

OMBUDSMAN COMMISSION

OF

PAPUA NEW GUINEA

REPORT OF AN

INVESTIGATION INTO

THE SPRING GARDEN ROAD

POREPORENA FREEWAY PROJECT

MEMBERS

OF THE

OMBUDSMAN COMMISSION

Charles Maino Ango Wangatau Jim Ridges
Chief Ombudsman Acting Ombudsman Acting Ombudsman

18 December 1992

OMBUDSMAN COMMISSION

OF

PAPUA NEW GUINEA

REPORT OF AN INVESTIGATION
INTO THE SPRING GARDEN ROAD
POREPORENA FREEWAY PROJECT

PART I: NATURE AND PURPOSE OF THE INVESTIGATION

- | | | |
|----|------------------------------------|----|
| 1. | INTRODUCTION | 2 |
| 2. | BACKGROUND OF THE FREEWAY PROPOSAL | 9 |
| 3. | STRUCTURE OF THE REPORT | 14 |

PART H: RECORD OF EVENTS AND FINDINGS OF THE
OMBUDSMAN COMMISSION

- | | | |
|-----|--|-----|
| 4. | DECISION TO PUBLICLY INVITE
EXPRESSIONS OF INTEREST: MAY 1990 | 18 |
| 5. | ADVERTISEMENT INVITING
EXPRESSIONS OF INTEREST: JUNE 1990 | 23 |
| 6. | RESPONSES TO THE ADVERTISEMENT: JULY 1990 | 35 |
| 7. | SIGNIFICANT INTERDEPARTMENTAL
MEETING: 31 JULY 1990 | 49 |
| 8. | PROGRESS DURING SECOND
HALF OF 1990 | 54 |
| 9. | PREPARATION OF SHORTLIST:
FEBRUARY 1991 | 73 |
| 10. | TERMS OF REFERENCE FOR THE
PROJECT: EARLY 1991 | 94 |
| 11. | THE MINISTERIAL COMMITTEE MEETING
OF 18 JULY 1991 | 103 |

12. THE RELATIONSHIP BETWEEN THE CHINESE CONSORTIUM AND THE MINISTER FOR TRANSPORT	120
13. FURTHER CHANGE IN COMPOSITION OF THE CHINESE CONSORTIUM: SEPTEMBER 1991	155
14. MINISTER FOR TRANSPORT SIGNS CONTRACT FOR CONSTRUCTION OF FREEWAY: OCTOBER 1991	162
15. ROLE OF THE WORLD BANK IN THE SPRING GARDEN ROAD/POREPORENA FREEWAY PROJECT	178
16. FATE OF THE POLICY SUBMISSION FAVOURING THE CHINESE CONSORTIUM: DECEMBER 1991	185
17. CONCERNS ABOUT CREDENTIALS OF TUNSON ENGINEERING CO LTD: DECEMBER 1991 – JANUARY 1992	196
18. MINISTER FOR TRANSPORT EXPEDITES PREPARATION OF NEW POLICY SUBMISSION: FEBRUARY 1992	707
19. HISTORY OF THE PROPOSAL BY KINHILL KRAMER PTY LTD	217
20. RESOURCE MANAGEMENT COMMITTEE RECOMMENDS RE-TENDERING OF PROJECT: 20 FEBRUARY 1992	238
21. THE MINISTER FOR TRANSPORTS POLICY SUBMISSION OF FEBRUARY 1992	241
22. FAVOURABLE ASSESSMENT OF THE KINHILL KRAMER PROPOSAL	
23. NATIONAL EXECUTIVE COUNCIL DECIDES TO AWARD PROJECT TO KINHILL KRAMER CONSORTIUM: 24 FEBRUARY 1992	284

24. OVERVIEW OF EVENTS BETWEEN APPOINTMENT OF KINHILL KRAMER CONSORTIUM AND SIGNING OF CONTRACT: FEBRUARY – MAY 1992	290
25. CONCERNS RAISED BY DEPARTMENT OF WORKS ABOUT DRAFT CONTRACT: MARCH – APRIL 1992	304
26. DEPARTMENT OF TRANSPORT RECOMMENDS SIGNING OF CONTRACT AGAINST ADVICE OF OTHER DEPARTMENTS: 22 APRIL 1992	321
27. NATIONAL EXECUTIVE COUNCIL DECIDES THAT CONTRACT MUST BE FINALISED: 23 APRIL 1992	332
28. ACTION TAKEN BY FOUR KEY DEPARTMENTS PRIOR TO THE NATIONAL EXECUTIVE COUNCIL MEETING ON 29 APRIL 1992	334
29. NATIONAL EXECUTIVE COUNCIL REJECTS ADVICE OF DEPARTMENT OF ATTORNEY-GENERAL: 29 APRIL 1992	355
30. ACTING STATE SOLICITOR GIVES LEGAL CLEARANCE DESPITE DEFECTS IN CONTRACT: 6 MAY 1992	358
31. NATIONAL EXECUTIVE COUNCIL APPROVES EXECUTION OF CONTRACT: 6 MAY 1992	367
32. EVENTS LEADING UP TO EXECUTION OF THE CONTRACT: 6 – 27 MAY 1992	375
33. THE CONTRACT OF 27 MAY 1992	395
34. EVENTS AFTER 27 MAY TERMINATION OF CONTRACT AND APPOINTMENT OF A COMMISSION OF INQUIRY	400

PART III: LAWS RELEVANT TO PUBLIC WORKS CONTRACTS

35. THE PUBLIC TENDER REQUIREMENTS OF THE PUBLIC FINANCES (MANAGEMENT) ACT	406
36. THE PUBLIC WORKS COMMITTEE ACT AND THE ROLE OF THE PARLIAMENT IN MONITORING PUBLIC WORKS PROJECTS	424
37. CONTROL OF OVERSEAS BORROWING BY THE STATE	39
38. LAWS GOVERNING FOREIGN INVESTMENT	446
39. LIMITS ON THE POWERS OF MINISTERS	451
40. FUNCTIONS OF THE DEPARTMENT OF TRANSPORT AND THE DEPARTMENT OF WORKS	460
PART IV; FINDINGS UNDER SECTION 219(1) OF THE CONSTITUTION AND SECTION 22(1) OF THE ORGANIC LAW ON THE OMBUDS • COMMISSION	
41. FINDINGS AS TO THE CONDUCT OF THE FORMER MINISTER FOR TRANSPORT	468
42. FINDINGS AS TO THE CONDUCT OF THE DEPARTMENT OF TRANSPORT AND THE SECRETARY FOR TRANSPORT	480
43. FINDINGS AS TO THE CONDUCT OF THE DEPARTMENT OF WORKS AND THE SECRETARY FOR WORKS	497
44. FINDINGS AS TO THE CONDUCT OF THE DEPARTMENT OF ATTORNEY-GENERAL, THE SECRETARY OF THE DEPARTMENT AND THE ACTING STATE SOLICITOR	501
45. FINDINGS AS TO THE CONDUCT OF THE DEPARTMENT OF FINANCE AND PLANNING	506

AND THE SECRETARY FOR FINANCE

46. FINDINGS AS TO THE CONDUCT OF THE NATIONAL EXECUTIVE COUNCIL	512
---	-----

PART V; RECOMMENDATIONS OF THE OMBUDSMAN COMMISSION

47. RECOMMENDATIONS CONCERNING LAWS RELEVANT TO PUBLIC WORKS PROJECTS	518
48. RECOMMENDATIONS AS TO THE EXERCISE OF POWERS BY MINISTERS	529
49. RECOMMENDATIONS CONCERNING THE POWERS AND DUTIES OF DEPARTMENTAL HEADS	534
50. RECOMMENDATIONS CONCERNING PROCEDURES OF THE NATIONAL EXECUTIVE COUNCIL	536
51. RECOMMENDATIONS TO THE DEPARTMENT OF TRANSPORT	544
52. RECOMMENDATIONS TO THE DEPARTMENT OF ATTORNEY-GENERAL	548
53. RECOMMENDATIONS TO THE DEPARTMENT OF FINANCE AND PLANNING	550
54. RECOMMENDATIONS TO THE MINISTER FOR TRADE AND INDUSTRY AND THE INVESTMENT PROMOTION AUTHORITY	554
55. RECOMMENDED DISCIPLINARY PROCEEDINGS	557
56. RECOMMENDATIONS CONCERNING THE FUTURE OF THE SPRING GARDEN ROAD/POREPORENA FREEWAY PROJECT	561

PART VI SUMMING UP

57. SUMMING UP	566
----------------	-----

i

	PART I	1
NATURE AND PURPOSE OF THE INVESTIGATION		

2

1. INTRODUCTION

(1.1] THE OMBUDSMAN COMMISSION'S DECISION TO CONDUCT AN INVESTIGATION

On 27 May 1992 the Governor-General, Sir Wiwa Korowi, signed a contract on behalf of the Independent State of Papua New Guinea for the design, finance and construction of a freeway in the city of Port Moresby. The Governor-General was acting on the advice of the National Executive Council, which a few weeks earlier had given final approval for the signing of the contract.

The Ombudsman Commission received information from a number of different sources suggesting that normal procedures had not been followed. It was also alleged there were irregularities in the contract negotiations and that the terms of the contract were heavily weighted against the interests of the State.

After making preliminary inquiries, it appeared that the project had neither been put to tender nor considered by the Parliament. As it was the Commission's understanding that public works projects of this magnitude (the contract committed the State to a minimum payment of US \$67 million plus interest) were subject to these procedures, the Commission decided in May 1992 that it would conduct an investigation, on its own initiative, into the circumstances leading to and surrounding the decision of the National

Chapter 1

3

Executive Council to advise the Governor-General to sign the contract for the design, finance and construction of the freeway.

[1.2] JURISDICTION

The Commission conducted its investigation under the Organic Law on the Ombudsman Commission. Section 13 authorises it to investigate, on its own initiative, any "conduct" on the part of any "governmental body" or any of its officers. The Commission can thus investigate the conduct of any arm, department, agency or instrumentality of the National Government, including the National Executive Council (Schedule 1.2(1) of the Constitution).

The Commission can investigate the policy of the National

Government or
a Minister, to the extent that the policy is contrary to
law or to the National
Goals and Directive Principles, the Basic Rights or the
Basic Social
Obligations or any Act of the Parliament (Section 219(3) of
the
Constitution).

The Ombudsman Commission is not authorised to conduct an
investigation
into the conduct of private citizens and companies.
Nevertheless, in the
course of reporting its findings and opinions on the
conduct of
governmental bodies, it is sometimes necessary to comment
on the
conduct of others who may not be within the jurisdiction of
the
Ombudsman Commission. That has happened in this report: we
have
occasionally made comments on the conduct of private
companies, as part
of the formation of an opinion on the conduct of various
governmental
bodies.

Chapter 1

4

[1.3] THE PURPOSE OF THIS INVESTIGATION

The purpose of this investigation was not to report on whether
the city of
Port Moresby needs a freeway. That could have formed a part of
the
investigation, because Section 219(3) of the Constitution
allows the
Ombudsman Commission to inquire into National Government
policies
which are contrary to the National Goals and Directive
Principles.

The second of our National Goals is for all our citizens to
have an equal
opportunity to participate in, and benefit from, the

development of our
country'. Directive Principles 2(3) and 2(4) require that
every effort be
made to achieve an equitable distribution of the benefits from
development
and an equalisation of services throughout the various parts
of the country.

It is arguable whether these objectives were advanced by the
decision of
the National Executive Council to commit a large amount of
public money
to the building of a freeway in the nation's capital;
especially as it is widely
recognised that the rural infrastructure of our country is
seriously under-
developed.

Nevertheless, the Ombudsman Commission decided, in its
deliberate
judgment, not to make that policy decision of the National
Executive
Council the subject of this investigation. We were concerned,
instead, with
the decision-making process which attempted to implement that
policy.

In accordance with Section 219(1) (a) of the Constitution the
purpose of the
investigation was:

to determine whether any of the "conduct" under
investigation
was "wrong"; and

Chapter 1

5

to determine whether there were "defects in any law
or
administrative practice.

[1.4] WHAT IS 'WRONG' CONDUCT?

Section 219(2) of the Constitution states that conduct is "wrong" if, for

example, it is:

"(a) contrary to law; or

(b) unreasonable, unjust/oppressive or improperly discriminatory, whether or not it is in accordance with law or practices or

(c) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations; or

(d) based wholly or partly on a mistake of law or of fact or

(e) conduct for which reasons should be given but were not,

whether or not the act was supposed to be done in the exercise of deliberate judgement within the meaning of Section 62 (decisions in 'deliberate judgement')."

However, Section 219(2) of the Constitution also provides that the

Ombudsman Commission is not constrained in its determination of whether

conduct is "wrong", by the examples listed above. The Ombudsman

Commission has a wide discretion to exercise in making this determination.

In exercising its discretion the Commission is guided, in particular, by the

National Goals and Directive Principles and the Basic Rights and the Basic

Social Obligations, as permitted by Sections 25 and 63 of the Constitution.

Chapter 1

6

(1.51) RELEVANCE OF THE LEADERSHIP CODE

The Ombudsman Commission of Papua New Guinea is entrusted with the task of administering two Organic Laws:

the Organic Law on the Ombudsman Commission; and

the Organic Law on the Duties and Responsibilities of Leadership.

The provisions of the Organic Law on the Duties and Responsibilities of Leadership, together with those in Division 111.2 of the Constitution, comprise the Leadership Code.

We emphasise that this report has not been prepared for the purpose of recording alleged breaches of the Leadership Code. The procedure for dealing with such matters is prescribed by the Organic Law on the Duties and Responsibilities of Leadership. This report has not been prepared under that Organic Law.

This is a report prepared in accordance with the Organic Law on the Ombudsman Commission. Our primary function in this investigation has been to investigate and report on wrong conduct and defective laws and administrative practices and to make recommendations accordingly.

In discharging that function the Ombudsman Commission has not formed any judgment on whether any of the persons involved have

breached the
Leadership Code.

Chapter 1

7

METHOD OF INQUIRY

The Commission obtained documents and other evidence from a number of different sources and used its powers under Section 18 of the Organic Law on the Ombudsman Commission to summon persons to attend before the Commission and give evidence under oath and produce documents in their possession or control. Most persons summoned to attend were co-operative. However it was, on occasions, necessary to warn some persons of their obligation to comply fully with the terms of the summons served on them.

We take this opportunity to point out that it is not sufficient for a person who has been required to produce all documents pertaining to a certain subject matter to attend the Commission and produce only some, or even most, of the documents required. Failure to comply fully with an Ombudsman Commission summons is a serious criminal offence under Section 30 of the Organic Law on the Ombudsman Commission, the penalty for which is a K500.00 fine or three months imprisonment for each offence (see *The State v Allan Ebu Marai*, National Court decision, O.P. 1 of 1991, 12.2.92).

A number of the documents obtained by the Ombudsman Commission under summons would in the ordinary course of events be regarded as confidential in nature, e.g. those providing evidence of the proceedings of the National Executive Council. However, the effect of Section 19(1) of the Organic Law on the Ombudsman Commission is that the Ombudsman Commission can only be denied access to such documents when the Prime Minister, after consultation with the Chief Ombudsman, certifies that their production is likely to:

Chapter 1

"(a) prejudice the security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization) or the investigation or detection of offences; or

(b) involve the disclosure of proceedings, deliberations or decisions of the National Executive Council which the Prime Minister certifies relate to matters of a secret or confidential nature, disclosure of which would be contrary to the public interest."

In the present case, no certificate under Section 19(1) was issued in respect of any documents which the Commission sought access to and so the Commission was able to require the production of those documents.

The investigation was conducted in private, as required by Section 17(2) of the Organic Law on the Ombudsman Commission.

* * * * *

Chapter 1

2. BACKGROUND OF THE FREEWAY PROPOSAL

[2.1] PORT MORESBY'S TRAFFIC PROBLEMS

It has been recognised for many years that the peculiar geography of the city of Port Moresby has given rise to a serious traffic problem. Other than following the long and winding "back road" through Baruni, or the inconvenient route along Scratchley Road through Kila Kila, only the Sir Hubert Murray Highway can carry traffic between downtown Port Moresby and the other major traffic-generating parts of the city at Gerehu, Waigani, Hohola, Boroko and Jacksons Airport.

The Highway, however, is not a high quality road and it is often congested. Breakdowns and accidents on some sections, particularly Three Mile Hill, can cause huge traffic jams.

2.2] THE UNCONNECTED SECTIONS OF THE SPRING GARDEN ROAD NETWORK

Construction of an alternative route, between the suburbs of Hohola and Konedobu, has long been regarded as the solution to the problem.

Various proposals have been put forward over the last thirty years and

most have favoured a road passing through the saddle of Burns Peak linking two presently unconnected sections of "Spring Garden Road".

These two unconnected sections are shown on the map at the end of this chapter. They are:

Chapter 2

10

from Champion Parade Konedobu to a point close to the Department of Transport headquarters in Konedobu: see map, points "B" to "C"; and

from Burns Peak Road Hohola to Wards Road Hohola: see map, points "D" to "E".

There are also other unconnected sections of the Spring Garden Road network which have, at various times, been earmarked for construction or redevelopment. These are:

from Wards Road Hohola to a point near the Hohola Demonstration School: see map, points "E" to "F"; and

from Hekakora Street Hohola to Boroko Drive: see map, points "G" to "I".

More recently, it has been proposed that the Spring Garden Road network be extended at "both ends", to form one arterial road linking the seaport at downtown Port Moresby with Jacksons Airport: see map, points "A" to

' . Under this proposal, the extended sections of the Spring Garden Road network would have been:

from Stanley Parade in downtown Port Moresby, along Champion Parade, to Spring Garden Road, Konedobu: see map points "A" to "B"; and

from the intersection of Spring Garden Road and Boroko Drive, Gordons, via Geauta Road, across the Sir Hubert Murray Highway at Erima to Jacksons Airport: see map, points "in to "K'. via "J".

Chapter 2

11

[2.3] DECISIONS OF THE NATIONAL EXECUTIVE COUNCIL DURING THE 1980s

In the 1980s, the Spring Garden Road issue was addressed by the National Executive Council on a number of occasions. In dealing with National Executive Council submissions and decisions in this report, we have paid special reference to the "Submissions Handbook for National Executive Council and National Parliament". [EXHIBIT 1]

In 1984, the National Executive Council directed the then Department of Transport and Civil Aviation to arrange a feasibility study on the "Burns Peak Road" and to ensure that funding was available under the National Road Improvement Programme for 1985-88. [EXHIBIT 2]

In 1988, requests for assistance were made to the Government of Japan for possible funding under grant aid and soft loan arrangements for a number of projects, including the Burns Peak tunnel. [EXHIBIT 3]

Also in 1988, Barclay Bros (PNG) Pty Ltd put a proposal to the National Government which included an open-cut road through Burns Peak, linking the Konedobu and Hohola sections of Spring Garden Road, at an estimated cost of K11 million. It was proposed that the project take place in conjunction with the redevelopment of Port Moresby's port facilities. The Barclay Bros proposal was discussed by a committee which recommended that the project be tendered. This proposal also failed to come to fruition.

[EXHIBITS 4 & 4A]

In 1989, the Departments of Transport, Foreign Affairs and Finance and Planning were directed by NEC Decision No. 76/89 to approach the Government of Denmark for aid funding on this and other transport projects. [EXHIBIT 5]

[2.4] THE NATIONAL EXECUTIVE COUNCIL DECISION OF 25 JANUARY 1990

It was against this background that the National Executive Council reconsidered the matter at its meeting on 25 January 1990, following a Policy Submission by the Minister for Transport, Mr Anthony Temo.
[EXHIBIT 6]

In Decision No.14/90, the National Executive Council:

- Department of Works and directed the Department of Transport, Department of Finance and Planning to formulate detail plans for the construction of Burns Peak Road;
2. directed that the plan should include the re-evaluation of the Barclay proposals and any other Turn-Key' proposals available;
3. approved the engaging of Ove Amp and Partners (Pacific) Pty Ltd, to undertake the Port Moresby Road Needs Study (Arterial Roads);
4. advised the Governor-General to enter into agreement on behalf of the State with Ove Amp and Partners (Pacific) Pty Ltd" [EXHIBIT 6A]

* * * * *

Chapter 2

MAP: THE SPRING GARDEN

ROAD NETWORK AND THE ROUTE OF THE PROPOSED POREPORA FREEWAY

Points marked:

Champion Parade	A	Stanley Parade/
Parade, Spring Garden Road	B	Champion
Garden Road Konedobu	C	End of Spring.
Road/Burns Peak Road	D	Spring Garden
Road/Wards Road	E	Spring Garden
(Near Hohola Demonstration School)	F	Spring Garden Road
Road/Hekakora Street	G	Spring Garden
Road/Waigani Drive	H	Spring Garden
Road/Boroko Drive/Geauta Road (Courts' Roundabout)	I	Spring Garden
Kookaburra Street/Sir Hubert Murray Highway	J	Geauta Road/
International Airport	K	Jackson

Chapter 2

14

3. STRUCTURE OF THE REPORT

[3.1] FOCUS OF INVESTIGATION

On 6 May 1992 the National Executive Council decided to advise the Governor-General to enter into a contract with Kinhill Kramer Pty Ltd and Curtain Bros (Old) Pty Ltd for the design, finance and construction of the Poreporena Freeway. That decision was a crucial one. However, in conducting this investigation, the Ombudsman Commission was not only interested in the circumstances immediately surrounding that particular decision. Our wider concern was to determine whether the whole decision-making process which occurred after the National Executive Council decision of 25 January 1990 was carried out lawfully in accordance with sound administrative practices.

The Ombudsman Commission therefore considered all the events that occurred after 25 January 1990, which culminated in the signing of the contract on 27 May 1992. After examining the evidence obtained in the course of the investigation, the Commission made a number of findings.

These are set out in Part II of the report, which contains a chronological account of the events which led to the signing of the contract. Each of Chapters 4 to 33 highlight a significant incident or decision which formed the chain of events up to 27 May 1992.

Chapter 3

15

2] ALL PERSONS ADVERSELY COMMENTED ON HAVE BEEN GIVEN A
RIGHT TO BE HEARD

During the course of documenting these findings, the
Ombudsman

Commission found it necessary to be critical of the conduct
of some

individuals and governmental bodies. All of these persons
and, in the case

of governmental bodies, their representatives, were given an
opportunity

to be heard prior to the completion of this report, in
accordance with the

duties imposed on the Ombudsman Commission under Section
17(4) of

the Organic Law on the Ombudsman Commission.

Section 17(4) states:

"Nothing in this Law compels the Commission to hold any
hearing and no

person is entitled as of right to be heard by the
Commission except that -

(a) where a report of the Commission may affect a State
Service, provincial

government body or statutory body, the Commission
shall provide

reasonable opportunity for the Permanent Head of that service or the statutory head of that body, as the case may be, to comment on the subject of the investigation; and

(b) the Commission shall not make any comment in its report that is adverse to or derogatory of any person without –

(i) providing him with reasonable opportunity of being heard; and

(ii) fairly setting out his defence in its report"

3.3] RELEVANT IAM

One of the main concerns of the Ombudsman Commission at the commencement of the investigation was the allegation – which came from

many sources – that proper financial and contractual procedures had been

bypassed.

Chapter 3

16

Part II(of the report accordingly gives an account of some of the important laws regulating public works contracts in Papua New Guinea.

[3.4] PART IV SUMMARISES AND FORMALISES ADVERSE FINDINGS

Part IV of the report summarises the adverse findings made against individuals and governmental bodies in Part II. These findings are based on Section 219 of the Constitution and Section 22 of the Organic Law on the Ombudsman Commission, which prescribe the type of conduct which is "wrong" or otherwise requires criticism by the Ombudsman Commission.

[3.5] RECOMMENDATIONS OF THE OMBUDSMAN COMMISSION

Part V of the report contains a number of important recommendations arising from our investigation. In particular, we make suggestions as to the manner in which public works projects such as the Spring Garden Road (also known as the Poreporena Freeway) project should be handled in future.

[3.6] SUMMING UP

Part VI sums up the investigation and the findings of the Ombudsman Commission.

* * * * *

Chapter 3

17

PART II
RECORD OF EVENTS
AND FINDINGS OF THE OMBUDSMAN COMMISSION

18

4. DECISION TO PUBLICLY INVITE EXPRESSIONS OF INTEREST:
MAY 1990

[4.1] THE INTERDEPARTMENTAL MEETING OF 22 MAY 1990

After the National Executive Council decided in January 1990 that detailed plans 'for the construction of Burns Peak Road' be drawn up, very little happened until May 1990, when the Minister for Transport, Mr Anthony Temo, convened an interdepartmental meeting. The meeting was held on 22 May 1990 and was chaired by Mr Temo. The subject was 'the Burns Peak Road Development'. [EXHIBIT 8]

Representatives from various departments and the Harbours Board were present, as well as a consultant employed by Ove Arup and Partners, the firm engaged to conduct the Port Moresby Road Needs Study. This study later concluded that construction of a link through Burns Peak would have a beneficial effect on the Port Moresby economy and that traffic flow on the Three Mile Hill section of the Sir Hubert Murray Highway would consequently be reduced by almost 50%.

[42] ISSUES UNDER CONSIDERATION

During this meeting, two crucial issues were addressed:

Chapter 4

19

1. The method of construction of the Burns Peak link

Once it had been decided that the route for the new road would pass through Burns Peak, the next thing to decide was the best way of getting through. Should a tunnel be constructed or would it be better to make a "cut" through the mountain?

2. The method of financing the project

The other crucial issue discussed at the meeting was the method of financing the project. One proposal, closely linked with the tunnel option, was that part of Spring Garden Road would become a tollway.

This later became transformed into the Build-Operate-Transfer (BOT) concept. Under this method of financing, it was envisaged that the Government would engage a contractor to build and operate the road as a tollway, holding the 'title' to it for, say, twenty years, until the contractor made a reasonable return on its investment, and then returning the road to the State. el

The Minister for Transport favoured this option, though he was also willing to consider other options, provided they involved no financial cost to the Government.

Chapter 4

20

[4.3] NO FIRM POLICY DECISIONS MADE

No firm decisions were made on either the method of construction or the method of financing the project at the meeting of 22 May 1990. The most important outcome was that the Minister for Transport directed the Department of Transport to advertise the project so that interested parties could express their interest.

The Minister also announced that he intended to direct the Department of Works to commence detailed design of the project immediately and to complete the design within six months. This was confirmed in writing the following day, 23 May 1990, in a letter to the Acting Secretary of the Department of Works, Mr G Morea. [EXHIBIT 9]

[4.4] MINISTER FOR TRANSPORT EXCEEDED HIS POWERS

It should be noted that the Minister for Transport had no power to give this direction to the Department of Works.

Section 148 of the Constitution states that Ministers only have such titles, portfolios and responsibilities as are given to them, from time to time, by the Prime Minister. During 1990, Mr Temo had no responsibility for the Department of Works and therefore it was wrong of him to direct the Department to finish the design within six months. We are not suggesting there was anything improper about getting the design phase underway; but if the Minister for Transport wanted to expedite the project, he should have gone about it the right way, by liaising with the Minister for Works, Secretary for Works and Secretary for Transport.

Chapter 4

21

When we made this finding in our preliminary report, Mr Temo responded as follows:

'The direction to Secretary for Works was a result of a suppose to be ministerial committee meeting. When the respective ministers did not turn up their respective secretaries or their nominees turned up. The Department of Works representative suggested the idea that it would take up to 6 months to have the Geo-Technical report ready and he wanted the decision to be relayed officially as a result of this meeting.

This letter was drafted by my staff relaying the decision of the meeting.

I was also acting as Chairman of ministerial committee on infrastructure_

Mr Temo's response does not address the thrust of our criticism. His direction to the Department of Works was unlawful and wrong, in that it was contrary to Section 148 of the Constitution.

.5] MINISTERS DO NOT HAVE THE POWER TO DIRECT DEPARTMENTS IN THEIR DAY-TO-DAY ACTIVITIES 1

There is an important aspect of Section 148 of the Constitution that must be emphasised here: though Section 148 gives Ministers "political" responsibility for particular Departments, it does not give them any power to direct or control a Department in its day-to-day activities.

A Minister is not the boss of a Department – the Head of the Department is the boss. The Minister's job – in conjunction with the National Executive Council – is to set the Department's policy on important issues. It is not his job to give directions to the Departmental Head or to Departmental officers on day-to-day matters. The only exception is where a Minister is specifically empowered by an Act of Parliament to give directions or make certain decisions. 1

Chapter 4

22

This important constitutional principle was explained by the Supreme Court in Supreme Court Reference No. 1 of 1982: Re Bouraga [1982] PNGLR 178. We discuss it further in Chapter 39 of this report.

So, even if Mr Temo had had political responsibility

for the Department of Works, it still would have been wrong for him to direct the Secretary for Works to complete the design within six months. He could only request that that be done and ensure that there were sufficient funds available for that purpose.

[4.6] IGNORANCE OF SECTION 148 OF THE CONSTITUTION: A MAJOR PROBLEM

There is a lot of misunderstanding of Section 148 of the Constitution in the Public Service, and some Ministers appear to know little about it.

The Ombudsman Commission often finds that Ministers believe that, simply because they are Ministers, they have the right to give directions to anyone in "theirs Department, or even, as shown in the present case, in a Department for which they have no responsibility. This is wrong. It is unconstitutional and it leads to chaos.

Unfortunately, there were many occasions during the life of the Spring Garden Road/Poreporena Freeway project when the Minister for Transport exceeded his powers as a Minister. This was the first of them.

* * * * *

Chapter 4

23

5. ADVERTISEMENT INVITING EXPRESSIONS OF INTEREST:
JUNE 1990

[5.1] ADVERTISEMENT PUBLISHED IN POST COURIER AND NATIONAL GAZEnE

Advertisements inviting expressions of interests in the "Burns Peak/Spring

Garden Road Link" were published in the Post Courier on 20 and 22 June 1990 and the National Gazette on 28 June 1990. [EXHIBITS 12 & 18]

There are three points that should be noted about the advertisement. They concern:

- the scope of the project;
- co-ordination of the project; and
- financing of the project.

I. THE SCOPE OF THE PROJECT

[5.2] TERMS OF THE ADVERTISEMENT

The advertisement stated that the National Executive Council had decided that "the section of Spring Garden Road in the National Capital District between Waigani Drive and Kaevaga/Konedobu ... is to be constructed as soon as possible".

Chapter 5

24

This statement was a little misleading.

What precisely had the National Executive Council decided?

What the National Executive Council had, in fact, decided by Decision No. 14/90 was that "plans for the construction of Burns Peak Road" be formulated.

This was a very vague decision. The only road in Port Moresby that is called "Burns Peak Road" is the dirt track running from Spring Garden Road, near Walnut Place, Hohola to the top of Burns Peak where the telecommunications transmitters are located.

Despite the vagueness of Decision No. 14/90 it was assumed by everyone concerned that the National Executive Council was actually referring to

Spring Garden Road. However, this interpretation still caused problems, because the National Executive Council did not specify (and has never at any stage specified) the particular parts of Spring Garden Road it wanted constructed and/or upgraded.

[5.3] WHAT WAS MEANT BY "THE BURNS PEAK ROAD" OR "SPRING GARDEN ROAD"?

This was not just a small side issue – it concerned the scope of the whole project. Did the National Executive Council want the upgraded road to begin at the junction of Stanley Esplanade and Cuthbertson Street in downtown Port Moresby or was the network to begin at the junction of Champion Parade and Spring Garden Road in Konedobu? Was the road to go through Burns Peak to Wards Road? Or one stage further, to Waigani Drive? Or to the end of Spring Garden Road at Boroko Drive? Or further still, to the Sir Hubert Murray Highway, at Erima? Or was the road required to go all the way to Jacksons Airport?

Chapter 5

25

Any of these options could conceivably have been brought within the terms of the decision that "plans for the construction of the Burns Peak Road" be formulated.

The Policy Submission which had generated the decision did not shed any light on this issue. It simply made reference to the scope of the project in general terms such as:

The purpose of the Submission is to request the National Executive Council to direct Department of Works, Department of Transport and Department of

Finance and Planning to adopt special procurement procedures to undertake the construction of Burns Peak Road (Spring Garden Road). The measures could include turnkey arrangements.- Construction of the BUMS Peak will involve considerable financial commitment' [EXHIBIT 6, page 1]

[EXHIBIT 6, page 1]

5.4] THE DEPARTMENT OF TRANSPORTS INTERPRETATION OF THE
5.4] THE DEPARTMENT OF TRANSPORTS INTERPRETATION OF THE
NATIONAL EXECUTIVE COUNCIL DECISION

The Secretary for Transport, Mr B K Amini CBE, interpreted the decision as applying only to the section of Spring Garden Road between Konedobu and Waigani Drive. This is evident from a letter dated 7 June 1990 he wrote to the Secretary for Works, Mr A Temu. Mr Amini described the scope of the project in the following terms:

'I wish to restate that the scope has not change except the grade and the elimination of the design of the tunnel option. Basically the scope of works am-

am-

8% grade
4 lanes (2 lanes in each direction)
80 km/ph
Establishment of a highway link between Rohola (Junction of Waigani Drive and Spring Garden Road East) and Konedobu (Junction of Champion Parade and Spring Garden Road West) by improving and extending Spring Garden Road over Burns Peak, Intersecting and crossing Wards Road.'

[EXHIBIT 10, page 1]

[5.5] CHANGE OF SCOPE WITHOUT EXPLANATION

The Secretary for Transport's interpretation of the National Executive Council decision was reflected in the advertisements inviting expressions of interest. But that interpretation did not remain constant.

Two years after the advertisement was published, the State had entered into a contract for construction of a freeway all the way from downtown Port Moresby to Jacksons Airport. This was a considerable expansion in the original scope of the project. [EXHIBITS 231 A, 231 B, 232]

[5.6] WHO MADE THE DECISION TO EXPAND THE SCOPE OF THE PROJECT?

In the course of this investigation, the Ombudsman Commission was never able to identify when the decision was made to alter the scope of the project. Nor can we say who made it. It seems to have "just happened" that way.

Mr Amini's explanation

When we raised this matter in our preliminary report, the Secretary for Transport, Mr Amini, responded in the following terms:

For every major project undertaken by the Department of Transport, there is a feasibility study that defines the scope in general terms. The outcome of the feasibility study is a three-part report - a summary containing the main findings

and recommendations, - a main report containing the main issues and - technical appendices or working papers. These serve as working papers on each project, including this one and there is minimum of paperwork. After these reports, follows the detailed design that pins down the last centimetre of the project's scope - where it starts and where it ends. It should be noted that, for this project, the detailed design had not been done as it was part of the turn-key - the consortium was going to do that as part of the contract.

Chapter 5

27

The project feasibility report prepared by the consultants, Ove Arup of Australia - entitled 'Spring Garden Road Economic Assessment' - contained the detailed scope of the project and it is a reference point and not a file. The scope was extended to connect the new DCA road from the airport (note this is normal to extend the scope - Department of Works almost invariably extend every project they implement). The end of the DCA project was known because it had been designed and that is where we were to end this project. The DCA project was two-lane and wisely we decided to widen it to four to conform with the Freeway. Both the start and the end of the project were clearly known. The Department followed its set procedures and this cannot be construed as defective administration." [EXEUBIT 254, pages 2-3]

Unsatisfactory explanation

In our view, Mr Amini has not given a satisfactory explanation of his Department's failure to make a careful and reasoned and properly documented decision as to the scope of the Spring Garden Road/Poreporena Freeway project.

His reference to the 'Spring Garden Road Economic Assessment' report by Arup Australia is, with respect, misleading. Mr Amini suggests that the scope of the project was determined in accordance with that report. Even if that were true, we would still expect to find evidence that at some stage the Department of Transport had made a formal decision to adopt the recommendations of the report.

However, the Arup report entitled 'Spring Garden Road Economic Assessment' did not provide any basis for the decision to extend the scope of the project to Jacksons Airport along the route envisaged in the contract with the Kinhill Kramer/Curtain Bros consortium.

Despite Mr Amini's claim that the start and end of the project were clearly known, the 'Spring Garden Road Economic Assessment Report' only contemplated a four-lane road from downtown Port Moresby to the intersection of Spring Garden Road and Waigani Drive (see Chapter 2

Chapter 5

28

map, points "A" to "H"), plus other associated works. The Spring Garden Road project, according to that report, did not include the upgrading of Spring Garden Road from Waigani Drive to Boroko Drive (see map, "H" to "I"). The project also did not include a four-lane arterial road from the intersection of Spring Garden Road and Boroko Drive to Jacksons Airport, via Geauta Road, which was the route envisaged in the contract entered into with the Kinhill Kramer/Curtain Bros consortium (see map, points "I" to "K"). [EXHIBIT 9A, page 10, para 5.12; EXHIBIT 233, Part Z Description of Concept]

In Arup's Study Report, which was separate from the Spring Garden

Road

Economic Assessment Report, it was recommended that, in addition to the

Spring Garden Road project, many other road construction and improvement projects should be undertaken in the city of Port Moresby.

These included widening the section of Spring Garden Road between Waigani Drive and Boroko Drive to four lanes (see map, "H" to "I"). However, the Study Report did not recommend the widening or upgrading

of Geauta Road, from Boroko Drive to the Sir Hubert Murray Highway (see

map, "I" to "J"). The Study Report, in fact, recommended that the most

direct route between downtown Port Moresby and Jacksons Airport should

be via Sir John Guise Drive, which was proposed to be extended as a two-lane arterial road. [EXHIBIT 69A, para 7.0, table 1]

Thus, neither the Spring Garden Road Economic Assessment Report nor the Study Report recommended a four lane arterial road along the route

contained in the contract executed with the Kinhill Kramer/Curtain Bros

consortium.

Mr Hitola's explanation

When our criticism of the Department of Transport's failure to specify the

scope of the project was conveyed to the Secretary for Works, Mr Hitolo

Chapter 5

29

(who was responsible for this project for a considerable time in the Department of Transport) he offered a different explanation.

Mr Hitolo said that because the project was to be implemented using Build-Operate-Transfer financing, it was up to the private sector to determine the financial viability of the project before proposing the scope

to the Government for approval. Mr Hitolo also said that a careful and

reasoned and properly documented decision about the scope of the project required a feasibility study costing between K200,000.00 and K400,000.00, which had not been budgeted for.

[EXHIBIT 265, page 2]

Explanation rejected

We find Mr Hitolo's explanation unconvincing. Even if we accept

that, in the case of a Build-Operate-Transfer project, the scope is determined by the developer, the fact is that no Build-Operate-Transfer proposal was ever lodged for the Spring Garden Road/Poreporena Freeway project. All of the proposals involved turnkey financing.

This meant that inevitably - at some stage - the Government would be paying for the freeway. It was therefore necessary for the Government to know exactly where it wanted the freeway to go and how long the freeway would be.

No proper comparison of competing proposals could be made unless everyone concerned knew the beginning and end points of the freeway and its route.

