provide for alternate service on a subordinate in the same premises.

The Commission therefore recommends that the Section 5 of the Claims By and Against the State Act be amended by deleting the "Secretary" and "Solicitor General" from Section 5(1) and substituting the "Attorney General" alone.

(d) Amendments to Notice of Claim

For State lawyers to respond to claims against State agencies, time is required for inquiry from client agency and instruction. The ninety (90) day response time from service provided by the Court Rules is intended to accommodate that. But given that claims can arise across the country, ninety (90) days is in fact little enough time. The record of default judgments graphically demonstrates the failure of State to comply, whether failure is because of State lawyers failing to seek instruction or the agencies to respond.

The need for prompt response to claims could be resolved, by adding the State agency to the Section 5 Notice that a claimant must lodge with the Attorney General.

It would impose no greater burden for a claimant. And further, to ensure the State lawyers are supplied with necessary facts to formulate proper response to the claim, Section 5 could be further amended to provide that the Departmental head of the agency

concerned shall be obliged to supply to the Attorney General the agency's response to such claim and a statement of facts in support.

The Commission also recommends the following amendments:

Definition of 'suit' in Section 1 be amended to read — "any claim, action or original proceeding between parties in any court of competent jurisdiction, including applications under Order 16 of the *National Court Rules*."

Section 5 of the *Claims By and Against the State Act* be amended to provide that such notice shall be served on:

o the Attorney General (not Solicitor General and Secretary for Justice); and

the relevant head of department or State agency intended or required to be named as a Defendant;

Section 5 "Notice" shall be in the form of a statutory declaration and shall contain details as to the following:

o Full name of claimant or claimants o Authority to act (where more than one claimant) o Full details of the claim (to enable Attorney General to ascertain time-bar issues and to obtain instructions)

Date

Place

Nature of claim

Loss or injury sustained

witnesses

State parties

There shall be no discretion to extend time to give Section 5 notice where the cause of action is time-barred by operation of law.

Definition of 'State' to include all governmental bodies as defined in the *Constitution*, Schedule 1.2

Form 1 Certificate of Judgement be replaced with certificates signed separately by:

" Registrar - Form 1 A; and

■ Attorney-General - Form IB (on presentation of form 1A), in the forms set out in the Appendix.

i

To provide that no judgment may be entered against the State by default. Instead a procedure substituted requiring the action proceed to trial of the merits including evidence of compliance with statutory process.

To provide that no settlement of a claim against the state be made without the approval of a National Court judge. Such a process is already provided in the National Court rules in court supervision of administration of Trusts and Estates and settlements for infants in personal injury cases. Such a course ensures a transparent factual assessment according to Law.

To provide that any application for a consent order for judgment against the State shall be endorsed with a certificate by the Attorney General in his own hand signifying compliance with the provisions of the *Claims By and Against the State Act* and that the payment of the consent sum has the approval of the Minister of finance under Section 61 of the *Public Finances (Management) Act*.

To define the term "claim" (for the purposes of Section 5 notice) to cover all claims, whether by Court action or otherwise and including claims that may be made outside of court process.

Upon receiving Section 5 notice, the Attorney General shall forward notice of the claim to the Secretary for Finance, Internal Revenue Commission and Bank of PNG for their records and advice.

Section 5 to be amended to provide simultaneous service of the claim on the head of the government agency with which disputes arise.

That Section 5 be amended to provide that the head of the Government agency with which the dispute arises shall supply to the Attorney General his agency's response to such claim and a statement of act in support.

Require the Attorney General and Solicitor General to obtain the written opinion and/or consent of the head of the government agency primarily responsible for the claim before settling the claim out of court.

To provide that any deed of settlement (or other instrument compromising a claim against the State) is of no force or effect unless it is "endorsed" by the National Court similar to trust settlements of Estates and Trusts, for infant settlements. Such a course would preclude "internal" settlement and ensure transparent factual assessment of damages according to law.

D. Amendments to Public Services (Management) Act 1995:

The Commission recommends that the *Public Services (Management) Act*; related legislation, instruments and standard terms and conditions of contracts for departmental heads and senior officers employed under contracts with the State be amended to provide the following:

- a. Prescribe "serious disciplinary offence" is also committed where:

State line agency named as defendant fails to provide full and proper instructions to Solicitor General -without reasonable excuse to comply:

comply;

investigate and provide the Attorney General and Solicitor General with instructions on any claim within a reasonable time (say 1 month from service of Section 5 notice on the departmental head);

State suffers loss as a result of negligence or failure to exercise due care in performance of duties

b. A finding of "serious disciplinary offence" -

• i. is a ground for termination;

ii. renders a person ineligible for re-appointment to any public office for ten (10) years

E. Brief-Outs

Section 7 (i) of the *Attorney-General Act 1989* provides that the Attorney General has the duty, function and responsibility to instruct lawyers within or outside the country to appear for the State in any matter. Therefore, a lawyer or a law firm cannot act for the State unless specifically briefed by the Attorney General.

Terms 1, 7, 10, 12 of the Commission's Terms of Reference and paragraph E of the Commission's Statement of Case deals with brief outs. Paragraph E of the Statement of Case reads:

"The controversies surrounding the Department, in particular in relation to payments made in satisfaction of out of court settlements, default judgment or consent judgments or other claims against the State, have given rise to concerns that the management of the Department particularly since 2000 was not done transparently and in accordance with good management and

accounting practice, and that public monies have been made falsely, fraudulently, improperly or in a manner not authorised by law." (Emphasis added)

Essentially, this Commission's task is to consider all payments and claims for payments by the Department of Finance in excess of K300,000 made during the relevant period, including brief outs.