It was the Department of Transport's responsibility to make a careful and reasoned decision on this basic issue. However, it failed to do this.

Chapter 5

30

[5.71 CHANGE OF FUNDAMENTAL DESIGN ALSO WITHOUT EXPLANATION

We make a similar observation on the decision about the tunnel/cut option.

Mr Amini's letter to the Secretary for Works of 7 June 1990 makes mention

of the fact that the tunnel option had been eliminated. [EXHIBIT 10, third

paragraph] But, at an interdepartmental meeting on 31 July 1990, it was decided that a geotechnical investigation was required, before a final decision could be made (see Chapter 7).

Throughout 1991, when negotiations were taking place with likely

contractors, it was assumed the project would include a tunnel. When the National Executive Council made Decision No. 36/92 in favour of IGnhill

Kramer Pty Ltd in February 1992, one of the key criteria (and one on

which Knhill Kramer was rated "excellent") was the "expected

quality of
tunnel". But when the contract was signed, on 27 May 1992,
there was
no mention of a tunnel.

MrAminarasmnrA

In our preliminary report, we were critical of the Department
of Transport
for the haphazard manner in which the tunnel/cut issue was
addressed.

The Secretary for Transport, Mr Amini, replied that the
geotechnical
investigation undertaken by Coffey Partners International (see
Chapter 8)

was meant to give a conclusive answer; but he said it turned
out to be
inconclusive. As to the eventual decision to opt for the cut,
rather than the

tunnel, Mr Amini said it was made by the Department of Works.

[EXHIBIT

254, page 3]

Chapter 5

31

Mr Hitolo's response

Mr Hitolo's explanation of the confusion over the tunnel/cut issue
was that
it was an investment decision, to be made by the consortium selected
to
undertake the project. [EXHIBIT 254, page 2]

Neither response was satisfactory

Having considered the responses of Messrs Amini and Hitolo, we
conclude
that neither offered a satisfactory explanation for the Department
of
Transport's failure to make a careful, reasoned and properly
documented
decision on the tunnel/cut issue.

Mr Hitolo's claim that it was an "investment decision" could only
possibly
make sense if the project were based on Build-Operate-Transfer
financing.

But, as pointed out earlier, no such proposal was ever put to the Department of Transport. The Government of Papua New Guinea was always going to pay for this project and therefore it should have decided whether a tunnel or a cut through Burns Peak was preferable.

We accept Mr Amini's description of the geotechnical report as inconclusive. But that report was made available in May 1991 – the Department of Transport had ample time after that to make a determination on this basic technical issue. Though the Department of Works was eventually consulted, this should have been done on a formal and methodical basis – not by means of casual conversation between officers of the two Departments.

We simply do not regard it as an acceptable administrative practice for the Department of Transport to have prepared a Policy Submission which assumed the project would include a tunnel and then – without any record

Chapter 5

32

of consultation or any record of any different decision – to allow a situation to develop in which the project included a cut through Burns Peak, rather than the tunnel.

[5.8] ADMINISTRATIVE INCOMPETENCE BY THE DEPARTMENT OF TRANSPORT

It is stating the obvious to say that decisions concerning Papua New Guinea's transport infrastructure should not be made as they were in the case of the Spring Garden Road/Poreporena Freeway project.

Decisions such as the length of a freeway and its fundamental design should not be made haphazardly. These decisions involve the expenditure of large amounts of public money. They must be made carefully and methodically and they must be properly documented. If Government departments make important policy decisions haphazardly, it is virtually impossible to keep a check on the expenditure of public money. And it

creates an environment ripe for corruption.

When an investigatory agency such as the Ombudsman Commission does

a check on a decision-making process which led to the commitment of millions of kina of public money, it should be able to find evidence of a series of reasoned and methodical steps and the careful evaluation of alternatives. But the evidence we have gathered shows the exact opposite: it was as if decisions – like the route of the freeway – were falling out of the sky.

The Ombudsman Commission has concluded that this situation arose because of the administrative incompetence of the Department of Transport.

Chapter 5

33

IL CO-ORDINATION OF THE PROJECT

[5.9] EXPRESSIONS OF INTEREST CO-ORDINATED BY DEPARTMENT OF WORKS

■
Despite the Minister for Transport's direction at the meeting of 22 May 1990 that the project be advertised by the Department of Transport, the advertisements were actually organised by, and the responses had to be made to, the Department of Works.

Apparently, this turnaround occurred because the First Assistant Secretary (Planning and Research) in the Department of Transport, Mr Amoako, asked the Department of Works for assistance in drafting the advertisement. The Principal Engineer (Roads), Mr Newberry, prepared a draft which was forwarded to the Department of Transport

for review and issue. However, Mr Amoako returned the document to Mr Newberry, advised him that it was satisfactory and requested that it be published by the Department of Works. [EXHIBIT 51, page 2 and EXHIBIT 52, page 2]

[5.10] A SIGNIFICANT LACK OF CO-ORDINATION

Though there was nothing improper in what was done by Mr Amoako, this incident is significant because it typified what was, and continued to be, a confusing state of affairs regarding the implementation of the whole project: there was a great deal of confusion as to the respective roles of the Department of Transport and the Department of Works, which we consider was ultimately detrimental to the overall interests of the State.

Chapter 5

34

III. FINANCING OF THE PROJECT

[5.11] TERMS OF THE ADVERTISEMENT

The advertisement of June 1990 alluded to the issue of financing the project, in the following terms:

"The work may be financed by a combination of any or all of the following:

a toll on the new road link
commercial leases on reclaimed

land

grant funding by external agencies

Other means of funding will be considered but it is not intended that the Government will contribute to any major extent."

[EXHIBITS 12 & 18]

The advertisement did not stipulate that the successful contractor would have to itself finance the project.

This is significant, because, as the Commission was to discover in the course of the investigation, there were a number of interested parties that were later summarily rejected because of the inadequacy of their financing proposals.

We consider this to have been quite unfair, because, though the advertisement stated that the Government would probably not finance the project, it did not stipulate that any company which failed to submit a "financial package" would be automatically excluded from consideration.

* * * * *

Chapter 5

35

RESPONSES TO THE ADVERTISEMENT: JULY 1990

6.1] RESPONSES SENT TO DIFFERENT PLACES

The Ombudsman Commission discovered that some of the expressions of interest were sent to the Department of Works, whereas others went to the Department of Transport.
Department of Transport.

[6.2] EXPRESSIONS OF INTEREST SENT TO THE DEPARTMENT OF WORKS

We have been able to confirm, by examining the files of the Department of Works, that ten expressions of interest were registered with it, on or before 31 July 1990, as required by the advertisement:
before 31 July 1990, as required by the advertisement:

Coecon Pty Ltd [EXHIBITS 13, 21]
Barclay Bros (PNG) Pty Ltd [EXHIBIT 14]
Connell Wagner (Old) Pty Ltd [EXHIBIT 17]
Willing and Partners Pty Ltd [EXHIBIT 20]
Robert Laurie Company Pty Ltd [EXHIBIT 20AA]
Maunsell Consultants PNG/Hornibrook
Constructions Pty Ltd [EXHIBIT 22]

Chapter 6

36

Curtain Bros (PNG) Pty Ltd [EXHIBIT 23]
LKN Construction Pte Ltd [EXHIBIT 25]
Cardno & Davies PNG Pty Ltd [EXHIBIT 26]
Juara Ltd [EXHIBIT 29]

(A number of documents we obtained referred to an expression of interest being received from Frame Harvey West (e.g. EXHIBITS 24, 38, 50, 148).

However, we could find no evidence of this. The consulting firm of Frame Harvey West & Maso later joined with Periquan International Resources and submitted a proposal to the Minister for Transport in July

1991, but
it appears not to have formally expressed any interest before
that.)

[6.3] EXPRESSIONS OF INTEREST SENT TO THE DEPARTMENT OF
TRANSPORT

Despite the clear statement in the advertisement that
expressions of
interest be registered with the Department of Works, five
groups wrote to
the Department of Transport. These were:

Executive Decisions Inc Pty Ltd [EXHIBIT 1 0A]

Kumagai Gumi Co Ltd/Kinhill Kramer Pty Ltd
[EXHIBITS 15, 16]

Pan Asia Management Consultants Center [EXHIBIT 27]

Chapter 6

37

Ove Arup & Partners (Pacific) Pty Ltd [EXHIBIT
21A]

Sabina Ltd/Peter Chen & Partners Pty Ltd
[EXHIBIT 35]

[6.4] MOST EXPRESSIONS OF INTEREST HELD BY DEPARTMENT OF WORKS

The Department of Works was made aware of all but one of
these
expressions of interest (from the Singapore-based
Executive Decisions Inc
Pty Ltd) when the Department of Transport faxed copies to
them on 1 and
2 August 1990. [EXHIBITS 34, 35] Mil

In light of the above, we are satisfied that as at 2
August 1990, the II
Department of Works had at least fourteen expressions of
interest in its
possession and that they were held by the Principal
Engineer (Roads), Mr IN
E Newberry, who was the Department of Works co-ordinator
of the project.

IR

[6.5] NO ACKNOWLEDGEMENT OF THE EXPRESSIONS OF INTEREST

During the first week of August 1990, Mr Newberry prepared a summary of the expressions of interest and delivered it to the Department of Transport. No attempt was made at this stage to rank them in any way.

We are not critical of this, because the advertisement had not called for firm proposals - all that was required were expressions of interest.

We consider, however, that the Department of Works should have at least sent an acknowledgment to each of the interested groups, indicating when a more detailed information package would be available, which could be used to formulate firm proposals for the project.

Chapter 6

38

When we expressed this opinion in our preliminary report, the Department of Works advised that, in fact, several of the expressions of interest were acknowledged. We were referred to letters sent to Connell Wagner and Ove Arup and Partners Pacific and to a telephone call made to the Robert Laurie Company. [EXHIBIT 261, page 1]

We accept that acknowledgements were given to each of these companies in the manner described. [EXHIBITS 17A, 19A AND 20AA]

However, acknowledgements were not given to the other twelve interested parties. In his response to the Ombudsman Commission, the Secretary for Works, Mr Hitolo, gave an explanation for this:

'It seems that the major reason that E0Is were not acknowledged was the rush that things were done in. This meant that a proper terms of

reference (TOR)

was not sent out, so most EOI's came in, not so much as expressions of interest, but as queries about the project. Concurrently, Mr Newberry was singlehandedly writing a further TOR (which would have involved a full team of specialists for a project of this scope and magnitude) and handling all of the other National Road Design Projects. For a period Mr Newberry was (or very nearly was) the only Road Engineer in the Roads & Bridges Branch, where the work load is more than 10 engineers could handle. He probably ran out of time to perform everything. This staff shortage still plagues the branch...

One further complication was that Department of Transport contacted some of the parties independently, asking for different information and receiving their expressions of interest. These were then passed on to Department of Works two weeks after the dosing of expressions of interest.

These factors all contributed to the overlooking of the acknowledgement of most of the Expressions of Interest. There is no indication that the failure to acknowledge them was purposeful.' [EXHIBIT 263, page 1]

While we appreciate the difficulties faced by any Department suffering from shortages of staff or other resources, the Ombudsman Commission remains critical of the Department of Works for not sending acknowledgements to all the companies which had expressed interest in the project. It was a simple administrative task to perform. It was wrong of the Department of Works not to carry it out.

Chapter 6

39

[6.6] BREAKDOWN IN COMMUNICATION BETWEEN DEPARTMENT OF WORKS AND DEPARTMENT OF TRANSPORT

We noted earlier that despite the Minister for Transport's direction that the project be handled by his Department, the

advertisements calling for
project be handled by his Department, the advertisements
calling for
expressions of interest were actually organised by the
Department of
Works.

This was very surprising because it is clear that the Minister
for Transport, Mr Temo, and the Secretary for Transport, Mr
Amini, both genuinely
Mr Temo, and the Secretary for Transport, Mr Amini, both
genuinely
believed that the project "belonged" to the Department of
Transport.

The Ombudsman Commission formed this view after interviewing
both Mr
Temo and Mr Amini in the course of the investigation. It was
also apparent
from correspondence between the Minister and the Secretary for
Transport, that the project was regarded as belonging to the
Department
of Transport. We refer, for example, to a letter from Mr Amini
to Mr Temo
on 28 June 1990 in which, only a few days after publication of
the
advertisement, Mr Amini gave Mr Temo an update on the
expressions of
interest for his "advice and directive". [EXHIBIT 1 9]

[6.7] DEPARTMENT OF TRANSPORT SUDDENLY INVITES DETAILED PROPOSALS

The closing date given by the advertisements for registration
of
expressions of interest was 31 July 1990. The Ombudsman
Commission
was surprised to find that before that date, the Department of
Transport
decided - without consulting the Department of Works -to
contact a
selected group of companies and invite detailed proposals for
the project.

Chapter 6

40

[6.8] ONLY A SELECT GROUP OF COMPANIES WERE INVITED TO SUBMIT PROPOSALS IN JULY 1990

This surprising turn of events occurred around the period 17-20 July 1990.

A pro-forma letter headed "HEARING FOR DEVELOPMENT OF THE SPRING GARDEN ROAD" was drafted within the Department of Transport [EXHIBIT 20A]. It was apparently meant to be sent to all the companies which had lodged expressions of interest. We infer this from the "List of Interested Companies" attached to the pro-forma letter in the Department of Transport file. [EXHIBIT 20A, page 3]

However, the Ombudsman Commission is not satisfied that the letter was in fact sent to all of those companies. There is no evidence on file verifying the postage or facsimile transmission of the letter to all of the companies that had lodged expressions of interest.

Furthermore, the list in the Department of Transport file excludes four groups that had registered interest with the Department of Works:

Curtain Bros (PNG) Pty Ltd;

Cardno & Davies (PNG) Pty Ltd;

Maunsell Consultants/Hornibrook
Constructions Pty Ltd; and

Juara Ltd.

Chapter 6

41

[6.9] WHY WERE SOME COMPANIES DROPPED FROM THE UST?

[6.9] WHY WERE SOME COMPANIES DROPPED FROM THE UST?

Perhaps the reason for these companies not being on the Department of Transport's list was that their expressions of interest were received later than the others (the four referred to above were received by the Department of Works during the period 27 July 1990 to 1

August 1990).

But other than the expression of interest from Maunsell/Hornibrook (which was one day late) all were received within the period specified in the advertisement.

There was therefore no justification for these companies being dropped from the list and deprived the opportunity to submit a formal proposal.

During the course of the Commission's investigation, representatives of both Cardno & Davies and the Maunsell/Hornibrook consortium were questioned and they confirmed that they had never received any formal acknowledgement of their expressions of interest, or been invited to submit a formal proposal.

It is surprising that these particular companies were omitted from the short-list, even though they all have permanent bases in Papua New Guinea and list, even though they all have permanent bases in Papua New Guinea and their expressions of interest were among the most detailed of those received by the Department of Works.

Indeed, it is ironic that the company which provided the least amount of information in its expression of interest - Curtain Bros (PNG) Pty Ltd - was ultimately selected to be closely involved in construction of the freeway. ultimately selected to be closely involved in construction of the freeway.
[EXHIBIT 23]

Chapter 6

[6.1 0] RESPONSE BY THE SECRETARY FOR TRANSPORT

When we made these findings in our preliminary report, the

Secretary for

Transport, Mr Amini, responded in the following terms:

'The Department did not receive any complaint from any developer. I will urge the Ombudsman Commission to be cautious in promoting any particular developer. If it was unreasonable, at least one or two of the developers would have made suggestions as they always do. No developer was ever stopped or prevented from submitting a proposal. They were actively encouraged. In any case, the submission date was extended twice to accommodate late bids. This is not defective administration.' [EXHIBIT 254, page 31

The Ombudsman Commission does not regard Mr Amini's response as satisfactory. His assertion that no developer was ever prevented from submitting a proposal is not borne out by the facts.

We are not suggesting the Department rejected or refused to accept any proposal. What the Department did wrong was to invite proposals from only a select group of companies, thus excluding a number of companies from consideration.

[6.11] OTHER MATTERS OF CONCERN

The Ombudsman Commission is not only concerned about the Department of Transport letter being sent to only a select group of companies. What is also disconcerting is the timing of the letter and the demands placed upon the companies chosen to receive it.

The Ombudsman Commission has been able to confirm that the letter inviting proposals was sent, during the second half of July 1990, to at least five of the companies and consortiums referred to on the

Department of
Transport list:

Chapter 6

43

Coecon Pty Ltd [EXHIBIT 20B]

Willing and Partners Pty Ltd [EXHIBIT 22A]

Ove Arup & Partners Pacific Pty Ltd [EXHIBIT 28]

Sabina Ltd/Peter Chen & Partners Pty Ltd [EXHIBIT 30]

Kumagai Gumi Co Ltd/Kinhill Kramer Pty Ltd. [EXHIBIT
31]

[6.12] THE DEPARTMENT'S REQUIREMENTS COULD NOT BE MET

Unreasonable and unrealistic demands were imposed by the
Department
of Transport. The letter stated:

"Dear Sir

HEARING FOR DEVELOPMENT OF THE SPRING GARDEN ROAD
This is to inform you of the fact that the Steering
Committee administering
the above-mentioned project will be meeting to consider
your proposals and
you are advised to send the details to this Department
before the 25/7/90.

The following planning information is required from you to
assist the
Government in selecting the developer.

- I. Technical Feasibility Report
2. Preliminary Design or Plans.
3. Financial Viability for a Toll System.
4. Details of Financial Arrangements.
5. Involvement of Landowners in the Development

Chapter 6

44

Since the Government is anxious to complete this project by September next year in preparation for the South Pacific Games, it is important that you state very clearly whether you can achieve this time frame.

Yours faithfully
[Signed]
BRIAN K AMINI CBE
Secretary'. [EXHIBIT 20A]

The Ombudsman Commission is at a loss to see how the Department of Transport could reasonably have expected these requirements to be met within one week. The only specifications available to the companies were those in the June 1990 advertisements. How could they be expected to submit meaningful technical feasibility reports, preliminary designs and financial arrangements, as well as give a proper assessment of the financial viability of a toll system and the involvement of landowners, in the space of a few days?

As one consultant explained to the Ombudsman Commission, a detailed feasibility study of the type being sought by the Department of Transport would cost thousands of kina and it would take considerably longer to do than the few days suggested in the letter.

In sending this letter, the Department of Transport gave the impression it had no idea at all of what was involved in a project of this magnitude.

[6.13] MR HETOLO'S EXPLANATION

In his response to our preliminary report, the former head of the Policy Secretariat in the Department of Transport, Mr Hitolo, made these comments:

Chapter 6

45

'The unreasonable and unrealistic demands were placed on the plight developers because the department was under pressure to meet the September 1991 Games as mentioned in the letter. This letter was sent to a selected few which was a normal practice and usually is called selective tendering. As long as three or more proposals are tendered a selection can be convened. The whole purpose was for interested and so-called reputable companies to propose a plan of execution of the tasks mentioned in the letter and propose an alternative if they cannot meet the deadline of September Games stated in the

letter. It was not mandatory to include all those that showed interest because some of the companies saw me personally or phoned to find out whether funding was available and when it was explained otherwise they indicated disinterest as most of them are not financiers. They only offer their engineering expertise and were unable to finance such a big project. • expertise and were unable to finance such a big project. • [EXHIBIT 265, page 3]

Mr Hitolo's explanation that representatives of some companies had seen him personally or telephoned to find out whether funding was available is not considered satisfactory. There were no file notes kept of the occasions on which these companies signalled their loss of interest in the project. We are also unimpressed by the suggestion that, provided at least three proposals were received, a proper selection could be made.

The private and undocumented "selective tendering" evident in the limited dispatch of the letters of July 1990 is very, very dangerous, because it can easily lead to corruption. It is vitally important that the public tendering procedures in the Public Finances (Management) Act are strictly adhered to, especially in projects which involve millions of kina of public money (see Chapter 35).

6.14] LETTERS WERE SENT LATE

The unreasonableness of the demands contained in the letters of July 1990 was exacerbated by the fact that the letters were sent late.

Chapter 6

46

Of the five companies we verified as receiving the letter, only one received it before the deadline for submission of proposals. [See the reference in each of EXHIBITS 28, 30 and 31 to the letter having arrived late and the date-received stamp of 26 July 1990 on EXHIBIT 22k]

An example of the confusion caused by the Department of Transport

Coecon Pty Ltd received its letter by facsimile transmission at 9.32 am on 20 July 1990, but the company was obviously (and understandably) confused as to what was required of it. At 2.25 pm on the same day, the General Manager, Mr P J Neville, sent a facsimile message to the Principal Engineer (Roads), Mr Newberry, at the Department of Works:

'Please advise us of present stage of development for Burns Peak. For instance: any technical reports such as preliminary design plans etc.' [EXHIBIT 711

There is a handwritten note at the foot of that document (though it is not clear who its author is, it was probably made by an officer of the Department of Works) that typifies the general state of confusion:

'The information requested of Department of Works by Coecon is what is requested of Coecon by Department of Transport. We seem to be going around in circles? [EXHIBIT nj

[6.15] ADMINISTRATIVE INCOMPETENCE BY THE DEPARTMENT OF
TRANSPORT

To sum up, the Ombudsman Commission is of the view that the conduct of the Department of Transport in dispatching the pro-forma letter dated 17 July 1990, advising companies that they had to send details of their proposals by 25 July 1990, was unfair, unrealistic and incompetent administratively for the following reasons:

Chapter 6

47

- (a) the letter was sent to only a select group of companies and, furthermore, excluded the two PNG-based companies which had submitted detailed expressions of interest;
- (b) the Department of Transport failed to advise the Department of Works (which was co-ordinating the expressions of interest) that it was sending the letter;
- (c) the letter placed unrealistic demands on the companies, which made it impractical for them to respond by the deadline;
- (d) the deadline for submission of proposals was on a date It before the closing date given in the advertisements for registration of expressions of interest; and
- (e) the letter was sent late, which resulted in most of the companies not receiving it until after the deadline set for submission of proposals.

[6.16] SOME COMPANIES WERE NEVER GIVEN ANOTHER OPPORTUNITY TO
SUBMIT PROPOSALS

The conduct of the Department of Transport during July 1990 cannot be dismissed as a mere administrative hiccup. It would have been possible to *forgive" the Department for its unfairness and incompetence if, at some later time, a proper opportunity to submit detailed proposals was given to a companies which had expressed genuine interest in the project. But this never happened.

f'hRpter 6

48

As we show later in the report, a number of companies were never considered or even contacted by the Department of Transport again. This was a disgraceful state of affairs.

When this sort of thing goes on, how can honest and responsible companies have confidence in the Department of Transport, or any other Department for that matter? How can anybody have confidence in the integrity of government in Papua New Guinea? The selective picking-and-choosing of companies to submit proposals must be avoided at all costs, since it is unfair and not in the best interests of the State and such practices breed corruption.

[6.17] LITTLE RESPONSE TO THE REQUEST FOR PROPOSALS

The Department of Transport's attempt, in July 1990, to get the "selected" companies to submit proposals, was so badly implemented, that hardly any of those companies responded. This meant that in 1991, the

shortlisting process had to begin again.

But as we show in Chapter 9, the shortlisting process in 1991 was also carried out in an arbitrary, unfair and unsatisfactory way.

* * * * *

Chapter 6

49

SIGNIFICANT INTERDEPARTMENTAL MEETING: 31 JULY 1990

7.1] ORIGINAL PURPOSE OF MEETING

An interdepartmental meeting, involving representatives of the Departments of Transport, Works, Finance and Planning and Attorney-General, was held on 31 July 1990. It was jointly chaired by the Secretary for Transport, Mr Amini, and the Secretary for Works, Mr Temu.

It was originally intended that the meeting would consider proposals invited by the Department of Transport's letters of 17-20 July 1990. [See the minute from the Director of the Department of Transport's Policy Secretariat, Mr Hitolo, to Mr Amini dated 27 July 1990 at paragraph 2 and the handwritten notes which refer to the "selection criteria": EXHIBIT 24.]

However, because the letters were sent late, the companies could not respond in time. Rather than being a forum for assessment of proposals the meeting therefore focused on other important issues concerning the project.

2] ISSUES DISCUSSED AT THE MEETING OF 31 JULY 1990

The minutes of the meeting record discussion of the following issues:

Chapter 7

50

The name of the project – the Secretary for Transport favoured the name "Spring Garden Road (Burns Peak) Link".

Funding of the project – Mr Hitolo advised that the World Bank had been approached.

The Port Moresby Roads Needs Study – the First Assistant Secretary of the Department of Transport's Planning and Research Division, Mr Parakei, advised that the Burns Peak project was part of the Study.

Engineering details – the Department of Works' Principal Engineer (Roads), Mr Newberry, addressed the tunnel/cut option, particularly the problems associated with disposal of the cut.

Landowner issues – Mr Hitolo advised that preliminary discussions had been held with landowners, some of whom were claiming lump sum payments prior to commencement of the project.

Scope of the project – some consideration was given to upgrading other sections of the Spring Garden Road network, particularly Wards Road to Waigani Drive.

Target date for completion – it was generally agreed the project could not be completed by the original target of September 1991, coinciding with the South Pacific Games. [EXHIBIT 33]

Chapter 7

51

[7.3] FUTURE ACTION

[7.3] FUTURE ACTION

As to the next action to be taken, two things were decided:

1. The National Executive Council was to be informed that the project could not be completed for the South Pacific Games.

2. Further geological investigations would have to be undertaken, so that a decision could be made on the tunnel/cut option.

[EXHIBIT

33, paragraph 5 and EXHIBIT 51, page 4, para 3]

[7.4] PROPOSALS WERE NOT CONSIDERED AT MEETING ON 31 JULY 1990

[7.4] PROPOSALS WERE NOT CONSIDERED AT MEETING ON 31 JULY 1990

MAIAITLOILEBIEIEIING

We note there is a reference to this meeting of 31 July 1990 in the Policy Submission presented to the National Executive Council in February 1992,

Submission presented to the National Executive Council in February 1992,

which led to the decision to award the project to Kinhill Kramer Pty Ltd (see Chapter 21).

It was suggested in the Policy Submission that the various expressions of interest and proposals had been presented at the meeting of 31 July 1990.

interest and proposals had been presented at the meeting of 31 July 1990.

However, it is quite dear, from the minutes of the meeting and other

documents considered by the Ombudsman Commission, that the proposals were not presented at that meeting. There were no proposals,

as at 31 July 1990, that could be considered.

Moreover there was never, in the life of the Spring Garden Road/Poreporena Freeway project, any interdepartmental meeting at which all the proposals were considered. Neither was there a meeting within the

Chapter 7

52

Department of Transport at which all the proposals were considered. There was not even a meeting at which all the expressions of interest were considered.

The Department of Transport's failure to methodically consider all options available to the Government was one of the worst aspects of the decision-making process that led to the National Executive Council decision in favour of IGnhill Kramer Pty Ltd in February 1992.

It was very unfair of the Department of Transport to arbitrarily reject expressions of interest from other companies that had put considerable time and effort into responding to the June 1990 advertisement.

[7.51 SECRETARY FOR TRANSPORT CLAIMS THAT ALL OPTIONS WERE CONSIDERED

When we put these allegations to the Secretary for Transport, he claimed that all options were considered:

"As I have said, all options were considered, including the Barclay proposals.

Mr Lohia Hitolo with his immense breath of experience and qualifications, did the assessment. Although he did not use the preferred approach, nevertheless, the approach he used has been used quite often by the

Department of Works

Design Branch. In addition, an NEC sub-committee reviewed his assessment

This is not defective administration." [EXHIBIT 254, page 4]

[7.6] MR HITOLO CONCEDES THAT SOME COMPANIES WERE REJECTED ON THE BASIS OF THEIR EXPRESSION OF INTEREST

In contrast to Mr Amini's response, the former head of the Department of

Transport Policy Secretariat, Mr Hitolo, conceded some companies had not

been seriously considered. The reason, he said, was that their expressions

Chapter 7

53

of interest did not state that they were willing to finance the project.

[EXHIBIT 265, page 3, para 5]

.7] FAILURE TO CONSIDER ALL OPTIONS

In our view, Mr Hitolo's response is testimony to the lack of effective

communication which pervaded the whole project.

As we pointed out in Chapter 5, the June 1990 advertisement did not state

that the successful contractor had to itself finance the project. Nor had

such a requirement been imposed by the National Executive Council.

It was therefore unfair and wrong of the Department of Transport to

summarily reject companies, simply because they had not indicated an

ability to provide finance.

In the opinion of the Ombudsman Commission, by failing to convene a

meeting at which all expressions of interest could be formally considered,

the Department of Transport failed to consider all of the

options available
to the Government. This was wrong and defective
administration.

* * * * *

Chapter 7

54

8. PROGRESS DURING SECOND HALF OF 1990

[8.1] A PERIOD OF INACTION 1

The period between the meeting of 31 July 1990 and the beginning of 1991 was significant in three respects:

1. There was little action taken to follow-up the expressions of interest.
2. The geotechnical survey was initiated by the Department of Works, but not completed.
3. A draft information paper was prepared for the National Executive Council, but not presented.

LACK OF ACTION FOLLOWING INVITATION FOR EXPRESSIONS OF INTEREST

[8.2] DEPARTMENT OF WORKS GUILTY OF DEFECTIVE ADMINISTRATION

Other than the unsuccessful attempt by the Department of Transport in July 1990 to obtain firm proposals from some companies, no further action

was taken by either the Department of Transport or the Department of Works during the second half of 1990 to follow-up the expressions of interest.

Chapter 8

55

It is apparent that Mr Newberry, of the Department of Works, drafted a letter of acknowledgment around the end of October 1990, which was intended to be sent to all companies which had expressed interest. [EXHIBIT 50]. But this was not done. The letter was drafted very late and shows incompetence by the Department of Works. In a minute to the Secretary of the Department of Works, Mr Temu, on 11 January 1991, Mr Newberry conceded "an acknowledgement should have been sent", and added "... but I wished to advise them what was happening or going to happen. There was/is considerable confusion over the acceptability of a tunnel proposal." [EXHIBIT 51, page 5, paragraph 3]

In our view, this was not an acceptable reason for not sending the acknowledgments. A number of companies had invested time and expense in formulating their expressions of interest and the very least they deserved was an acknowledgment. Mr Newberry's draft letter of 31 October 1990 correctly and succinctly stated the position as at that date and we can see no good reason for it not being dispatched, although it was very late.

Since the Department of Works was at that time co-ordinating the expressions of interest, it should be held responsible for this bad administrative error.

[8.3] PROS AND CONS OF TUNNEL AND CUT
[8.3] PROS AND CONS OF TUNNEL AND CUT

The most important outcome of the interdepartmental meeting of 31 July 1990 had been the decision to conduct a comprehensive geotechnical investigation of the Burns Peak Saddle.

Chapter 8

56

The rationale for this decision was explained in a minute from Mr Newberry to the Secretary for Works on 11 January 1991:

'Confusion was increased by the letter/fax sent by DOT to some of the registrants on 20 July. The DOW/DOT meeting on 31 July did clarify some of the issues. Since that time Works has proceeded on the basis that no requests can be made for detailed proposals until the additional geotechnical investigation provides data sufficient to allow a developer to make a reasoned choice between a tunnel and a cut.

The concept of the project if a tunnel is chosen is entirely different from that if a cut is to be constructed. A tunnel provides very little material for filling or for use in other parts of the construction. If any reclamation is to be carried out it would have to be from imported material. The road pavement and fill materials would also have to be imported. The tunnel also has a continuing high operation and maintenance cost. The tunnel option also carries a higher risk of damage, closure or operational loss as a result of an accident or vandalism particularly with only a single two lane tunnel for the initial period. The presently proposed tunnel cross section may be inadequate for safe use by

trucks carrying containers. Trucks with dangerous materials would not be allowed to use the tunnel but would have to use an alternate route.

It has been claimed that the tunnel would allow a grade of only 3% for the road connection. This is possible but would require a tunnel of much greater length and cost than that presently proposed. The present proposal has grades of over 8% on the western approach road.

The cut provides considerable, possibly excessive, material for use in the construction of the project and connecting roads embankments and pavements and also for port and other reclamation. The cut would provide an immediate four lane road connection. The provision of four-lanes reduces the risk of accident, damage and operational loss. However the risk of loss from collapse of part of the cut wall still exists with the level of risk increasing as the cut slopes are steepened and the volume and cost of the cut decrease. There is however increased opportunity for early financial return from port and harbour reclamation works which may reduce the financial risks in the project.

The developer has a difficult choice to make between the tunnel and cut options and the government also has to make an assessment of the risks it is prepared to take and the charges (eg. toll) it is prepared to allow the developer to make for provision of facilities.' (Emphasis added) [EXHIBIT 511

[8.4] WHY WAS A FURTHER GEOTECHNICAL INVESTIGATION NECESSARY?

A preliminary study in 1977 by consultants Dames and Moore had found it was geologically feasible to build a tunnel, but the Department of Works

Chapter 8

57

obviously felt that a more detailed investigation should be carried out. This point was explained in a press statement drafted by Mr Newberry on 18 January 1991 (which apparently was not released):

The last time a detailed investigation was made of the underground conditions along the Spring Garden Road Link from Hohola to Konedobu was in 1977.

Then holes were drilled in the rock and samples of the rock taken for examination. These holes were generally along the line of a proposed deep cut

It was then decided that the sides of the cut may fall down unless flatter side slopes were used so a tunnel was proposed. However tunnels are expensive as slopes were used so a tunnel was proposed. However tunnels are expensive as

the rock in the tunnel roof must be supported so that it does not fall into the tunnel Ventilation also becomes important as air can only enter and leave at tunnel Ventilation also becomes important as air can only enter and leave at the ends of the tunnel and fans may be necessary.

Since 1977 there have been other geological investigations around Port Moresby and it is now believed that the underground rock conditions may be more complicated than was thought in 1977. It is now considered too risky to decide on building either a tunnel or a rock cut without further investigation of the

underground conditions. This is particularly important since the estimated cost of the rock cut for a 4-lane road is about 120 million, 2-lane tunnel would cost about 120 million and a 4-lane tunnel would cost about 120 million with about another 40 million for improvements to Champion Parade, Wards Road, Waigani

of the rock cut for a 4-lane road is about 120 million, 2-lane tunnel would cost about 120 million and a 4-lane tunnel would cost about 120 million with about another 40 million for improvements to Champion Parade, Wards Road, Waigani about 120 million and a 4-lane tunnel would cost about 120 million with about another 40 million for improvements to Champion Parade, Wards Road, Waigani another 40 million for improvements to Champion Parade,

Wards Road, Waigani
Drive and the existing sections of Spring Garden
Road.' [EXHIBIT 52A]

[8.5] CO-ORDINATION OF THE GEOTECHNICAL INVESTIGATION
[8.5] CO-ORDINATION OF THE GEOTECHNICAL INVESTIGATION

The geotechnical investigation was co-ordinated by Mr
Newberry and also
involved the Senior Engineering Geologist from the Geological
Survey of
PNG in the Department of Minerals and Energy. It was decided
the project
would be offered to a private consultant, so the first step
was to formulate
terms of reference for the project. This was done during
August 1990 by
Mr Newberry. [EXHIBIT 51, page 4]

[8.6] THE PROCEDURE USED TO SELECT THE CONTRACTOR
[8.6] THE PROCEDURE USED TO SELECT THE CONTRACTOR

Terms of Reference

The terms of reference was sent to the Department of
Transport for
ratification during August 1990. The Secretary for Transport
replied that

Chapter 8

58

his Department agreed with the course of action proposed by the
Department of Works.
[EXHIBIT 42A]

Invitations, accompanied by a document entitled "Sub Surface
Exploration
and Assessment for Spring Garden Road Link between Hohola and
Konedobu Via Burns Peak Saddle: Terms of Reference for Consultants
Brief', were sent in September 1990 to the following companies:

Engineering Geology Ltd, of Lae.

Coffey Partners International Pty Ltd, of Australia.

Cardno & Davies Pty Ltd, of Port Moresby.

Kinhill Kramer Pty Ltd, of Port Moresby

Maunsell Consultants PNG Pty Ltd, of Port Moresby.

Ove Arup & Partners Pacific Pty Ltd, of Port Moresby.

Snowy Mountains Engineering Corporation, of Australia.

Hollingsworth, Dames & Moore (PNG) Pty Ltd, of Port Moresby. [EXHIBITS 44A, 44B1

Failure to publicly invite tenders

We note that there was no public advertisement inviting tenders for the geotechnical project. Nor was a "certificate of inexpediency" – which could have authorised the selective tendering procedure – issued under Section

Chapter 8

59

40(3)(b) of the Public Finances (Management) Act. This meant that, though the matter was ultimately referred to a Supply and Tenders Board, there had been a breach of the Public Finances (Management) Act.

Section 40(1) of the Act requires that tenders be publicly invited for the supply of works and services expected to cost more than the prescribed amount (which at the relevant time was K5,000.00). The public tender procedures of the Public Finances (Management) Act are discussed in detail in Chapter 35 of this report.

We are satisfied that none of the exceptions to the general rule imposed by Section 40(1) applied in the case of the geotechnical project.

The Department of Works therefore acted wrongly, by engaging in the process of selective tendering without obtaining a certificate of inexpediency in accordance with the Public Finances (Management) Act.

Evaluation of proposals

The closing date for submission of proposals was 25 October 1990 and, according to Mr Newberry's minute to the Secretary for Works of January 1991, this was when the task of evaluating the proposals began. [EXHIBIT 51, page 4] However, because of ambiguity in the wording of the terms of reference, due to the incompetence of the Department of Works, it was necessary to obtain supplementary proposals from a number of respondents. This delayed the selection process by at least a month. [EXHIBITS 48A, 50A, 50B]

Submission to Design Priorities Committee and Tender Board

On 5 December 1990, Mr Newberry presented a detailed submission to the Design Priorities Committee and Tender Board, recommending the

Chapter 8

60

contract for the geotechnical investigation be awarded to Coffey Partners International of Sydney, Australia, at a cost of K184,000.00. [EXHIBIT 500]. The recommendation was endorsed by the Board at its meeting on 11 December 1990. [EXHIBIT 50F] Coffey Partners International was subsequently advised it had won the contract and arrangements were made to commence the seismic field work during January 1991 [EXHIBITS 50G, 51A]

[8-7] GEOTECHNICAL INVESTIGATION DURING JANUARY - MAY 1991

The investigation took approximately four months to complete. A "Burns Peak Geotechnical Steering Committee" was established to monitor the project and progress reports were provided during the course of the investigation [EXHIBITS 55A, 64A, 66A, 79A, 80A, 84A]. The final report was presented to the Department of Works at the end of May 1991. [EXHIBITS 87A, 87B]

It was recommended that "the deep open cut option through Burns Peak Saddle will involve greater financial uncertainty than the

tunnelling option".

[EXHIBIT 87B, page 29, paragraph 8]

The time it took to organise the geotechnical investigation was a cause of frustration to some people, including the Minister for Transport, Mr Temo.

On the EM TV news bulletin of 8 January 1991 he was reported to be

highly critical of the Department of Works and apparently blamed the

Department for delaying the project. This prompted a detailed response

from the Secretary for Works, Mr Temu, which was forwarded to the

Secretary for Transport in a letter dated 11 January 1991 [EXHIBIT 52]

Chapter 8

61

.8] THE GEOTECHNICAL INVESTIGATION CAUSED A DELAY OF NINE MONTHS

In retrospect, it can be seen that the decision to undertake the geotechnical investigation delayed the planned commencement of the

project by about nine months. After the interdepartmental meeting on 31

July 1990:

It took five weeks for the terms of reference for the consultancy brief to be finalised and invitations for proposals to be dispatched.

The consultants were given six weeks to lodge their proposals.

Six weeks were spent on clarifying and evaluating the proposals.

The recommendation favouring Coffey Partners International was before the Design Priorities Committee and Tenders Board for about a week before a decision was made and announced.

It took Coffey Partners International about five weeks to mobilise its equipment and personnel and commence the

seismic field work.

The actual investigation, including laboratory testing of core samples, took four months to complete (from late January 1991 to late May 1991).

Chapter 8

11

62

[8.9] FINDINGS IN RELATION TO THE GEOTECHNICAL INVESTIGATION

1. The need for the investigation

We do not question the need for the investigation. Irrespective of whether a tunnel or a cut is built through Burns Peak, safety considerations obviously must be paramount.

2. Investigation

However, we are critical of the Department of Works for the delay in making the decision that a geotechnical investigation was necessary.

The decision to go ahead with the Spring Garden Road project was conveyed to the Department of Works in late January 1990. The Department of Works, amongst others, was directed to "formulate detailed plans for the construction of the Burns Peak Road". [EXHIBIT 61] We have already noted the impreciseness of that decision and criticised the National Executive Council for not being more explicit in its requirements. However that does not excuse the Department of Works for its failure to expeditiously implement the decision.

Nor is it an excuse to say that the Department of Works was waiting for an indication from the Department of Transport as to the route of the road.

The geotechnical investigation was a matter that was clearly within the jurisdiction of the Department of Works.

When we raised these matters in our preliminary report, the Secretary for Works responded in the following terms:

Chapter 8

63

'What caused the delay in deciding to perform the Geotechnical Investigation?

Initially it was not projected to perform a further Geotechnical Investigation.

However, Department of Transport wanted to jump in and build the project

without any significant planning, while Works was pushing for as much

planning and advise from specialists as possible. Several times Mr Newberry

(then Principal Engineer Roads) met with the Geological Survey Section of

DME to discuss the project. Of specific concern was the "ICold Fault' which

was known to run right through the 'saddle'. It appears that the requirement

for further investigation was not seriously considered until advised accordingly

by a Senior Engineering Geologist at an inter-departmental working group on

19 July 1990 [see Exhibit 51]—This seems to be the conception of the requirement

for further geotechnical investigation to give a degree of confidence to any

decision regarding 'Open Cut" or 'Tunnel"' [OCKIBIT 263, page 1]

Having considered this response, the Ombudsman Commission retains the

view that the Department of Works should have, by itself, raised the issue

of the need for a geotechnical investigation sooner than it did, since it is

the appropriate Department responsible for such matters in the interests

of the State.

The excavation of the Burns Peak Saddle was clearly going to be a complex engineering task. It was up to the Department of Works to

find
out whether any further geotechnical investigation was necessary as
soon
as possible and take follow-up action. The need for this should have
been
raised at least as early as the interdepartmental meeting on 22 May
1990
(see Chapter 4).

N

The Ombudsman Commission considers that the six month delay in
making the decision to undertake the geotechnical investigation was
unjustifiable. Furthermore, in the absence of a certificate of
inexpediency,
invitations to submit tenders for this work should have been
publicly
advertised – not selectively issued.

Once the decision was made, on 31 July 1990, to undertake the
investigation, there were some further delays but – with the
exception of
the failure to publicly invite tenders – the Department of Works
handled the
matter well from then on.

Chapter 8

64

We note that various proposals were carefully and
methodically evaluated.

The proposal made by Coffey Partners International was
detailed and well
presented [EXHIBIT 48A]. There was a sharp contrast between
the quality
of that document and some of the atrocious documents [eg
EXHIBIT 115]
that were later to be paraded as serious proposals for
construction of the
freeway.

Indeed, the professional way in which the geotechnical
investigation
proposals were evaluated was in stark contrast to the events
which later
led to the execution of the contract for the design, finance
and
construction of the Poreporena Freeway.

THE MINISTER FOR TRANSPORTS DRAFT POLICY SUBMISSION OF AUGUST 1990

[8.10] DECISION TO ADVISE NATIONAL EXECUTIVE COUNCIL OF PROGRESS

Besides the decision to undertake the geotechnical investigation, the other important outcome of the interdepartmental meeting of 31 July 1990 was the decision to advise the National Executive Council of progress on the project, in particular to clarify the fact that it would be impossible to finish the Burns Peak link in time for the South Pacific Games in September 1991. To this end, a document headed "Policy Submission For Members of the National Executive Council" was drafted within the Department of Transport in August 1990. [EXHIBIT 36]

Chapter 8

65

1

8.11] CONTENT OF THE DRAFT POLICY SUBMISSION

This document gave an update of the status of the project as at August

1990, and referred to the decision to undertake a further geotechnical

investigation of the Burns Peak Saddle. The bulk of the document,

however, was devoted to explaining the need for public participation in the

planning process and the preparation of an environmental impact

statement.

The document concluded as follows:

It is recommended that the Spring Garden Road project scope includes the commencement point (Cuthbertson and Stanley Esp. Junction) at the Port Moresby main overseas wharf and termination at the Jackson's AirPort-

2. It is recommended that an Environmental Impact Statement be made of the whole route using the N.S.W. manuals including soil erosion guide for the assessment.

3. It is recommended that the upgrading to the Waigani Road and any other spot improvements along the main arterial network be done as a matter of urgency in preparation for the South Pacific Games in 1991.

4. It is recommended that the savings be immediately identified in the current capital works and studies votes in order to implement these projects.

5. It is recommended that the Council note that advice of the experts for delay in the opening of the Burns Peak link and approve the new scope to be implemented in three stages.

6. It is recommended that this project be developed through involvement of the private sector and the landowners using toll for financing."

.12] WIDE CIRCULATION OF THE DRAFT POLICY SUBMISSION

This document was widely circulated and comments were received from

a number of Government departments. [EXHIBITS 39, 40, 41, 42, 43, 44, 48]

Chapter 8

66

Some departments expressed serious reservations about its recommendations. The Secretary for Finance, Mr Morea Vele, for example, was particularly concerned about the economic viability and the security risk of the tunnel/toll road proposal. [EXHIBIT 42]

The Secretary of the Department of Environment and Conservation, Mr Barney Rongap, pointed out that Papua New Guinea had its own environmental impact legislation – the Environmental Planning Act (Chapter No. 370) – and therefore it was inappropriate to rely on the New South Wales model for this purpose.

The draft policy submission was also sharply criticised within the Department of Transport itself. [EXHIBITS 46, 47] The First Assistant Secretary (Land Transport Division), Mr M Ume, went so far as to say:

'It is very difficult to follow what the Submission is about and perhaps if it is on Burns Peak then more discussion should be on Burns Peak Road itself.*

[8.13] RE-DRAFTING OF THE JULY 1990 DOCUMENT

In January 1991, after receiving the views and comments from various departments, the Department of Transport redrafted the National Executive Council submission. This time, the document was entitled "Information Paper For Members of the NEC: Burns Peak Link of Spring Garden Road". [EXHIBIT 54]

This document also emphasised the need for an environmental impact statement. But it was different to the earlier document in a significant respect: whereas the July 1990 document contained very little discussion of the method of financing the project, the January 1991 document was dogmatic in its assertion that "this project will be constructed under Build, Operate and Take-over (BOT) system". [EXHIBIT 54, page 5, para 2.12]

Chapter 8

67

[8.14] POLICY SUBMISSION AND INFORMATION PAPER NOT PRESENTED TO NATIONAL EXECUTIVE COUNCIL

The Ombudsman Commission was surprised to discover that, despite the time and effort put into the drafting and redrafting of the National Executive Council submission and the wide circulation of the first draft, neither the first nor the second draft submission was actually filed with the National Executive Council.

That is, despite the fact that draft submissions had been circulated for more than six months, the National Executive Council was not fully informed – as it should have been – of progress on the project and the reasons for delay in its commencement.

We note that the Department of Transport complied with the normal administrative requirement to give status reports to the Secretary of the Department of Prime Minister and National Executive Council. [EXHIBITS 6C, 25A, 63A, 77A, 87C & 124A]

However, the Ombudsman Commission considers that, because of the magnitude of the project, the Minister for Transport had an administrative obligation to ensure the National Executive Council was fully and formally advised of the important developments that were taking place. In our view, this duty was not discharged.

[8.15] MINISTER FOR TRANSPORT FAILED TO PROPERLY ADVISE NATIONAL, EXECUTIVE COUNCIL OF PROGRESS

There were some aspects of the August 1990 document which should have been brought to the attention of the National Executive Council as a

Chapter 8

68

matter of priority, particularly the recommendation that the scope of the project be expanded. But this important policy matter was very poorly documented and was eventually put before the National Executive Council, in February 1992, without explanation or justification. The scope of the project, being essentially important, should have been explained and defined in detail for the benefit of the members of the National Executive Council.

The August 1990 document was widely circulated for views and comments. The failure to present it reveals a lack of regard for proper administrative procedures by the Minister for Transport, Mr Temo. He did not appreciate the importance of keeping his colleagues, at the National Executive Council level, fully informed of progress of the project and explaining significant

changes in policy.

[8.16] THE NEED TO KEEP THE NATIONAL EXECUTIVE_COUNCIL FULLY INFORMED

There is a lesson to be learned here by all departments and ministries: if delays are experienced in the implementation of Government policies, the National Executive Council must be advised of the delay and the reasons for it.

Often there are justifiable reasons for projects not being implemented as soon as originally planned. But if the National Executive Council is not advised why there has been a delay, it will naturally be assumed that there are no good reasons for further delay. The National Executive Council will become frustrated and impatient and the environment will be ripe for the making of rash and ill-considered decisions in the end.

Chapter 8

69

All of these things happened in the case of the Spring Garden Road/Poreporena Freeway project.

3.17] SCOPE OF THE PROJECT

The first recommendation of the August 1990 "Policy Submission" was that the scope of the project should be expanded, so as to create a direct link, via Spring Garden Road, between downtown Port Moresby and Jacksons Airport. [EXHIBIT 36, page 5, para 11.1]

However, there was no discussion or analysis – in fact, hardly a mention – of this crucial policy decision in the text of the Submission.

As we emphasised in Chapter 5, the Ombudsman Commission found it extraordinary that in the course of this investigation we were not able to

pinpoint when the decision was made to expand the scope of the project,
from the original proposal to link the two unconnected sections of Spring Garden Road between Konedobu and Hohola.

The way in which this recommendation was added to the document - giving the appearance that it was an afterthought - simply adds to the mystery surrounding that decision.

18] THE BUILD-OPERATE-TRANSFER CONCEPT

Another feature of the January 1991 draft "Information Paper" is that it is the first Department of Transport document which referred to the Build-Operate-Transfer method of financing the project.

Chapter 8

70

However, just as the August 1990 document failed to explain or discuss the pros and cons of expanding the scope of the project, the January 1991 document failed to weigh the pros and cons of different methods of financing the project. [EXHIBIT 54, page 5, paragraphs 2.12 - 2.13]

These failures clearly indicate lack of consultation resulting in the poor drafting of the documents for the National Executive Council.

[8.19] DEFICIENT POLICY MAKING BY THE DEPARTMENT AND MINISTRY OF TRANSPORT

The fact that both the August 1990 Policy Submission and the 1991 Information Paper documents were only in draft form and never actually filed with the National Executive Council means that the Ombudsman Commission cannot be overly critical of their contents.

But, in the absence of evidence to the contrary, these documents support

our conclusion that important policy decisions such as the length of the freeway and the method of financing were being made by the Department and Ministry of Transport without proper analysis or documentation.

SUMMARY OF DEVELOPMENTS DURING 1990

[8.20] PROGRESS DURING 1990

Progress on the project during 1990 can be summarised as follows:

Chapter 8

71

In late January 1990 the National Executive Council directed the Department of Transport, the Department of Works and the Department of Finance & Planning to formulate detailed plans for the project.

Nothing was done until 22 May 1990, when the Minister for Transport chaired an interdepartmental meeting and directed that design of the project be finalised within six months and expressions of interest be publicly invited.

An advertisement inviting expressions of interest was published in June 1990 by the Department of Works.

Around 17 – 20 July 1990, the Department of Transport invited a select group of companies to lodge proposals for the project, but this exercise was incompetently handled, hence there was little response.

On 31 July 1990, it was decided that the Department of Works would arrange a further geotechnical investigation of the Burns Peak Saddle.

A draft policy submission, intended to provide an update on progress, was circulated for comment during August and September 1990. The submission was subsequently revised but never presented to the National Executive Council.

The first version of the submission proposed that the scope of the project be considerably expanded, but there was no documented discussion or analysis of this proposal.

geotechnical
Partners International Pty
sent to selected

On 11 December 1990, the contract for the investigation was awarded to Coffey Ltd of Australia after invitations were companies by the Department of Works.

[8.21] STATUS OF THE SPRING GARDEN ROAD PROJECT AT THE END OF 1990

By the end of 1990:

been fully and
commencement of the project
scope.

The National Executive Council had not formally advised of the delay in or the apparent proposal to expand its

begun, so no decision
route or length of

The geotechnical investigation had not had been made on the tunnel/cut option. No decision had been made on the exact the road.

of financing the
project.

No decision had been made on the method

* * * * *

9. PREPARATION OF SHORTLIST: FEBRUARY 1991

[9.1] FIFTEEN GROUPS HAD EXPRESSED INTEREST
[9.1] FIFTEEN GROUPS HAD EXPRESSED INTEREST

The advertisements in June 1990 inviting expressions of interest in the "Burns Peak/Spring Garden Road Link" had attracted fifteen interested parties. In July 1990, the Department of Transport made an abortive attempt to get some of them to submit firm proposals.

It was later decided that the Department of Works would organise a detailed geotechnical investigation of Burns Peak, so a firm decision could be made on the tunnel/cut option. This investigation began in January 1991 and continued until May 1991. While that investigation was still in progress, a shortlist of prospective developers was prepared.

In this chapter we record our findings as to the preparation of the shortlist.

MINISTER FOR TRANSPORT PREPARES SHORTLIST
MINISTER FOR TRANSPORT PREPARES SHORTLIST

[9.2] WHEN WAS THE SHORTLIST PREPARED AND WHO PREPARED IT?
[9.2] WHEN WAS THE SHORTLIST PREPARED AND WHO PREPARED IT?

The Ombudsman Commission has concluded that the shortlist was prepared in February 1991 by the Minister for Transport, Mr Anthony Temo.

Chapter 9

On 27 February 1991, Mr Temo wrote to the Secretary of the Department of Transport in the following terms:

"My Dear Secretary

A total of 15 (Fifteen) companies have shown or registered expressions of interest to design and construct the Burns Peak Road..

This is under Turnkey arrangement meaning financing will be done by them.

The following Companies have been selected for short list-

1. Outlet Year Limited
2. Sietco
3. Barclay Bros and Maunsell Joint
4. Curtain Bros
5. L.K.N. Construction
6. Kumagai Gumi
7. Sabina Group Consortium

Please inform them respectively by way of fax and organise a bid walk in 3 weeks from 27/2/91." [EXHIBIT 631

[9.3] A LATE ADDITION TO THE SHORTLIST

On 28 March 1991, the Minister for Transport wrote another letter to the Secretary for Transport:

'My dear Secretary

I refer to my letter dated 27 February, 1991 in which I short listed a number of companies for the Burns Peak Project.

Chapter 9

75

I now wish to include the following on the short list-
Tasman Pacific International
Please inform the Company accordingly" [F3CIBB1T 69]

[9.4] THE MINISTER PREPARED THE SHORTLIST WITHOUT ADVICE OR CONSULTATION

In his response to our preliminary report Mr Temo emphatically denied that he had prepared the shortlist. He said the letter to the Secretary for Transport of 27 February 1991 was simply a list of companies which had sent written expressions of interest to his office. He said his staff in the Ministry did not understand the term "shortlist":

'The various expressions of interest in the Burns Peak Road project by different companies was sent by way of letter or verbal to 3 different place:

(a) Department of Works
(b) Department of Transport
(c) Chairman of Ministerial Committee and Minister for Transport.

Some companies about 15 contacted my office. About half of them verbally and the other half by way of letter or fax.

It was the Department of Transport in consultation with Department of Works that prepared the short list not me or my office.

Department of Works and the Department of Transport did their short list and Chairman of the Ministerial Committee did their own short list"

[EXHIBIT 257, page 1]

With due respect to Mr Temo, the Ombudsman Commission cannot accept what he says about the preparation of the shortlist. The terms of his letter to the Secretary for Transport on 27 February 1991 were quite clear: he advised that seven companies "have been selected for shortlist". There is no evidence the companies on the Minister's list had written directly to him, rather than the Department of Transport.

Chapter 9

76

The Ombudsman Commission is satisfied that neither the Department of Transport nor the Department of Works had any involvement in the preparation of the shortlist. The Minister prepared the shortlist without consulting either Department.

[a5] MINISTERS SHOULD NOT BE INVOLVED IN IMPLEMENTATION MATTERS

The Minister for Transport's preparation of the shortlist in February 1991 was defective administration in a number of respects.

First, there was no need for a shortlist to be prepared. The interested parties had only submitted expressions of interest in the project and had not been given the opportunity to submit firm proposals, so preparation of a shortlist was premature.

Even if it had been an appropriate time to prepare a shortlist, this job should have been done by officers of the Department of

Transport and/or
the Department of Works. It is not the function of a Minister
to prepare a
shortlist for a public works project.

Too often in Papua New Guinea, Ministers make unilateral
decisions without
calling on their qualified and experienced Departmental
officers for advice.

This is very bad. If Ministers cut themselves off from their
Departments -
by always giving directions, rather than asking for advice -
it is inevitable
they won't always have the best information before them on
which to make
decisions.

It was very naive of the Minister for Transport to believe he
had the
necessary technical knowledge to prepare a shortlist of
developers without
the advice of his Department.

Chapter 9

77

0

Whenever a Minister makes an important decision in this way,
it inevitably
leads to suspicion about his motives. People start to ask
questions. Why
were some companies selected for the shortlist and others left
out? Did
some companies make the shortlist because the people running
them
were friends or wantoks of the Minister? Was anyone bribed? Et
cetera.

The only way the People can have confidence in their
Government
departments and Ministers is if normal, established procedures
are
followed.

The decision-making process must be above suspicion.

[9.6] SOME COMPANIES WERE SHORTLISTED WITHOUT JUSTIFICATION

The Ombudsman Commission makes the following findings in
relation to
the eight groups shortlisted by the Minister for Transport:

1. Outlet Year Ltd

This Hong Kong-based company had not lodged an expression of interest.

It first became interested in the project in February 1991, when the Minister

for Transport travelled to Taiwan and Hong Kong and was entertained by the company's officers and its associates (see Chapter 12).

As a result of the Minister's visit, the company's Managing Director, Mr

Leung Keung, wrote a letter dated 12 February 1991 to Prime Minister

Namaliu. Outlet Year Ltd offered to "design and build Southern Highlands

Kikori Road and Burns Peak Road in Port Moresby' and "invest up to US dollars 5 billion in Papua New Guinea." [EXHIBIT 57]

Chapter 9

78

On 13 February 1991, Outlet Year Ltd wrote similar letters addressed to:

"Hon. Anthony Temo, Minister for Transport or Hon. Ted Diro, Deputy Prime Minister, Acting Transport Minister". [EXHIBITS 59 & 60]

Soon after that, on 19 February 1992, Mr Diro wrote to the Secretary for

Transport, advising that he had received advice from Mr Temo that Outlet

Year Ltd be "included in the pre-qualification for all tenders in Erave-Kikori

and Burns Peak roads in Port Moresby". Mr Diro directed the Secretary

to take "necessary actions" in relation to the "pre-qualification" of Outlet

Year Ltd. [EXHIBIT 61]

The Ombudsman Commission was to discover in the course of this investigation that the Minister for Transport's trip to Hong Kong, where he

held discussions with Outlet Year Ltd, was paid for by associates of that

company. This is wrong.

The shortlisting of this particular company was therefore improper.

It should also be noted that the Deputy Prime Minister does not have power to give directions to a Departmental Head, unless such a power

is expressly given by an Act of the Parliament or some other law. The office of Deputy Prime Minister is created by Section 2 of the Prime Minister Act (Chapter No. 27 of the Revised Laws). However it does not carry with it any greater power of direction and control than those held by other Ministers. The purpose of the office of Deputy Prime Minister is to enable a Minister to step into the shoes of the Prime Minister whenever the Prime Minister is unable to perform the duties of his office or any of the other situations in Section 143 of the Constitution exist.

Chapter 9

79

That is, the person holding the office of Deputy Prime Minister is not the "second-in-charge" of the Ministry and does not have any powers of direction and control by virtue of holding that office. His powers and responsibilities are at all times constrained in accordance with Section 148 of the Constitution (see Chapter 39).

2. Sietco

The company known as Sietco (PNG) Pty Ltd is a PNG off-shoot of a government agency in the People's Republic of China, known as the "China Sichuan Corporation for International Techno-Economic Co-operation". Neither of these groups had lodged an expression of interest.

Sietco is interested in road construction projects in the Southern Highlands Province and, during 1991, the company had a very close business connection with the Minister for Transport, Mr Temo. In fact, just a few weeks before directing that Sietco be included on the shortlist, the Minister's family company, Outskirts Construction Pty Ltd, had entered into a "partnership agreement" with Sietco, whereby the two companies agreed to jointly invest in Papua New Guinea and set up a "partnership enterprise"

to undertake "construction and maintenance of roads and some other civil engineering projects as contractor or sub - contractor". This agreement was signed by the Minister, on behalf of Outskirts Construction Pty Ltd.

[EXHIBIT 55B]

The closeness of the relationship between the Minister and Sietco is further demonstrated by the fact that only five days before including the company on the shortlist, the Minister had visited China and signed an agreement with Sietco's Chinese parent company, which was intended to clarify the partnership contract signed just a couple of weeks before in Papua New Guinea. [EXHIBITS 62k 62B]

Chapter 9

80

When the Minister was interviewed by the Ombudsman Commission, he was asked whether he thought it improper a company he was so closely involved with, was asked by him to lodge a proposal for construction of the freeway. He did not deny his close relationship with Sietco but stressed that, as soon as the company had expressed an interest, he had instructed that it not be further considered because it might not look right.

But, if that is the case, why did the Minister put the company on the shortlist?

The Ombudsman Commission cannot accept Mr Temo's explanation and is forced to conclude that his decision to shortlist this company was improper.

3. Barclay Bros and Maunsell Joint

Both of these groups had lodged expressions of interest -but not as joint venturers. Maunsell Consultants were linked with Barclay Bros in 1988

(see Chapter 2), but had actually lodged a joint expression of interest with

Boulderstone Hornibrook in response to the June 1990 advertisement.

The Minister's decision to link Maunsell with Barclay Brothers therefore did not make sense.

4. Curtain Bros

This company – though it ultimately became closely involved with the consortium selected to undertake the project – had submitted the expression of interest with the least amount of detail.

Chapter 9

81



While it is an established construction company, with experience in Papua

New Guinea, we query its inclusion at the expense of other companies which had expressed their interest in the project in a more active and detailed manner.

5. LKN Construction

This Singapore-based company, represented by LKN (PNG) Pty Ltd, had lodged a two page expression of interest in July 1990.

6. Kumagai Gumi

This Japanese company had lodged a joint expression of interest with Kinhill Kramer Pty Ltd in 1990. The company had shown interest in the project for some time.

7. Sabina Group Consortium

Peter Chen and Partners, of Brisbane Australia, had lodged an expression of interest on behalf of the Sabina Group Consortium, in July 1990. A brochure, giving details of the consortium's previous activities, was enclosed, but otherwise no details concerning the Spring Garden Road project were provided.

8.. TagitaL.PagifiCalea

This PNG company is essentially a K2.00 shelf company, which operates a small consultancy business in Port Moresby. It was added to the shortlist one month late. At the relevant time, its 100% shareholder was Mr Sam Pepena.

The Ombudsman Commission also became aware that the Deputy Clerk of the National Parliament, Mr Ano Pala, had a close association with the company.

Chapter 9

82

Tasman Pacific International has few assets and no employees. It has no experience in road construction or design. It had not lodged an expression of interest.

The company later joined with the Australian company Cooks Mitchell Peacock Stewart Pty Ltd to lodge a formal proposal for the project.

However, in March 1991, there was little justification for Tasman Pacific International being on the shortlist at the expense of other established PNG companies.

[9-7] PREPARATION OF THE SHORTLIST WAS IRRESPONSIBLE AND QUESTIONABLE

Three of the groups on the shortlist had not submitted an expression of interest. Of these, the Ombudsman Commission discovered that the Minister for Transport, Mr Temo, had direct negotiations with two of them (Outlet Year and Sietco) outside Papua New Guinea, just a couple of weeks before he gave the shortlist to the Secretary for Transport. The other one – a Port Moresby shelf company with no experience in road construction or design, Tasman Pacific International – was added to the

shortlist one month later.

Question-marks also surround the decision to put companies such as

Curtain Bros and Sabina on the shortlist, because their expressions of interest were flimsy compared with the carefully documented expressions of interest submitted in July 1990 by established PNG consulting firms such as Cardno & Davies and Maunsell Consultants.

Chapter 9

83

In the opinion of the Ombudsman Commission the most favourable view that can be taken of the Minister for Transport's shortlist is that it was unfair and arbitrary. But unfortunately the way in which it was prepared leaves room for suspicion that the Minister for Transport was compromised.

Whether this was, in fact, the case, the Ombudsman Commission cannot say, because we found no hard evidence of bribery.

However, the evidence shows that, if the Minister was not compromised, he was at least naive and irresponsible in believing that he alone – and not the officers of the Department of Transport or the Department of Works – the officers of the Department of Transport or the Department of Works – had the necessary technical expertise to decide which companies were to be shortlisted.

VENTS AFTER PREPARATION OF SHORTLIST

.8] WHAT ACTION WAS TAKEN FOLLOWING PREPARATION OF THE MINISTER'S SHORTLIST?

Shortly after preparation of the shortlist, a standard letter was drafted within the Department of Transport, over the signature of the

Secretary for
Transport, Mr Amini.

Copies of this letter - dated 8 March 1991 - were apparently intended to be dispatched to each of the shortlisted companies, explaining the information to be contained in their proposals.

Chapter 9

84

The letter read, in part:

Your company has been short-listed for the above-mentioned project and you are hereby requested to send K40.00 ... for cost of reproducing the Terms of Reference and preliminary 'Economic' and 'Financial Assessment' reports plus air mail to your address if you do not have an Office here in Port Moresby -

Your proposal should contain the following information:-

Financial Plan

1.1 Traffic Forecasts

anticipated growth of Pori Moresby with your estimate of timing for maximum capacity,

1.2 Design, construction and other associated costs for suggested alternative schemes must be on a fixed prize [sic] basis.

These conceptual designs should estimated Bills of Quantities for our guide only. The estimate of total project cost must include the engineering

payable to Government, elements of the work as well as costs
occupied if and when needed, including a land premium for area
project company for this An estimate cost of setting up the
prior to opening _11 project and training the operatives

[EXHIBIT 64, page 1]

The letter concluded by stating:

It must be pointed out very clearly that all
financing will be your responsibility." [EXHIBIT 64, page 3]

[9.9] MISSING DOCUMENTS

There are some perplexing things to note about the
standard letter drafted
by the Department of Transport. In particular, there are
no copies of it on
any Department of Transport files that the Ombudsman
Commission
inspected: there is simply no Departmental record that
these letters were
sent, or even that they were drafted.

Chapter 9

85

We only became aware of their existence when the former Minister for
Transport, Mr Temo, was summoned to appear before the Commission
and produce relevant documents. Mr Temo had fourteen copies of the
letter in his possession, addressed to the following companies:

1. Barclay Bros (PNG) Pty Ltd 1
2. Cardno & Davies PNG Pty Ltd
3. Coecon Pty Ltd

4. Connell Wagner (Old) Pty Ltd
 5. Curtain Bros (PNG) Pty Ltd
 6. Frame, Harvey and West
 7. Juara Ltd
 8. Kumagai Gumi/Kinhill Kramer
 9. LKN (PNG) Pty Ltd - •
 10. Maunsell Consultants PNG
 11. Ove Arup & Partners Pacific Pty Ltd ■
 12. Robert Laurie Pty Ltd
 13. Sabina Group Consortium
 14. Sietco (PNG) Pty Ltd •
- [EXHIBITS 64, 64B - 64N] •

I

We also became aware that a copy of the same letter – dated 28 March 1991 – was sent to Tasman Pacific International, the company that was a late addition to the Minister's shortlist. There was also no copy of this letter in the Department of Transport's files. [EXHIBIT 68B]

Chapter 9

86

[9.10] FURTHER MYSTERY SURROUNDING THE LETTERS OF MARCH 1991

Each of the letters dated 8 March 1991 began by stating: "Your company has been short-listed for the above-mentioned project" (but the letters in fact had no title). This was very strange. The Minister had short-listed seven companies for the project on 27 February 1991. Why were fourteen companies being advised by a letter dated 8 March 1991 that they had been short-listed? This simply did not make sense.

Upon discovering the existence of the fourteen letters dated 8 March 1991, each of which bore the signature of the Secretary for Transport, the Ombudsman Commission conducted interviews with

representatives of
four Port Moresby-based companies, among the list of
fourteen:

Barclay Bros (PNG) Pty Ltd
Maunsell Consultants PNG
Cardno & Davies (PNG) Pty Ltd
Frame Harvey and West.

Some companies did not receive the Secretary's letter
Each of the persons interviewed had knowledge of the Spring
Garden Road project and their company's interest in it. They each
stated that they had never seen the letter of 8 March 1991 before. Not only
that, they had never received acknowledgment of their company's expression
of interest in the project, let alone been advised that their company had
been short-listed.

Chapter 9

87

9.11] OTHER COMPANIES DID RECEIVE THE LETTER

Some companies did receive a copy of the letter of 8 March
1991. A representative of LKN Construction (PNG) Pty Ltd, for
example, was able to confirm, by checking the company's files, that the letter
had been received. [EXHIBITS 66B, 70]

It is also likely that Sabina Ltd, of Brisbane Australia,
received a copy of the letter. [See the letter from Sabina to Mr Amini of 8
April 1991, which refers to a letter dated 18 March 1991: EXHIBIT 71]

9.12] THE SECRETARY FOR TRANSPORTS EXPLANATION

Mr Amini's explanation of the confusion over the letters of March 1991 was as follows:

'Normally for a common letter meant for more than one addressee, the original is signed and then photocopied for the different addressees to be typed on. In so doing, the clerks were missing out making additional copies for files. In the end, only one copy was left for filing. This practice was discovered and corrected. As far as I am aware, all those short-listed were sent an invitation. Some were by facsimile. To suggest that such a simple mistake could not occur is just being unrealistic. This is not defective administration.' [EXHIBIT 254, para 71

(9.13] DEPARTMENT OF TRANSPORT GUILTY OF DEFECTIVE ADMINISTRATION

We accept Mr Amini's point that simple mistakes can occur in any organisation. But we find it difficult to understand why the Department of Transport files contain no record at all of the existence of these letters. And why were fourteen letters drafted, when only seven companies had been shortlisted? Why did some companies not receive the letter? Why is there no record of the existence of the Tasman Pacific International letter in the Department's files?

Chapter 9

88

If no proper records are maintained, especially in projects such as this, how can the decision-making process be properly put in place and justified?

One of the themes of this report is that unequal treatment was given to companies which had expressed interest in the project. Some were treated very favourably, whereas others did not even have their expressions of interest acknowledged.

There are too many unanswered questions surrounding the letters of March 1991 to dismiss the above matters as a minor administrative bungle. We are surprised that the Minister for Transport had copies of the letters and not the Department of Transport – though they were signed by the Secretary for Transport.

We can only conclude that the Department of Transport's failure to retain any record of these letters and the failure to ensure that all the letters were sent was a serious case of defective administration, which had the effect of denying a number of companies the opportunity of making a bid for the project.

[9.14] THE STATE OF THE SHORTLIST IN MARCH 1991

In light of the above evidence, the situation with the Minister's shortlist, as at March 1991, can be summarised as follows:

In February 1991 the Minister short-listed seven companies, two of which had not lodged expressions of interest, without the advice of his Department.

Chapter 9

89

One month later, the Minister added another company to the shortlist, even though it also had not lodged an expression of interest. This company had no experience in road design

or construction. It was advised in writing it had been shortlisted, but there is no copy of the letter in the Department's files.

In the meantime, standard letters advising fourteen companies they had been short-listed, were signed by the Secretary for Transport.

However, there is no record of the existence of these letters in the Department's files.

At least four of the fourteen letters were not received.

At least one of the companies on the Minister's shortlist – Barclay Bros (PNG) Pty Ltd – did not receive the letter.

This was all quite bizarre. However, even stranger things were to happen in the months ahead. •

[9.15] THE FATE OF THE SHORTLISTED COMPANIES

As at the end of March 1991, the Minister had shortlisted eight consortiums for the project. However, when the Ministerial Committee on Spring Garden Road met on 18 July 1991, it had a shortlist of five:

Chapter 9

90

Topbay Investment Limited & China Ample Development Ltd, the Second Surveying & Designing Institute, Ministry of Railways, People's Republic of China, together with Moore's Investment Group.

Kumagai Gumi-Kinhill Kramer consortium.

Periquan's International Resources Pty Ltd and Pty Ltd Asia Management Consultants Centre.

Tasman Pacific International and Crooks Mitchell Peacock Stewart Pty Limited.

McConnell Dowell.

So, what Only two of these were on the original shortlist of eight.
And happened to the six groups that disappeared from the list?
And where did the three new ones come from?

[9.16] THE COMPANIES WHICH LEFT THE SHORTLIST

The Ombudsman Commission makes the following observations
in relation to the six companies which disappeared from the
shortlist:

1. Outlet Year Ltd – in June 1991 it was "substituted" by
Topbay Investment Ltd, another Hong Kong-based company (see
Chapter 12).

Chapter 9

91

III

2. Sietco (PNG) Pty Ltd – there is no evidence that
this U company was advised it was on the shortlist. In
fact, there is no evidence on the Department of Transport
files of any correspondence from or to this company.

III

3. Barclay Bros (PNG) Pty Ltd/Maunsell Consultants
PNG Pty Ltd – neither of these companies were advised
they had la been shortlisted.

FE

4. Curtain Bros – there is no evidence that either
Curtain Bros (PNG) Pty Ltd or Curtain Bros (Old) Pty Ltd were
advised II they had been shortlisted.

Ltd wrote II

5. LKN Construction – on 8 April 1991 LKN (PNG) Pty

it was to the Department of Transport and advised that withdrawing its expression of interest. [EXHIBIT 70]

6. Sabina Group Consortium – this group was definitely aware it had been shortlisted, but was unable to meet the deadline for submission of proposals. [EXHIBITS 76, 82, 83]

[9.17] THE THREE NEW GROUPS "ADDED " TO THE SHORTLIST

The Ombudsman Commission makes the following observations in relation to the three groups included in the July 1991 shortlist, but not in the March 1991 shortlist:

1. Topbay Investment Ltd – this company replaced Outlet Year Ltd, but essentially the same group of Asian businessmen was involved (see Chapter 12).

Chapter 9

92

2. Periquan's International Resources Pty Ltd – this company joined with the Port Moresby consulting firm, Frame Harvey formal West & Maso, and submitted a late proposal. But no expression of interest had been lodged before this.

3. McConnell Dowell – this Brisbane-based company only heard about the project in April 1991. On the basis of a half-page fax to the Department of Transport and two telephone Secretariat, Mr Hitolo, a letter was dispatched to the company, advising it had been shortlisted. [EXHIBITS 74, 75, 77]

SUMMARY OF PREPARATION OF SHORTLIST

[9.18] UNEQUAL TREATMENT WAS GIVEN TO COMPANIES WHICH HAD EXPRESSED INTEREST IN THE PROJECT

There was a great disparity in the treatment given to the various companies that had expressed interest in the Spring Garden Road project since July 1990:

Some companies were shortlisted, even though they had not lodged an expression of interest (e.g. Outlet Year Ltd, Topbay Investment Ltd, Tasman Pacific International and McConnell Dowell) whereas others which had lodged detailed expressions of interest in July 1990 were excluded and never received acknowledgement of their interest (e.g. Cardno & Davies and Maunsell Consultants).

Chapter 9

93

Some shortlisted companies were allowed extensions of time to submit proposals [see EXHIBITS 67, 72, 76, 78, 79, 81, 83, 93, 94] whereas others (e.g. Barclay Bros) were not even advised they had been shortlisted.

The result of this arbitrary and unsatisfactory process was that, by July 1991, a shortlist of five had been prepared for the consideration of the Ministerial Committee on Spring Garden Road.

* * * * *

Chapter 9

94

10. TERMS OF REFERENCE FOR THE PROJECT: EARLY 1991

[10.1] PURPOSE OF THE TERMS OF REFERENCE

In early 1991, a document was drafted within the Department of Transport, entitled 'Terms of Reference-Spring Garden Road'. The purpose of this document was to describe the requirements of the Department of Transport and assist potential developers in the formulation of proposals.

[EXHIBIT 55]

In the Ombudsman Commission's view, the document was seriously flawed and very confusing. It failed to specify the scope of the project and its technical parameters. The timing of the document's release, its limited circulation and its stipulation concerning Build-Operate-Transfer financing are also matters for concern.

[10.2] THE SCOPE OF THE PROJECT

We reported in Chapter 5 that, despite extensive investigations, we were never able to pinpoint who made the decision to extend the scope of the Spring Garden Road/Poreporena Freeway project from the original plan to link Konedobu, through Burns Peak, with Hohola.

Nor could we determine when the decision was made that a freeway should be built all the way from downtown Port Moresby to Jacksons Airport.

Chapter 10

95

The problem of defining the scope of the project was exacerbated by the Terms of Reference document. Whereas the advertisements published by the Department of Works in June 1990 had specified (arbitrarily) that the new road would link Konedobu and Waigani Drive, the Department of Transport's Terms of Reference simply spoke in vague terms such as "the Spring Garden Road Link near the Burns Peak".

[10.3] WHAT DOES THE "SPRING GARDEN ROAD UNK" MEAN?