The Commission commenced inquiries but due to limited time was not able to fully investigate and sufficiently report on matters involving brief outs.

Guided by its Terms of Reference, the Commission commenced its inquiry in the following manner:

The current Attorney General was requested to provide information on all matters briefed out within the relevant period;

All law firms were also requested to provide information on all matters brief out to them by the Attorney General, and to also provide information relating to their fees; and

Various former and current Solicitors General and Attorneys General gave evidence. Apart from the current Attorney General, the Hon. Dr. Allan Marat; Solicitor General, Neville Devete; and Acting Secretary, Hitelai Polume-Kiele, the Commission also examined Francis Damem, John Kawi, David Lambu, Francis Kuvi and Zacchary Gelu.

All those examined stated that they had in place a system that dealt with brief outs. However, none of them were able to produce a manual/instruction document/policy document of their system of brief out. All agreed with the matters as stated below:

The Attorney General has the power to brief out matters upon recommendation of the Solicitor General. However, Francis Damem disagreed maintaining that the discretion rested with the Attorney General with or without consultation with the Solicitor General. The circumstances warranting a brief out:

Conflict of interest;
Lack of expertise; and
Shortage of lawyers.

The letter of instructions in the brief out would address the essential facts, issues arising, the law applicable, the State's position and matters to attend to. Further, the law firm was required to submit its bill in taxable form. The Solicitor General maintained custody of the file briefed out and was required to provide instructions in the conduct of the matter

The Commission finds that there was no systematic approach to the exercise of powers and responsibilities in brief-outs by the Attorney General. In the ordinary course, procurement of a service is regulated by Public Finance (Management) Act 1995 [s39(l)(b)] and all engagements that exceed K100,000 require Ministerial Approval [s. 61(2)].

The Commission recommends some immediate actions as set out below:

Establishment of "Attorney General Brief-outs Tenders Board"

Membership

- o Chief Secretary or alternate
- o Attorney General or alternate
- o President Law Society or alternate
- o President Certified Practising Accountants or alternate
- o Chairman, Central Supply & Tenders Board (CSTB⁵) or alternate
- o Chairman, PNG Council of Churches or alternate

Meeting procedures consistent with CSTB procedures

Tender procedures consistent with CSTB and Public Finances

(Management) Act 1995, Attorney General to issue Certificate of

Inexpediency

Alternatively, the Attorney General (on his own or through a system as described above) engage a panel of PNG law firms periodically for up to three (3) years

The State must provide separate annual budgetary appropriation for brief-outs.

All fee-notes issued for brief-outs shall be in taxable form.

F. Taxation

Where claims are pursued in court, once liability and damages are ascertained, the court may be asked to order that a party pay the costs of the other party. The State like any other party in court proceedings may be found liable to pay the costs of the other party or where the State is successful, the Court may order that the other party pay the State's costs. In either case, where there is no agreement as to the amount payable for costs, the avenue available under the National Court Rules is to have the successful party's costs taxed.

Taxation is also available to a client who is entitled to dispute the lawyer's legal fees. As such, unless there is prior agreement as to costs payable, the State is entitled to dispute the legal fees of the law firm briefed by the Attorney General.

Of the matters investigated, the Commission has found:

In one matter costs were awarded against the State following dismissal for want of prosecution of proceedings commenced by the State. Costs were taxed at K2 million. The matter warrants further inquiry to ascertain whether the costs were justified;

In four matters involving the same person, the taxing officer signed four (4) Certificates of Taxation each in the sum of K200, 000.00 following the lodgement of four (4) "instrument of consent" signed by the Solicitor General and the claimant's lawyer for the said sums. The rules of court do not make provision for taxation by consent and the "instrument of consent". The Certificate of Taxation can only be issued upon the conduct of taxation

following consideration of a bill of costs in taxable form. No bill of costs was filed;

As part of a settlement in another matter, the Solicitor General signed the deed of release committing the State to pay the claimant's costs of K100, 000.00. The Commission found that there was no plausible explanation for the Solicitor General's actions;

In one matter involving 130 claimants (each filing separate Complaints arising from the same police raid), the District Court ordered that costs to be paid by the State in each matter be taxed. Costs were not taxed. For no plausible reason the Solicitor General advised the Department of Finance to pay the claimant's costs totalling K456,281.49;

Also in another matter involving 112 claimants (each filing separate Complaints arising from the same police raid), the District Court ordered costs at K3, 800.00 for each of the 112 matters making a total of K425, 600.00. There was no appearance by the State. All 112 matters were heard and determined on the same day by the District Court;

In another matter, the State was made to pay the costs of a party (K2, 598, 130.00) in the absence of orders to that effect.

In evidence before the Commission, a taxing officer acknowledged having no training or knowledge in taxation law and practice. This person was responsible for exorbitant amounts paid by the State.

The Commission recommends amongst others that:-

The Taxing Officer shall be a lawyer admitted to practise and has continued to practise in civil litigation for at least three (3) years in PNG;

The State shall be afforded every opportunity to be heard on an application for taxation; Scale of Costs in need of review (District/ National and Supreme Court) to reflect actual costs incurred

Out of Court Settlements

In regard to out of court settlements, the Commission recommends that:

(a) NEC direct immediate freeze on any further payment in respect of settlements; (h) For amounts above K100,000, the Attorney General may settle on approval by the NEC following recommendation of Attorney General;

For amounts up to K100,000, the Attorney General may settle;

All settlements to take place following informed consultation with:- i Solicitor General;

Lawyer having carriage of the matter at the Solicitor General's Office;

Principal Defendant/party;

Internal Revenue Commission on assessment, including the conduct of appropriate due diligence, particularly as to assessment of loss and interest

There shall be no settlement as to costs;

All claims for costs shall be taxed in accordance with the relevant rules of the Court;

Prescribe terms and form of Deed of Settlement

No settlement where claim time-barred (Frauds & Limitations, Claims By & Against the State Act etc)

No settlement where lack of Section 5 Notice

Referrals of Leaders & Professionals

Based on the investigation reports, the Commission recommends the following persons be referred to the appropriate authorities mentioned below.