This term can mean at least three things:

a link between Champion Parade Konedobu and Wards Road Hohola; or

a link between Champion Parade Konedobu and Waigani Drive; or

a link between Champion Parade Konedobu and Boroko Drive. [See the map at the end of Chapter 2]

All of the above alternatives would "link" various unconnected sections of Spring Garden Road, which runs from Champion Parade Konedobu to Boroko Drive, Gordons.

The Terms of Reference document was seriously deficient in its failure to specify exactly what was required of prospective developers. The qualifying words which appear in the document - "near the Bums Peak" - suggest the scope of the project was intended only to be the link between Champion Parade and Wards Road.

Chapter 10

96

But if that was the case, why did the State eventually enter into a contract for the construction of a freeway going all the way from downtown Port Moresby to Jacksons Airport?

[10.4] THE TERMS OF REFERENCE DEFIED COMMON SENSE

It seems common sense that when the Government commissions the building of a road, one of the first things to decide is where the road is going to go and how long it should be. How can a company lodging a proposal to build a road estimate the total project cost (inclusive of design and construction) when it doesn't know where the road is supposed to go or how long it is supposed to be?

In his response to our preliminary report, the Secretary for Works, Mr Hitolo, who was responsible for the project for a considerable time in the Department of Transport, stated that the scope of the project was deliberately not specified in the Terms of Reference document, because this was to be a Build-Operate-Transfer project:

"Government's role is purely to create the business atmosphere conducive to the private company to become interested in investing on a scale and scope it believes it can get a profitable return." [EXHIBIT 265, page 3]

Mr Hitolo said it would have been premature to specify the scope of the project in the Terms of Reference. He also suggested that the Ombudsman Commission did not understand the Build-Operate-Transfer

concept.

By contrast, when the Secretary for Transport, Mr Amini, responded to our preliminary report, he maintained that the detailed scope of the project was contained in the Terms of Reference document. However, when asked to point to the section of the document which specified the scope, Mr Amini was unable to do so. [EXHIBIT 254, page 4]

Chapter 10

97

Quite dearly, the Terms of Reference did not specify the scope of the Spring Garden Road project. It did not state where the road was supposed to begin and end. We reject Mr Amini's claim that it did. We also reject Mr Hitolo's claim that it was unnecessary for the scope of the project to be specified.

The Ombudsman Commission concludes that the Terms of Reference document was vague and confusing, especially because of its failure to specify what was required of prospective developers.

The inadequacy of the document is borne out by the fact that, despite its insistence that proposals be based on Build-Operate-Transfer financing, no such proposal was ever lodged with the Department of Transport.

[10.5] THE TERMS OF REFERENCE ALSO FAILED TO SPECIFY THE TECHNICAL PARAMETERS OF THE PROJECT

Another serious defect in the Terms of Reference document was its failure to specify the fundamental technical parameters of the

project. This point
was made by the World Bank Mission which visited Port Moresby
in
September 1991 to monitor the Spring Garden Road project:

Mu technical parameters are left =claw as to whether Papua
New Guinea

was seeking a two or four lane road, one or two tube
tunnels, and whether the road surface would be of
compacted gravel or asphalt concrete, and whether an open
cut or tunnel was desired.'

road surface would be of compacted gravel or asphalt
concrete, and whether an open cut or tunnel was desired.'

[EXHIBIT 111, at page 1 and see generally Chapter 15J

[10.6] TIMING OF THE RELEASE OF THE TERMS OF REFERENCE

The Terms of Reference document was first released in March
1991. This
was before the results of the geotechnical investigation
undertaken by

Chapter 10

98

Coffey Partners International was completed. However, the
interdepartmental meeting on 31 July 1990 had decided that
firm
proposals would not be called for, until after that
investigation was
complete (see Chapter 7).

The Ombudsman Commission therefore seriously questions the
timing of
the release of the document

0.7] LAVED CIRCULATION OF THE TERMS OF REFERENCE

An even more serious concern is the fact that the Terms of
Reference
document was only circulated to a limited number of
developers. It was
only those companies shortlisted by the Minister for
Transport, Mr Temo,
in February/March 1991, that were eligible to receive a

copy.

We have already commented on the unsatisfactory and arbitrary way in which that shortlist was prepared (see Chapter 9). It would have been far better to publicly advertise the availability of the Terms of Reference, rather than selectively offer it to only a few companies.

Whenever investment opportunities are offered to companies "selected" by a Minister, there are bound to be suspicions of corruption. The best way to avoid this is to give all interested companies an equal opportunity to submit proposals through public advertisements.

.8] BUILD-OPERATE-TRANSFER FINANCING

A feature of the Terms of Reference document. is that it dictated that the project be undertaken using the Build-Operate-Transfer (BOT) method of financing.

Chapter 10

99

The Ombudsman Commission has been unable to establish how or, even, when this important policy decision was made, because the Terms of Reference document is undated and the Department of Transport files did not disclose this information. It was certainly never the stated policy of the National Executive Council that the project be financed in this way.

In the absence of such a policy directive, the Ombudsman Commission expected to find some evidence that, before stipulating the project would be financed in this way, the Department of Transport had carefully and methodically considered all the policy options available and formally made a decision to invite proposals on the basis of Build-Operate-Transfer financing. However, our examination of their files revealed that Build-Operate-Transfer financing was addressed only in the following documents:

the Information Paper that was supposed to be presented to the National Executive Council, but which never was (see the final part of Chapter 8); and

the Terms of Reference document. [Exhibits 36 & 55]

Neither document could satisfy us that the decision concerning Build-Operate-Transfer financing for the Spring Garden Road project had been made carefully or competently.

In our preliminary report we suggested that the Department of Transport had failed to make a careful, reasoned and properly documented decision on financing the Spring Garden Road project. The Secretary for Transport, Mr Amini, responded by stating:

Chapter 10

100

'The concept of BOT was debated at length at our Executive Meetings. It was introduced by Mr Hitolo. I do not encourage new concepts which are not fully assessed for implications and impacts to be put before the NEC.'
[EXHIBIT 254, page 31

However, when Mr Amini was pressed on this issue, the only evidence he could provide was the minutes of a Department of Transport Executive Staff Meeting on 14 September 1990. The minutes stated:

"Director (Policy Secretariat) said he will prepare a submission to NEC for discussion when considering plans for the project on the BOT system. HOT stands for Build, Operate and Takeover.

The system simply means that the company awarded the contract will build the road (project) and operate it in a bid to recover costs and

expenses. Then hands
the mad back to National Government." [EXHIBIT 45A, page 4]

Mr Amini also provided copies of two papers presented at a Transport Sector Seminar held in Port Moresby in 1991, which addressed the issue of Build-Operate-Transfer financing. One of them was prepared by Mr Hitolo, then Director of the Policy Secretariat in the Department of Transport, entitled "Spring Garden Road BOT Concept". Mr Hitolo stated:

'The main reason to get Spring Garden Road to be proposed for financing through private sector was the fact that the Government's intention for this project to attract aid was not successful despite its good economic justifications. Hence the Government, decided to get private funding by directing the Department of Transport to assess the turn-key concept as the basis for implementing the project. This simply meant that a particular company be selected on a competitive basis and get it to arrange a private loan on behalf of the Government. As the general policy and understanding was to use the private sector for the total financing, construction and operation so that efficiency in the private sector may be tapped in the provision of infrastructure services.

In actual fact the BOT (Build, Operate and Transfer) or the alternative B00 (Build, Own and Operate) systems were implied in the above-mentioned policy. Hence the concept of BOT system came into consideration followed by an invitation for interests in this sort of scheme. Unfortunately, the concept was not very well known in this country and therefore the responses were not satisfactory.' [EXHIBIT MA, page 303]

The Ombudsman Commission does not dispute Mr Hitolo's expertise. Nor do we take issue with the Build-Operate-Transfer concept, as such. As an innovative method of financing it deserved to be closely and widely considered.

What we are critical of is the Department of Transport's failure to carefully consider all the financing options available and its failure to formulate a policy and advise the Minister for Transport to table it before the National Executive Council so that a formal Cabinet policy decision could be made on this important issue.

10.9] SUMMARY OF THE TERMS OF REFERENCE: INCOMPETENT ADMINISTRATION BY THE DEPARTMENT OF TRANSPORT

There were many unsatisfactory aspects of the Terms of Reference document prepared by the Department of Transport in early 1991:

As a document which was supposed to indicate to developers what was required in their proposals, it was very vague. It did not mention where the road would go, or how long it would be.

It also failed to specify basic engineering aspects of the project.

It was prematurely released.

It dictated that the proposals incorporate Build-Operate-Transfer financing, however no formal decision in favour of this method of financing had been made by the Department of Transport, the Minister for Transport or the National Executive Council

It was made available - unfairly - to only a selected group of companies.
In the opinion of the Ombudsman Commission the preparation and distribution of this important - but defective - document was another example of incompetent administration by the Department of Transport.

* * * * *

Chapter 10

11. THE MINISTERIAL COMMITTEE MEETING OF 18 JULY 1991

[11.1] PERSONS PRESENT AT THE MEETING

The Minister for Transport Mr Anthony Temo convened a meeting of "the Ministerial Committee on Spring Garden Road" in his Parliamentary office on 18 July 1991. Present at the meeting were:

Mr Temo, MP;

the Minister for Lands and Physical Planning, Sir Hugo Berghuser MP;

the Minister for Works, Lukas Waka OBE, MP;
the Parliamentary Secretary for Finance and Planning,
Thomas Negints MP;
the Head of the Policy Secretariat in the Department of
Transport, Lohia Hitolo; and
the First Assistant Secretary (Planning & Research) in
the Department of Transport, Henry Paraket.

Chapter 11

104

[11.2] WHAT WAS THE PURPOSE OF THE MINISTERIAL COMMITTEE MEETING?

The purpose of the meeting was to select a developer to undertake the Spring Garden Road project. As a result of the arbitrary and unsatisfactory shortlisting process between February and July 1991 (considered in Chapter 9) five consortiums were to be considered.

THE MINISTERIAL COMMITTEE ON SPRING GARDEN ROAD

[11.3] STATUS OF THE MINISTERIAL COMMITTEE

Before we address the deliberations of the Ministerial Committee, there is one important point to note: in the course of its investigation the Ombudsman Commission was unable to find any document showing how or when this Committee was established or who its members were.

The Secretary to the National Executive Council testified there was no record of the establishment of such a committee and the Secretary for Transport said his Department had also tried in vain to find some record of the Committee's existence.

When we put the issue to Mr Temo, he was adamant that the Committee had been duly authorised by the National Executive Council to report back to it on the preferred method of implementing the project. He could not, however, provide any details of the Committee's establishment.

Chapter 11

105

Mr Temo stated:

"My mind is quite clear that there was a NEC decision which authorised the Minister for Transport to be Chairman of the Ministerial Committee on infrastructure. Also the same Ministerial Committee used NEC decision to bypass normal tender procedures to construct Enga Highway Stage 2 or 3. If NEC did not make this decision), Porgera mine would not have started production on time because normal department tender procedures normally takes a very long time even the normal political will does not work.

One should understand that if there was no such Ministerial Committee established why was NEC recognising and expecting Ministerial Committees recommendations?

Therefore obviously I acted with some lawful authority even if we are unable to get the records. See letter from NEC Secretary dated 19 November 1992'

[EXHIBIT 257 para 2]

When we questioned Sir Hugo Berghuser on this point, he stated that the

Committee had been established at his initiative. But Sir Hugo, also, could

not point to any formal record of its existence.

[11.4] THE MINISTERIAL COMMITTEE ACTED WITHOUT AUTHORITY

The Ombudsman Commission concludes that the "Ministerial Committee

on Spring Garden Road" was never formally established by the National

Executive Council and had no authority to make decisions binding or

purporting to bind the National Executive Council.

At this juncture, we note that Section 149(4) of the Constitution provides:

'Except where the contrary intention appears, nothing in this Constitution prevents the powers, functions, duties or responsibilities of the [National Executive Council] from being exercised, as determined by it, through a Minister.'

Thus, the Constitution does allow the powers of the National Executive

Council to be delegated to Ministers.

Chapter 11

106

But this does not mean that any group of Ministers can appoint themselves to "committees" of the National Executive Council and clothe that "committee" with powers or status.

A Ministerial Committee – even one which only intends to make recommendations to the National Executive Council – must have its powers and responsibilities properly delegated and controlled by the National Executive Council under Section 149(4) of the Constitution before it makes any decisions or holds itself out as having any powers or responsibilities.

This did not occur in relation to "the Ministerial Committee on Spring Garden Road". It therefore had no lawful status or power or authority.

[11.5] WHAT DOCUMENTS WERE CONSIDERED AT THE "MINISTERIAL COMMITTEE" MEETING?

The Head of the Policy Secretariat in the Department of

Transport, Mr

Hitolo, brought the following documents to the meeting on 18 July 1991, for the consideration of the Ministerial Committee:

the proposals of the five shortlisted consortiums; and
a document dated 17 July 1991 entitled "Financing the Construction of the Spring Garden Freeway".

Chapter 11

107

LOSS OF DOCUMENTS

[11.6] MOST OF THE FIVE PROPOSALS HAVE BEEN LOST

It has been very difficult for the Ombudsman Commission to ascertain exactly which proposals the Ministerial Committee had before it. By the time we conducted our investigation, most of the proposals had been lost.

The investigation was also hampered by the fact that the meeting is poorly documented in the files of the Department of Transport. In fact, the only evidence of the meeting taking place is a letter from the Minister for Transport to the Secretary for Transport asking him to attend the meeting and a one-page memorandum of the decisions made at the meeting.

[EXHIBITS 97,102]

[11.7] HOW WERE THE PROPOSALS LOST?

Mr Hitolo testified that at the end of the meeting he had left all five proposals in the Minister for Transport's office at the request of Sir Hugo Berghuser, who said that he wanted to study them further before making a decision.

When Sir Hugo was questioned on this point, he agreed the proposals had been left, at his request, in the office. But he said he only asked that copies be made for him. He was dissatisfied with the proposals before the Committee and he said as much to the other members of the Ministerial Committee. 'When I left the office, the proposals were still there and I have never seen them since', Sir Hugo said.

Chapter 11

108

Correspondence between Mr Hitolo (who became Secretary for Works in early 1992) and Mr Amini in March 1992 confirmed that this incident took place [EXHIBIT 160, final paragraph]. But the Ombudsman Commission has not been able to trace the whereabouts of the proposals left in the Minister's office.

The Ombudsman Commission concluded that the proposals were lost by the Minister for Transport, Mr Temo.

When we made this allegation in our preliminary report, Mr Temo claimed that, in fact, the proposals had been lost by Sir Hugo Berghuser. However, even if this were, in fact, the case, Mr Temo was the Minister of the State entrusted with custody of these important and confidential documents. It was his responsibility to take adequate steps to ensure the documents were in safe hands.

[11.8] THE DEPARTMENT OF TRANSPORT FAILED TO KEEP COPIES OF THE PROPOSALS

Surprisingly, the Department of Transport had not kept copies of the proposals, except the one made by the Chinese consortium - which was the group selected by the Ministerial Committee to undertake the project.

This meant, therefore, that most of the proposals had been lost.

This particular administrative mistake was to have far-reaching consequences several months later, when pressure was put on the Department to expedite the project and the Department had second-thoughts about supporting the Chinese proposal (see Chapter 18).

Chapter 11

109

It meant that when the Department was required to prepare a National Executive Council Policy Submission in February 1992, recommending a consortium to undertake the project, it only had one proposal in its possession.

[11.9] DEPARTMENTAL RECORDS SHOULD NOT BE GIVEN TO MINISTERS

As a general rule the Ombudsman Commission believes that official Government records and files should not be left in the possession of Ministers. An official Government file is the property of the State – it does not belong to a Minister. A Minister has the right to be fully and objectively briefed by his or her Departmental Head. But he does not have the right to keep possession of official files.

If this principle of sound public administration had been followed in the present case, the proposals probably would not have been lost.

EVALUATION OF PROPOSALS

[11.10] la
SPRING GARDEN FREEWAY

This document was the focus of discussion at the Ministerial Committee meeting of 18 July 1991. It is dated 17 July 1991, i.e. one day before the Ministerial Committee meeting. There were in fact two versions of it:

Chapter 11

110

One version was addressed to "the Members of the Resource Management Committee". It was drafted as a submission by the Department of Transport and shows the submitter as "B K Amini CBE Secretary"; however, it was unsigned. [EXHIBIT 100]

The other version of the document was drafted as a Policy Submission to the National Executive Council by the Minister for Transport; it was signed by Mr Temo. [EXHIBIT 99]

Although there are some minor variations, both versions of the document are essentially the same:

They outline the background of the Spring Garden Road project.

The scope of the project is described as being from downtown Port Moresby to Jacksons Airport.

The five short-listed proposals are evaluated, according to ten criteria.

The conclusion is reached that the Second Surveying and Designing Institute of the Peoples' Republic of China (which lodged a proposal in conjunction with Topbay Investment of Hong Kong) be "appointed" to commence negotiations with the Department of Transport for the development of the Spring Garden Road.

Chapter 11

111

[11.11] THE METHOD USED TO EVALUATE THE SHORTLISTED PROPOSALS

The "Financing the Construction of the Spring Garden Freeway" document evaluated the five proposals according to ten criteria:

1. Interpretation of the Terms of Reference.
2. Logical Phasing of Tasks in the Methodology.
3. Environment Impact Statement.
4. Financier's Credibility.
5. Main Contractor's Relevant Experience.
6. Local Partner Participation.
7. Proposed Equity Distribution.
8. Personnel Proposed in General.
9. Team's Experience in B.O.T. System.
10. Funding Proposal for the Project.

The proposals were given a rating of "Excellent", "Very Good", "Good", "Fair" or "Satisfactory" on each criteria.

The proposals were then given an overall ranking, as follows:

1st: Topbay Investment Ltd/Second Surveying & Designing Institute, People's Republic of China.

2nd: Periquan's International Resources.

3rd: Kumagai Gumi/Kinhill Kramer.

4th: Tasman Pacific International.

5th: McConnell Dowell.

Chapter 11

112

In light of these rankings, the document concluded that the project be awarded to the Chinese consortium.

(11.12] FURTHER UNSATISFACTORY ADMINISTRATION BY THE DEPARTMENT OF TRANSPORT

We have noted elsewhere in this report that the standard of documentation of important policy decisions by the Department of

Transport was extremely poor. We made that finding in relation to a number of issues, e.g. the decision to extend the freeway to Jacksons

Airport, the tunnel/cut issue and the Build-Operate-Transfer method of financing (see Chapters 5 & 10).

We make a similar finding in relation to the evaluation of the five proposals shortlisted for consideration by the Ministerial Committee.

The Ombudsman Commission considers that a much more detailed and methodical comparison of the alternative proposals was required than the one page table attached as an appendix to the "Financing the Construction of the Spring Garden Freeway" document.

The subjective rankings on the basis of the ten selected criteria were vague and meaningless.

This situation occurred because the Department of Transport did not have any established procedures for evaluating proposals for construction of roads or other transport infrastructure. The Department of Transport, on the instructions of the Minister for Transport, had wrongly assumed responsibility for a task that should have been carried out by a Supply and Tenders Board, in accordance with the Public Finances (Management) AM

Chapter 11

113

[11.13] OTHER DEPARTMENTS NOT INVOLVED IN THE RANKING OF PROPOSALS

A feature of the decision-making process which led to the selection of the consortium to build the Spring Garden Road/Poreporena Freeway, is the flagrant disregard of normal tender procedures (see Chapter 35).

If the project had been properly put to public tender in the first place, the Ministerial Committee would not have had to deliberate on the matter and the Department of Transport would not have been required to rank the proposals shortlisted by the Minister.

Though these mistakes were made, the maladministration would not have been so serious, if the Minister for Transport and the Department of Transport had been willing to consult other Departments when ranking the shortlisted proposals. However, no consultation took place.

We are particularly concerned that the Department of Works was not consulted. This Department has far more experience in selection of contractors to undertake road projects than the Department of Transport.

It was also wrong for the Department of Transport not to consult the Department of Finance and Planning. There is no evidence that any proper checks were made by the Department of Transport on criteria such as "Financier's Credibility" and "Funding Proposal for the Project". We note the Chinese proposal was rated "excellent" on both these criteria. Yet six months later the Department of Transport found it necessary to seriously question the bona fides of the proponents (see Chapter 15).

Chapter 11

114

[11.14] DID THE PROJECT "BELONG" TO THE DEPARTMENT OF TRANSPORT?

We have no doubt many mistakes were made because the Minister for Transport and the Secretary for Transport believed that the Spring Garden Road/Poreporena Freeway project was "a Department of Transport project" – not "a Department of Works project".

However, the terms of National Executive Council Decision No. 14/90 were that "the Department of Transport, the Department of Works and the Department of Finance and Planning formulate detail plans

for the
construction of Burns Peak Road". [EXHIBIT 6A]

We could therefore see no justification for the Minister for Transport or the Department of Transport shutting out these two other departments from the decision-making process.

Though it was within the policy prerogative of the Department of Transport to determine where the freeway would go, whether there would be a tunnel or cut through Burns Peak and whether the project would be undertaken using Build-Operate-Transfer financing, it was wrong for the Minister for Transport and the Department of Transport to exclude the other key Departments from the decision on who was going to design, finance and build the freeway.

[11.15] THE FORMAL RECORD OF THE MINISTERIAL COMMITTEE'S DECISION

In his oral testimony to the Ombudsman Commission, Sir Hugo Berghuser stated that the Ministerial Committee meeting lasted not much longer than 30 minutes and that the discussion had been confined to the contents of the "Financing the Construction of the Spring Garden Freeway" document.

Chapter 11

115

No minutes of the meeting were kept and the only record of the Committee's decision is a document, under Ministry of Transport letterhead, that was signed by Mr Temo, Mr Waka and Mr Negints. It stated:

'On the 18th day of July 1991, the Ministerial Committee On The Spring Garden

Road Development met at the Transport Minister's office in the National Parliament House and authorized and approved the following recommendation:

That the Chairman of this Committee seek National Executive Council (NEC) endorsement for the appointment of The Second Surveying and Designing Institute, Ministry of Railways of Peoples Republic China to commence negotiation for the development of the Spring Garden Road.

2. That the Chairman of the Committee seek National Executive Council endorsement to authorize the Attorney-General's Department and the Department of Finance and Planning to negotiate and execute the principle terms and conditions of the contract emerging from their proposals.

3. That the Chairman of this Committee seek National Executive Council endorsement to negotiate and use B.O.T. or turnkey as the basis of funding the Spring Garden Road Development.

4. That the Chairman of the Ministerial Committee seek National Executive Council endorsement in order to authorize Department of Finance and Planning to negotiate and execute the Franchise agreement and any other necessary and desirable documents relating thereto on behalf of the State? [EXHIBIT 102]

Sir Hugo testified that this document was not signed at the meeting of 18 July 1991 and we accept that that was in fact the case.

[11.16] WHAT HAPPENED AFTER THE MEETING?

The document recording the decisions of the Ministerial Committee appears to have been signed a day or two after the meeting took place.

Chapter 11

116

Sir Hugo stated that, though he had seen this document, he had deliberately not signed it because he did not agree with its contents. He was very suspicious about the negotiations that had already taken place with the Chinese. In fact, Sir Hugo alleged that he had been invited to a Chinese restaurant in Port Moresby, and asked to sign the document in the presence of other members of the Ministerial Committee and representatives of the Chinese consortium. He said that he refused to sign the document and walked out of the restaurant.

The Ombudsman Commission has been unable to obtain any corroborating evidence of this particular incident. However, we share Sir Hugo's concern about the propriety of the decision to favour the Chinese consortium.

WAS THERE AN OBJECTIVE EVALUATION?

[11.17] HAD THERE BEEN A GENUINE ATTEMPT TO EVALUATE THE ALTERNATIVES?

On the face of it, the selection of the Chinese consortium was yet another example of the type of haphazard and careless decision

making that had
come to characterise the Ministry and Department of
Transport's handling
of the Spring Garden Road/Poreporena Freeway project. But
our
investigations revealed that there was more to the selection
of the Chinese
than just slipshod administration.

Chapter 11

117

[11.18] THE DECISION HAD ALREADY BEEN MADE

In the opinion of the Ombudsman Commission, the Ministerial
Committee
meeting of 18 July 1991 was really just a rubber-stamping
exercise for a
decision already made by the Minister for Transport, Mr
Temo, to award
the project to the Chinese consortium.

Both versions of the "Financing the Construction of the
Spring Garden
Freeway" document actually referred to "the Ministerial
Committee's
decision to appoint the SSDI to commence negotiations ...for
the
development of the Spring Garden Road". But the document was
dated
17 July 1991 – one day before the Ministerial Committee made
that
decision!

The Ombudsman Commission discovered that, in fact, the
Minister for
Transport had formed a close association with members of the
Chinese
consortium well before the meeting. He had entertained a
delegation from
the consortium, in Port Moresby, only one week before the
Committee's
decision to favour them (see Chapter 12). 1

In light of that evidence, the Ombudsman Commission was
forced to
conclude that the deliberations of the Ministerial Committee
were not a
genuine attempt to objectively evaluate the five short-
listed proposals.

[11.19] MR TEMO'S RESPONSE

When we suggested in our preliminary report that Mr Temo had improperly arranged the selection of the Chinese consortium, he responded in the following terms:

Chapter 11

118

"Most of the companies that showed or expressed interest either did not understand the terms of reference of the project or did not bother to re-check with the Committee or Departments of Transport or Works.

As you can see in NEC decision or purpose of the NEC submission No. 14/90 it was the wish of the NEC to speed up the project. That is why the NEC submission's purpose was to bypass normal tender procedures in order to speed up the project to be completed in time for the SP Games. Also there was a criticism against me in NEC or Parliament every time there was a traffic problem along Sir Hubert Murray Highway even by public what are you doing Mr Chairman or Mr Minister for Transport.

While I was being pressured by the public NEC and Parliament I had to negotiate with any of these companies that showed interest as a Chairman of Committees I was left to look like a fool if I did not report back to NEC with a positive report I would have failed my duty and I was scared I could loose my job.

No companies complained because it was a new concept proposed by Barclay Bros. before my time. I had to carry on from that initiative. It has been a very

tough job trying to get the best companies to do the job.

Some companies responded again when it was convenient to them. We had to follow them because PNG does not have the resources in monetary and manpower.

The companies that came up with fancy proposals and sort of got in touch with my office or the Secretary's office kept getting our attention.

At least I was given a responsibility to present to NEC. I did not discriminate other companies against that showed interest. It was a mere who comes first with the best proposal for PNG.

I have a feeling that the Chinese companies were not consortium but they were selling their information from one company to another.

The Department was very uncooperative to me or NEC.

I, Mr Temo was not hiding any transactions from the Department. I always notified of the progress that is why I have them all information. I therefore regardless whether I had meeting or not prior to not really relevant in the situation of this new confused situation as there was no better proposals and interest shown other than that of the Chinese.

All the time the Department was aware I did not organise any secret de--11c an my mine was dear all the time." [EXHIBIT 257, page 2]

Chapter 11

With due respect to Mr Temo, he has not satisfactorily answered our criticism of the way in which the Chinese consortium was favoured by the Ministerial Committee. We conclude that he convened the meeting of the Ministerial Committee for the purpose of facilitating the Chinese consortium selected by himself to undertake the project.

The closeness of the relationship between Mr Temo and the Chinese consortium is explored further in the next chapter.

* * * * *

Chapter 11

120

12. THE RELATIONSHIP BETWEEN THE CHINESE CONSORTIUM AND THE MINISTER FOR TRANSPORT

[12.1] A MATTER OF CONCERN

The manner in which the Chinese consortium was chosen by the Ministerial Committee was a matter of concern to the Ombudsman Commission.

We therefore wanted to find out who was actually behind the proposal of the "Second Surveying and Designing Institute, Ministry of Railways, People's Republic of China". We were also interested to know whether the Minister for Transport had any particular association with those negotiating on behalf of the Chinese.

WHO WAS IN THE CHINESE CONSORTIUM?

[12.2] KEY PARTIES IN THE PROPOSAL INVOLVING THE SECOND SURVEYING AND DESIGNING INSTITUTE

Mr Leo Moore of Taiwan

Our investigations revealed that a key person was Mr Leo Moore, a citizen of the Republic of China (Taiwan). Mr Moore is a businessman, with interests in the Taiwanese fishing industry, who had made a number of visits to Papua New Guinea during 1991 and 1992.

Chapter 12

121

Mr Moore was called to give evidence under oath on several occasions in the course of this investigation. We formed the view that he was a co-operative and reliable witness. His evidence shed considerable light on the events leading to the selection of the Chinese consortium.

Outlet Year Ltd and Mr Leung Keung of Hong Kong

Mr Moore stated that he had first become interested in Papua New Guinea in September 1990, after a meeting in Taiwan with another

businessman,
Mr Leung Keuno (hereafter referred to as Mr Leung).. Mr Leung is the head of a Hong Kong-based company known as Outlet Year Ltd, which was supposedly considering making large investments in Papua New Guinea. The meeting between Mr Moore and Mr Leung was arranged by Mr To Ken Chung (Mr Moore's godfather and Mr Leung's close friend) and Mr Stephen Zohr (one of Mr Moore's business advisers).

At that meeting it was agreed that an invitation would be extended to a group of government officials from Papua New Guinea to come to Taiwan to discuss business opportunities in Papua New Guinea.

Business relationship between Outlet Year Ltd and the SSDI

Mr Moore explained that Outlet Year Ltd had business connections with a number of government authorities in the Peoples' Republic of China (ie mainland China); one of them being the Second Surveying and Designing Institute (SSDI).

The SSDI is a civil engineering agency involved in design and construction of railways and highways. Mr Moore supplied the Ombudsman Commission with a brochure describing its activities. [EXHIBIT 102A]

Chapter 12

122

Mr Moore explained that, as a result of overtures made by Mr Leung, the SSDI had contacted Mr Moore on 27 January 1991. In a one page facsimile transmission, a representative of the SSDI indicated that they were a very strong and influential government company in China and that they were keen to go into business with Mr Leung and Mr Moore for the purpose of building a freeway in Port Moresby, which they had been informed about by Mr Leung. [EXHIBIT 53]

OVERSEAS TRIP PAID FOR BY CHINESE CONSORTIUM

[12.3] VISIT TO TAIWAN AND HONG KONG BY PAPUA NEW GUINEA

PARLIAMENTARIANS IN FEBRUARY 1991: A MATTER OF CONCERN

Mr Moore testified that on 6 February 1991 he purchased four return tickets from Port Moresby to Hong Kong, which were later picked up at the Cathay Pacific office in Port Moresby.

After being invited to Taiwan and Hong Kong, a "delegation" from Papua New Guinea arrived in Taipei on 8 February 1991. The delegation comprised:

- the Minister for Transport, Mr Anthony Temo;
- the Member for Gulf Province, Mr Aaron Noaio;
- the Member for Sohe Open, Mr David Beu; and

Chapter 12

Minister for a member of the Official Personal Staff of the Fisheries & Marine Resources (who at that time was the Deputy Prime Minister Mr Akoka Doi) Mr Chris Maravis.

The Ombudsman Commission interviewed Mr David Beu in connection with this trip and the evidence he gave corroborated that given by Mr Moore.

[12.4] STATUS OF THE PNG DELEGATION

Before we address the events that transpired during and after the trip, there is one important matter to emphasise: the Papua New Guinea "delegation" had no official status. Although the members of the group were, in a sense, representing the Government of Papua New Guinea, the delegation was privately sponsored. All the expenses, including airfares, accommodation and meals, were paid for either by Mr Leo Moore or Outlet Year Ltd.

[12.5] PRIVATELY SPONSORED OVERSEAS TRIPS CAN BE UNLAWFUL

It is important for all leaders of Papua New Guinea who contemplate privately sponsored trips to bear in mind that it is a requirement of the Leadership Code that permission from the Ombudsman Commission be obtained before accepting the benefits of such a trip.

This is a principle of Papua New Guinea law that should also be considered by any person or company thinking about offering such a trip to a leader.

Chapter 12

124

[12.6] THE MINISTER ALLOWED HIMSELF TO BE ENTERTAINED BY ONE OF THE COMPANIES BIDDING FOR THE PROJECT AT THE SAME TIME HE WAS PREPARING THE SHORTLIST

The Ombudsman Commission is concerned that the Minister for Transport, Mr Temo, made his trip to Taiwan and Hong Kong and involved himself in negotiations for the Spring Garden Road/Poreporena Freeway project at the same time he was preparing the shortlist of prospective developers (see Chapter 9).

The Ombudsman Commission emphasised earlier in this report that Ministers should not be preparing shortlists for public works projects. In this case, the Minister for Transport was not only preparing the shortlist, he was, at the same time, allowing himself to be wined and dined overseas, at the expense of one of the companies interested in getting the contract for construction of the freeway.

When this sort of thing happens, it is very difficult to conclude that the decision-making process was legitimate, fair and proper.

It is also difficult to say there was no bribery or corruption.

[127] THE MINISTER FOR TRANSPORTS DEFENCE

When we suggested in our preliminary report that it was wrong of Mr

Temo to make an overseas trip, paid for by one of the companies bidding

for the project, at the same time he was preparing a shortlist of

prospective developers, he denied any impropriety. He said he did not

realise it was a privately sponsored trip until after he accepted the

invitation to go to Hong Kong:

Chapter 12

125

"The trip to Taiwan and Hong Kong was organised by a Chris Maravis in Mr

Akoka Dors office. Mr Doi was the Deputy Prime Minister so I took it that

I was going on an official trip. later I realised that it was a PAP fishing trip

paid by Mr Leo Moore and some fishing people.

While in Taiwan and Hong Kong as I was not Minister for Fisheries so I was

asked about Transport Projects and I said we have a 10 year plan that need to

be completed. However, we did not have finance and manpower it was paid

by Mr Leo Moore not short listed company.

I did not prepare the final short list.

While in Hong Kong I told the company representative to let the Prime

Minister, Minister for Finance and the other senior ministers know of their

investment proposal in PNG.

According to me I did not hide anything and I told them, if you want to invest

for the trip and accommodation while in Taiwan and Hong Kong. I did this

after learning that it was a PAP fishing trip. Therefore, I

notified the
Ombudsman in writing about who was paying for the trip and
accommodation
while in Taiwan and Hong Kong. I did this after learning it was a
PAP fishing
trip." [F.XHIBIT 257, page 3]

The Ombudsman Commission, with respect, does not consider Mr Temo's
explanation to be satisfactory. We find it difficult to believe that
a Minister

of the State would legitimately travel overseas without knowing what
the
purpose of the trip was.

As to the claim that he advised the Ombudsman Commission of the trip
and who was paying for it, we refer to a letter dated 28 March 1991
received by the Commission from Mr Temo:

Mr Temo stated:

'Thank you for your very helpful Leadership Manual received
today. I note
that I must declare to the Commission every time I leave for
overseas be it
official or unofficial

I therefore wish to inform the Commission that from the 22
February, 1991 until
4 March, I was on an official visit paid for by M.T.L
Organisation. This trip
was approved by the National Government to lead a delegation to
Taiwan.'

[EXHIBIT 68B]

Chapter 12

126

[12.8] POOR ADMINISTRATION BY THE MINISTER FOR TRANSPORT

One thing is certain: irrespective of whether Ministers and
other
Government officials breach the Leadership Code when they

accept

benefits such as free travel, free accommodation and gifts from foreign enterprises, it is a very bad administrative practice.

It undermines the integrity of the decision-making processes of

Government. It creates the impression that to get Government approval for

a project in Papua New Guinea, it is necessary to be on friendly terms

with the right Minister. It attracts the wrong sort of foreign investors to

Papua New Guinea. It creates a bad image of Papua New Guinea.

If this sort of administrative practice continues, instead of honest and

genuine investors coming to our country, we will be overrun by fly-by-

night operators, only too willing to bypass normal procedures in the quest

for easy money for themselves and not for the People of Papua New

Guinea. Papua New Guinea has had enough of them already.

Since it is not in the best interests of the People of Papua New Guinea

and our country, such practices must be stopped at all costs.

[12.9] WHAT HAPPENED DURING THE TRIP TO TAIWAN AND HONG KONG?

Mr Moore testified that Messrs Temo, Noaio, Beu and Maravis spent three

days in Taipei, followed by four days in Hong Kong.

Three days in Taipei

In Taipei, the members of the PNG "delegation" were entertained by Mr

Moore.

Chapter 12

127

Mr Moore testified that during this visit there was a lot of talk about road

projects, particularly "the 8.8 km road in Port Moresby", as well as other

investment opportunities in Papua New Guinea. The Papua New Guinea

people described their country as a good place to invest - particularly in

mining, oil, fishery and forestry projects – but they said the road network was not very good and that is why Papua New Guinea is a poor country.

Mr Moore told the Minister for Transport he would like to come to Papua New Guinea and see the country for himself. Four days in Hong Kong

After spending three days in Taiwan the group from Papua New Guinea travelled to Hong Kong, leaving Mr Moore behind. Mr Moore stated that throughout their stay in Hong Kong, the group from Papua New Guinea was looked after by Mr Leung of Outlet Year Ltd. He said that, as it was Chinese New Year, much of the time was taken up in social activities and the group from Papua New Guinea was housed at the Sheraton Hotel.

It was during this visit to Hong Kong that Mr Temo, in his capacity as Minister for Transport, signed a quite extraordinary document: a "memorandum of agreement" for the construction of the Southern Highlands-Kikori Road. [EXHIBIT 58]

[12.10] THE MEMORANDUM OF AGREEMENT FOR THE CONSTRUCTION OF THE SOUTHERN HIGHLANDS – GULF ROAD

The Minister for Transport, Mr Temo, signed this agreement in Hong Kong on 12 February 1991, on behalf of "the Ministry of Transport, National Government of Papua New Guinea". The other signatory was Mr Leung Keung, who entered into the agreement on behalf of Outlet Year Ltd of

Chapter 12

Hong Kong. The document was witnessed by Mr Aaron Noaio, the Member for Gulf Province and Mr To Ken Chung (Mr Leo Moore's godfather).

Terms of the agreement for the construction of the Southern
Highlands
Gulf Road

The terms of this agreement, which appeared under the letterhead of
Outlet Year Ltd, were as follows:

'MEMORANDUM OF AGREEMENT

'KNOW ALL MEN BY THESE PRESENTS:

This Memorandum of Agreement is entered into and executed this
12th day of
February, 1991, by and between:

Ministry of Transport, National Government of Papua New Guinea
with
principal offices of P.O. Box 457 Konedobu, National Capital
District, Papua
New Guinea represented by Hon. Anthony Temo, Minister for
Transport
(hereinafter referred to as NPG).

and

Outlet Year Limited, a duly registered Hong Kong Corporation
with principal
offices at No. 20, HOK Yuen Street, Block FL 3/F Hunghom,
Kowloon, Hong
Kong, herein represented by Mr Leung Keung, Managing Director
(hereinafter
referred to as HK).