(a) Ombudsman Commission

Isaac Lupari

Gabriel Yer

Thaddeus Kambanei

4. Francis Damem

Lawyers Statutory Committee

1. Zacchary Gelu
2. Francis Kuvi
3. Paul Paraka
4. Guguna Garo
5. John Sinaka Goava
6. Nicholas Tame
7. Mundua Kua
8. Joseph B Nanei
9. Francis Damem
10. Peter Pena
11. Danny Gonol
12. Simon Norum
13. Dan Kakaraya
14. Kumuro Sino
15. Dawa Agu-Klewaki
16. Bob Marley Nani
17. Eric Kiso
18. Gaure Odu
19. Daniel Kop
20. Jeffrey Abone
21. Neville Devete
22. Lias Paul Kandi

Attorney General/LTI Council 1.

Billy Bonner

I. Civil Actions and Recovery

Pursuant to recommendations in individual matters investigated, the Commission recommends the State to -

I. Set aside-

the following Judgements -

National Court

Toka Enterprises Ltd

Leo Kainam

Pacific Paradise Corporation

Manoburn Earthmoving Ltd

Pacific Engineering & Repairs Ltd

Pacific Helicopters Ltd

Peter Yama

District Court

■ Andeka Tepoka

the following Deeds -

Peter Yama

Andrew Maid

Isaac Lupari

Umba Y Gabriel

Mountain Pearl Ltd

Pioneer Construction Ltd

Angela Dyra Morgan

Jimendi Enterprises Ltd

Kareana Estates Ltd

Nakitu Ltd

Tau Iiu

Ben Noel
"Wilfred Bongali
Lynette Malu
Paiyo Bale

3. the following Certificates of Taxation - .

(i) Party-party

Mirupasi Lawyers - K2m
Paraka Lawyers - K800,000
Simon Norum Lawyers - K465,000
Simon Norum Lawyers - K462,000
Paulus Dowa Lawyers- K200.000

II. Commence recovery action against the following -

Walala Trading
Andeka Tepoka
Simon Wapo (Moko Esso)
John Poro
Jimmy Kendi
Nelson Wahune

. Criminal Prosecutions

Benny Balepa
Wilfred Bongali
Wesley Aisora, Paul Kamakande, Dan Kakaraya, Dawa Agu-Klewaki
Dick Teman
5- Directors of IBK (PNG) Ltd
James Mobie Genaboro, James Towa, Wai Herumaho
Paiyo Bale
Paul Paraka, Gabriel Yer, Kumuro Sino

Tom Rangip
Daniel Kop, Jack Herepe
Dadi Toka, John Goava
Peter Yama
Hon. Andrew Maid, MP; Peter Pena; Jeffrey Abone
Joel Aundambui; Sam Kemaken
Moko Esso; Boas Hembehi; Alphonse Silas; Mary Martin; John Vailala
Kandaso Napi
Simon Norum, Raphael Appa
Jerry Luru, Thaddeus Kambanei, Simeon Manihia
Isaac Lupari, GugunajGarouilly Bonnerj Paul Paraka, Eric Kiso
Bruno Kaupa
Nelson Wahune, Francis Damem, Boas Hembehi, Jacob Yafai, Margoni
Wamanimbo, Simeon Manihia, Thaddeus Kambanei
Ben Pokanau, Ambrose Vakinap
John Poro
ZacchajxGglu
Francis Kuvi
Mundua Kua
Joseph B Nanei
Francis Damem
Peter Pena

X. REMEDIAL ACTION AND RECOMMENDATIONS

It is recommended that the Government of PNG declare its commitment to eradicate corruption and to promote integrity in public administration and that the initiatives of this Commission of Inquiry be integrated into a programme of reform for this purpose.

Remedial action is detailed by recommendation in each of the Investigation Reports. Central to these are recommendations that:

- the Government continue enquiry into the validity of debts of the State incurred by unlawful settlements,
- immediate legislative action be taken to halt the default process of judgment against the State, and
- the Government, the NEC itself, oversee the executive action required to implement recommendations.

Acceptance of recommendations made, in this Report raises concerns for their implementation.

These recommendations include recommendations for the recovery of funds, recommendations for discipline of officers or criminal prosecution of personnel or claimants.

The Commission is firmly committed to a recommendation that actions for recovery of funds should be implemented. Notwithstanding that there will have been substantial dissipation of settlement payouts, there will remain equally substantial balances, which if not in cash, will be recoverable from investments or assets.

In addition there are those claims settled but not yet paid out. Setting aside those deeds or judgments found to be unlawful and or fraudulent constitutes possible savings to the State of tens of millions.

In the ordinary course, civil actions for recovery of State funds should be instituted by the Attorney General through the Solicitor General's office. Criminal prosecution should be pursued by the Public Prosecutor or by the Police. However the record of implementation of recommendations in the past for recovery and or the pursuit of prosecutions by the departments concerned is lamentable. Indeed there is a public perception that there is no follow through on Commissions of Inquiry revelations and recommendations.

A major reason for lack of action on the part by those offices is a fundamental lack of capacity - shortage of professional and support staff. Burdened with current tasks, and lack of the necessary organisation to undertake the work, the offices of Attorney General and Public Prosecutor have demonstrated little or no capacity for the additional workload that recovery and prosecution referrals generate.