IN WITNESSETH:

WHEREAS, the National Government of Papua New Guinea has fully
authorized NPG to implement an Infrastructure Development Plan

WHEREAS, NPG is willing to undertake this job per engineering
details and
specifications, contained in the NPG's Cost Study (Gulf-Southern
Highlands
Province - ERAVE to KEREMA [sic]).

WHEREAS, NPG has found the credentials of HICG to be financially
qualified
and technically capable to execute this project in a manner
consistent with the
technical standards set forth by engineering standards.

WHEREAS, HEW has offered to undertake construction of this project.

NOW, THEREFORE, for and in consideration of the above premises and of the mutual covenants heretofore set forth, the parties have agreed, as they hereby agree, on the following terms and conditions:

Chapter 12

129

1. PROJECT

NAME Southern Highlands Kikori Road

LOCATION From ERAVE to KIKORI

SPECIFICATION AND INSPECTION
Per Cost Study (Gulf-Southern
Highlands Province - ERAVE to KEREMA)

DURATION From May 1st, 1991 to May 1st, 1993.
BONUS AND PENALTY.

2. CONTRACT PRICE : HKG shall submit within 60 days after signing of this Memorandum a price, to be forwarded to and acceptable to PNG.

3. PAYMENT Payment plan to be negotiated between PNG and HKG on an equitable and acceptable basis to both parties

4. PERFORMANCE BOND Upon signing of Contract by both parties MG shall provide to PNG a Performance Bond in the form of cash, bank guarantee or other form of guarantee acceptable to PNG, for an amount not less than 10% of the Contract value, to warrant the performance of EKG's obligation under the Contract (Gulf-Southern Highland Province - ERAVE TO KEREMA). This

Performance Bond shall be returned HKG without interest, when HKG shall have fulfilled its obligations under the Contract.

5. FORCE MAJEURE HKG is not responsible for delay or non-performance of its contractual obligation to construct, caused by war, blockade, revolution, insurrection, civil commotion, riots, mobilization, strikes, Act of God, plague, or other epidemic, fire, flood, action or acts of government or public enemy.

Chapter 12

130

6_ CANCELLATION & : PNG may cancel the Contract, and
ALTERATION OF confiscate the Performance Bond,
if CONTRACT IIKG is unable to deliver in
accordance with the stipulated time schedule
or breath of Contract.
Postponement or alteration of the
Contract if required, should be
agreed by both parties in writing.

IN WITNESS WHEREOF, the parties hereto have hereunto
affixed their signatures at Hong Kong this 12th day of February
1991.

MINISTRY OF TRANSPORT

[signed]

HON. ANTHONY TEMO
MINISTER FOR TRANSPORT

WITNESS: MEMBER OF PARLIAMENT

[signed]

HON. AARON NOAIO
MP For Gulf Province

For and on behalf of

OUTLET YEAR LIMITED

[signed]

Authorized Signature

LEUNG KEUNG
MANAGING DIRECTOR

WITNESS:

[signed]

TO KEN CHUNG" [EXHIBIT 58]

[12.11] THE AGREEMENT OF 12 FEBRUARY 1991 DID NOT MAKE SENSE

Any person with a basic knowledge of contracts and the English language would realise that this document is very poorly drafted. The grammar is atrocious and, in places, the document just does not make sense. For

Chapter 12

131

instanLe though the subject of the agreement is described in Clause 1 as "Southern Highlands Kikori Road from Erave to Kikori", there are three sai other references in the document to the "Erave to Kerema" Cost Study or Contract.

1111

The Ombudsman Commission is left wondering whether the parties to this agreement actually knew what they were agreeing to. In view of this, it is very doubtful whether the agreement could have ever been regarded as valid or enforceable.

But that does not, in our view, excuse the Minister for Transport for his actions in signing this agreement.

[12.12] THE PROPRIETY OF THE MINISTER FOR TRANSPORTS ACTIONS

In the opinion of the Ombudsman Commission, it is very embarrassing for our country when persons holding official positions sign documents as amateurish as the agreement for the construction of the Southern Highlands-Kikori Road. It is terrible administration for any office-holder, particularly a Minister of the State, to unilaterally decide to enter into such agreements.

The Ombudsman Commission believes that whenever any Minister goes overseas to engage in negotiations on behalf of Papua New Guinea, he should be accompanied by at least one senior Departmental adviser. If that had happened in this case, we have no doubt the Minister for Transport would have been advised not to sign the agreement for the construction of the Southern Highlands-Guff Road.

Having said that, the Ombudsman Commission still finds it remarkable that, during the course of being entertained by foreign businessmen, and

Chapter 12

would have
signed an agreement for the carrying out of an extremely
important
national road project without the advice or knowledge of the
Department
of Transport or the Government he was supposed to be
representing.

This sort of thing simply should not happen. It raises
questions of legal
authority and breeds the atmosphere and environment ripe for
bribery
and corruption.

[12.13j] COULD THE MINISTER'S ACTIONS BE JUSTIFIED?

During the course of this investigation, the Ombudsman
Commission
questioned the former Minister for Transport on his actions.
He agreed he

had been to Hong Kong and signed the Memorandum of
Agreement. In
his view, however, he had done nothing improper. His
explanation was

that it was not intended to be a binding document:

"While in Hong Kong I signed a couple of pages
documents as memorandum
of understanding. This a Chinese Government policy that
before they leave
to go out of R.O. China it is a mandatory that they
must have some form of
agreement of some sort so they be allowed to leave
their country. They had
no choice but to show their Government information why
they were leaving
for PNG. I was authorised by NEC to negotiate on Burns
Peak Road.

Therefore, I had some authority to negotiate not make a
decision. The

Department was made known as usual."

[EXHIBIT 257, pages 3-4]

In the opinion of the Ombudsman Commission, that is not a satisfactory explanation.

A Minister should not sign any document which purports to bind himself or his Department or the Government of Papua New Guinea to any course of action unless he has been expressly and lawfully authorised to do so.

L

Chapter 12

133

There is no evidence, as Mr Temo claims, that he was authorised by the

National Executive Council to conduct any negotiations. Nor is there any

evidence he advised the Department of Transport what he was doing.

The Secretary for Transport's evidence was to the contrary. 11

The Minister for Transport had no authorisation to conduct negotiations 11

concerning the Southern Highlands–Gulf Road or the Spring Garden

Road/Poreporena Freeway project. He had no right to sign this

document He signed it without the advice or knowledge of
his

Department or the National Executive Council. It was very
wrong of him to

sign it.

[12.14] OTHER EVIDENCE OF OUTLET YEAR LTD'S INTEREST IN PAPUA NEW
GUINEA

a

Mr Leo Moore's oral evidence of Outlet Year Ltd's interest
in Papua New

Guinea is corroborated by three documents that the
Ombudsman

111

Commission has obtained:

a

(i) A letter from Outlet Year Ltd. dated 12 February
1991, to the then

Prime Minister. Mr Rabbie Namaliu. The letter states:

'Your Excellency:

Hon. Anthony Temo, Minister for Transport, approached our Company seeking funds and technical assistance to develop – an infrastructure Development Plan – in your country Papua New Guinea. We are interested to invest up to US Dollars 5 billion in Papua N. G.

As per our meetings, [with Mr Terns)] we wish to design and build Southern Highlands ICikori Road and Burns Peak Road in Port Moresby. We shall build these roads under a Turnkey arrangement, which means we shall supply manpower as well as financing.

111

Should your Government endorse this idea, please send me an invitation so our delegation consisting of the undersigned and Mr Steven Zohr and Mr Leo Moore, could assist your Country in the nearest future.

Chapter 12

1111

134

We are taking this as a matter of urgency and priority, and hope to meet you personally.

Respectfully yours,
[signed]
LEUNG ICEUNG
MANAGING DIRECTOR"

This letter was marked:

"c.c. His Excl. Ted Biro [sic], Deputy Prime Minister
His Excl. Sir Michael T. Samare, [sic], Foreign Minister
His Excl. Hon. Paul Bora [sic], Finance Minister
His Excl. Hon Anthony Temo, Minister for Transport'.

[EXHIBIT 57]

- (ii) A letter from Outlet Year Ltd dated 13 February 1991 to Mr Temo
(also addressed to Deputy Prime Minister Mr Ted Diro, who was described as the Acting Transport Minister).

This letter was headed "Application for pre-qualification of Southern Highlands Kikori Road' and states:

"We wish to design and construct Southern Highlands/
Kikori Road in Port Moresby [sic] under a Turnkey arrangements which means we will supply manpower and finance'. [EXHIBIT 59]

- (iii) Another letter from Outlet Year Ltd dated 13 February 1991 to Mr Temo (also addressed to Mr Diro).

This letter was headed "Application for Pre-qualification of Burns Peak Road" and states:

'We wish to design and construct Burns Peak Road in Port Moresby under a Turnkey arrangements which means we will supply manpower and finance". [EXHIBIT 60]

[1215] THE TRIP TO TAIWAN AND HONG KONG WAS A VERY BAD PIECE OF ADMINISTRATION

The three letters from Outlet Year Ltd were written at the time of the Minister for Transport's visit to Hong Kong. When the letters are considered, together with the signing of the "Memorandum of Agreement" for the Southern Highlands-Gulf road, they show that, by shortlisting Outlet Year Ltd, the Minister had given that company favoured treatment.

It would not be unreasonable for any person knowing these facts to wonder whether the Minister's actions were a result of his trip to Hong Kong and Taiwan.

The Minister had compromised his own impartiality by allowing his airfares and accommodation to be paid by foreign enterprises at a crucial time in the decision-making process.

By taking it upon himself to become actively involved in the selection of a contractor for the Spring Garden Road/Poreporena Freeway project the Minister had a duty, as a matter of administration, to be totally impartial in his evaluation of the competing proposals. Not only that, he had to be seen to be totally impartial and objective.

The Minister for Transport failed, in our view, to fulfil this basic administrative duty. The trip to Taiwan and Hong Kong and the signing a of the agreement on 12 February 1991 was a very bad piece of administration.

Chapter 12

[12.16] THE FINANCIAL STATUS OF OUTLET YEAR LTD136

The three Outlet Year Ltd letters referred to earlier give the impression that the company is large and influential, with huge financial resources at its disposal. Mr Leo Moore's evidence, however, suggests that this was far from being the case.

Mr Moore testified that Outlet Year Ltd was quite a small company which simply did not have the sort of money to invest in Papua New Guinea it made out it had. He said this had first been brought to his attention in a facsimile message received on 27 March 1991 from a business adviser, Mr Stephen Zohr. [EXHIBIT 68]

Mr Zohr was concerned about the uncertain financial background of Outlet Year Ltd and advised Mr Moore to be cautious in making any decisions about investing in Papua New Guinea.

[12.17] OUTLET YEAR LTD HAD NO EXPERTISE IN ROAD PROJECTS AND NO EXPERIENCE IN PAPUA NEW GUINEA

Mr Moore further testified that Mr Leung, of Outlet Year Ltd, had realised, soon after he wrote those letters, that his company would find it very difficult to raise the finances necessary to undertake projects such as Spring Garden Road and the Southern Highlands-Gulf Road. Mr Moore stated that the Minister for Transport, in all of his negotiations, had insisted on a 10% performance bond being given to the Government of Papua

New Guinea.

Nevertheless, Outlet Year Ltd continued to be involved in the negotiations, at least until July 1991. And it was not until September 1991 that the company formally dropped out of the negotiations (see Chapter 13).

Chapter 12

137

The Ombudsman Commission was unable to question Mr Leung in the course of this investigation. However, on the basis of evidence available, we are satisfied that Outlet Year Ltd was quite a small company with no expertise in road construction or design and no prior experience in Papua New Guinea.

THE MINISTER FOR TRANSPORT AND MR LEO MOORE

[12.18] MR LEO MOORE'S FIRST VISIT TO PAPUA NEW GUINEA

Mr Moore first came to Papua New Guinea in May 1991. He was accompanied by his wife, Ida Moore, and Mr Leung of Outlet Year Ltd.

They were met at Jacksons Airport by the four men who formed the delegation to Taiwan and Hong Kong in February 1991. Mr Moore said that on the second day of their visit, they had a meeting with the Minister for Transport to discuss the Spring Garden Road project. The cost was estimated to be US\$50 million.

The Minister wanted the Outlet Year consortium to build the road first and to pay them 5 to 10 years later. But Mr Leung was not very interested.

In fact, he went home early, while Mr and Mrs Moore stayed behind for another week. During this time, the Minister introduced Mr Moore to the then Deputy Prime Minister and Minister for Fisheries and Marine

Resources, Mr Akoka Doi, and various other investment projects were discussed.

Chapter 12

138

[12.19] MINISTER FOR TRANSPORT APPEALS FOR LOAN FUNDS ON BEHALF OF PAPUA NEW GUINEA

Before he returned to Hong Kong, Mr Moore was handed a letter from the Minister, under Ministry of Transport letterhead, in which he asked Mr Moore to arrange a loan to develop Papua New Guinea's "ten year development plan". The Ombudsman Commission obtained a copy of this letter. It is dated 24 May 1991 and reads as follows:

"Mr Leo Moore,

Papua New Guinea is a Country, full of all Natural Resources renewable and non renewable.

At this stage Papua New Guinea requires Financial assistance badly.

Our Economy will pick up in 1993 onwards.

Until then Papua New Guinea requires at least US\$50 million dollars in infrastructure development in the next five (5) years from 1992 or sooner the better.

Should you require my department's ten (10) year development plan I will bring it with me.

By this letter I am appealing on behalf of PNG Government that you arrange for a loan in kind or cash to develop and implement our ten (10) year

development plan.

Should you arrange for same, please try to make the loan finance cheaper than Asian Development bank and World Bank.

I thank you and your group in advance, with kind regards.

[Signed)
ANTHONY TEMO
Minister for Transport" [EXHIBIT 871

The purpose of this letter was to enable Mr Moore to go back to Taiwan with some proof he had negotiations with a Minister of the State in Papua New Guinea.

chapter 12

139

II

[12.20] MR MOORE RETURNS TO TAIWAN AND NEGOTIATES DIRECTLY WITH THE SSDI

Mr Moore testified that, on his return to Taiwan in May 1991, he contacted Mr Leung in Hong Kong and told him that, despite Mr Leung's reservations, he was still very keen to see the Port Moresby road project go ahead, with the assistance of the SSDI.

Mr Moore then started (with Mr Leung's knowledge) to negotiate directly with Mr Lee Chong Chan, who was the link-man between the SSDI and the Government in Beijing. These negotiations resulted in the Beijing Government approving a visit to Port Moresby by representatives of the SSDI in July 1991.

[12.21] ANOTHER VISIT TO HONG KONG BY THE MINISTER FOR TRANSPORT

Prior to the visit to Port Moresby by the SSDI observation group, the Minister for Transport made another unofficial trip to Hong Kong, at Mr Leo Moore's expense.

This visit took place between 7 and 14 June 1991. The Minister was accompanied by his wife, whose airfare was paid for by Mr Leo Moore; the Minister for Transport had his own airfare on this occasion. The Minister and his wife again stayed at the Sheraton Hotel and all their expenses in Hong Kong, including meals and accommodation, were paid for by Mr Leo Moore.

Chapter 12

140

[12.22] MINISTER FOR TRANSPORT HOLDS PRIVATE DISCUSSIONS WITH TOPBAY INVESTMENT LTD IN HONG KONG

During this visit to Hong Kong, the Minister for Transport met with Mr Leo Moore and six representatives of a Hong Kong-based company called Topbay Investment Ltd.

Mr Moore testified they had discussed the Spring Garden Road project for almost two days. Mr Moore arranged the meeting himself. By this stage, he had formed the view that Outlet Year Ltd may not have the ability to undertake the Spring Garden Road project. He had had previous business dealings with Topbay Investment Ltd and saw them as a good substitute for Outlet Year Ltd.

The Ombudsman Commission asked Mr Moore whether Topbay Investment Ltd had any experience in road construction or design: they did not. The company had never done any business in Papua New Guinea and none of the company's principals had ever been to

Papua
New Guinea.

[12.23] EVIDENCE OF THE MINISTER FOR TRANSPORT'S PRIVATE
DISCUSSIONS IN HONG KONG

In the course of this investigation the Ombudsman Commission
obtained from Mr Temo, a copy of a letter from Topbay Investment Ltd
addressed to the Secretary for Transport, dated 14 June 1991. The
letter reads:

Chapter 12

141

"My Dear Secretary,

Re: Burns Peak Freeway

Please enclose our proposal as requested.

We would like to show our interest to support
funding this Freeway project
subject to all details of construction plan will be
released to us as soon as
possible.

Funding [illegible] US\$50,000,000.00 (US Dollars,
Fifty Million) will be available
on receipt of our acceptance notification from PNG
Government.

Final terms and condition to be discussed on
acceptances of our proposal

Note: The Company has changed from Outlet Year
Company to Topbay
Investment Ltd.
Thank you and we are waiting your favourable reply.

Yours sincerely,
[Signed]
W.C. Dave Kwok
Group General Manager"

[EXHIBIT 89]

The date of this letter coincides with the date of the Minister's visit to Hong Kong, which the Commission has confirmed by checking the Minister's passport.

We are satisfied, therefore, that the evidence given by Mr Leo Moore as to the Minister's visit to Hong Kong between 7 and 14 June 1991 is true and correct.

[1224] WRONG CONDUCT BY THE MINISTER FOR TRANSPORT

We have emphasised how important it is for Ministers of the State not to go on privately sponsored overseas trips, especially when they are provided by foreign enterprises which may expect to reap rewards by showing hospitality to a Minister.

Chapter 12

111

142

In our preliminary report, we suggested it was wrong for Mr Temo to make this second trip to Hong Kong. His response was as follows:

"I met the expenses for my second trip to Hong Kong, my wife's expenses were paid for by Mrs L Moore and were on a family business trip.

While there I may have talked to somebody about Burns

Peak as a total 10 year
plan. However, the trip was for my private co. business
and I have also advised
the Ombudsman Commission about that trip." [EXHIBIT 257,
page 4]

Mr Temo's excuse that he was on a family business trip is
not considered
acceptable. As the Minister who had assumed primary
responsibility for
the Spring Garden Road/Poreporena Freeway project, he
compromised
his impartiality by accepting the benefits associated with
this trip from an
associate of one of the companies bidding for the project.
There is also
no evidence that the Department of Transport knew anything
about the
trip or the negotiations the Minister had with Topbay
Investment Ltd.

In the circumstances, it was wrong of Mr Temo to conduct
these
negotiations. It was another very bad piece of
administration.

CHINESE CONSORTIUM VISITS PORT MORESBY

[12.25] SSDI VISITS PORT MORESBY IN JULY 1991

An observation group from the Second Surveying & Designing
Institute
visited Port Moresby from 6 to 10 July 1991 – just a week
before the
Ministerial Committee decided to favour their proposal. The
group, which
consisted of about seven engineers, was led by Mr Sun Young
Hse, who
described himself as the "Executive Director on behalf of
the Observation
Group of the Second Surveying and Designing Institute
Ministry of
Railways". [EXHIBITS 95, 96, 102B].

Chapter 12

143

Mr Moore, his wife Ida Moore, Mr Leung and Mr Leung's son also travelled to Port Moresby for the occasion. Mr Moore said that his group and the SSDI group were met at the Port Moresby Travelodge Hotel by the Minister and they spent considerable time inspecting the route of the Spring Garden Road/Poreporena Freeway project.

12.26] CONFUSING ASPECTS OF THE OBSERVATION GROUP'S VISIT

The Ombudsman Commission wonders why Mr Leung of Outlet Year Ltd would have made this trip to Port Moresby, in view of Mr Moore's evidence that Mr Leung had already realised his company didn't have the financial capability to undertake the project. There are also other aspects of the SSDI's visit that the Ombudsman Commission finds very confusing:

another agreement was signed by the Minister for Transport during the visit of the Chinese consortium. However, no such agreement appears in the files of the Department of Transport.

We are also confused by the fact that two different proposals for the design, finance and construction of the freeway appear to have been submitted around this time on behalf of the Chinese consortium.

[12.27] WERE ANY AGREEMENTS SIGNED DURING THE VISIT BY THE CHINESE CONSORTIUM?

Mr Leo Moore testified that during the July 1991 visit by the Chinese consortium, the Minister for Transport signed a document, about two or three pages in length, which summarised the financial terms on which the Government of PNG would engage the consortium.

The document was also signed by Mr Zhu Chuanhua, a member of the SSDI observation group. [A copy of a business card in the name of this person is located in the Department of Transport's files: EXHIBIT 102B]

According to Mr Moore, the signing of this agreement took place at the Port Moresby Travelodge Hotel.

Mr Moore described this document as a "pre-agreement". The Ombudsman Commission has tried unsuccessfully to obtain a copy of it.

The document is not in the Department of Transport's files. But, there is a reference to it in a letter to the Minister for Transport from the China Huashi Enterprises Corporation dated 6 September 1991.

This letter reads:

Your Excellency,

Attached please find a CERTIFICATE issued by Bank of China Chengdu Branch, which we hope will provide you with a brief description of our firm's financial status. We, China Huashi Enterprises Corp, (CHECO) joint with the Second Surveying & Designing Institute, Ministry

Railways are very willing
and fully capable to undertake the surveying,
designing and construction of the
proposed Spring Garden Road Link project

In order to release current traffic congestion as
soon as possible based on
suggestion made by observation group of the Second
Surveying & Designing
Institute, Ministry of Railways, the proposed road
will be constructed in
following stages.

Chapter 12

145

1. completion of engineering survey, design
and geological work of above
road project;

construction of the first of a twin tunnel
through the Burns Peak;

3. construction of the missing sections (i.e.
nonexisting sections) along the
proposed route from Moresby Harbour in
Konedobu to Jackson Airport;

4. construction of the second of the twin
tunnel and upgrading the
existing road to 4-lane highway.

If you agree the above-mentioned arrangement in
principle, we intend to sign
a main contract of contracting the Spring Garden
Road Link project with you
based on the Pre-agreement signed by you and Mr
Zhu Chuanhua in P.N.G.
And then to sign execution sub-project contract
stage by stage, and provide you
Bank Guarantee according to the stipulization of
sub-project contract

Please do not hesitate to contact us should you
desire more information about

our firm or clarification of the points in this letter.

With best regards.

Yours sincerely,

& Des-	Liu Shouning Deputy General Manager	Mau Shesheng Second Surveying
Institute, Ministry	China Huashi Enterprises Corp.	igning
Railways." [11XIIIIBTY 106]		of

[12.28] WHAT IS THE CHINA HUASHI ENTERPRISES CORPORATION?

Mr Leo Moore stated that this was another agency of the Peoples'

Republic of China - a Government company closely linked with the SSDI.

In Mr Moore's view it was not unusual that the letter of 6 September 1991

had come from it, rather than the SSDI, because the SSDI is not itself

authorised to enter into contracts outside China. Only a company such as

the China Huashi Enterprises Corporation can do this, he said.

[12.29] THE MINISTER HAD SIGNED A PRE-AGREEMENT

The letter of 6 September 1991 confirms Mr Moore's evidence as to the signing of some form of "pre-agreement" by the Minister for Transport during the visit of the SSDI in July 1991.

When we made this finding in our preliminary report, it was not disputed by Mr Temo.

In the opinion of the Ombudsman Commission it was wrong of Mr Temo to sign any "pre-agreement". He had no authorisation from the National Executive Council to conduct negotiations, let alone sign an agreement. Even the so-called Ministerial Committee on Spring Garden Road had not authorised its signing. The Minister signed the agreement without the knowledge or advice of his Department.

CONFUSION CAUSED BY LODGMENT OF DIFFERENT PROPOSALS

[12.30] WHAT PROPOSALS WERE ACTUALLY SUBMITTED TO THE DEPARTMENT OF TRANSPORT DURING THE COURSE OF THE SSDI'S VISIT TO PORT MORESBY?

As we noted in Chapter 11, it has been impossible to precisely ascertain which proposals were considered by the Ministerial Committee when it decided that the project be awarded to the Chinese consortium. Most of the proposals were lost after they were left in the Minister for Transport's office, and the Department of Transport did not keep copies of them.

Chapter 12

147

The confusion was made worse by our discovery of two different proposals on behalf of the Chinese consortium.

Of course, it must be appreciated that whenever the term "Chinese consortium" is used in this report there is bound to be some confusion.

This cannot be avoided because the composition of the consortium kept changing.

Even with the benefit of hindsight it has been very difficult to ascertain which companies comprised the consortium at different times. Nevertheless, it is appropriate to always refer to the loose grouping of companies and individuals as 'the Chinese consortium' because, despite frequent changes in its composition, it usually had some common elements, viz the SSDI and Mr Leo Moore.

[12.31] THE PROPOSAL BY OUTLET YEAR LTD AND THE SSDI

The files of the Department of Transport show a joint proposal being made by Outlet Year Ltd and the SSDI. The proposal was submitted under cover of a letter on SSDI letterhead addressed to the Secretary for Transport.

This letter is undated. Also, there is no date-received stamp on it, which makes it doubly difficult to determine when it was submitted. [EXHIBIT 95]

In the course of his interrogation by the Ombudsman Commission, Mr Leo Moore indicated that this letter had been typed on 8 or 9 July 1991 at the Port Moresby Travelodge Hotel. It is poorly written and difficult to understand. It reads:

Chapter 12

148

"Dear Sir,

OBSERVATION REPORT (Draft)

ON A PROPOSED FREEWAY PROJECT FROM PORT
MORESBY TO JACKSON'S AIRPORT IN PNG

It is really a pleasure to send you the Observation Report (Draft) on a proposed freeway project from Port Moresby to Jackson's Airport in PNG. After having received your invitation letter and scrutinizing all relevant documents available, we, the Second Surveying and Designing Institute, Ministry of Railways P.ILC, immediately sent a observation group to your beautiful Country, (4 Senior Engineers and a Senior economist), together with Mr Leung Keung (Managing Director of Outlet Year Limited) and his party. From July 6, arriving day, to July 10, we have made a on-the-spot investigation to the proposed freeway project. The Observation Report (draft) is attached to the Financial Proposal.

The total project including the tunnel could cost almost US\$50 million are included. We believe it is unwise at this stage because the traffic lights can function just as effectively, but off cause it is negotiable.

Hence, your government gives the approval of the construction of this project at a total cost of US\$50 million which will become a loan to the Government in principle with the following Principal terms and conditions.

Borrow:	The Independent State of PNG on behalf of the Spring Garden Toll Road Corporation.
Lender,	The Bank of China and our Corporation
Maturity:	10 years
Grace Period:	3 years (including construction period)
Amount:	US\$50 million (approx K million)
Interest Rate:	Nil
Commitment Fee:	Nil
Management Fee:	Nil
Performance Bond	10% to be issue by the Bank of China.

We hope all these reports and conditions for the funding are acceptable for your requirement.

With Best Regards.
Yours faithfully
[Signed]
MOORE'S INVESTMENT GROUP
Sun Young HSE (Executive Director)

On Behalf of
Observation Group of
The Second Surveying and Designing
Institute
Ministry of Railways." [palIBIT 95]

This undated letter was accompanied by an "Observation Report'. It states:

Chapter 12

149

"This proposal has been prepared in response to an invitation from the Department of Transport to Outlet Year Ltd to submit a proposal for the development of the Spring Garden Road through BOT system...Outlet Year Ltd in joint partnership with the Ministry of Railways of People's Republic of China will assume full responsibility to the Department of Transport for the successful completion of the required services from planning, design, financing and implementation." [EXHIBIT 951]

Curiously, most of this twenty-eight page "observation report' was almost exactly the same (i.e. word-for-word) as another document the Ombudsman Commission obtained during the investigation. This other document is entitled "Spring Garden Road through BOT System Technical Proposal Submitted by Topbay Investment Limited Kowloon Hong Kong June 1991". [EXHIBIT 91]

[12,32] THE PROPOSAL BY TOPBAY INVESTMENT LTD

The "Technical Proposal" in the name of Topbay Investment Ltd is not in the files of the Department of Transport. The Ombudsman Commission was not aware of its existence until it was produced under summons by Mr Temo. Although the greater part of this document [EXHIBIT 91] is exactly the same as the "Observation Report" submitted by Outlet Year Ltd [EXHIBIT 95] there are significant differences between the two documents.

[12.33] DIFFERENCES BETWEEN TOPBAY PROPOSAL AND THE OUTLET YEAR PROPOSAL

11

The most obvious difference is in the identity of the proponents. Whereas the "Observation Report" in the possession of the Department of Transport refers to Outlet Year Ltd and the SSDI, the document we obtained from the Minister for Transport states, in the corresponding paragraphs:

Chapter 12

150

"This proposal has been prepared in response to an invitation from the Department of Transport to Topbay Investmended [sic] to submit a proposal for the development of the Spring Garden Road through the BOT system... Topbay Investmended [sic] in joint partnership with the Ministry of Foreign Economic Relations and Trade of the People's Republic of China will assume full responsibility to the Department of Transport for the successful completion of the required services from planning, design, financing and implementation."
[EXHIBIT 91]

It will be observed that not only is there a different Hong Kong -based company referred to here, there is also a different agency of the Chinese Government: the Ministry of Foreign Economic Relations and Trade, rather than the Ministry of Railways. And at another point in the Topbay Investment Ltd document, there is a reference to yet another mysterious entity called the "China Guangzhou International Economic and Technical Co-operation Company". [EXHIBIT 91, third last page]

The "Financial Proposals" included in the two documents are also different.
[Compare EXHIBIT 95, folios 96-101 with the last 3 pages of EXHIBIT 91.]

However, the Topbay and Outlet Year proposals do have some things in common. They are equally vague and poorly drafted and they both contain bald assumptions about involvement of Motu-Koita landowners in the project. They both assume (alarming)ly that as part of the deal, the Chinese consortium will be awarded contracts for other major road projects in Papua New Guinea.

[12.34] THE MYSTERY SURROUNDING THE TWO DIFFERENT PROPOSALS ON BEHALF OF THE CHINESE CONSORTIUM IS A MATTER OF SERIOUS CONCERN

Although the bulk of the two proposals was exactly the same, they were in fact two separate documents. The Ombudsman Commission is mystified and seriously concerned by the fact that only one of the proposals was in the possession of the Department of Transport.

It is also a mystery why the Topbay Investment Ltd Technical Proposal was linked with a Ministry of the Chinese Government different to the one which had consistently been referred to in earlier documentation.

Even after closely examining the files of the Department of Transport and questioning two of the key persons in the negotiations at length (i.e. the Minister for Transport and Mr Leo Moore) it is impossible for us to say exactly what negotiations had taken place, when they took place and with whom.

The mystery surrounding these two proposals is a small indication of how unprofessionally the whole negotiating process was being handled. It was nothing short of a farce.

The sad thing is that a group of well-intentioned foreign businessmen and representatives of the Government of the People's Republic of China, were being given false expectations by a Minister of the State.

The Minister was acting without the advice of his Department and had assumed far too much control over a decision-making process that should have been carried out objectively and fairly by other bodies using the normal and lawful procedures under the Public Finances (Management) Act and other laws regulating public works projects (see Part III of this report).

[12.35] WHAT IMPRESSION WAS GIVEN TO THE CHINESE CONSORTIUM BY THE END OF THEIR VISIT IN JULY 1991?

The Ombudsman Commission has no doubt that the observation group of the SSDI left Port Moresby at the end of their visit in July 1991 with the firm belief that, subject to confirmation of financing arrangements such as the 10% performance bond, they had "won" the contract for the Spring Garden Road/Poreporena Freeway project.

This is evident from the undated letter to the Secretary for Transport which the SSDI delivered just before its departure. It stated:

"Hence, your government gives the approval of the construction of this project at a total cost of US\$50 million...". [EXHIBIT 95, page 1]

The letter to the Minister for Transport from the China Huashi Enterprises Corporation of 6 September 1991 was in similar terms:

"If you agree the above-mentioned arrangement in principle, we intend to sign a main contract of contracting the Spring Garden Road Link project with you based on the Pre-Agreement signed by you and Mr Zhu Chuanhua in PNG." [EXHIBIT 106, page 2]

The Ombudsman Commission questioned Mr Leo Moore as to his view of the situation at the end of the observation group's visit. He testified that the group appreciated the Minister's decision had to be ratified by the National Executive Council. But they understood this to be only a formality. The Minister had told them he foresaw no problems. As long as they could arrange for a bank guarantee of the performance bond, the final contract would be signed.

Chapter 12

153

IMPROPER RELATIONSHIP BETWEEN THE MINISTER AND THE CHINESE CONSORTIUM

[12.36] SUMMARY OF THE RELATIONSHIP BETWEEN THE MINISTER FOR TRANSPORT AND THE CHINESE CONSORTIUM PRIOR TO THE MINISTERIAL COMMITTEE MEETING OF 18 JULY 1991

In light of the evidence outlined above, the Ombudsman Commission is satisfied that, prior to the meeting of the Ministerial Committee on 18 July 1991, the Minister for Transport had formed a very close association with members of the Chinese consortium.

In particular we draw attention to the following unsatisfactory aspects of that relationship:

1. The Minister had twice been on all-expenses-paid overseas trips to personally negotiate deals concerning the Spring Garden Road/Poreporena Freeway project and other national road projects. Both trips were paid for by one of the key persons involved in the bid by the Chinese consortium.
2. On the first of these trips, the Minister signed a contract for construction of the Southern Highlands-Kikori Road with a company that was part of the Chinese consortium. He did this without authorisation and without the advice or knowledge of the Department of Transport.
3. The first trip took place at the same time the Minister himself was preparing the shortlist for the Spring Garden Road/

Poreporena

Freeway project.

Chapter 12

154

4. The Minister invited representatives of the Chinese consortium to Port Moresby on two separate occasions before the Ministerial Committee (which he chaired) made its decision on which consortium to favour. On both occasions the Minister engaged in detailed negotiations concerning the Spring Garden Road/Poreporena Freeway project, as well as other national road projects.

5. On the second visit to Port Moresby by the Chinese consortium, the Minister signed a "pre-agreement" and gave the clear impression that, subject to finance, they had won the contract for the Spring Garden Road/Poreporena Freeway project.

6. Furthermore, the Minister had formed a personal friendship with one of the key persons involved in the Chinese bid, Mr Leo Moore. This friendship was strengthened in the second half of 1991: the Minister had another visit to Hong Kong paid for by Mr Moore and the Minister went into business with Mr Moore.

By forming this association with the Chinese consortium and entering into private negotiations without consulting the Department of Transport before the Ministerial Committee met on 18 July 1991 and before the matter was considered by the National Executive Council, the Minister for Transport, Mr Temo, had transformed the decision-making process for the Spring Garden Road/Poreporena Freeway project into a sham.

* * * * *

13. FURTHER CHANGE IN COMPOSITION OF THE
CHINESE CONSORTIUM: SEPTEMBER 1991

[13.1] THE NEGOTIATING PATTERN IN THE FIRST HALF OF 1991

During the first half of 1991 the Minister for Transport had been negotiating with a number of different companies and individuals, in relation to the Spring Garden Road/Poreporena Freeway project. In particular, the Minister had been negotiating with:

Mr Leo Moore;

represented the Second Surveying and Designing Institute, by Mr Sun Young Hse; and

Keung. Outlet Year Ltd, represented by Mr Leung

[13.2] WHO ELSE FORMED 'THE CHINESE CONSORTIUM'?

However, these were not the only parties that formed, what the Ombudsman Commission has termed in this report, "the Chinese consortium". The following parties were also, at different times, involved:

company. The Topbay Investment Ltd: a Hong Kong-based proposal endorsed by the Ministerial Committee on Spring Garden Road was actually in the name of this

company.

company had never
of the

[EXHIBIT 99, at page 13]. However, the
conducted business in PNG and the principals
company had never been to PNG.

Chapter 13

156

China Guangzhou International Economic and Technical Cooperation Company and Ministry of Foreign Economic Relations and Trade of the Peoples' Republic of China: referred to as joint partners in the Technical Proposal of Topbay Investment Ltd. [EXHIBIT 91] Their role in the negotiations is a complete mystery.

China Ample Development Lid: also linked with Topbay Investment Ltd and the SSDI in the summary of proposals contained in the draft NEC Submission of July 1991. [EXHIBIT 99, at page 13, discussed in Chapter 8] However, the name does not appear in any other documents in the records of the Department of Transport obtained by the for the purposes of this investigation. Its role in the negotiations is also a complete mystery.

Moore's Investment Group: a name used in two letters written by Mr Sun of the SSDI. It appears to be a name of convenience only, used to describe the consortium, of which the SSDI was an integral part.
[EXHIBITS 95, 110]

China Huashi Enterprises Corporation: from the evidence of Mr Moore, this Chinese Government company is closely linked with the SSDI. It was apparently intended that it would formally enter into the contract for the Spring Garden project Road/Poreporena Freeway with the PNG Government.

Chapter 13

157

[13.3] THE ROLE OF MR LEO MOORE

Mr Leo Moore's role in the negotiations was not well defined, but it is clear he had an active and vested interest in everything that was happening in relation to the project.

The Ombudsman Commission does not suggest there was anything illegal or improper in Mr Moore's involvement. He was, however, at all times, an important link between the Minister for Transport and the other parties involved.

[13.4] ANOTHER HONG KONG COMPANY JOINS THE CONSORTIUM

During September 1991 there was a significant change in the negotiating pattern: another Hong Kong-based company was appointed to act on behalf of the SSDI. This company was called Tunson Engineering Co Ltd.

News of this change of plan was conveyed to Mr Temo in a letter from the SSDI dated 28 September 1991. The letter reads as follows:

'Dear Mr. Temo:

Our second surveying & designing Institute, ministry of Railways Prc. Now has pass the burns peak project to our contractor in Hong Kong under the name of Tnnson Engineering Co. Ltd, 1-3/F, 21-23 Han Wong Road, Kowloon City, Kowloon Hong Kong. Who has the experience of contracting the Mordem constructions both in peoples republic of China as well as Hong Kong.

Chapter 13

158

It would be much appreciated if your department will change
your record

Accordingly.

Yours faithfully

[Signed]

MOORS INVESTMENT GROUP

SUN YOUNG HSE (EXECUTIVE DIRECTOR)

ON BEHALF OF OBSERVATION GROUP OF THE

SECOND SURVEYING AND DESIGNING

INSTITUTE, MINISTRY OF RAILWAYS [sic].

[EXHIBIT 110]

The Minister for Transport made a handwritten note at the bottom of
the
letter, dated 10.10.91.

"SECRETARY

PLEASE TAKE NOTE OF ABOVE CHANGE AS I HAVE NO OBJECTION AS
LONG AS THEY ARE MEETING OUR CRITERIA.

ALSO PREPARE THE FINAL SUBMISSION TO CABINET. WORK CLOSELY
WITH FINANCE DEPARTMENT.