With the Department of Justice and Attorney General undergoing substantial restructuring and still massively undermanned, these offices are not well placed to undertake referrals in the immediate future.

Another reason is that the fact/evidence required for each office to take court action must be supplied by other agencies. Neither the Solicitor General or the Public Prosecutor has the support staff of its own to assemble necessary witnesses and evidence.

The findings of a Commission of Inquiry do not constitute instructions or supply evidence. They may constitute a road map to where fact and evidence may be found, but such findings cannot on their own be the evidence of prosecution or recovery. Those agencies must develop their own fact/evidence from such road maps. But without instructions or capacity to source witnesses and evidence themselves, references fail.

The Commission has accordingly considered whether there should be another authority to ensure implementation of recovery and prosecution.

Part VIII of the Constitution provides for Supervision and Control of public finances and State services, establishing the Auditor General and the Public Accounts Committee to audit and oversee the management of public accounts; while the Ombudsman Commission is tasked with supervising the conduct of the Public service and the Leadership Code. Although each has extensive powers of investigation and inquiry none of themselves have authority or capacity to implement remedial or disciplinary action. They are essentially tasked to report and make recommendations only, reliant on other agencies, for implementation of needed action.

There have been calls for another investigator policeman, an Independent Commission Against Corruption with draconian powers of investigation, arrest and prosecution of offenders. The Commission however does not support the creating of yet another "department" to take over the tasks of others already in place. It does not represent good governance.

Quite apart from the Constitutional anomalies establishing such a body would generate, and the time delay necessary to set up, staff and mobilise such a force, it would mean creating another authority to carry out what others are already Constitutionally tasked and empowered to do and are doing. There must be cause to overturn the Constitutional plan. Before adding to the list of investigating or enforcement bodies there must first be reason that shows these bodies are inadequate for the task and if their performance is unsatisfactory whether or not they may be improved or restored.

If it was found an ICAC is needed, there is one constitutionally ready to hand. Except for powers of arrest and immediate prosecutions the Ombudsman Commission has all the powers proposed for an ICAC. Simply repealing the constitutional restrictions on enforcement (Section 219(6)) would do much to enable the Ombudsman Commission to ensure more effective action on its findings. "With amendments to the Organic Laws allowing, indeed requiring that it conducts its inquiries openly and publicly would enable the Ombudsman Commission to demonstrate its ready action on corruption and show

that complaints are actively pursued. This Commission recommends that consideration be given to such change.

A. The Government, the National Executive Council to Implement Recommendations

Today corruption is recognised as a major challenge to the integrity of the People and Government of Papua New Guinea. Public outcry continues to demonstrate that confidence in public agencies and officials is being eroded by seeming lack of response to complaint of corruption and maladministration.

Positive Government leadership is essential in stamping out corruption, demonstrating commitment to action and reforms necessary to restore integrity in public administration.

Papua New Guinea has already ratified the United Nations Convention Against Corruption and it is timely that Government declare that its commitment to the eradication of corruption and the promotion of integrity is fundamental to a policy of reform of public administration in the development of PNG.

The Commission considers that the implementation and or enforcement of action recommended by this Commission be undertaken by the Government, the National Executive Council itself as a demonstration of such a commitment.

"While Ministers have political responsibility for their Departments, the Constitution (Section 148) specifies they have no powers of direction or control over the actual administration of those agencies. Similarly supervisory committees lack action officers and **it is effective executive action that is required.**

Some recommendations require immediate action, others implementation through legislative change or programmes of departmental reform. The NEC has the Constitutional responsibility for executive government of Papua New Guinea and only

the NEC has the authority to direct and ensure all such tasks are carried through by the appropriate agencies, not as matters of discretion as when or whether to implement, but as directions requiring performance.

Further, with the Commission's primary findings of Government agencies ignoring specific Government directions, indeed usurping the function of Government, proceeding independently, and dealing with public funds on an immense scale, contrary to law, there is urgent need for the Government to reassert authority and control over public administration. It must do this by ensuring the Departmental agencies still maintain the capacity for their functions, are well instructed in Government's directions to them and are indeed performing them as required.

Importantly, there is no legal impediment to the NEC taking such action immediately. Constitutional and statutory authority is already in place, with the *Prime Minister and National Executive Council Act 2002* supplying the machinery and executive secretariat under the Chief Secretary.

Under this Act the Chief Secretary is designated the Senior Officer of the National Public Service. He is Chairman and Chief Executive of the CACC. He is in effect the General Manager. His major function as with the CACC is to ensure that the decisions of Government are implemented by an accountable Public Service under his authority. These functions are as in Section 20.

"SECTION 20, FUNCTIONS OF CHIEF SECRETARY TO GOVERNMENT.

The functions of the Chief Secretary to Government are —

*to be the principal adviser to the Prime Minister and to the National Executive Council; and
to co-ordinate policies and initiatives of the National Executive Council; and*

to ensure that decisions, directions and policies of the National Executive Council are implemented by the National Public Service and by public bodies; and
to ensure that the National Public Service and public bodies perform effectively and are accountable to the National Executive Council and to the Parliament; and
to oversee public sector reform; and
Such other functions as are determined by the National Executive Council, or any other law>."

To enable those functions Section 21 gives the Chief Secretary comprehensive powers of investigation and direction.