THANK YOU

A. TEMO". [EXHIBIT 110]

In his response to the Ombudsman Commission's preliminary report, Mr
Temo also claimed that he had asked the Secretary for Transport to
do

a company search on all the companies that put in a bid:

even instructed the Secretary to send someone to Hong Kong to find out in case we mislead the NEC." [EXHIBIT 257, page 4]

We have been unable to find any evidence to corroborate this claim.

Chapter 13

159

[13.5] SIGNIFICANCE OF CHANGE IN COMPOSITION OF THE CONSORTIUM

Tunson Engineering Co Ltd was at least the third Hong Kong-based company to join the Chinese consortium in less than six months. In the opinion of the Ombudsman Commission, the fact there had been yet another change in the composition of the consortium should have been a matter of great concern, both to the Minister for Transport and the Department of Transport.

During the course of this investigation, the Ombudsman Commission found it impossible to identify the precise legal relationships between the various parties that, at different times, constituted the Chinese consortium. We are left to wonder how confusing it must have been at the time, with companies such as Outlet Year Ltd, China Ample Development Ltd and Topbay Investment Ltd, as well as "Moore's Investment Group", all being linked with the proposal of the SSDI and various other

agencies of the
Chinese Government.

The addition of Tunson Engineering Co Ltd to the consortium in September 1991 could only have added to the utter confusion that any reasonably cautious administrator would have experienced at that time.

[13.6] THE CONFUSION CAUSED BY A FURTHER CHANGE IN THE CONSORTIUM SHOULD HAVE LED TO A HALT IN NEGOTIATIONS

There were some obvious questions to ask about the arrival of Tujison Engineering Co Ltd:

Why was the change in composition of the consortium necessary?

Chapter 13

160

Were the companies previously in the consortium disreputable?

Did they have financial problems?

If so, what guarantee was there that the same problems wouldn't be encountered with this new company?

Who was behind Tunson Engineering Co Ltd?

Was it a reputable company?

How long had it been established?

Did it have any experience operating in PNG?

Had any of its principals been to PNG?

What was the company's asset base?

Did the company have experience in civil engineering projects?

Was it registered with the National Investment and Development Authority (NIDA)?

It later transpired that the Department of Transport did begin to ask some of these questions (see Chapter 15). The Minister's reaction, however, was not the same as the Department's.

Chapter 13

161

[13.7] THE MINISTER'S LACK OF CONCERN WAS IRRESPONSIBLE

The Ombudsman Commission considers that the Minister for Transport's direction to the Secretary of the Department of Transport on 10 October 1991 to "take note of the change" and the Minister's comment that he had "no objection as long as they are meeting our criteria" was an ill-considered, inadequate and reckless response to the addition of Tunson Engineering Co Ltd to the Chinese consortium.

The Minister for Transport showed a total disregard for all the normal and proper legal and administrative procedures regulating public works projects in Papua New Guinea.

The Minister should have been deeply concerned about this development.

But he was not concerned. Far from it. As we show in the next chapter of this report, only a few days after advising the Secretary for Transport about Tunson Engineering Co Ltd, the Minister signed a contract with that company for construction of the freeway.

* * * * *

14. MINISTER FOR TRANSPORT SIGNS CONTRACT FOR
CONSTRUCTION OF FREEWAY: OCTOBER 1991

[14.1] NEGOTIATIONS WITH TUNSON ENGINEERING CO LTD

During October 1991, the Managing Director of Tunson Engineering Co Ltd, Mr Siu Chu Yen, visited Port Moresby and had negotiations with the Minister for Transport, concerning the Spring Garden Road/Poreporena Freeway project.

Mr Siu was accompanied by four other Hong Kong businessmen, as well as Mr Leo Moore.

Mr Moore testified that the Tunson group visited Port Moresby for one week and stayed at the Port Moresby Travelodge Hotel. He came on the same flight as the Tunson group and returned with them to Hong Kong in mid-October 1991.

The Ombudsman Commission is satisfied that the negotiations between the Minister for Transport and Tunson Engineering Co. Ltd occurred without the knowledge of the Secretary for Transport, Mr Amini.

[14.2] RESULT OF NEGOTIATIONS

The result of the negotiations was that, on 15 October 1991, the Minister for Transport, purporting to act on behalf of the Department

of Transport,

Chapter 14

163

Tunson signed a contract for the construction of the Spring Garden Road/Poreporena Freeway. The contract was entered into with Engineering Co. Ltd. of Kowloon Hong Kong. [EXHIBIT 115

THE CONTRACT OF 15 OCTOBER 1991

[14.3] TERMS OF THE CONTRACT

The contract dated 15 October 1991 is nine pages in length and is entitled:

'CONTRACT AGREEMENT ■
The agreement for the construction of (Burnspeak-Spring Garden Road) (from Port Moresby to Jackson Airport [sic].'
■

The document states, amongst other things:

To change the traffic condition from Port Moresby to Jackson airport, design the construction of the Spring Garden Road Link project from Port Moresby to jacksons Airport in PNG.

From June 1991, we have invited by the Ministry of Transport of PNG to realize the work and make the agreement as following item.

A. This agreement will be signed between the Transportation of PNG as Party A and Tunson Engineering Co., Ltd. as Party.

B. Project Description:

B1(a) The proposed mad link will start from Moresby Harbour in Konedobu, along the existing Spring Garden Road crossed the Bums Peak saddle (by tunnel) and intersects with Wards, Waigani, Boroko Roads, and then along the Geauta Drive Road intersects with Hubert Murray Highway, finally to Jackson airport total length 8.8 km.

B1(b) Based on the economic Assessment for Spring Garden Road on Port Moresby Road needs study and requirements pointed out by the Department of Transportation. The main technical standards are as follows:

Chapter 14

164

Length of new mad :	4.6 kilometer
Length of existing mad:	3.5 kilometer
Number of Lanes :	4
Width of each Lanes :	35m
Medium	2m
Width of each pedestrian (earth surface) (for :	3.5 m
each side, not including tunnel)	
Width of Subgrade	23m
Pavement	Bituminous Concret
Including	Traffic Sign Board.'

[EXHIBIT 115]

[14.4] A POORLY DRAFTED AND BARELY INTELLIGIBLE DOCUMENT

This is quite a remarkable document. It purports to be a contract for construction of the Spring Garden Road/Poreporena Freeway project. But

it is so vague and poorly drafted, it is difficult to believe it was prepared by anyone with legal qualifications or, indeed, anyone reasonably fluent in the English language.

Mr Moore testified the contract had been drafted and typed in a rush, and was not finished until the early hours of one morning at the Port Moresby Travelodge Hotel. This is evident from the quality of the document.

It is riddled with bizarre and barely intelligible terms. For example, Clause E quotes a total construction cost of US\$49,383,000.00. Clause F then states:

Not including:

- F(1) Unexpected (unlimited) cost etc.
- F(2) The cost for land acquisition and removal of existing structures, houses, electrical power cables, underground pipes and cable etc.

Chapter 14

165

1

F(3) Party A shall be responsible for the net profit, import materials machinery and daily equipment taxes that can be omitted.

F(4) Changing price for the requirements the money or other unexpected cost. From above F(1) and F(4) mentioned about the price will be written in details in construction agreement.

F(5) The construction of channel, drainage, manhole,
traffic lights and
all E & M services works.'
[EXHIBIT 115, page 4]

It is stating the obvious to say that many of these
provisions - which
presumably represent additions to the "total construction
cost" - simply defy
comprehension.

[14.5] THE MINISTER FOR TRANSPORT AGREED TO AWARD OTHER ROAD
CONTRACTS TO TUNSON

An alarming part of the Contract is Clause G, which relates
to 'Terms of
Payment". Its states:

"G(1) Party A must pay in U.S. dollars and it must make
promise from bank
guarantee of (The Bank of Papua New Guinea).

G(2) Payment to be paid with 10th years including
construction period. Any
default over 10th years % (percent) will be charge per
year.

G(3) In the meantime, Part A and Part B intend to sign
other contract.

G(4) If Party B sign more than one contract with Part A
(Transportation
Department of Papua New Guinea Government), the
aforesaid item of
following
G(2) must be voided and payment will according to the
payment terms, details as shown on G(7), (8), (9).

Chapter 14

166

G(5) Party B is agree [sic] to sign one more contract for 45 kilometer [sic] of Roadway with Party A (Minis' try of Transport) Than the payment must be according to the Original Contract.

G(6) Furthermore, Party B also intend to sign the another contract of construction for 147 kilometer length mad link will start from Bereina to Lae and Malalna to Erave with Party A after their future site investigation and other preparation works [sic].•
[EXHIBIT 115, page 4]

It is apparent from these terms that, in the course of negotiating construction of the Spring Garden Road/Poreporena Freeway, the Minister for Transport was also negotiating other road projects, including a road between Erave, Southern Highlands Province, and Malalaua, Gulf Province.

The Department of Transport was not aware the Minister was conducting negotiations for the Erave-Malalaua road. Nor is there evidence the Minister was authorised by the National Executive Council to do so.

[14.6] THE SCOPE OF THE PROJECT IN THE CONTRACT OF 15 OCTOBER 1991

The scope of the project is very poorly defined in the contract with Tunson Engineering Co Ltd.

Clause B(1)(a), for example, describes the route of the proposed road link in very general terms and describes the total length as 8.8 kilometres.

Clause B1(b) then states the length of new road will be 4.6 kilometres, and the existing road 3.5 kilometres, ie a total of only 8.1 kilometres: 700

metres of road has disappeared in the space of one paragraph.

Chapter 14

167

Clause B1 (b) further states that there will be one tunnel, four bridges,

sixteen cross road drainages and four junctions, but does not specify

where any of them will be.

These are only a few of the many defects in this woefully inadequate

document The Ombudsman Commission is at a loss to find any good

reason why a Minister of the State would have signed it.

[14.7] COULD THE MINISTER'S ACTIONS BE JUSTIFIED?

We emphasised in Chapter 12 that, in the opinion of the Ombudsman

Commission, it is very wrong for any Minister of the State to sign contracts

on behalf of his Department or the Government without express

authorisation.

In this case, the Minister for Transport repeated the mistake he made eight

months earlier in Hong Kong: he signed a contract for a mufti-million kina

transport project of national significance, without the authorisation of the

National Executive Council and without the knowledge or advice of his

Department This was unlawful and wrong, and was not in the best

interests of the Government and the State.

[14.8] WAS THE CONTRACT MERELY A *MEMORANDUM OF UNDERSTANDING'?

The only conceivable way the signing of the contract with Tunson

Engineering Co Ltd could be acceptable is if it were regarded as merely

a record of an "understanding" reached between Mr Temo and the

Managing Director of that company. This was the view taken by the

Department of Transport, when it discovered the signing of the agreement.

Chapter 14

In his response to our preliminary report, Mr Temo also claimed the

contract was only meant to be a memorandum of understanding:

The Secretary for Transport or in his absence there was always someone to give me advice in fact we had a morning briefing every week on Burns Peak and other matters.

The contract was a documentation of some sort required by Chinese Government before they leave out of China.

Because it was mentioned that they did not have office in PNG so they required a form and reason paper to show their Government so they could come again to PNG many times. This was very important to them as a requirement.'

[EXHIBIT 257, page 41

The Ombudsman Commission regards this as a very charitable assessment of the Minister for Transport's actions, which were wrong and unacceptable.

The document of 15 October 1991 is entitled "Contract Agreement". Though it is poorly drafted and barely intelligible, it gives the appearance – at first glance – of being intended to be a binding agreement. It has a number of specific terms and sets a "total construction cost" of US\$49,383,000.00. The document has been signed and witnessed in a way contracts are normally executed.

The Ombudsman Commission therefore cannot accept that the "Contract Agreement" of 15 October 1991 was only intended to be a memorandum of understanding.

Nor do we accept Mr Temo's spurious claim that it was necessary to sign the contract, so that members of the consortium based in the People's Republic of China would be allowed to leave their country. If there were

such a requirement, then the only proper way to comply with it was to

Chapter 14

169

formally advise and liaise with the Chinese Embassy in Port Moresby.

However, there is no suggestion that that was done.¹¹¹

[14.9] THE DANGERS OF ENTERING INTO UNAUTHORISED AGREEMENTS WITH FOREIGNERS

We do appreciate that, in his own mind, the Minister for Transport might have believed that the contract with Tunson Engineering Co Ltd was not enforceable without National Executive Council approval. But that does not, in our view, provide an excuse for his actions.

When foreign enterprises enter into written agreements with Ministers, they expect those agreements to be honoured. If the agreements are not honoured, the time and money of the foreign enterprises can be wasted.

This gives Papua New Guinea a bad name and the investment climate becomes uncertain, if not bad. Our image abroad is very important

Foreigners who are not familiar with our laws and our Constitution won't always understand that the Minister they were dealing with had no authority to sign the agreement entered into. Nor do they always know that an agreement will require the approval of the National Executive Council or a Supply and Tenders Board or the Public Works Committee. This is especially the case with businessmen from Asia, where accepted methods of doing business are often different from those applying in Papua New Guinea.

In addition to the embarrassment that these 'specie' agreements with

Ministers can cause for the whole Nation when not honoured,
such agreements create an environment for sweetheart deals,
bribery and corruption. It is just plain common sense that Ministers –
and any other persons holding official positions – must not sign these
documents.

Chapter 14

170

In the opinion of the Ombudsman Commission it was grossly
irresponsible of the Minister for Transport to sign the Contract Agreement
with Tunson Engineering Co Ltd on 15 October 1991.

[14.10] REACTION OF THE DEPARTMENT OF TRANSPORT TO THE SIGNING OF THE CONTRACT WITH TUNSON ENGINEERING CO LTD

The Department of Transport became aware of the contract
with Tunson soon after it was signed. Not surprisingly, the news that
the Minister had signed a contract for the building of the freeway without
National Executive Council approval caused alarm and bewilderment within the
Department.

[14.11] MR HITOLO ADVISES MR AMINI ABOUT THE CONTRACT OF 15 OCTOBER 1991

In a minute to Secretary Amini dated 17 October 1991, the
Director of the Policy Secretariat, Mr Hitolo stated:

'... Now I am at a loss, as to how to proceed on this
project because your verbal instruction which is consistent with the World Bank
advice seem to be in direct

conflict with this signed contract agreement.

I do not know the legality of it but it seems our procurement procedures are being short-circuited by the use of the delegated powers of the NEC in his capacity as the Chairman of the Special Ministerial Committee on Spring Garden Road. Even so, I think there are other legal aspects like registration of the company in PNG and also the professional requirement to practice as Engineers in PNG needs to be completed...

I am trying to get this circulated to the Members of the Steering Committee so that we are able to get proper advice as to how to proceed, because it seems our Minister is determined to pursue the project with the Chinese. In other words, the policy from him is loud and clear as I interpreted it, but let us make it our business to get the best and the most cost effective solution for Papua New Guinea.' [EXHIBITS 117,1181

Chapter 14

171

[14.12] SECRETARY FOR TRANSPORT ADVISES MINISTER TO EXERCISE CAUTION

Shortly after receiving Mr Hitolo's advice, Secretary Amini wrote to the Minister in the following terms:

"My Dear Minister

I have just browse through an agreement on the Bums Peak project (attached) which you have signed with the proposed developers.

It comes across to me that it may not be accepted as a legal binding document for the following reasons:-

As Chairman of the Ministerial Committee, you made recommendation for the construction contract to be awarded to The Second Surveying and Designing Institute, Ministry of Railways of China' but the agreement sign is with Tunson Engineering Co. Ltd, Hong Kong a completely new company;

2. It is my understanding that such agreements are between the State and the developers, in which case the Finance Minister or the Governor General is the one that has the delegated powers to sign;

3. Some of the conditions and terms are not in the best interest of the State. Our Attorney General Department should review the document;

I am inclined to suggest that perhaps it wads meant to be a Memorandum of Understanding, in which case you are right to sign but it should be made clear that it is so, and that it has no legal binding on the State.

On these basis, I would advise you strongly that you do not pursue the document as an agreement.

In this regard, I would suggest that you write to the developers and advise them of this position. I have attached a draft letter for your perusal.

In the meantime, I will seek legal advice from the Attorney General Department to assist you in dealing with this situation.

ale; tiar 14

172

I am available to discuss this further with you at your convenience.

Yours sincerely
[Signed]
BIC AMINI, CBE
Secretary' [EXHIBIT 122]

[14.13] PROPRIETY OF THE SECRETARY'S ACTIONS

Like Mr Hitolo's letter to Mr Amini, Mr Amini's letter to the Minister made

a number of pertinent points about the propriety of the Minister's signing

of the contract with Tunson. It is, in our view, quite proper and necessary

for the Secretary of a Department to bring such matters to the attention

of his or her Minister.

Mr Amini deserves praise, at this point, for his prompt action in advising

the Minister to write to Tunson and tell them not to rely on

the contract as

a binding agreement.

There was one very important matter, however, which Mr Amini neglected

to mention: the signing of the contract was in direct conflict with the advice

of the World Bank. This had been brought to Mr Amini's attention by Mr

Hitolo and Mr Amini should have spelt it out in clear and unambiguous

terms to the Minister.

Only a couple of weeks before the Minister signed the contract with

Tunson Engineering Co Ltd, the World Bank had strongly advised that the

Spring Garden Road/Poreporena Freeway project be re-tendered. This

development is documented in Chapter 15.

Chapter 14

173

MINISTER CONTINUES NEGOTIATIONS WITH CHINESE CONSORTIUM

[14.14] FURTHER DIRECT NEGOTIATIONS BETWEEN THE MINISTER FOR TRANSPORT AND THE SECOND SURVEYING AND DESIGNING INSTITUTE

Though he signed a contract for construction of the freeway on 15 October

1991, the Minister for Transport continued to conduct negotiations with the Chinese consortium.

Letter written on 21 October 1991

On 21 October 1991, the Minister for Transport wrote a letter to Mr Zhu Chuanmua, a Senior Engineer with the Second Surveying and Designing Institute and a member of the SSDI team that had visited Port Moresby three months earlier, in July 1991.

It appears the Minister was trying to communicate his concern about some of the terms in "the final contract" which, the Minister says, the SSDI had sent on 13 and 23 September 1991.

The letter reads as follows:

"SUBJECT: REGARDING THE COMMENT OF FINAL CONTRACTS OF THE FREEWAY PROJECT FROM PORT MORESBY TO JACKSON AIRPORT (OR) BURNS PEAK PROJECT

DEAR MR. ZHU,

I acknowledge in receiving the final contract which your institute had written on 13th and 23rd of September 1991 passed thru Mr. Sun Young Use with Appreciation. I and my department had review it and would like to apply as follow.

According to our Government policy there are four 1/2
point to be mentioned.

1. the total cost of the contraction cannot be over US
\$50 millions, and
your cost for the contract which you had put in the
final contract is
over US\$64 million dollars, that is more than the
other contractors from
Japan, America, Australia and Hong Kong.

2. In regards to the supervision of the project, it
should be supervised by
our transportation department, as discussed in
meetings.

3. The systems of the Surveying, and Designing should
be in three systems,
British, Australian, and Papua New Guinean system.

According to our policy, before construction our
Government cannot
per any deposit or advance to the contractor, even
Moore's Investment
Group willing to pay, it would not be accepted,
what our Government
will do, will be seeking our bank to guaranty the
payment thru Bank
of Papua New Guinea accordingly.

5. The contract must seek their bank to put up 10%
Performance bond,,
and your bank certificate is not accepted.

Your engineer were here in July, and went thru all the
meeting, it seems that
your interpreter had his interpret the whole meaning I
hope your Institute
can re-check and advise as soon as possible, awaiting
for your reply, thanking
you.

Yours sincerely
[Signed]
HON. ANTHONY TEMO, MP - Minister for Transport,
Transportation
Department. • [EXHIBIT 123]

[14.15] WHAT DID THE MINISTER MEAN BY THE 'FINAL CONTRACT'?

It is unclear what the Minister was referring to as "the final contract which

your institute had written on 13th and 23rd of September 1991". There is

no contract bearing either of those dates in the files of the Department of

Transport. Perhaps the Minister was referring to the observation report

and the financial proposal sent to the Department of Transport under cover

of the undated letter from the SSDI, referred to in Chapter 12 of this report.

[EXHIBIT 95]

Chapter 14

175

Perhaps there was a final contract signed with the SSDI, that the Minister

for Transport failed to advise anyone else about.

We have been unable to ascertain what the Minister meant by "the final

contract".

[14.16] SIGNIFICANCE OF THE LETTER OF 21 OCTOBER 1991

Irrespective of whether the Minister had signed a contract with the SSDI,

the significant thing about this letter is that it was written six days after the

Minister signed the contract with Tunson Engineering Co. Ltd. That is,

though he had already signed a contract for construction of the freeway

with that company, the Minister was continuing to negotiate the terms of

the deal with its consortium partner.

[14.17] MR TEMO'S DEFENCE

When we made this finding in our preliminary report, Mr Temo responded

as follows:

'NEC had authorised my Ministerial Committee to negotiate the best deal for PNG by following special tender procedures. There was no legal agreement in place for any company to proceed everyone knew that.' [EXHIBIT 257, page 51]

Mr Temo consistently claimed the National Executive Council had approved

"special procedures" for this project. He suggested he had been

encouraged to bypass normal tender procedures. If normal procedures

were followed, he said, the project would have taken too long to come to

fruition. He said he was constantly being harangued in the Parliament

about the traffic problems in Port Moresby. Whenever there was an

Chapter 14

176

accident on Three Mile Hill, he was blamed. He saw it as his duty to the Nation to get the project implemented as soon as possible.

He didn't
always get the support he should have received from other
members of
the Ministerial Committee on Spring Garden Road or the
Department of
Transport. It was therefore necessary to conduct
negotiations himself.

[14.18] Mr TEMO'S EXPLANATION REJECTED

In the opinion of the Ombudsman Commission, none of these
things
satisfactorily explain the Minister's continuing to
negotiate the terms of the
agreement with the SSDI, when he had signed a contract for
construction
of the freeway just prior to this, with another member of
the SSDI
consortium. His actions could only have caused confusion to
the various
members of the Chinese consortium, if they had known what
the Minister
was doing. It was very bad for the Government and the
country.

THE MINISTER FOR TRANSPORT ACTED IRRESPONSIBLY

[14.19] SUMMARY OF DEVELOPMENTS DURING OCTOBER 1991

Prior to October 1991, the Hong Kong-based company known as
Tunson
Engineering Co. Ltd had no involvement in the Spring Garden
Road/Poreporena Freeway project. However, during October
1991,
representatives of that company travelled to Port Moresby to
discuss the
project with the Minister for Transport.

Chapter 14

Following these discussions the Minister wrongly entered into a
contract
with the company for the construction of the Spring Garden

Road/Poreporena Freeway, without the advice or knowledge of the Department of Transport.

Despite doing this, the Minister continued to negotiate the terms of the contract with another member of the Chinese consortium.

As a matter of administration, the Minister's conduct during October 1991 was, in the opinion of the Ombudsman Commission, naive, incompetent and irresponsible.

* * * * *

Chapter 14

178

15. ROLE OF THE WORLD BANK IN THE SPRING GARDEN ROAD/POREPORENA FREEWAY PROJECT

[15.1] TWO WORLD BANK MISSIONS

The World Bank has an on-going interest in the development of Papua New Guinea's transport infrastructure. In 1991, at least two World Bank

Missions visited Port Moresby and made recommendations concerning the Spring Garden Road/Poreporena Freeway project.

[15.2] THE FIRST MISSION: JUNE 1991

The first Mission was carried out from 21 to 26 June 1991 and consisted of Mr Heins Unger, a municipal engineer. The draft Aide Memoire prepared following this Mission (we were unable to obtain a final version of the document) shows that the Mission met with officials from the Department of Transport, the Office of International Development Assistance and the National Capital District Commission.

The purpose of the Mission was to give advice on a wide range of World Bank-sponsored transport projects, one of which was Spring Garden Road. The Aide-Memoire dated 26 June 1991 records the following observations:

"The Coffey Geotechnical Investigation of the Spring Garden Road scheme was reviewed in summary form by the mission and found to be thorough, comprehensive and clear in its findings and recommendations...

Chapter 15

[Regarding] the need of Department of Transport for expert

advice and assistance with solicitation, evaluation and negotiation of private sector BOT proposals for the construction of the Spring Garden Road link. In the mission's view, short term, intermittent support may be the preferable option, because different expertise is needed at the various stages of the project the costs of the assistance could also be kept down, since a suitable source of funding is still being explored. Further advice will be given from Bank HQ." [EXHIBIT 92]

It is apparent from this document that the idea of getting more expert advisers from the World Bank to assist the Department of Transport in the evaluation of proposals for the Spring Garden Road/Poreporena Freeway project had been raised.

As a consequence, another World Bank Mission was dispatched to Port Moresby a few months later.

[15.3] THE SECOND MISSION: SEPTEMBER 1991

The second World Bank Mission visited Port Moresby from 24 to 28 September 1991. On this occasion, attention was focused solely on the Spring Garden Road/Poreporena Freeway project.

The Aide-Memoire of 28 September 1991

The Mission's findings and recommendations are contained in an Aide-Memoire dated 28 September 1991, signed by Ms M C Nguyen, on behalf of the World Bank, and Mr Amini, on behalf of the Department of Transport.

Chapter 15

180

The Aide Memoire states:

"a) The private sector proposals do not meet the requirements of the TOR [i.e. Terms of Reference], including the selected proposal;

b) The inability of interested parties to respond adequately to the request is in part due to unclear distinction between the concepts of Build-Operate-Transfer (BOT) and the turnkey procurement;

c) While the economic viability of the project is established, the financial plan of the project based on recovery through tolls alone is unrealistic and unworkable;

d) The untested and novel concept of BOT and toll (in PNG) prevented respondents from submitting responsive bids;

e) The technical parameters are left unclear as to whether PNG was seeking a two or four lane road, one or two tube tunnels, and whether road surface would be of compacted gravel or asphalt concrete, and whether an open cut or tunnel was desired;

f) Land acquisition and environmental impact issues were not addressed in the request for proposal. Given the land tenure problems in PNG and potential environmental problems if an open cut is desired, specifications on these points could help get a more

responsive interest
to the project; and

g) Finally, the uncertain environment in PNG for private sector investments also contributes to the lack of responsive bids.'
[EXHIBIT 111, at page 1]

Other significant findings and recommendations of the World Bank, recorded under the heading "Retendering of Spring Garden Road", were as follows:

'An environmental impact study should be prepared to determine the environmental parameters that should be considered in the design of the link road- An investigation of the land aquisition in the area to determine the degree of difficulty in obtaining the right of way.

Following these studies which could be undertaken in three months, Department of Transport should issue a new request for proposal (RFP) including specifications that would help solicit responsive proposals from PS [the Private Sector]...

Chapter 15

181

If there is no responsive interest from private investors after the new tendering, it is proposed that Department of Transport seeks public funds for financing the above project" [EXHIBIT pages 3-41]

[15.4] SUMMARY OF WORLD BANK RECOMMENDATIONS

Put simply, the World Bank was saying that:

The Terms of Reference document prepared by the Department of Transport in early 1991 was vague and inadequate (see Chapter 10).

sector
studies
acquisition

If the Government was intent on pursuing private funding of the Spring Garden Road project, further studies would have to be undertaken to address the problem of financial returns and environmental and land issues.

new

Once these studies were completed – which would take about three months – it would be necessary to issue a "request for proposal".

funding the
seek

If the private sector was still not interested in project, the Department of Transport would have to seek public funding.

In other words, the World Bank was advocating a "back-to-the-drawing-boards" approach: the project should be re-tendered.

Chapter 15

[15.5] WERE THE WORLD BANK'S RECOMMENDATIONS FOLLOWED?

The recommendations contained in the Aide-Memoire of 28 September 1991 were completely ignored. No further financial or environmental studies were undertaken and the project was not re-tendered.

Only a couple of weeks after the Aide-Memoire was delivered, the Minister for Transport signed a contract for construction of the freeway with Tunson Engineering Co Ltd (see Chapter 14). This contract was not pursued, however, and in February 1992, the National Executive Council approved the awarding of the project to another company.

[15.6] WAS THE MINISTER ADVISED ABOUT THE RECOMMENDATIONS OF THE WORLD BANK?

The Ombudsman Commission asked the Secretary for Transport whether the World Bank's recommendations were brought to the attention of the Minister for Transport.

His reply was that "any major document is always referred to the Ministers for their information". Thus, the Secretary was saying that the normal practice of his Department is to bring such major documents to the attention of the Minister.

The Secretary also said:

The Minister was aware of the World Bank advice but took the view that this was just an advice and not binding on an Independent State and implied that NEC has the final say: [EXHIBIT 254, pant 131

However, the Secretary could not convince us he had formally briefed the Minister on the World Bank's advice. There is no documentary evidence in any of the Department of Transport files that this had been done.

The Minister for Transport, Mr Temo, said he had not seen the World Bank report until it was shown to him by the Ombudsman Commission and that the Secretary had never mentioned it to him.

The Ombudsman Commission is not necessarily concerned about the World Bank recommendations not being followed. It was the prerogative of the National Government to decide whether or not to adopt the recommendations.

Our concern is that the Secretary of the Department of Transport did not bring the recommendations immediately and formally to the attention of the Minister.

(15.7] THE IMPORTANCE OF INDEPENDENT ADVICE

The World Bank recommendations were obviously crucial to the future of the Spring Garden Road/Poreporena Freeway project. It was the duty of the Secretary for Transport to immediately and forcefully bring them to the attention of the Minister: The only way this could properly have been done was officially, i.e. in writing.

The Secretary for Transport failed to do this.

It is not relevant, in our view, to suggest that the Minister would have ignored the World Bank recommendations. In the opinion of the Ombudsman Commission, it is never an excuse to say that advice was not given to a Minister because it was thought, or even known, that the advice would not be followed.

The integrity and efficiency of our Public Service depends upon Ministers being promptly and fearlessly advised of all relevant matters – even when the advice is something the Minister does not want to hear. If we get to the stage where our Ministers only get the advice that they want to hear, we will be in a very sorry state. The professionalism of the Public Service will deteriorate.

The Ombudsman Commission concludes that the failure of the Secretary for Transport to formally convey the World Bank recommendations immediately to the Minister for Transport in late September 1991 was a bad piece of administration.

* * * * *

16. FATE OF THE POLICY SUBMISSION FAVOURING THE
CHINESE CONSORTIUM: DECEMBER 1991

[16.1] BACKGROUND TO NATIONAL EXECUTIVE COUNCIL SUBMISSION OF 17
JULY 1991

In July 1991 the Department of Transport had prepared a
Policy Submission entitled "Financing the Construction of the Spring
Garden Freeway" (see Chapter 11).

This document contained an evaluation of five proposals. It
concluded by recommending the project be awarded to a Chinese consortium
consisting of the Second Surveying and Designing Institute of the
People's Republic of China and various Hong Kong-based companies.

The document was the focus of discussion at the meeting of
the Ministerial Committee on 18 July 1991. It was used by the Committee as
the basis for its decision to recommend negotiations be commenced with
the Chinese consortium. (Though the Minister for Transport had,
on his own accord, already commenced private negotiations with the
consortium.)

In Chapter 11 the Ombudsman Commission criticised that
decision and the document on which it was based. The method used in the
document to select the Chinese consortium was vague and unsatisfactory.
There had not been a genuine attempt to objectively evaluate the five
short-listed proposals.

Chapter 16

186

In this chapter, we trace the fate of the document of 17 July
1991, after its consideration by the Ministerial Committee.

SUBMISSION FAVOURING THE CHINESE CONSORTIUM FILED IN OCTOBER 1991

[16.2] THE POUCY SUBMISSION DATED 17 JULY 1991 WAS FILED IN THE NATIONAL EXECUTIVE COUNCIL IN OCTOBER 1991

The document considered by the Ministerial Committee was not amended following the meeting of 18 July 1991. It was filed in the National Executive Council during October 1991.

Though there is no record of this in the files of the Department of Transport, we are satisfied, after considering the evidence of the Secretary for Transport, that the document was filed during October 1991 by the Head of the Policy Secretariat, Mr Hitolo.

[16.3] SECRETARY FOR TRANSPORT CLAIMS THE POUCY SUBMISSION WAS FILED WITHOUT HIS KNOWLEDGE

Mr Amini testified that in October 1991 he attended an International Maritime Conference in London. He was accompanied by the Minister for Transport, the Prime Minister's personal secretary, the Principal of the Madang Nautical College and the First Assistant Secretary in the Maritime Division of the Department of Transport, Mr Zurenuoc.

Chapter 16

187

Mr Amini said the Minister for Transport was supposed to present the case for Papua New Guinea at the Council held in conjunction with the conference. However, he claimed the Minister left the conference early and returned to Port Moresby via Hong Kong, where he stayed for a few days.

The Ombudsman Commission discovered that on this visit to Hong Kong – the Minister's third in 1991 – he was again accommodated and

entertained

at the expense of members of the Chinese consortium bidding for the Spring Garden Road/Poreporena Freeway project.

Mr Amini said he was forced to present the case for Papua New Guinea

at the International Maritime Organisation conference in the absence of the Minister for Transport; and the case was lost, Mr Amini said.

Mr Amini testified that when he returned from the conference he discovered

that the Policy Submission dated 17 July 1991 had been filed in the National Executive Council in his absence on the direction of the Minister

for Transport. Mr Amini said he was very annoyed about this, because the

Submission had not been considered by the Resource Management Committee. Also, he said, it was wrong for any Policy Submission to leave the Department without his approval.

[16.4] MR TEMO'S EVIDENCE

When we questioned Mr Temo, his recollection of these events was less precise than Mr Amini's.

In his response to our preliminary report, Mr Temo stated:

Chapter 16

188

"The Secretary for Transport was always aware of this even when he was in London or USA. His Department was briefing him all the time. Mr. Amini knew the progress of such event. If his Department was aware then Brian Amini could not deny. He could not carry the Department with him around.

Mr. Amin and all FAS in the Department were summoned to explain about

the Burns Peak project in
NEC 3 times. Mr. Amini was seen by NEC members
all the time.

There was so many different
Chinese companies and when they come to see
me, I do not go and talk
into them in a secret place. I call on the Secretary
and other Department
officials to brief us.

I got advice from the
Department before proceeding to do the work of Chairman
of Ministerial Committee.

All NEC submissions are
prepared by the Department, checked and signed by
Mr. Brian Amini or his
delegate.

I never put in any input in
wording or selection criteria. If a company group
come to me I refer the to
the Department or jointly have a meeting. •

[EXHIBIT 257, page 51

Mr Temo also stated that he had, in fact,
presented the papers on behalf
of Papua New Guinea at the International
Maritime Organisation
conference.

[16.5]
OF THE
CONSORTIUM

SUMMARY OF CIRCUMSTANCES SURROUNDING FLUNG
POUCY SUBMISSION FAVOURING THE CHINESE

The Ombudsman Commission finds the
evidence of the Secretary for
Transport more convincing than that of Mr
Temo. Mr Amini's evidence as
to the movements of the Minister during
October 1991 is corroborated by
evidence given by Mr Leo Moore, who
entertained the Minister on his
Hong Kong stopover. The Ombudsman
Commission has also examined
the entries appearing in the Minister's

passport for the relevant period.

Chapter 16

189

We therefore accept Mr Amini's version of events as correct.
That is:

The Policy Submission dated 17 July 1991 was filed in
the National Executive Council during October 1991.

It was filed by Mr Hitolo at the direction of the
Minister for Transport.

It was filed without the knowledge or approval of the
Secretary for Transport.

IMPROPRIETY BY MINISTER FOR TRANSPORT

[16.6] MATTERS FOR CONCERN

The Ombudsman Commission shares the concerns raised by the
Secretary for Transport as to the way in which the Policy Submission
favouring the Chinese went to the National Executive Council. It is sound
administrative practice that, whenever a Minister contemplates making an
important Policy Submission to the National Executive Council, it should be
presented in close consultation with the head of his Department.

There are also other matters which concern the Ombudsman
Commission about the filing of this particular Policy Submission.

On 5 October 1991 the Minister for Transport had signed a

contract for the
construction of the freeway with Tunson Engineering Co Ltd of
Hong Kong
(see Chapter 14).

Chapter 16

190

So, the impropriety that had developed was this: the Minister
for Transport
was attempting to present a submission to the National
Executive Council,
authorising his Department to commence negotiations with the
Second
Surveying and Designing Institute, when he had already, just
prior to this,
signed a contract with the SSDI's consortium partner, Tunson
Engineering
Co Ltd, for the construction of the freeway.

Not only that, on 21 October 1991 he wrote directly to the
SSDI in China
trying to renegotiate the terms of their financial proposal
(which was
different to the one in the contract he had signed with
Tunson Engineering
Co Ltd).

These disturbing developments show how important it is for
normal and
established public tender procedures to be followed in
projects of this
nature.

[16.7] THE POLICY SUBMISSION WAS NOT ACCEPTED BY THE NATIONAL EXECUTIVE COUNCIL

As it turned out, the National Executive Council did not get
the opportunity
to debate the Policy Submission favouring the Chinese
consortium. The
Minister's actions were short-circuited by the diligence of
the Secretary to
the National Executive Council, Mr P M Eka OBE. Mr Eka
rejected the
submission, because proper procedures for filing of National
Executive
Council submissions had not been followed.

In a letter to the Secretary for Transport dated 4 December
1991, Mr Eka

advised that he was returning the fifty copies of the Policy Submission entitled "Financing the Construction of the Spring Garden Freeway.

[EXHIBIT 127]

Chapter 16

191

Mr Eka rejected the Submission because comments from the Department of Finance and Planning and the Department of Attorney-General had not been sought. [EXHIBIT 127]

[16.8] NATIONAL EXECUTIVE COUNCIL PROCEDURES

Chapter 2 of the National Executive Council Submissions Handbook prescribes the requirements for presentation of Policy Submissions.

Paragraph 2.7(d) states:

"Comments from the five Central Agencies and all other Ministries affected by the Proposal must be included. Particular care should be taken to ensure that views of all affected Ministries are obtained in writing prior to the Submission being referred to the NEC Secretariat Submissions requiring views to be sought in the NEC Meetings are not accepted," [EXHIBIT 1]

The "five central agencies" are prescribed in Paragraph 1.14 of the Handbook. They are:

the Department of Attorney-General;

Executive

the Department of Finance and Planning;

the Department of Personnel Management;

the Department of Provincial Affairs; and

the Department of Prime Minister and National Council.

Chapter 16

192

The Ombudsman Commission notes that Section D of the Policy Submission of 17 July 1991, under the heading "Views of other Ministers Affected", simply states:

°Being sought. • [EXHIBIT 99, at page 7]

Clearly, there had been a failure to comply with the proper National

Executive Council's procedures. We therefore find that the Secretary to the National Executive Council acted properly in rejecting the Policy

Submission.