Section 21 ~ POWERS OF THE CHIEF SECRETARY TO GOVERNMENT. (1) The Chief Secretary to Government may at any time, for the purpose of the performance of his functions under this Act or any other law —

Enterpremises occupied or used by —

a Department; or

a Provincial Government; or (i) a public body; and

question a person who appears likely to have information relevant to the functions of the Chief Secretary to Government; and

require any person to provide information relative to the functions of the Chief Secretary to Government; and

require any person to produce documents within his possession or subject to his control where such documents are relevant to the functions of the Chief Secretary to Government; and

make and retain copies of any document produced under Paragraph (d); and

Issue directions relative to his functions to a Departmental Head and to the head of a public body.

2. All Departmental Heads, heads of public bodies and officers of the National Public Service and of public bodies shall —

*co-operate with the Chief Secretary to Government in the performance of his functions
and the exercise of his powers under this Act; and
Comply with any directions issued under Subsection (1)(j)."*

With the functions already designated and the authority of a standing Commission of Inquiry within the National Public Service, the office of the Chief Secretary is ideally placed to head a Government task force, with importantly, the capacity to implement needed action.

The Commission accordingly recommends that a Supervision and Control Authority - an NEC Commission - be set up under the Chief Secretary to oversee:

implementation and compliance with Government/NEC policy and directions,

Conduct capacity and integrity reviews of Government agencies to ensure efficient, accountable management systems and protocols and that ensure transparent exercise of discretionary function.

To oversee immediate actual implementation of needed reforms, and Implementation of the recommendations of this Commission.

Continuation of investigations of this Commission of Inquiry in similar terms as are set out in its Terms of Reference.

Such authority would be staffed by senior professionals whether from the Public Service or Private Sector with the expertise experience and authority to conduct necessary examination and or audit of the performance of functions of any Department or Agency and to determine whether they maintain necessary standards of accountability for their functions.

To enable prompt and concerted action across public administration, multiple ad hoc teams of professionals with expertise in the particular field (e.g. accountants, bankers, lawyers, law enforcement) acting under a delegated Commissioner could be engaged for simultaneous reviews of specialised agencies.

A task force of lawyers/investigators under a Secretary delegate/Commission could enable provision of necessary fact, evidence for consideration by the Public Prosecutor as to prosecution or otherwise of referrals made to him. Similarly it would enable fact/evidence for recovery action by the task force itself, or as consultants through the Attorney General as needed.

An NEC Commissioner with a staff of lawyers/investigators could undertake the balance of the task of this Commission of Inquiry. Under the authority of the *Prime Minister and NEC Act* investigation and report could continue, with the particular advantage that needed action could be carried out forthwith.

B. Whistle-blowers

It is important the Commission record that the great majority of public officers assisting the Inquiry exhibited high ethical standards and sound professional ability. They demonstrated that there is a majority within public administration with a determination to perform duties impartially and with integrity despite the frustrations of observing unchecked corrupt behaviour by fellow officers.

Reluctance to challenge and report misconduct or enforce work force discipline is plainly caused by uncertainty of support and or fear of retribution.

Those concerns can be addressed by statutory protection for those who confront corruption and enforce rules of conduct.

It is recommended that a Whistle Blower Protection Act be promulgated to provide legal protection for persons and public officers who report corrupt practices by public officials.

C. Freedom of Information Act

Section 51 of the Constitution states;

"Every Citizen has the right of reasonable access to official documents— "

As the Constitutional Planning Committee explained: *(CPC Report Ch5)*

For our citizens to be able to participate effectively in the public affairs of this, it is essential that they have access to official information. Without information as to governmental activity a person cannot make a meaningful contribution to discussion of the issues involved in government policies and programmes. The degree to which citizens are able to fully participate in debate on the public affairs of the country will be a good measure of the extent to which our system of government is truly democratic. ...

In developing countries such as Papua New Guinea, it is an unfortunate fact that often foreign businessmen know far more about the actions and policies of the Government than do all but a select few of its own citizens. Thus these business interests are in a position to exercise influence on the government without any reaction from nationalist groups being felt by the Government until it is too late for it to take any positive action in response to such reaction."

An informed public can also be effective in combating corruption.

The Commission, therefore, recommends that a Freedom of Information Act to provide clear processes to regulate access to official records and documents pursuant to Section 51 of the Constitution be promulgated.

D. Trial By Jury

The Constitution (Section 186) provides for trials by jury.

Trial of a person charged with an offence, by a jury of fellow citizens is the final step in an effective criminal justice system. Jury trial is already part of the laws of the Solomon Islands, Vanuatu and Fiji. PNG is the only Melanesian country where trials before a judge remain alone. Trial by a jury ensures that each and every citizen is eligible to take part in responsible action in the administration of justice in PNG.

Participation as a juror also constitutes a very effective method of broadcasting knowledge of the rules of law.

The Commission recommends legislation be enacted that promotes the use of assessors in criminal trials preparatory to eventual adoption of a system of jury trials for major crime.

E. The Commission of Inquiry be Continued

With less than half of the claims reviewed the work of the Commission is far from completed. The remainder of settlements are known to result from default judgments and out of court settlements for compensation under similar circumstances to those already examined raising the probability of unlawful settlement and the need for recovery action.

Added to those are the claims certified but as yet unpaid amounting to some K211 million which must be examined as to validity. These give opportunity to reduce State liability and a substantial saving of public funds.

It is therefore recommended that a Commission of Inquiry be appointed to continue the inquiries in the same or similar terms as the Terms of Reference of this Inquiry.

The period of this Inquiry is now 3 years in the past.

It is therefore commended that the period for review of the new Commission of Inquiry be extended to 31 October 2010.

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XI, COURT ACTIONS INVOLVING THE COMMISSION

Since its commencement, the Commission of Inquiry has been party to National Court and Supreme Court actions. These include:

A. Challenges to Jurisdiction of the Commission

There were numerous Court actions filed against the Commission, the Prime Minister (as appointing authority) and the State, essentially claiming:

That the Commission lacked jurisdiction to inquire into their claims against the State; and
That their interests were adversely affected by the Inquiry.

Those challenges are grouped into two (2) categories. The first category concerns Court actions relating to the challenge to the Decision of the Prime Minister, Sir Michael Somare made on 2 and 12 April 2008, establishing this Inquiry, whilst the second category comprises Court actions challenging the Decision of the Prime Minister, Sir Michael Somare made on 14 July 2009, extending the term of the Inquiry to 31st October 2009.

(a) First Category Court Actions The Court actions in the first category include:

OS (JR) 654 of 2008 - Zacchary Gelu, Isaac Lupari & Tau liu -v- Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

SC OS 2 of 2008 - In the Matter of an Application by Zacchary Gelu, Isaac Lupari & Tau Liu pursuant to Section 18 (1) of the Constitution of Papua New Guinea

and in the Matter of the Constitutional validity of the Prime Minister's Decision to set up the Commission of Inquiry

SCM 15 of 2008 - Prime Minister, Sir Michael Somare, Commission of Inquiry & the State - v- Zacchary Gelu, Isaac Lupari & Tau Liu

SCM 17 of 2008 - Zacchary Gelu, Isaac Lupari & Tau Liu -v- Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

SCA 138 of 2008 - Zacchary Gelu, Isaac Lupari & Tau Liu -v- Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

SCA 141 of 2008 - Prime Minister, Sir Michael Somare, Commission of Inquiry & the State, - v- Zacchary Gelu, Isaac Lupari & Tau Liu

(JR) 654 of 2008 - Zacchary Gelu, Isaac Lupari & Tau Liu -v- Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

This Court action was commenced by Messrs Gelu, Lupari & Liu (Plaintiffs) on 22nd October 2008. In this action, the Plaintiffs applied for Judicial Review of the decision of the Prime Minister dated 2 and 12 May 2008 to appoint the Commission of Inquiry. On 17 November 2008, the National Court granted the Plaintiffs Leave for Judicial Review.

The Plaintiffs Application was dismissed for want of prosecution on Application by the Commission on 16 April 2009. The Plaintiffs were also ordered to pay the costs of the Respondents to be taxed "if not agreed". The Commission's draft Bill of Costs will be finalised and forwarded to the Solicitor General.

SC OS 2 of 2008 - In the Matter of an Application by Zacchary Gelu, Isaac Lupari

Tau Liu pursuant to Section 18 (1) of the Constitution of Papua New Guinea and in the Matter of the Constitutional validity of the Prime Ministers Decision to set up the Commission of Inquiry

This is a Supreme Court Application filed by Messrs Gelu, Lupari and Liu (Applicants) on the same day they filed the Application for Judicial Review in the National Court (OS

654 of 2008) referred to above. In both proceedings they sought similar orders. The relief sought included a request pursuant to Section 18 of the Constitution to declare unconstitutional the Prime Minister's decision to set up the Commission. His Honour Injia, DCJ (as he then was) raised a preliminary point as to the standing of the Applicants. They were allowed an adjournment to consider their position. Without notice, the Applicants withdrew the proceedings on 31 October 2008 with no Order as to Costs.

SCM 15 of 2008 - Prime Minister, Sir Michael Somare, Commission of Inquiry & the State -v- Zacchary Gelu, Isaac Lupari & Tau Liu

Unlike the two actions referred to above, this Supreme Court Motion was filed on 30 October 2008 by the Prime Minister, the State and the Commission against Messrs Gelu, Lupari and Liu.

This was essentially an Appeal from the decision of Justice Sakora of 27 October 2008 granting an interim injunction in favour of Messrs Gelu, Lupari and Liu in the Court proceedings, OS 654 of 2008 against the Commission.

The intention of Messrs Gelu, Lupari and Liu were to stop the Commission from continuing with its inquiry until their Application for Leave was heard. After the hearing of the Application for Stay on 3 November 2008, the Supreme Court comprising, then Acting Chief Justice Sir Salamo Injia and Justices Kirriwom and Gabi ordered amongst other things that the matter and the application for Stay be remitted to the National Court for hearing of the application for Leave for judicial review and application for Stay before another Judge.

Consequendy, the proceedings were withdrawn with each Party to pay their own costs in connection with the Appeal.

SCM 17 of 2008 - Zacchary Gelu, Isaac Lupari & Tau Liu -v- Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

This is an Appeal filed by Messrs Gelu, Lupari and Liu (Applicants) in the Supreme Court, from the decision of Justice Cannings made on 21 November 2008 in the National Court proceedings, OS 654 of 2008, refusing the Application by Messrs Gelu, Lupari and Liu for a Stay of the proceedings of the Commission of Inquiry.

At the same time of filing the Appeal, the Applicants also filed an application for various interim relief similarly sought in the National Court proceedings (OS 654/08) of which the decision is being appealed in this matter.

On 4 December 2008, the Commission filed an Objection to Competency of this Appeal. The Objection went before Justices Gavara-Nanu, Lenalia and Gabi on 11 December 2008 and a decision handed down the next day in favour of the Commission dismissing the Appeal as being incompetent, with costs to the Commission. The issue of costs remains outstanding in this matter. The Commission recommends the Solicitor General pursue it.

SCA 138 of 2008 - Zacchary Gelu, Isaac Lupari & Tau Liu -v- Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

This was a second Appeal filed by Messrs Gelu, Lupari and Liu. (Appellants) The Appeal instituted by an Application for Leave to Appeal was filed on 15 December 2008. Essentially this was filed to pursue the grounds raised by the Appellants in the proceedings SCM 17/08 which was dismissed for being incompetent.