SUBMISSION FAVOURING CHINESE CONSORTIUM WAS NOT RE-PRESENTED

[16.9] WHAT HAPPENED TO THE POLICY SUBMISSION AFTER IT WAS REJECTED BY THE SECRETARY TO THE NATIONAL EXECUTIVE COUNCIL?

Following rejection of the Policy Submission, the Secretary for Transport

took immediate steps to obtain the views of other Departments. To his

credit, he went further than required. In a handwritten note dated 6

December 1991, addressed to one of his First Assistant Secretaries, the

Secretary issued an instruction in the following terms:

'As discussed with you 5/12, I'm disappointed that this paper went through
Minister without my approval. The procedures required by NEC
mg be done
without exception. All comments from other Departs must be
included esp the
World Bank, DFP, Foreign Affairs, Lands, DOW, PM's Dept,
Personnel Mgt Dept,
Environment, NCDC, Attorney General, OIDA etc. Urgent
action.'

[EXHIBIT 1271

Chapter 16

[16.10] CIRCULATION OF THE POLICY SUBMISSION

The Policy Submission of 17 July 1991 was subsequently circulated to the

Departments specified by Mr Amini, as well as to the Department of Trade and Industry. This was done under cover of standard letters dated 6 December 1991. [EXHIBIT 128]

[16.11] SLACK RESPONSE BY OTHER DEPARTMENTS, PARTICULARLY FINANCE AND PLANNING

Only one of the Departments which had been asked to comment, did so: the Department of Trade and Industry. [EXHIBIT 133]

This was a disappointing response. In particular, we single out the Department of Finance and Planning for its failure to take the opportunity to demand more information. The Policy Submission indicated that the total cost of the project would be in the vicinity of \$US 50 million. Obviously the financial and budgetary implications were going to be enormous.

In the opinion of the Ombudsman Commission it was irresponsible of the Department of Finance and Planning not to respond to the Policy Submission. It is that Department's responsibility and therefore should be its practice to comment on the budgetary implications of all major projects undertaken by or on behalf of the State.

Chapter 16

194

[16.12] WAS THE POLICY SUBMISSION OF 17.7.91 RE-PRESENTED?

On the surface, the circulation of the Policy Submission to the other Departments in December 1991 meant that proper procedures were being complied with. But that was not, in fact, the case.

The Policy Submission circulated in December 1991 was never

re-

presented to the National Executive Council. There was another Policy Submission presented to the National Executive Council in February 1992, resulting in the decision to award the project to Kinhill Kramer Pty Ltd. But this Policy Submission was not circulated for the comments of other Departments.

The February 1992 submission was not the same as the one circulated in December 1991. The February 1992 submission differed from the one circulated in December 1991 (i.e. the one dated 17 July 1991) in a very significant way.

The February 1992 submission gave a choice between two proposals: the Tunson/SSDI proposal and a proposal by Kinhill Kramer. The submission which the various Departments were invited to comment on had unequivocally favoured the SSDI proposal. The name "Tunson" was not referred to and the only reference to "Kinhill Kramer" was as a consortium partner in an old proposal promoted by Kumagai Gumi.

[16.13] MORE MATTERS OF CONCERN

This state of affairs gave rise to some obvious questions:

Chapter 16

195

to Why didn't any of the other Departments get the chance to comment on the February 1992 submission?

change How could a National Executive Council submission so dramatically in a short space of time?

proposal? Why was Kinhill Kramer permitted to lodge a late

Chinese Why was Kinhill Kramer given equal ranking to the

proposal in the 1992 submission, when previously it was part of the Kumagai Gumi proposal and ranked number three? We will address these questions later in this report.

* * * * *

Chapter 16

196

17. CONCERNS ABOUT CREDENTIALS OF TUNSON ENGINEERING CO LTD: DECEMBER 1991 - JANUARY 1992

[17.1] DEPARTMENT OF TRANSPORT CONCERNED ABOUT BONA FIDES OF TUNSON ENGINEERING CO LTD

In December 1991, concerns were being raised within the Department of Transport as to the bona fides of the Tunson Engineering Co Ltd proposal, especially its financial aspects. These concerns were, of course, quite legitimate.

Apart from the obvious technical defects in the contract the Minister had signed with the company on 15 October 1991 (see Chapter 14) the Tunson proposal did not comply with the Terms of Reference which the Department of Transport had circulated. The Terms of Reference had required the project to be implemented on a Build-Operate-

Transfer basis,
whereas the Tunson contract involved turnkey financing.

[1 7 21 THE MOST IMPORTANT CONCERN

Not only that, nobody in the Department of Transport knew anything about Tunson Engineering Co Ltd or any of the people involved in it. Tunson had never operated in Papua New Guinea before. It was not known whether it was a reputable company, whether it had any experience in design, financing, construction or management of road projects or whether it had sufficient financial resources to undertake a task of the magnitude of the Spring Garden Road/Poreporena Freeway project.

Chapter 17

197

This alarming situation had arisen because the negotiations which led to the contract of 15 October 1991 were conducted secretly by the Minister for Transport, Mr Temo.

INVESTIGATIONS CARRIED OUT BY THE DEPARTMENT OF TRANSPORT

[17.3] DEPARTMENT OF TRANSPORT CONDUCTS ITS OWN INVESTIGATION

Quite fortuitously, at the time these concerns were being aired, the Department of Transport had acquired the services of a technical adviser from Hong Kong, Mr Amin Ebrahim, who was engaged from the consulting organisation Wilbur Smith Associates.

The Department had entered into an arrangement with Mr Ebrahim whereby he worked in Port Moresby on a fortnight-on-fofortnight-off basis; at the end of each fortnight, he returned home to Hong Kong. So, Mr Ebrahim was requested to conduct inquiries into Tunson Engineering Co Ltd on one of his visits to Hong Kong.

[17.4] COMPANY SEARCH OF TUNSON ENGINEERING CO LTD

Mr Ebrahim arranged a company search of Tunson Engineering Co Ltd in early January 1992. He also attempted (unsuccessfully) to arrange a meeting with the company's managing director, Mr Siu Chu Yuen. [EXHIBIT 131]

Chapter 17

198

The company search revealed very little. Mr Ebrahim discovered the company had only recently been incorporated (in June 1990) and all but one of its 500,000 shares had been allocated to Mr Siu Chu Yen. However, the search did not show what the company's paid-up capital was. Other details about the company (eg the state of its bank accounts and its balance sheets and other financial statements) were also unavailable. [EXHIBIT 130]

Consequently, this company search was practically useless. Tunson Engineering Co Ltd could well have been a one-man shelf company, with a letterhead as its major asset, and the Department of Transport would not have known.

[17.5] TECHNICAL ADVISER RECOMMENDS RE-TENDERING OF THE PROJECT

When Mr Ebrahim returned to Port Moresby in early January 1992, he reported his concerns in a brief to the Secretary for Transport dated 9 January 1992. He gave a detailed analysis of the numerous defects in the Tunson contract and recommended that the World Bank's advice be followed, ie that the project be "re-tendered". [EXHIBIT 132]

This recommendation was not followed. Instead, the Department of Transport persisted with the task of trying to find out more about Tunson Engineering Co Ltd.

Chapter 17

[17.6]
REPRESENTATIVES OF
14 JANUARY 1992

DEPARTMENT OF TRANSPORT OFFICERS MEET
TUNSON ENGINEERING CO LTD IN PORT MORESBY:

Since February 1991 (when the Minister for Transport first went to Taiwan and Hong Kong) Mr Leo Moore had maintained a watching brief over all negotiations concerning the Spring Garden Road/Poreporena Freeway project. His role in the project was never clearly defined. However, from the oral evidence he gave to the Ombudsman Commission, it is clear he had ties with all the various Hong Kong-based companies that had been a part of the Chinese consortium. He had an interest in the outcome of all negotiations.

Mr Moore was regarded by the Department of Transport as the Port Moresby representative of Tunson Engineering Co Ltd, even though the Department had been advised that Port Moresby-based consulting company Tauwala Consultants Pty Ltd had been appointed by Tunson to act as their agent. [EXHIBITS 120, 121]

When the officers of the Department decided to intensify their efforts to check the bona fides of the Tunson proposal, they decided to interview Mr Moore. He and his wife were called to a meeting with Department of Transport officials in the office of the

Secretary on 14 January 1992. The meeting was chaired by the Acting Secretary for Transport, Mr Zurenuoc.

[17.7]
CONSORTIUM STILL
WAS THEIRS

THE REPRESENTATIVES OF THE CHINESE
BELIEVED IN JANUARY 1992 THAT THE PROJECT

The officers of the Department of Transport informed Mr and Mrs Moore of the fundamental problem they saw in the contract signed by the Minister for Transport on 15 October 1991: Tunson Engineering Co Ltd expected to be paid for building the freeway – but this had not been budgeted for.

Chapter 17

200

It was explained that the project was supposed to be financed on a Build-Operate-Transfer basis. The contract did not meet this requirement. The Department also interrogated Mr and Mrs Moore on the background of Tunson Engineering Co Ltd. They asked the sort of questions that should have been asked by the Minister for Transport before he entered into any serious negotiations with this company.

Following this meeting, the request for more information on Tunson Engineering Co Ltd was put in writing. [EXHIBITS 135, 141]

In his evidence to the Ombudsman Commission, Mr Leo Moore said he was completely taken aback by the attitude of the Department of Transport officers at that meeting. As far as he was concerned, the deal between Tunson and the Minister for Transport had already been finalised. He therefore did not understand why the Department of Transport was seeking further details about the company. He was offended by the aggressive manner in which questions were put to him and his wife.

The Ombudsman Commission accepts that this was Mr Moore's genuine reaction to this incident. For many months he had been involved in negotiations with the Minister for Transport. He was shocked to find that officers in the Minister's Department would be asking him detailed questions about things that were really, as he understood the situation, the business of the Minister.

[17.8] DID THE DEPARTMENT OF TRANSPORT ACT RESPONSIBLY?

While this may have been an understandable reaction for a person of Mr Moore's background, the Ombudsman Commission does not criticise the officers of the Department for their actions. The Acting Secretary, Mr

Chapter 17

201

Zurenuoc, is to be congratulated for realising the dangerous situation created by execution of the contract of 15 October 1991 and for taking the initiative and calling the meeting with Mr Moore.

The Ombudsman Commission's only criticism is that this meeting should have been called a couple of months earlier, as soon as the Department discovered what the Minister had done.

[17.9] THE DECISION-MAKING PROCESS HAD BROKEN DOWN

The meeting between the Department of Transport and Mr and Mrs Moore gives an indication of the farce that had developed by the beginning of 1992: the Minister had already signed a contract for the construction of the freeway, but three months later his Department was still trying to find out whether the proposal was genuine. In the course of doing that, officers of the Department were interrogating a foreigner who - though having a

vested interest in the project - had no formal connection with the company
*selected" by the Minister, and who was totally confused and offended by their attitude.

This was all happening just six weeks before the National Executive Council decided to award the contract for the construction of the freeway to a completely different company!

The decision-making process had become a complete shambles and it is an embarrassment to our country that this sort of thing was allowed to happen, because the Minister for Transport took it upon himself to handle, negotiate and sign agreements without consulting his Department.

Chapter 17

202

[17.10] DEPARTMENT OF TRANSPORT SEEKS HELP FROM OTHER DEPARTMENTS

Despite the wide circulation of the draft submission "Financing the Construction of the Spring Garden Freeway", the only Department to respond to the request for comments was the Department of Trade and Industry (see Chapter 16).

As stated earlier, it is disappointing that other Departments did not comment on the draft submission. It is most irresponsible of those Departments, especially the "key" Departments.

It is also disappointing that, when the Department of Transport formally sought advice from two Departments on the contract the Minister for Transport signed with Tunson, no useful assistance was given.

OTHER DEPARTMENTS GUILTY OF DEFECTIVE ADMINISTRATION

[17.11] ADVICE SOUGHT FROM DEPARTMENT OF FINANCE AND PLANNING AND DEPARTMENT OF ATTORNEY-GENERAL

On 15 January 1992, the Acting Secretary, Mr Zurenuoc, wrote to the Office of International Development Agency in the Department of Finance and Planning. He enclosed a copy of the Tunson contract and asked that it be reviewed, so the Department of Transport would be in a better position to advise the Minister for Transport. [EXHIBIT 137]

Chapter 17

203

On the same day, Mr Zurenuoc wrote a similar letter to the Department of Attorney-General. [EXHIBIT 138]

Mr Zurenuoc advised the Minister for Transport that he had requested this advice. [EXHIBIT 136]

[17.12] INADEQUATE RESPONSE TO REQUESTS FOR ADVICE

Each of these letters requesting advice should have sent alarm bells ringing within the Departments which received them. It should have been obvious to anyone with basic knowledge of public works contracts and the requirements of public sector financing that the contract with Tunson Engineering Co Ltd was seriously and dangerously flawed and that the Minister for Transport had no right to sign it.

Any Department reasonably alert to its responsibilities to the State, would have realised – by a quick examination of the contract – that something was very, very wrong.

Unfortunately, however, the responses were inadequate.

[17.13] DEPARTMENT OF FINANCE AND PLANNING GUILTY OF DEFECTIVE ADMINISTRATION

The Director of the Office of International Development Agency in the Department of Finance and Planning, Mr Pepson, responded in a letter dated 13 February 1992:

Chapter 17



204

"I regret to inform you that we are not in a position to comment as we note the Minister has already signed the contract and also we are not in the full picture on the status of the proposal" [EXHIBIT 146

This was a poor response by the Department of Finance and Planning.

The Minister for Transport obviously had no right to sign the contract with

Tunson Engineering Co Ltd. Furthermore, the contract purported to

commit the State to a minimum outlay of \$US 50 million, which was

entirely un-budgeted expenditure.

By failing to offer any advice, the Department of Finance and Planning was

acting in dereliction of its duties to the State and therefore was guilty of defective administration.

[17.14] DEPARTMENT OF ATTORNEY-GENERAL ALSO GUILTY OF DEFECTIVE ADMINISTRATION

The only response made by the Department of Attorney-General was in a

letter dated 30 January 1992, from Senior Legal C Mr Singin. He

acknowledged receipt of the contract documents and said the Department's comments would be forwarded in due course. But they never were. [EXHIBIT 144]

The Acting State Solicitor, Mr Z Gelu, conceded to the Ombudsman Commission that written advice was not given to the Department of Transport about the Tunson contract. In his response to our preliminary report, Mr Gelu said:

'Though I failed to offer written advice, my officers namely Messrs. Robert 'rung and Sumasy Singin provided verbal advice to the Department of Transport during their consultative meeting. The officers were representing the Department of Attorney General in these meetings.' [EXHIBIT 2621]

Chapter 17

205

We do not regard this as an adequate explanation. The meetings referred to by Mr Gelu were the meetings held in March and April 1992 during the course of negotiations with Kinhill Kramer. Our concern, however, at this point, is with the period in January 1992.

In January 1992, the Department of Attorney-General was given notice of a contract that was manifestly flawed, which contained provisions purporting to bind the State to large and long term financial commitments concerning a number of road projects of national significance and which had been signed by a Minister clearly acting contrary to the Public Finances (Management) Act.

In these circumstances, there was a duty to act immediately and give written advice to the Department of Transport on what it

should do. The

Department of Attorney-General failed to discharge this duty and was guilty of defective administration.

[17.15] SUMMARY OF THE DEPARTMENT OF TRANSPORTS ATTEMPTS TO INVESTIGATE CREDENTIALS OF TUNSON ENGINEERING CO LTD

During December 1991 and January 1992 the Department of Transport tried in vain to find out essential background information on the company with which the Minister for Transport had signed a contract for construction of the freeway.

Assistance was also sought from the Department of Finance and Planning and the Department of Attorney-General. Both of these Departments failed in their duty to offer assistance, even though it was clear that the Minister for Transport had acted unlawfully in signing the contract.

Chapter 17

206

As a result, in January 1992, the Department of Transport was still in a quandary as to what to do about that contract.

That problem was soon to become irrelevant, however, because on 13 February 1992 the Minister for Transport put pressure on his Department, that was to lead the project in an entirely different direction: he suddenly instructed his Department to prepare a Policy Submission to the National Executive Council and consider a very late proposal by Kinhill Kramer Pty Ltd of Port Moresby. These developments are recorded in Chapters 18 and 19.

* * * * *

Chapter 17

207

18. MINISTER FOR TRANSPORT EXPEDITES PREPARATION OF NEW POLICY SUBMISSION: FEBRUARY 1992

[18.1] ASSUMPTION THAT THE PROJECT WOULD BE AWARDED TO CHINESE CONSORTIUM

Ever since the Ministerial Committee decided to recommend awarding the contract to the Chinese consortium, it had been assumed that decision would go to the National Executive Council for ratification.

The Minister for Transport pre-empted this process by negotiating directly with the Chinese consortium on a number of occasions (see Chapters 12 and 14). But it seems to have been assumed that the matter would eventually go to the National Executive Council and that the Minister would recommend that the project be formally awarded to the Chinese consortium. This had been the purpose of the draft submission 'Financing the Construction of the Spring Garden Freeway' (see Chapters 11 and 16).

18.2] A SIGNIFICANT TURN OF EVENTS

In February 1992 there was a significant turn of events: a new National

Executive Council Policy Submission was prepared. But rather than favouring the Chinese consortium, the new submission gave the National Executive Council a choice of two proposals: the Chinese proposal and a proposal by Kinhill Kramer Pty Ltd of Port Moresby.

Chapter 18

208

In this chapter we trace the events that led to this new submission being presented to the National Executive Council.

SECRETARY FOR WORKS BRIEFS THE MINISTER FOR TRANSPORT

[18.3] MINISTER FOR TRANSPORT ASKS SECRETARY FOR WORKS FOR BRIEFING ON SPRING GARDEN ROAD PROJECT

In early February 1992, the Minister for Transport asked the Secretary for Works, Mr Hitolo, for a briefing on the Spring Garden Road project.

Mr Hitolo did not advise the Secretary of the Department of Transport, Mr Amini, that he was briefing the Minister for Transport.

[18.4] MINISTERS SHOULD NOT OBTAIN 'SECRET' BRIEFS FROM DEPARTMENTS FOR WHICH THEY HAVE NO RESPONSIBILITY

The Ombudsman Commission regards this as a bad administrative practice. If the head of a department is requested to provide a brief to a Minister other than the one carrying political responsibility for the department he is in charge of, he should advise the head of that Minister's department that he has been asked to provide the brief, either before or immediately after it is given.

This basic administrative procedure is necessary to ensure consistency in the advice given to Ministers and to avoid the chaos that inevitably results when Ministers receive uncoordinated advice from a number of different sources.

[18.5] WHY DID THE MINISTER FOR TRANSPORT ASK THE SECRETARY FOR WORKS FOR ADVICE?

The Minister for Transport acted as he did because the Secretary for Works, Mr Hitolo, until a short time beforehand, had headed the Policy Secretariat in the Department of Transport. He had been responsible for the Spring Garden Road/Poreporena Freeway project for a considerable time and had briefed the Minister for Transport on a number of occasions.

From the evidence given by Mr Leo Moore, it is also apparent Mr Hitolo knew a lot more about the negotiations with the Chinese consortium than did the Secretary for Transport.

[18.6] IT WAS WRONG OF THE SECRETARY FOR WORKS NOT TO ADVISE THE SECRETARY FOR TRANSPORT

When we suggested in our preliminary report that Mr Hitolo had erred in briefing the Minister for Transport, he said that he had done so because, at that time, Mr Temo was the Acting Deputy Prime Minister. He also gave a number of other reasons for his actions. These were:

Chapter 18

that presentation of a draft National Executive Council submission recommending involvement of Motu-Koitabu

landowners in the project had been delayed by the
Office of the Secretary for Transport; and
that landowners were becoming frustrated and suspicious
co- about delays in getting the project started and their
the operation was critical to the smooth implementation of
project; and
that the Government had to make a quick decision on the
type of financing required for the project. [EXHIBIT
261]

The Ombudsman Commission appreciates that the Secretary for
Works genuinely believed he was acting properly in briefing the
Minister for Transport. Our concern is not so much that he provided the
brief. What we are critical of is Mr Hitolo's failure to advise the
Secretary for Transport of what he had done.

As a matter of sound administrative practice and common
courtesy, the Secretary for Works should have advised the Secretary for
Transport he had received the request from the Minister for Transport. His
failure to do so was defective administration.

[18.7] THE POSITION OF ACTING DEPUTY PRIME MINISTER IS NOT RECOGNISED BY LAW

One of the reasons given by the Secretary for Works for
briefing the Minister for Transport was that the Minister was, at the
time, Acting Deputy Prime Minister. However, there is no such position recognised
by the

Chapter 18

211

Constitution or any Act of the Parliament. The Prime Minister
Act (Chapter No. 27 of the Revised Laws) which creates the office of
Deputy Prime Minister and allows the office-holder to be Acting Prime
Minister in certain

situations, does not refer to an "Acting Deputy Prime Minister".

Though the Minister for Transport may have carried the unofficial title of Acting Deputy Prime Minister, he had no extra official powers or responsibilities beyond those conferred on him as Minister for Transport.

One of the themes of this report is that there is a need for all our Ministers and Departmental Heads to become fully acquainted with the limits of Ministerial powers imposed by the Constitution. The briefing of the Minister for Transport by the Secretary for Works is an example of the type of confusion about Ministerial powers that seems to exist. This important issue is dealt with further in Chapter 39.

[18.8] PURPOSE OF THE SECRETARY FOR WORKS' BRIEF TO THE MINISTER FOR TRANSPORT

The purpose of Mr Hitolo's brief was to bring the Minister for Transport up to date on what was happening with the project. But Mr Hitolo did not have a great deal to report. He noted that the draft National Executive Council submission favouring the Chinese had been prepared by the Department of Transport in July 1991, but stated that the Department was still "holding onto it" because views of other Departments had not been received. [EXHIBIT 145, at page 3]

Chapter 18

212

[18.9] NO MENTION OF KINHILL KRAMER

The most significant aspect of Mr Hitolo's brief was that he assumed the

Chinese proposal was still the favoured option. There was no indication that the Kumagai Gumi/Kinhill Kramer proposal was being reconsidered or that Kinhill Kramer was to be given the opportunity to lodge a fresh proposal.

In retrospect this is very interesting, because it was only eighteen days after this brief was presented to the Minister for Transport, that Kinhill Kramer was selected by the National Executive Council to undertake the project. It is apparent therefore that, less than three weeks before that decision, the Secretary for Works was completely unaware of the Kinhill Kramer proposal.

But it was not only the Department of Works that was ignorant of the Kinhill Kramer proposal. The Department of Transport was also unaware of it, until at least seven days before the National Executive Council's decision in favour of that company.

MINISTER INSTRUCTS DEPARTMENT OF TRANSPORT TO EXPEDITE POLICY SUBMISSION

[18.10] MINISTER FOR TRANSPORT INSTRUCTS HIS DEPARTMENT TO FINALISE SUBMISSION TO NATIONAL EXECUTIVE COUNCIL

On 13 February 1992 the Minister for Transport wrote to the Secretary for Transport in the following terms:

Chapter 18

213

'RE: BURNS PEAK NEC SUBMISSION

This matter has been dragging on for quite sometime. I would like to have the matter discussed at the next NEC meeting which is on the 19th of February, 1992,

You are required to have the submission in order for presentation on the above date. Discuss with me on any hold up on the matter.' [EXHIBIT 147]

i.11] NO INDICATION THAT KINHILL KRAMER PTY LTD WOULD BE CONSIDERED

There is no indication in the Minister's instruction that he had changed his mind about favouring the Chinese consortium. There is no suggestion an invitation would be extended to any other consortium to put in a late bid. The Secretary was simply required to have "the submission" ready for presentation.

The fact that the Minister did not ask that the submission be altered adds to the mystery surrounding the subsequent lodgment of the Kinhill Kramer proposal.

The Minister's instruction was received in the Department of Transport Secretariat the following day, 14 February 1992, and the Secretary made the following handwritten notation on it:

'Pis action urgently Finance and Attorney General Depts views must be obtained.' (EXHIBIT 147)

[18.12] VIEWS OF OTHER DEPARTMENTS WERE NOT OBTAINED

It is interesting to note the Secretary's insistence that views be obtained from the Department of Finance and Planning and the Department of Attorney-General. They never were. Both these Departments were given the opportunity to comment on the previous draft submission (the one circulated in December 1991 favouring the Chinese consortium) - but they failed to respond.

Neither Department was given the opportunity to comment on the submission which led the National Executive Council to the decision in favour of Knhill Kramer Pty Ltd.

[18.13] DEPARTMENT OF TRANSPORT'S IGNORANCE OF THE KINHILL KRAMER PROPOSAL

On 17 February 1992 the Secretary for Transport wrote to the Secretary for Works.

This was, in effect, a protest note. Mr Amini had just obtained a copy of the brief Mr Hitolo gave to the Minister for Transport and was obviously very cross that the Secretary for Works had prepared it, rather than himself. Mr Amini stated:

'The matter of Spring Garden Road is the responsibility of the Department of Transport until such time as the consortium is selected and all the detailed

contracting arrangements are completed. At the time of design and construction, the DOW will be fully involved." [EXHIBIT 149]

Chapter 18

215

Later in this letter, Mr Amini made a very frank and startling admission:

"In the draft NEC submission dated 17 July 1991 on the financing of Spring Garden Road prepared by you while you were with the Department of Transport, you evaluated five consortiums, however, we do not have any proposals from any companies except the Chinese consortium- If you do have any of the information, please arrange to send it to me at your earliest convenience." [EXIBBIT 149, emphasis added]

In other words, Mr Amini was saying this: of the five proposals short-listed for the consideration of the Ministerial Committee in July 1991, only one was still in the possession of the Department of Transport as at 17 February 1992 - the Chinese one.

This was only seven days before the National Executive Council decision in favour of Kinhill Kramer.

This disturbing situation prompted two questions for the Ombudsman Commission during the course of the investigation:

What had happened to the remaining four proposals? and

Was the Kinhill Kramer proposal that was eventually approved by the National Executive Council one of the four "lost", or was it a new proposal?

Chapter 18

216

[18.14] WHAT HAD HAPPENED TO THE FOUR LOST PROPOSALS?

This question has already been addressed in Chapter 11: the proposals were left in the Minister for Transport's office on 18 July 1991 and have never been seen since. The Department of Transport had not kept copies of them, nor requested copies from the companies which submitted them.

[18.15] WAS THE KINHILL KRAMER PROPOSAL A NEW PROPOSAL?

The Ombudsman Commission put this question to the Executive Chairman of Kinhill Kramer Pty Ltd, Mr Frank Kramer. He testified that previously Kinhill Kramer had submitted a joint proposal with Kumagai Gumi Ltd. But Kumagai Gumi had lost interest in the project and Kinhill Kramer decided to submit its own proposal.

This candid response begged other questions:

Was Kinhill Kramer invited to submit a new proposal?

If so, when?

Who invited Kinhill Kramer to submit their proposal?

These important issues are explored in Chapter 19.

Chapter 18

217

19. HISTORY OF THE PROPOSAL BY KINHILL KRAMER PTY LTD

[19.1] INITIAL INTEREST OF KINHILL KRAMER

The Executive Chairman of Kinhill Kramer Pty Ltd, Mr F M Kramer CBE, said his company first became interested in the Spring Garden Road/Poreporena Freeway project as early as 1987 or 1988, when Mr Roy Yaki was the Minister for Transport in the Government led by the Rt. Hon. Pias Wingti. Mr Yaki had sent Kinhill Kramer a letter explaining the priority to be given to the project. to be given to the project.

However, nothing came of this and, according to Mr Kramer, the project "went quiet for several years".

INTEREST SHOWN IN THE PERIOD 1990 – FEBRUARY 1992

[19.2] TECHNICAL FEASIBILITY REPORT SUBMITTED IN 1990

The next time Kinhill Kramer showed interest was the first half of 1990,

when it submitted a 'Technical Feasibility Report' to the Department of Transport. [EXHIBIT 7B]

Chapter 19

218

Mr Kramer said this document was given to the Department of Transport on an unsolicited basis. Its purpose, he said, was to demonstrate the advantages of constructing an arterial road link from downtown Port Moresby to Jacksons Airport, to provide a comparison of the tunnel/cut options and to give an estimate of the project cost.

The cost of the project was estimated to be K40 million. [EXHIBIT 7B at page 15]

[19.3] NEXT EXPRESSION OF INTEREST: JUNE 1990

The next time Kinhill Kramer expressed interest was June 1990, following the advertisement inviting expressions of interest.

By this time Kinhill Kramer had come to an arrangement with Kumagai Gumi Co Ltd of Japan, a company which Kinhill Kramer had worked with on other projects in Papua New Guinea: the Morobe Sports Complex in Lae and PTC Haus and Revenue Haus in Port Moresby.

A letter dated 25 June 1990 was sent to the Department of Transport by the "Kumagai Gumi-Kinhill Kramer Consortium". It stated:

'Dear Sir,

RE PROPOSED SEAPORT – AIRPORT ARTERIAL LINK
(INCORPORATING THE BURNS PEAK TUNNEL)

We refer to various meetings during the past few weeks
(HTTOL/ICIMURA)
regarding the above proposed project.

We are pleased to advise that Kumagai Gumi Co. Ltd. of
Japan and ICinhill
Kramer Pty. Ltd. of P.N.G. have formed a consortium for
this project.

Chapter 19

219

The Consortium offers the following advantages to the Department.

(i) Attractive semi-concessional finance package which is already
known
and acceptable to the Department of Finance and Planning and
which
is currently being used by the P.N.G. Government for a variety
of
projects.

Through Kumagai Gumi Co. Ltd., the Consortium offers tunnelling
and
construction expertise from one of Japan's leading companies in
these
fields.

Through Kinhill Kramer, the Consortium offers the region's
largest
engineering design capabilities for major engineering projects.

(iv) The Consortium has already commenced a Toll/Revenue Study which
is expected to be completed in approximately 3 weeks.

(v) Given the above factors, this Consortium is the only one who
may be
in a position to complete the project by the end of 1991.

For your information, we enclose herewith our two company's brochures, Terms and Conditions of the Finance Package available, and a set of drawings for the project

The basic proposal is to divide the project into three stages as follows:

Stage 1: From the sea-port area to Wards Road including the first barrel of a twin-barrel tunnel

Stage 2 Section from Wards Road to the Kennedy Rd/Boroko Dr./Geauta Dr. Curie.

Stage 3: The Section from Kennedy Rd./Boroko Dr./Geauta Dr. Circle to the Airport., including the second barrel of the tunnel

Details of the total proposal can be finalised by mutual arrangement.

The offer is for a full TURN-KEY package comprising design, construction and finance.

Should you be interested in our offer, please contact the undersigned.

Yours faithfully,
KUMAGAI GUMI KIN LL KRAMER CONSORTIUM
[Signed]
MR Y. KIMURA
General MANOWI
[EXHIBIT 16]

FINANCE PACKAGE NOT IN POSSESSION OF THE DEPARTMENT OF
TRANSPORT

The letter of 25 June 1990 suggests the terms and conditions of the finance package were to be enclosed with the letter. However, when we examined the files of the Department of Transport, no record of these terms and conditions could be found.

When Mr Kramer was asked to produce this letter and its enclosures, he produced the letter, but the only enclosures attached were two identical drawings entitled "Moresby-Jacksons/Airport Arterial Link Through Burns Peak". [EXHIBIT 16]

The Ombudsman Commission was left in a quandary as to what the terms and conditions of Kumagai Gumi-Kinhill Kramer's 1990 finance package actually were. It was only when all the files of the Department of Works were made available, that we could piece together what appeared to be the true situation.

[19.5] WHAT WAS THE KUMAGAI GUMI_KINHILL KRAMER 'FINANCIAL PACKAGE'?

The files of the Department of Works suggest that there were four one-page documents attached to the letter of 25 June 1990. These were:

Chapter 19

- 1 A document entitled "Information Received from the Export-Import Bank of Japan". This document stated that the typical terms and conditions of EXIM financing included an interest rate of 7.6% per annum, repayable 5-8 years after the completion of the project. [EXHIBIT 16A]

2. A flowchart entitled "Kumagai Gumi Co Ltd Overview Flow". This document purported to show some financial relationships between the PNG Government, Kumagai Gumi Ltd, an un-named Japanese trading company and the EXIM Bank. However, as the flowchart was not referred to in the letter of 25 June, 1990, it was difficult to understand its relevance to the expression of interest. [EXHIBIT 16B]
3. A document entitled "Operational Framework". This document appeared to describe the various lending schemes available from the EXIM Bank. However, the EXIM Bank was not actually referred to and so a person reading the document could easily have been confused about its relevance. [EXHIBIT 16C]
4. A document entitled "Note to the EXIM Bank Loan Conditions". Like the first document referred to above, the purpose of this document appears to have been to describe the conditions attached to EXIM Bank financing. The copy of the document we obtained from the Department of Works' files is confusing, as various sections have been crossed-out and others inserted, in an unknown person's handwriting. We are unclear whether the document was presented to the Department of Transport in this form. [EXHIBIT 16D]

Chapter 19

222

These four documents were appended to the letter of 25 June 1990 in a way that was, in our view, quite confusing.

When we suggested this in our preliminary report, Mr Kramer replied that the documents were appended in a way that was the "industry norm" given the circumstances. He described the expression of interest as a "carefully considered business communication prepared by and with one of the world's great engineering enterprises". [EXHIBIT 253 paragraphs 5 and 8]

Be that as it may, our view is that the Department of Transport or any other governmental body receiving proposals from private corporations for

of kina projects should insist on a much higher standard
documentation.

[19.6] MR HITOLO'S EXPLANATION

When we suggested in our preliminary report that the Kumagai Gumi-Kinhill Kramer proposal was vague and should not have been regarded as acceptable, we received the following response from Mr Hitolo, the former head of the Policy Secretariat in the Department of Transport:

"Kumagai Gami-Cinhfil Kramer consortium proposal is the classical example of the other three proposals that got lost except for the Chinese. In fact they never submitted a definite proposal consistent with the B.O.T. concept of the Terms of Reference. So in fact most of them were vague and unprofessionally done purely letter show of interest or trying to buy time for them to organise financing. Hence, the deadline was extended 2 or 3 times as I cannot recall properly but I know I had discussions with some of the 5 short listed companies. The deadline had expired and the so-called Ministerial Committee was to be briefed. The Secretary of Department of Transport directed Mr Parakei and me to brief them and the so-called proposals were taken up to Parliament. At least he should have stopped it or attend himself but this is the type of attitude he has been portraying throughout the project'.

[EXHIBIT 265, pant 12]

Mr Hitolo is suggesting the Department of Transport was put under pressure by the Minister for Transport to rank the proposals for the Ministerial Committee meeting in July 1991. He concedes that most of the proposals, including Kinhill Kramer's, were only letters of interest, rather than firm proposals. Under normal circumstances, most of the proposals would not have been regarded as acceptable.

[19.7] THE KINHILL KRAMER FINANCIAL PROPOSAL WAS NEVER PUT IN PRECISE TERMS

There was no other occasion on which Kinhill Kramer's financial proposal was formally put to the Department of Transport in more precise terms than in the letter of 25 June 1990. Mr Kramer said that further details were delivered to the relevant persons and departments on numerous occasions after June 1990. [EXHIBIT 253, paragraph 5]

However, this must have been done on an informal basis, as there is no record of these events in any of the Departmental files and Mr Kramer did not provide us with any record of the meetings.

[19.8] FURTHER CORRESPONDENCE IN JULY 1990

The next occasion on which Kumagai Gumi-Kinhill Kramer expressed interest was in a letter dated 31 July 1990. This was in response to a letter from the Department of Transport, inviting a detailed proposal from the consortium. [EXHIBIT 31]

Chapter 19

We reported in Chapter 6 that the Department of Transport was

wrong to

only invite proposals from a select group of companies. The Kumagai Gumi-Kinhill Kramer consortium was among the selected group.

However, the letter of 31 July 1990 did not elaborate on the financial proposal that had earlier been given to the Department.

[19.9] TRAFFIC REVENUE STUDY: AUGUST 1990

Mr Kramer stated to the Ombudsman Commission that around August 1990, he had submitted a document to the Department of Transport entitled "Port Moresby to Jacksons Airport Arterial Road Link Via Burns Peak Tunnel Preliminary Traffic and Revenue Report". This document was prepared by Kinhill Cameron McNamara Pty Ltd of Milton, Queensland, Australia. [EXHIBIT 37]

The report provided an analysis of expected revenue on the assumption that certain parts of the Spring Garden Road network would become a tollway.

Mr Kramer indicated that, like the "Technical Feasibility report" presented to the Department of Transport in the first half of 1990, the Traffic and Revenue Report had been given to the Department of Transport on an unsolicited basis as an indication of the seriousness of the interest in the project by the Kumagai Gumi-Kinhill Kramer consortium.

Chapter 19

225

[19.10] FURTHER INTEREST EXPRESSED BY KUMAGAI GUMI-KINHILL KRAMER; MAY 1991

In early 1991 the Department of Transport had prepared a

document
entitled 'Terms of Reference for Spring Garden Road". In
Chapter 10 we
criticised this document: it was vague and poorly prepared.
These
concerns were also expressed by the World Bank (see Chapter
15).

Another concern was that, like the July 1990 invitation for
proposals, the
Terms of Reference document was only circulated to a few of
the
companies which had expressed interest in the project. The
Kumagai
Gumi-Kinhill Kramer consortium was again among the selected
group.

On 20 May 1991 the Kumagai Gumi-Kinhill Kramer consortium
wrote a
brief letter to the Department of Transport, in response to
the Terms of
Reference document. The letter, again, did not elaborate on
earlier
correspondence and stated that the details of the finance
could be
"finalised by mutual arrangement." [EXHIBIT 86]

[19.11] NO FURTHER CORRESPONDENCE AFTER MAY 1991

There was no further correspondence between the Kumagai
Gumi-Kinhill
Kramer consortium and the Department of Transport after the
letter of 20
May 1991.

Kumagai Gumi Ltd had no further involvement in the project.
As to Kinhill
Kramer Pty Ltd, their next involvement was in February 1992
when they
were invited to submit another-proposal.

Chapter 19

226

[19.12] FINDINGS REGARDING THE KUMAGAI GUMI-KINHILL KRAMER PROPOSAL

In light of the above, the Ombudsman Commission makes the
following

findings regarding the proposal by the Kumagai Gumi-Kinhill
Kramer Consortium:

1. The consortium formally expressed interest in the project on three occasions: June 1990, July 1990 and May 1991.
2. On the first occasion, the consortium's financial proposal was attached to the letter of interest. The proposal should not, in the opinion of the Ombudsman Commission, have been regarded by the Department of Transport as a firm proposal for financing the project. It should only have been regarded as an expression of interest. The next two letters of interest failed to give further details.
3. As a result of the Minister for Transport's arbitrary shortlisting procedure in the first half of 1991, Kumagai Gumi-Kinhill Kramer was one of five consortiums considered by the Ministerial Committee at the meeting of 18 July 1991. It was ranked number three. (See Chapter 9.)
4. It is impossible to conclude precisely the form in which the Kumagai Gumi/Kinhill Kramer proposal was presented to that meeting, because it was one of the four proposals subsequently lost. However, it is clear there was never at any time a single document which embodied the Kumagai Gumi-Kinhill Kramer proposal.