This was an Appeal from the decision of Justice Cannings made on 21 November 2008 in the National Court proceedings, OS 654 of 2008, refusing the Application by Messrs Gelu, Lupari and Liu for a Stay of the proceedings of the Commission of Inquiry.

Like the National Court proceedings and the Appeal, SCM 17/08, Messrs Gelu, Lupari and Iiu also sought various interim relief in the nature of injunctions against the further conduct of the Commission which were heard by the Chief Justice, Sir Salamo Injia on 23 January 2009 and refused on 5 February 2009.

As for the substantive Appeal, the Commission also filed an Objection to Competency of this Appeal This was heard together with the Appellants⁵ Application for Leave to Appeal on 25 February 2009 before the Supreme Court comprising of Justices Kiriwom, Kandakasi and Hartshorn. The Decision is still pending.

SCA141 of 2008 - Prime Minister, Sir Michael Somare, Commission of Inquiry & the State, -v- Zacchary Gelu, Isaac Lupari & Tau Liu

This is an Appeal filed by the Commission against the Decision of Justice Cannings, granting leave to Messrs Gelu, Lupari and Liu to apply for Judicial Review on 17 November in OS 654/08.

The Appeal was heard on the same day and by the same judges as in the matter of SCA 138/08 and like SCA 138/08, the Decision is pending.

(b) Second Category Court Actions

The Court actions in the second category include:

O.S No. 352 of 2009 - Mahuru Dadi Toka & Anor -v- Commission of Inquiry & Ors

O.S No. 354 of 2009 - Isaac Lupari -v- Commission of Inquiry & Ors

O.S No. 376 of 2009 - Paul Paraka Lawyers -v- Commission of Inquiry & Ors

O.S No. 377 of 2009 - Umba Y Gabriel -v- Commission of Inquiry & Ors

Recently, four proceedings were filed by Toka Enterprises Ltd & Mahuru Dadi Toka, Isaac Lupari, Paul Paraka trading as Paul Paraka Lawyers and Umba Y Gabriel challenging the jurisdiction of the Commission to inquire into their involvement in the matters subject of inquiry. Except for the proceedings instituted by Toka Enterprises Ltd and Mahuru Dadi Toka, the other three proceedings also challenged the powers of the Prime Minister to appoint and establish the Commission of Inquiry.

The application was fully contested by the Commission. Decision was made on Friday, 14 August 2009 refusing leave on all four matters.

Decision in respect of Paul Paraka

The Court held that none of the matters raised before the Court were argued/raised at the Commission. Those matters should have been raised before the Commission first. Further, the Court held that the letters by the Commission issued to Paul Paraka inviting him to assist the Commission cannot be regarded as decision capable of review. Paul Paraka further alleged that he was denied natural justice however the Court stated that there was no basis to raise this allegation because Paul Paraka refused to appear before the Commission. Furthermore, there are no decisions of the Commission as such Paul Paraka does not have standing nor does he have sufficient interest in the matters subject of Court proceedings. Leave for judicial review was refused. The Court also ordered that the costs of the Commission be paid by Paul Paraka Lawyers on a solicitor-client basis.

Decision in respect of Toka Enterprises Ltd (hereafter "TEL")

The main argument raised by TEL is that this matter did not fall within the Commission's Terms of Reference. This argument was refused by the Court stating that there was evidence on file showing that the matter falls within the Commission's Terms of Reference. Further, the Court noted that serious issues of law arise in the manner the matter was pursued in Court. Leave for judicial review was refused. The Court also

ordered that the costs of the Commission be paid by Mahuru Dadi Toka and TEL on a solicitor-client basis.

Decision in respect of Isaac Lupari (hereafter "Lupari")

Lupari argued that the Commission is estopped from investigating the matter due to the various clauses in the Deeds of Release which he argues raise the issue of estoppel. Further, Lupari argued that the other three Deeds of Release were not paid as such cannot be investigated. The Court refused all arguments raised by Lupari stating that the arguments have no merit and lack legal basis as such leave was refused. Leave for judicial review was refused. The Court also ordered that the costs of the Commission be paid on a solicitor-client basis by Issac Lupari and Nicholas Tame, lawyer for Issac Lupari (50% each).

Decision in respect of Umba Y Gabriel (hereafter "Umba")

The main argument raised by Umba was that since all the monies, K1.7 million was repaid to the State, there was no basis to investigate the matter. The Court refused the argument stating the Commission was set up to investigate not only payments made but "claims" made. The arguments raised lacked merit and any legal basis. Further, the Court held that some of the arguments were never raised before the Commission. They should have been raised before the Commission first. Leave for judicial review was refused. The Court also ordered that the costs of the Commission be paid on a solicitor-client basis by Kumuro Sino, lawyer for Umba.

Appeal

No appeals were filed in respect of the decision of the Court by Paul Paraka and Mahuru Dadi Toka. The Commission is aware that Isaac Lupari (SCA No. 117 of 2009) and Umba Y Gabriel (SCM No. 15 of 2009) have filed separate appeals on 23 September

2009 in the Supreme Court (from the decision of the National Court on 14 August 2009). The Commission is yet to be served -with the appeal documents.

Immediate Recommendations

The Solicitor General file an application for taxation and have the costs of the Commission taxed and certified. Following taxation, the Certificate of Taxation must be enforced against those ordered to pay the costs of the Commission and such payments should be made to the Consolidated Revenue Fund;

The Solicitor General maintain constant contact with the Deputy Registrar, Supreme Court to ensure the appeals filed by Umba Y Gabriel and Isaac Lupari are opposed and dismissed. If they are pursued, application must be filed to dismiss the appeals on issues of competency;

Commission of Inquiry Act be amended to specifically provide for:-

the powers of the Appointing Authority (Prime Minister) to extend the term of the Commission of Inquiry;

Section 19 be amended to state that prosecutions under that section shall be commenced within three months following the referral by the Commission of Inquiry.

B. Related Actions

SCA 53 of 2008: Yama -v- Yer, Louma, The Commission of Inquiry & The State

This is a Supreme Court Appeal against National Court Orders for the immediate clearance and release of a cheque for K7.75 million supposedly a part payment of a K38 million claim settled under deed by the Solicitor General in 2002 for K15 million.

The Commission joined proceedings as an appellant because the 2002 deed is a settlement falling within the Commission's Terms of Reference, because the base transaction demonstrated a total lack of any legal claim; the claim was in any case time barred; there was a continued breach of the statutory process for claims against the State; and the payment in the form of a cheque originated from funds not lawfully available.

In addition, the National Court orders for clearance and release of the cheque, including orders of contempt are clearly in breach of the Claims By and Against the State Act and, therefore, outside the authority of the Court.

This matter also raised serious issues of just how the Solicitor General's office in 2008 came to endorse the 2002 deed in the face of the gross anomalies displayed. The Commission has established that there was not even a file in the office of the Solicitor General regarding this claim prior to the endorsement of the claim and additional payment. These matters have been the subject of inquiry by the Commission.

Recent Response Action by The State

OS 658 of 2008 The State -vs- Yama. Following the Commission's intervention in the proceedings and public examination of the facts and circumstances of the settlement in SCA 53 of 2008 has caused the Attorney General on behalf of the State to file a challenge to the validity of the Deed of Settlement citing grounds similar to the Commission's public findings. This matter is waiting to be set down for hearing.

Defence Force Personnel Claim

A similar sudden anomalous "Settlement" occurred in February of this year. A cheque of K12.9 million purportedly in part settlement of a claim by ex Defence Force personnel was drawn to the Commission's attention by the Secretary for Justice. She had had the payment halted for it having issued without any reference to the offices of the Solicitor General and or the Attorney General. Because the bulk of Defence Force personnel

claims fall within the Commissions Terms of Reference and "final settlements" of them have in many cases been paid out already, new and or additional payments for such claims become a matter for investigation of the sudden issue of a cheque contrary to prescribed processes. The matter was still under inquiry at the close of this Inquiry.

C. Unnecessary Delay to Work of the Commission

As discussed above, *OS 654 of 2008 Messrs Gelu, Lupari and Liu -vs- Sir Michael Somare, the Commission of Inquiry and the State* was dismissed for want of prosecution. However, those proceedings spread over five months constituted unwanted delays to the work of the Commission through diversion of staff and resources to defend them. They also demonstrate the vulnerability of limited-life Commissions of Inquiry to no-limit, time lines of the court processes.

Such actions - as was the case against the Commission - focus on claiming urgent issues challenging jurisdiction, and or matters that purport to render a Commission's task "sub judice." i.e., matters for decision by the court alone, therefore obliging the Commission to refrain from any action till the completion of the court action.

When such actions are backed with orders of restraint pending actual hearing of the Court disposing of the matter, - again as was the case in OS 654 of 2008 - the claimant has effectively won a delay that may out-last the life of a Commission or last until the Court can be persuaded either to dismiss the proceedings for want of prosecution, or at least commit the claimant to a firm hearing of his dispute.

The progress of any action then becomes largely dependant on the willingness of the claimant to advance the claim, an advantage not always taken but one not readily given up. In the absence of action by the parties, the courts take little action to promote completion of the hearing.

These delays in prosecution of the claims can be wholly detrimental to good governance. The process of government is needlessly delayed while claimed rights of a personal dispute is disposed of. The matter may readily be addressed by authorising a requirement for prompt resolution of such matters.

The Commission is of the view that without infringing on citizens rights of access to the courts, it is in the interest of the State as a whole that such matters should be dealt with promptly. A ready solution would be to eliminate long adjournments by a court direction for their prompt resolution. This may be done by requiring the courts to accord the hearing of a dispute all possible speed.

Accordingly, it will be a recommendation of the Commission that the Claims By and Against the State Act (and or the Attorney Generals Act) be amended to provide that where the Attorney General is satisfied that is in the interest of the State as a matter of good governance that a claim against the State be determined as a matter of urgency he may cause an application for urgency to be lodged in the proceedings concerned requiring that the hearing and determination of the action be conducted as soon as possible and in any case within 28 days from the lodging of the application, and unless the court is shown exceptional hardship to a party, it shall accord such urgency.

XII. APPENDIX

A. Form 1A

PAPUA NEW GUINEA.

Claims By and Against the State Act.

Sec. 13(2) Form 1A.

CERTIFICATE of JUDGEMENT.

A.B. v. The Independent State of Papua New Guinea.

I certify that A.B., of , on 19 , did obtain a judgement of the (name of court) in his favour, and that by such judgement the sum of K was awarded to him.

Dated... 20.

Registrar (or Clerk).

(Name of Court).

B. Form 1B

PAPUA NEW GUINEA.

Claims By and Against the State Act.

Sec. 13(2) Form IB.

CERTIFICATE of JUDGEMENT.

A.B. v. The Independent State of Papua New Guinea.

I certify that—

the judgement of the (name of court) in favour of AB made on day
of , may be satisfied

OR

the State proposes to take further action in this matter and
satisfaction of judgement cannot take place.

Dated... 20.

Attorney General