Chapter 19

227

5. It appears the proposal consisted of the three letters of interest, the collection of documents which constituted the financial proposal and the Technical Feasibility Report prepared by Kinhill Kramer in April 1990.

6. Thus, the proposal submitted by Kinhill Kramer Pty Ltd in February 1992 was an entirely new proposal, in which Kumagai Gumi Ltd had no involvement at all.

THE FEBRUARY 1992 PROPOSAL

[19.13] NO RECORD OF LODGMENT IN DEPARTMENT OF TRANSPORT FILES

As the Commission has remarked many times in this report, the extent to which important decisions, policies and events were being documented by the Department of Transport left a great deal to be desired. We make the same comment in relation to the events of February 1992, when Kinhill Kramer Pty Ltd lodged the proposal which resulted in it being awarded the contract for the Spring Garden Road/Poreporena Freeway project.

There is no record in the Department's files of when that proposal was lodged or why Kinhill Kramer was permitted to lodge it. Nor is there any record of its evaluation by officers of the Department. In fact, the only record of its existence is its inclusion as an appendix to the Policy Submission which led to the decision by the National Executive Council in the company's favour on 24 February 1992.

When we made these allegations in our preliminary report, the Secretary for Transport responded in the following terms:

Chapter 19

228

The Department received this additional information from the Minister, who requested the information direct from the developer for clarification purposes at a meeting with the consortium. As I have said above, if a proposal has the

potential to deliver the services, but lacks details, additional information can be sought." [EXHIBIT 254, pars 141

With due respect to Mr Amini, he has not addressed the point of our criticism.

A full and proper record should have been made of the receipt of the Kinhill Kramer proposal. At the very least, a date-received stamp on the proposal should have indicated when it was received. There should have been some indication of when, how and by whom the proposal was evaluated. However, there was just no record of its lodgment.

In the opinion of the Ombudsman Commission this is not good enough.

The lodgment of a proposal for a multi-million kina project – especially the proposal which is successful – should not be shrouded in mystery. The Department of Transport failed in its duty to keep a proper public record of this important event.

[19.14] ORAL EVIDENCE GIVEN TO THE OMBUDSMAN COMMISSION

Because of the gap in the Departmental records, the Ombudsman Commission was forced to rely on oral evidence given in the course of the investigation to determine the circumstances in which the proposal was lodged. We considered evidence from the Executive Chairman of Knhill Kramer, Mr Kramer, the Minister for Transport, Mr Temo and the Secretary for Transport, Mr Amini.

Chapter 19

The evidence of Mr Kramer

Mr Kramer stated that the February 1992 proposal was submitted as a result of a telephone call by an officer of the Department of Transport. He said the caller advised him that, of all the consortiums which had bid for the project, there were only two that the Government was still interested in: the Kumagai Gumi-Kinhill Kramer consortium being one of them. Mr Kramer said the caller invited him to update his bid or re-confirm it.

Mr Kramer could not recall who the caller was. Inquiries by the Ombudsman Commission during this investigation have also failed to reveal the identity of the caller. There is no evidence on the Department of Transport's files of this important phone call being made.

As to the date of the telephone call, Mr Kramer stated, after checking records kept in his company's office, that it was on or about 17 February 1992.

Evidence of the Secretary for Transport

Mr Amini said the Department had reluctantly considered this late proposal because they had been instructed to do so by the Minister for Transport.

There had been a meeting between the Minister for Transport and representatives of Kinhill Kramer which had taken place before the Kinhill Kramer proposal was lodged.

As to the date of lodgment, Mr Amini stated that it was at "the last minute".

By that, he meant that it was only a day or so before the meeting of the

Resource Management Committee which was held on 20 February 1992 (see Chapter 20).

Chapter 19

Evidence of the Minister for Transport

Mr Temo's recollection of these events was not very clear, but he indicated that all of the consortiums which had been shortlisted in 1991 were invited to update their proposals. Mr Temo said only Kinhill Kramer was "still interested".

Mr Temo denied giving Kinhill Kramer favoured treatment:

'Kinhill Kramer proposal was brought in by the Department's advise that the Chinese proposals were confusing because of change of companies. Also we need to have 1 or 2 companies who are already based in PNG and who have registered interest and have a reasonable grading in the Department's criteria.

The Secretary advised that the Chinese wanted to bring in a lot of Chinese to be as labourers they did not have reputation. The Secretary advised we should give the NEC a choice of expensive, neat and quality work and cheap and poor Pe°Ple- As a result the NEC decision to go for Kinhill Kramer, I did not favour any company after the Department's advice` [EXHIBIT 257 pages 5-61

[19.15] FINDINGS OF THE OMBUDSMAN COMMISSION REGARDING THE FEBRUARYAN2TROPOSAL: KINHILL KRAMER PTY LTD WAS INVITED TO LODGE A LATE PROPOSAL

We do not accept Mr Temo's claim that all shortlisted consortiums were given the opportunity to update their proposals. There is no evidence in the Department of Transport's files that this was done and Mr Temo was unable to produce any documentary evidence to corroborate

the claim.

We found Mr Amini's evidence to be more credible than Mr Temo's.

Chapter 19

231

We accordingly conclude that Kinhill Kramer was invited by the Department of Transport to submit a late proposal and that the invitation was issued on the instructions of the Minister for Transport.

The opportunity given to Kinhill Kramer to lodge a late proposal was 101 given to any other company which had expressed interest in the project

When Mr Kramer was invited to comment on this finding in our preliminary report, he denied his company had been invited to submit a fresh bid. The invitation, he said, was only to "update" the 1990 proposal.

Irrespective of the exact wording of the invitation - i.e. whether the telephone caller asked Mr Kramer to "update" the proposal or to submit I

a fresh bid - we conclude that Kinhill Kramer took the opportunity to lodge a fresh proposal.

19.16] KINHILL KRAMER PTY LTD WAS GIVEN FAVOURED TREATMENT

In his written response to the Ombudsman Commission's preliminary report, Mr Kramer denied that it was unfair to other interested parties, to allow Kinhill Kramer to lodge a proposal in February 1992:

'Your investigators miss the point in rejecting Minister Temo's 'claim' that all shortlisted consortiums were given the opportunity to update their proposals.

The Tunson Engineering proposal, for one, needed no updating. It was only a matter of months old - by contrast with the Kumagai Gumi proposal (some 2 years out of date). There could have been no unfairness in inviting novation of our proposal, in those circumstances." (EXHIBIT 253, paragraph 11]

We accept Mr Kramer's point that the proposal by Tunson Engineering Co Ltd did not need updating. But many other proposals did need updating.

Chapter 19

232

[19.17] WHY WERE OTHER CONSORTIUMS NOT CONTACTED?

We do not understand why other companies whose proposals were also out of date were not given the opportunity to update them. None of the three consortiums shortlisted for consideration by the Ministerial Committee in July 1991, were given this opportunity. Those consortiums were:

Asia Periquan's International Resources Pty Ltd and Pan Management Consultants Centre

Peacock Tasman Pacific International and Crooks Mitchell
Stewart Pty Ltd
McConnell Dowell. [See Chapter 11]

In particular, it is very strange the Periquan consortium – ranked ahead of Kumagai Gumi–Kinhill Kramer in July 1991 – was not invited to update its bid.

The Ombudsman Commission concludes that Kinhill Kramer Pty Ltd was given favoured treatment.

It was unfair to the other companies which had expressed interest in the project for only Kinhill Kramer to be allowed to submit a late proposal. It was a totally unsatisfactory situation. It was wrong of the Minister for Transport to direct his Departmental Head to consider a late proposal from only one company.

When this sort of thing happens, it is hardly surprising that allegations of bribery and corruption surface.

Chapter 19

233

WHEN WAS THE KINHILL KRAMER PROPOSAL LODGED?

[19.18] DATE OF LODGMENT OF THE PROPOSAL

The Ombudsman Commission is satisfied that by the time the Resource Management Committee met on 20 February 1992, the Kinhill Kramer proposal had been lodged. The records of that meeting reveal that the Kinhill Kramer proposal was considered. [EXHIBITS 151A & 152]

This means the proposal was lodged at some time before 20 February 1992.

The Ombudsman Commission also concludes that the proposal

was lodged no earlier than 17 February 1992, for the following reasons:

Mr Kramer testified he had received the phone call inviting the proposal on or about that date.

Mr Amini's letter to the Secretary for Works of 17 February 1992, clearly shows that the only proposal in the possession of the Department of Transport on that date was the proposal by the Chinese consortium (see Chapter 18 and EXHIBIT 149).

Thus, the Kinhill Kramer proposal was in all probability lodged on 18 or 19 February 1992: only five or six days before the National Executive Council decided to award the project to this company.

Chapter 19

234

The Ombudsman Commission finds it incredible that following a decision-making process that had been proceeding for more than two years (since NEC Decision 14/90 on 24 January 1990) the decision on such an important project, with its huge financial implications for the State, could be made in this way.

* * * * *

Chapter 19

20. RESOURCE MANAGEMENT COMMITTEE RECOMMENDS
RE-TENDERING OF PROJECT: 20 FEBRUARY 1992

1

[20.1] MEETING HELD TO DISCUSS THE PROJECT

On 20 February 1992 a meeting of the Resource Management Committee was held to discuss the Spring Garden Road/Poreporena Freeway project.

This meeting was necessary because of the administrative requirement

that submissions to the National Executive Council involving un-budgeted allocation of resources be considered by the Resource Management

Committee and the National Planning Committee, before being finally

presented. [National Executive Council Submissions Handbook, paragraph 1.23, Exhibit 1]

The Secretary for Transport, Mr Amini, was present at the meeting and

introduced the Policy Submission entitled "Financing the Construction of the Spring Garden Freeway".

1

It is clear that, by this stage, the version of the Policy Submission being

discussed was the one actually presented to the National Executive

Council on 24 February 1992, i.e. the one which gave a choice of two 1

consortiums: the Chinese and Kinhill Kramer. [NEC Policy Submission No.

33/92, EXHIBIT 148]

I

Chapter 20

236

[20.2] RECOMMENDATIONS OF THE RESOURCE MANAGEMENT COMMITTEE

After the meeting, the Chairman, Mr B Bai CBE, prepared a submission from the Resource Management Committee to the National Planning Committee. [EXHIBIT 151 A]

The submission expressed the following views:

The Resource Management Committee was not impressed with either the Chinese (Tunson Engineering) proposal or the Kinhill Kramer proposal: neither was considered suitable as they were based on turnkey financing, 'Which is too expensive for the Government' (paragraph B3).

Rather than build a freeway from downtown Port Moresby to the Airport, it would be better to proceed in stages; the first stage being the Champion Parade-Wards Road section, through Burns Peak: "this will enable financing for the construction to be easily secured" (paragraph B4).

The project should be re-tendered: "the Department of Transport in calling for tenders should specify and advertise widely on both Build-Operate-Transfer and Turnkey proposals. It should also specify that the Government would prefer the Build-Operate-Transfer proposal" (paragraph B5).

If the Government cannot secure finance, a loan could be

negotiated to fund the project (paragraph B7).

Chapter 20

237

[20.3] RECOMMENDATIONS CONVEYED TO MINISTER BY SECRETARY FOR TRANSPORT

The Secretary for Transport conveyed the recommendations of the Resource Management Committee to the Minister for Transport on 21 February 1992. Mr Amini stated:

Both the proposals, namely the Chinese and the Kinhill Kramer's are turn-key proposals. The country has had very bad experience from turn key projects. Normally, Papua New Guinea does not benefit from turnkey, and the benefits are derived by the country which provides the funding. Also, the turnkey financing is very expensive. Although turnkey method of financing as proposed by the Chinese and Kinhill' Kramer is convenient, it is not in the interest of PNG' [EXHIBIT 152, paragraph 5]

In the opinion of the Ombudsman Commission, Mr Amini acted property in bringing these matters to the attention of the Minister. As we have emphasised throughout this report, the Government's top advisers have a duty to give advice fearlessly and forcefully at all times, which means it is usually necessary to give the advice in writing or confirm verbal briefings or advice in writing.

[20.4] SECRETARY FAILED TO ADVISE MINISTER OF REQUIREMENTS OF
PUBLIC FINANCES (MANAGEMENT) ACT

However, we find it necessary to make a criticism of Mr Amini's advice to the Minister.

We point out that this is a criticism of the Secretary for Transport – not a condemnation. We appreciate the difficult position he had been put in by the Minister for Transport's indiscretion in October 1991, when he signed the contract for construction of the freeway with Tunson Engineering Co

Chapter 20

238

Ltd. We do not intend to cast all the blame on the Secretary for a wrongful act of the Minister. The Minister must, clearly, carry responsibility for his decision to sign that contract (see Chapter 14).

Our criticism is that, though the Secretary properly suggested to the Minister in February 1992 that the Champion Parade to Wards Road section of the project be put to tender, he did not say why it was so important to do this.

As we show in Chapter 35, this project was subject to the normal public tender procedures in the Public Finances (Management) Act. The Secretary should have pointed this out to the Minister. The message should have been clearly and unambiguously given to the Minister formally, in writing – that his signing of the contract in October 1991 had been unlawful and that it was necessary to follow normal tender procedures.

Mr Amini responded to this allegation in the following terms:

'The Minister was appropriately advised and, as further step, I sought advice from the Department of Attorney General, Department of Finance and Planning and the Loans Borrowing Committee but none responded. As far as I am concerned, what was critical was that the Minister did not have the delegated powers to sign the contract. That is what I highlighted to him. That advice did work and no harm was done. The effectiveness of my actions should be acknowledged.' [EXHIBIT 254, para 161

In the opinion of the Ombudsman Commission, this does not adequately explain the Secretary's failure to advise the Minister of the requirements of the Public Finances (Management) Act, either on this occasion (the brief of 21 February 1992) or any other occasion.

Chapter 20

239

We have found that the Secretary for Transport did not at any time during the life of the project, advise the Minister in writing of the need to follow the public tender procedures in the Public Finances (Management) Act.

As permanent head of the Department of Transport, it was the Secretary's duty to ensure that the provisions of the Act were complied with in relation to his Department. He failed to discharge this important duty.

[20.5] THE SECRETARY'S ADVICE WAS TOO LATE

The Ombudsman Commission concludes that, while the Secretary

for
the Transport acted properly in bringing the recommendations of
the Resource Management Committee to the attention of the
Minister, it really
was a case of "too-little-too-late".

The crucial advice he gave on 21 February 1992 – only three
days before
the National Executive Council decided to award the project
to Kinhill
Kramer – should have been given in much clearer terms and a
long time
before it eventually was.

[20.6] CHAIRMAN OF RESOURCE MANAGEMENT COMMITTEE PRESENTS
RECOMMENDATIONS TO THE NATIONAL EXECUTIVE COUNCIL

The usual procedure with recommendations of the Resource
Management
Committee is that they are presented to the National Planning
Committee,
before going to the National Executive Council. [EXHIBIT 1,
para 1.23]

Chapter 20

240

In this case, however, the National Planning Committee
was by-passed
and the recommendations were forwarded direct to the
National Executive
Council.

The recommendations were tabled in the National
Executive Council and
the Chairman of the Resource Management Committee, Mr
Bai, on
direction from the Prime Minister, presented the
Committee's views at the
National Executive Council meeting on 24 February 1992.
[EXHIBITS 151 A – 151 B]

[20.71] RESOURCE MANAGEMENT COMMITTEE RECOMMENDATIONS
REJECTED

All the recommendations of the Resource Management

Committee were

rejected. Instead, the National Executive Council decided to award the project – a freeway from downtown Port Moresby to Jacksons Airport – to Kinhill Kramer Pty Ltd.

* * * * *

Chapter 20

241

THE MINISTER FOR TRANSPORT'S POLICY SUBMISSION OF FEBRUARY 1992

21.1] POLICY SUBMISSION NO. 33 OF 1992: A NEW SUBMISSION

The Minister for Transport presented Policy Submission No. 33/92 to the National Executive Council at its meeting on 24 February 1992.

[EXHIBIT 148]

Though this document carried the same title as the submission dated 17 I

July 1991 and filed in October 1991, it was a fundamentally different document (see Chapter 16).

Whereas the submission dated 17 July 1991 strongly favoured the I

Chinese consortium and ranked a joint proposal from Kumagai Gumi and

Kinhill Kramer as number three in a short-list of five, Policy Submission No.

33/92 gave a choice of two proposals: the Chinese proposal

and a

proposal dated February 1992 from Kinhill Kramer Pty Ltd.

21.2] THE HURRIED PREPARATION OF THE POLICY SUBMISSION

The Secretary for Transport testified that Policy Submission No. 33/92 was prepared by his Department on the instructions of the Minister for Transport. He further stated that the views expressed in it were those of his Department.

11]

Chapter 21

242

Mr Amini conceded the Policy Submission was prepared in a rush. Indeed, it must have been. The Commission found in Chapter 19 that a proposal from Kinhill Kramer had been lodged on 18 or 19 February 1992 and in Chapter 20 it was shown that Policy Submission No. 33/92 – which evaluated the Kinhill Kramer proposal – was considered by the Resource Management Committee at its meeting on 20 February 1992.

So, the Policy Submission must have been prepared by the Department of Transport on 18 or 19 February 1992 after the proposal had been lodged. We note that it carries the date 14 February 1992. However, that date cannot be accurate because the proposal was not lodged until after 17 February 1992.

[21.3] THE SUBMISSION WAS POORLY PREPARED AND DEFECTIVE

The fact that Policy Submission No. 33/92 was prepared

hurriedly is borne
out by the quality of the document. It was poorly prepared
and seriously
defective in a number of important areas.

When we made findings to that effect in our preliminary
report, the
Secretary for Transport responded as follows:

'NEC Secretariat follows strict guidelines, if it was
poorly done as alleged they
would have rejected it. Again when it went -to NEC, no
such comments were
made I was there. The submission was prepared by Mr
Parakei, assisted by a
World Bank technical assistant. This person is now in
charge of the multi-
billion dollar new Hong Kong Airport project' [EXHIBIT
254, para 171

Chapter 21

243

With due respect to Mr Amini, he has not answered our
criticism of the
Policy Submission. The fact that it was not rejected by the
National
Executive Council Secretariat and not adversely commented on
by
members of the National Executive Council is no guarantee of
its quality.

The Ombudsman Commission retains the view that Policy
Submission No.
33/92 was poorly prepared and seriously defective. In this
and the
succeeding chapter, we explain our reasons for making this
finding.

POOR PRESENTATION OF ISSUES

[21.4] THE COLLECTION OF CONFUSING APPENDICES

In finding that Policy Submission No. 33/92 was poorly presented, we are not referring to the cosmetic appearance of the document. If the document were to be judged on its appearance, it would have to be said it appears to be well presented. But the appearance is deceptive: a book must not be judged by its cover.

In terms of its presentation of issues, the document is very weak. It contains numerous appendices, none of which are marked alphabetically or numerically and none of which are referred to in the text of the submission. As a consequence, it would have been extremely difficult for anyone without an intimate knowledge of the project to appreciate the significance of the appended documents.

Chapter 21

244

All Policy Submissions to the National Executive Council should be carefully and professionally compiled, so as to present issues in a lucid and methodical manner to avoid confusion.

Policy Submission No. 33/92 failed to meet these requirements. The ten page text of the submission was accompanied by a collection of twenty-two appendices. The Ombudsman Commission has examined each of these and found most to be meaningless and confusing and in some cases very misleading.

[21.5] EXAMINATION OF THE DOCUMENTS APPENDED TO THE POLICY
SUBMISSION

The twenty-two appendices (which the Ombudsman Commission has
itself numbered for the purpose of this report) and our comments on
each of them, are as follows:

Appendix 1: this was the document recording the decisions of
the

Ministerial Committee on 18 July 1991.

It related to paragraph 24 of the submission. However there
was no cross-
reference in that paragraph to this document. Readers of the
submission
were therefore left to their own devices to assess its
significance.

Appendix 2: the contract agreement between Tunson Engineering
Co Ltd

and the Minister for Transport of 15 October 1991.

This document related to paragraph 26 of the submission, but
again there

was no cross-reference to the document in the text of the
submission.

Chapter 21

245

Appendix 3: a letter from the Secretary for Transport to the
Secretary for
Works dated 5 December 1991.

This letter was presumably meant to show that the views of the
Department of Works on Policy Submission No. 33/92 were sought. But
the letter of 5 December 1991 was actually seeking views on the
previous
draft National Executive Council submission (ie the one dated 17
July
1991) - not Policy Submission No. 33/92. It was very misleading to
include
this letter as an appendix to the submission.

Appendix 4: an undated memorandum from Tunson Engineering Co Ltd
to the Minister for Transport regarding the details of a bank
account.

This document is not referred to in the text of the submission. It
is an
entirely meaningless and irrelevant document.

Appendix 5: the World Bank Aide-Memoire of 28 September 1991. This document related to paragraph 26 of the submission, but there was no cross-reference to the document in the text of the submission. The text

also failed to draw attention to the most significant recommendation in the

Aid-Memoire: that the project be re-tendered.■

Appendix 6: a two page undated and unsourced document entitled "Information Received from the Export-Import Bank of Japan".

This is a completely meaningless document. It bears no relation to anything discussed in the submission.

Appendix 7: a one page unsourced and undated document headed "Operational Framework".

This is also a completely meaningless document. It bears no relation to

anything discussed in the text of the submission.

Chapter 21

246

Appendix 8: a letter from the Secretary for Transport to the Secretary of

the Department of Prime Minister dated 5 December 1991.

Like Appendix 3, it gives the impression that the views of another Department had been sought. But the only occasion on which the views of the Department of Prime Minister were sought on Policy Submission No.

33/92 was during the course of the Resource Management Committee meeting on 20 February 1992. And the Resource Management Committee recommended that the project be re-tendered.

Appendix 9: an unsourced and undated document headed "Appendix B Preliminary Traffic and Revenue Report".

This document is not referred to in the text of the submission. In the way

it is presented, it is just a meaningless set of toll revenue figures

estimated by an unknown person.

Appendix 10: an unsourced sixteen page document entitled "Port Moresby

to (Jacksons) Airport Arterial Road Link Via Burns Peak Tunnel Technical

Feasibility Report April 1990".

This document actually forms a part of the February 1992 Turnkey Proposal by Kinhill Kramer Pty Ltd. But in its presentation, it appears to

be yet another unsourced document, bearing no necessary relation to

any
of the proposals referred to in the text of the submission. Without
a
proper explanation of its relevance, the inclusion of this document
as an
appendix is utterly confusing.

Appendix 11: a map of the City of Port Moresby.
There were no maps referred to in the text of the submission. This
map
does not show with any precision the scope of the project the
National
Executive Council was being asked to approve.

Chapter 21

247

Appendix 12: an unsourced line drawing no. 75024, entitled "Moresby-Jacksons/Airport Arterial Link Through Burns Peak: Typical Section & Details".

The Ombudsman Commission is at a loss to understand the relevance of this document. It is entirely meaningless.

Appendix 13: an unsourced line drawing no. 75025, entitled "Moresby-Jacksons/Airport Arterial Link Through Burns Peak: Dual Lane Bridge Typical Cross Section".

Yet another meaningless appendix.

Appendix 14: an unsourced line drawing no. 75026, entitled "Moresby - Jacksons/Airport Arterial Link Through Burns Peak: Typ Tunnel Cross Sections".

This document was also not referred to in the text of the submission.

Perhaps this document and Appendices 11 and 12 were appended to give the appearance that the technical aspects of the project had been addressed. But they were nothing more than a confusing collection of meaningless technical drawings of no relevance whatsoever to the text of the submission.

Appendices 15. 16. 17 and 18: standard letters from the Secretary for Transport to the Departments of Lands and Physical Planning, Trade and Industry, Attorney-General and Finance and Planning inviting comments on a draft NEC Submission.

We have already commented above on the illusion created by including

these types of letters as appendices. The letters were seeking comments on the previous submission, i.e. the one which did not favour the selection of Kinhill Kramer Pty Ltd.

Chapter 21

248

Appendix 19: a letter from the Acting Secretary for Transport to the Department of Attorney-General dated 15 January 1992 seeking advice on the contract agreement signed by the Minister with Tunson Engineering Co Ltd.

This document was not referred to in the text of the Policy Submission.

Its inclusion could only confuse readers of the Policy Submission.

Appendix 20: a letter from the Acting Secretary for Transport to the Office

of International Development Agency dated 15 January 1992.

This document was also not referred to in the text of the Submission. It is

another meaningless document.

Appendix 21: an unsourced two page document entitled "Financial Terms".

This document was actually quite important. When the Executive Chairman

of Kinhill Kramer Pty Ltd gave evidence to the Ombudsman Commission, he testified that this particular two page document, which he referred to

as "the financial envelope", had been enclosed - as a separate document -

when the Kinhill Kramer proposal was lodged with the Department of Transport. It therefore represented the financial terms on which the company was offering to undertake the project.

The Policy Submission gave no indication that this is what the document

was. It appears - like most of the other appendices - to be yet another

unsourced, undated, meaningless, irrelevant document.

Appendix 22: the February 1992 Turnkey Proposal by the Kinhill Kramer Consortium.

This thirteen page document was probably the most important appendix.

However, it was not expressly referred to in the text of the submission.

Any person – especially a busy Minister – who was required to quickly read the text of the submission may not have realised the significance of this document and could quite easily have skipped over it.

Chapter 21

249

As we explain below, the Kinhill Kramer proposal was, in fact, quite vague.

With respect, if the members of the National Executive Council had realised how vague the proposal really was, they may not have voted in favour of it.

[21.6] WAS THE POLICY SUBMISSION MEANT TO BE CONFUSING?

Policy Submission No. 33/92 was so confusing in its presentation, the

question must be raised whether this was intentional.

We refrain from making that finding. Our view of the situation is that,

following the Minister for Transport's direction of 13 February 1992, the

Department of Transport was required to hurriedly compile the submission.

The Department's efforts to put together a proper submission were

hampered by the Minister's instruction that it include the late proposal by Kinhill Kramer Pty Ltd.

That proposal had to be evaluated and the Department's assessment of

it incorporated in the submission. This assessment was also done in a

hurry. With the Minister putting pressure on the Department and the

deadline for filing the submission fast approaching, it appears that a

number of documents were hastily and carelessly appended to the text of

the submission to give it a bulky appearance. The members of the

National Executive Council were expected to find their own way through

the jungle of papers.

In addition to the confusion that the presentation of the

document must
National Executive Council entertained it, when its contents were
seriously defective.

Chapter 21

250

DEFECTS IN THE POLICY SUBMISSION

[21.71 SEVEN SERIOUS DEFECTS IN THE POLICY SUBMISSION 1992

In the opinion of the Ombudsman Commission, the text of
Policy Submission No. 33/1992 is seriously defective in a number of
important areas.

The Ombudsman Commission has identified seven serious
defects. These relate to:

1. The establishment of the Ministerial Committee.
2. The illusion that an equal opportunity had been given
to numerous companies and consortiums to submit proposals.
3. The failure to properly advise the National Executive
Council of the recommendations of the World Bank.
4. The failure to give any explanation of non-compliance
with the Public Finances (Management) Act and the Public
Works Committee Act.
5. The failure to refer to the recommendations of the
Resource Management Committee.
6. The failure to properly explain the history of the
Kinhill Kramer proposal.
7. The favourable assessment of the Kinhill Kramer
proposal.

a

[21.8] FIRST DEFECT: ESTABLISHMENT OF THE MINISTERIAL COMMITTEE I

Paragraph 7 of the Policy Submission No. 33/92 refers to "a special ■
Executive Council Ministerial Committee" being established by the National
Committee ■ to speed up development of this project. However, no such
was ever established (see Chapter 11).

The members of this committee assumed powers and responsibilities which they did not lawfully have.

[21.9] SECOND DEFECT: ILLUSION THAT AN EQUAL OPPORTUNITY HAD BEEN GIVEN TO ALL COMPANIES AND CONSORTIUMS TO SUBMIT PROPOSALS

Paragraphs 8 and 9 refer to the various expressions of interest that were lodged and clearly give the impression that all of the companies and consortiums were given a fair opportunity to lodge proposals for the project. As the Ombudsman Commission explained earlier in this report, that was far from the truth (see particularly Chapter 9).

The shortlist for this project was arbitrarily prepared by the Minister for Transport without advice or consultation. Some companies which had expressed interest did not even receive an acknowledgement from the Department of Transport. Some unknown foreign companies which had no experience operating in Papua New Guinea were given special treatment by the Minister for Transport. Other companies were shortlisted, though they had no experience at all in road construction or design.

Chapter 21

252

The statement in paragraph 8 that the proposals of fifteen consultants were presented to a Steering Committee meeting on 31 July 1990 is false and misleading (see Chapter 7).

There was never any meeting at which all of the proposals were fairly and objectively evaluated

[21.10] THIRD DEFECT: FAILURE TO PROPERLY REPORT THE RECOMMENDATIONS OF THE WORLD BANK

The World Bank recommended in September 1991 that the Spring Garden Road/Poreporena Freeway project be re-tendered (see Chapter 15).

Paragraph 25 of the Policy Submission referred to the World Bank Mission which made this recommendation but did not make any mention of that recommendation.

The National Executive Council was not advised of this crucial piece of advice from the World Bank.

[21.11] FOURTH DEFECT: FAILURE TO EXPLAIN NON-COMPLIANCE WITH NORMAL TENDERING PROCEDURES

The decision-making process which led to the State entering into the contract with Kinhill Kramer Pty Ltd on 27 May 1992 was fundamentally unlawful. Legislation such as the Public Finances (Management) Act and the Public Works Committee Act was completely ignored (see Chapters 35 and 36).

The Policy Submission should have given some explanation as to why these laws were by-passed. It did not do this.

[21.12] FIFTH DEFECT: FAILURE TO REFER TO THE RECOMMENDATIONS OF THE RESOURCE MANAGEMENT COMMITTEE

Only four days before the National Executive Council decided to award the project to Kinhill Kramer Pty Ltd, the Resource Management Committee recommended that the project be implemented in three distinct phases and put to tender.

The Policy Submission failed to refer to either of these crucial recommendations.

[21.13] SIXTH DEFECT: FAILURE TO EXPLAIN THE HISTORY OF THE KINHILL KRAMER PROPOSAL

Paragraph 8 claimed that some of the fifteen original companies which expressed interest in the project had sought an extension of time to lodge their proposals, but that these requests had been rejected. Paragraph 13 stated that of the original fifteen, only the Kinhill Kramer consortium presented a detailed technical and financial proposal. These statements were very misleading and false.

The truth is that many of the original fifteen companies were not given a fair opportunity to submit proposals. Also, in its original proposal, Kinhill Kramer Pty Ltd was linked with Kumagai Gumi Ltd of Japan. The proposal which was before the National Executive Council in February 1992 was a new proposal, not involving Kumagai Gumi Ltd. Kinhill Kramer had been

Chapter 21

given a considerable extension of time. In fact, as we revealed in Chapter

19, the new proposal was lodged only five or six days before the National Executive Council met.

The Policy Submission should have carefully explained all this for the benefit of the members of the National Executive Council.

[21.14] SEVENTH DEFECT: FAVOURABLE ASSESSMENT OF THE KINHILL, KRAMER PROPOSAL

The most serious defect in National Executive Council Policy Submission No. 33/92 was its unjustified favourable assessment of the Kinhill Kramer proposal.

This unrealistic assessment is something which, we believe, affected the integrity of the whole decision-making process concerning this project. It is dealt with as a separate matter in the next chapter.

* * * * *

Chapter 21

255

KINHILL KRAMER PROPOSAL

[22.1] THE NATIONAL EXECUTIVE COUNCIL POLICY SUBMISSION WAS
SERIOUSLY DEFECTIVE

We have concluded that the Policy Submission which resulted in the project being awarded to Kinhill Kramer Pty Ltd was poorly prepared and seriously defective (see Chapter 21).

One of the most serious defects was the favourable assessment of the

I Kinhill Kramer proposal. That assessment was unjustified.

I When this opinion was expressed in our preliminary report, we received

responses from two persons: the Secretary for Transport, Mr Amini and

I the Executive Chairman of Kinhill Kramer Pty Ltd, Mr Kramer.

I Mr Amini's response was as follows:

I
The detailed proposals were all
was hidden from them. I
an informed decision. My
but this request was rejected
defective administration.'

'This is a matter of professional judgement.
put before National Executive Council. Nothing
believe National Executive Council always make
Department, however, did argue for more time
I
by National Executive Council. This is not
[EXHIBIT 254, para 18]

1

Chapter 22

256

Mr Kramer's response was similar to Mr Amini's:

"Are you suggesting that the most serious defect(s)" was
the "favourable
assessment of the Kinhill Kramer proposal". What does this
mean? The
assessment was made by the Department of Transport and
presumably proper
advice was obtained in respect of such assessment The
statements in the
report in relation to this heading are made without any
proper evidence of same
and show, with respect, a very limited understanding of

the bureaucratic procedures in respect of matters such as this." [EXHIBIT 253, pars 131

Having considered these responses, the Ombudsman Commission retains the view that the favourable assessment of the Kinhill Kramer proposal in the Policy Submission was unjustified. In this chapter, we explain the reasons for drawing that conclusion.

Before we do that, it is necessary to specify what the Kinhill Kramer proposal consisted of, when it was evaluated by the Department of Transport.

OUTLINE OF THE KINHILL KRAMER PROPOSAL

[22.2] WHAT DID THE KINHILL KRAMER PROPOSAL CONSIST OF?

This is not a straightforward issue, because there is no official record of the Department of Transport receiving the Kinhill Kramer proposal (see Chapter 19). It was therefore difficult to conclude, by just looking at the Department's files, what exactly the Kinhill Kramer proposal was. In addition, because of the confusing manner in which Policy Submission No. 33/92 was compiled, it was virtually impossible for anyone reading it to work out what the Kinhill Kramer proposal consisted of.

However, after questioning the Executive Chairman of Kinhill Kramer Pty Ltd, Mr Kramer, we are satisfied that the proposal lodged on 18 or 19 February 1992 actually consisted of two separate documents:

1. A spirally-bound document, consisting of twenty-nine pages (not numbered consecutively), entitled:

Department of
Incorporating Burns Peak
Proposal The IGnhill
[EXHIBIT 150]

"Independent State of Papua New Guinea
Transport Seaport/Airport Link
Tunnel and Spring Garden Road Turnkey
Kramer Consortium February, 1992".

2. A stapled document of two pages, entitled:

"Financial Terms". [EXHIBIT 151]

[223] THE TURNKEY PROPOSAL DOCUMENT

This document consisted of twelve pages of text, which formed the main part of the proposal, and two appendices.

[22.4] THE TEXT OF THE PROPOSAL

The proposal was introduced in the following terms:

'The Joint Venture Consortium of Kinhill Kramer and a Major Contractor through their many years of construction involvement in Papua New Guinea. Fully appreciate the environmental, social, political and financial aspects of a

Terms of Reference project of this magnitude. In response to known
the Joint
Preliminary Planning Phase an Venture Consortium shall assemble in the
an experienced multi-disciplined team to fully
investigate and develop an economic
solution in which in the social and environmental
criteria will take precedence.'
[EXHIBIT 150, para. I.0)

Chapter 22

258

The text of the proposal continued:

"The Joint Venture Consortium shall consist of two
principle partners being
Kinhill Kramer and a Major Civil Engineering and
Construction and Consulting Engineering. [sic]
The Project Management and preliminary design
phase followed by detail
design and construction supervision will be
undertaken by Kinhill Kramer the
background of Kinhill Kramer is set out in the
attached appendices.

During the Construction Phase, Kinhill Kramer
shall act as the Superintendent
of the Works. Any disputes between the
Government's Executing Agency and
the Construction Consortium shall be resolved at
the sole discretion of the
Superintendent.

Construction works including detailed tunnel
design shall be undertaken by
a Major contractor (yet to be named). The
Contractor shall also arrange the
financing of the project. The background of the
Contractor shall be provided
at a later stage." [EXHIBIT 150, pars 2.0,
emphasis added]

[22.5] KINHILL KRAMER DID NOT HAVE A CONSORTIUM

The significant thing to note is that, though the proposal was lodged in the name of "the Kinhill Kramer consortium", Kinhill Kramer did not have a consortium at all. It was a sole proposal by Kinhill Kramer Pty Ltd. At the time of lodgment of the proposals, the other member(s) of "the Consortium" did not exist

When this point was made in our preliminary report, the Executive Chairman of Kinhill Kramer Pty Ltd responded in the following terms:

'The fact that the Kinhill Kramer Consortium did not have a company to do the contracting work is not surprising. There are any number of major contractors available who are qualified and have expertise to carry out this type of work. There is no attempt by myself in the proposal to mislead the State. My statements envisaged "a consortium". This was accepted by the State. At all times, our nomination of the contractor was subject to National Executive Council approval. Selection of the contractor would have been, in the circumstances, a condition precedent to overseas funding (as you are obviously aware)." [EXHIBIT 253, pars 15]

Chapter 22

259

The other feature of the text of the Turnkey Proposal document is the

section headed "Financial Terms". It states:

'The Lump Sum Cost of the Project shall be Sixty Million Kina (K60,000,000) for stages 1, 2 and 3 which consist of a four (4) lane road link between downtown Port Moresby and Jackson's Airport including a 2 lane single barrel tunnel through Burn's Peak.

In addition to this Lump Sum Cost a Five Million Kina (K5,000,000) contingency sum has been allowed for. The use of the contingency sum shall be jointly at the discretion of the Secretary of the Department of Transport and the Executive Chairman of Kinhill Kramer.

The Consortium shall arrange a loan for the entire construction cost of Sixty Million Kina together with the Five Million Kina contingency sum. The terms of the repayment shall be 10 - 15 years repayment period with a 3 year initial grace period and at an interest rate not exceeding 10%.

The commencement of loan period and the grace period shall coincide with the signing of formal contract between the Consortium and the Government's Executing Agency. The contract shall be exempt from all Government Import Duties and taxes." [EXHIBIT 150, para. 6.0]

It will be observed that the conditions on which the lump sum price of the

project would be paid by the State were expressed in very broad terms:

the interest rate was not specified, except to say it would not exceed 10%

and the period for repayment of the loan was stated generally to be "10 - 15 years".

[22.7] THE APPENDICES

There are two appendices which also formed part of the Turnkey Proposal

document. (The contents page of the proposal indicated there were three

appendices, but the first one - "Company Profiles" - is missing; perhaps

because, when the proposal was completed, Kinhill Kramer did not have

a consortium partner.)

Chapter 22

260

The two appendices are:

"Appendix B: Preliminary Traffic and Revenue Report". This is a one page summary of the document of August 1990, [EXHIBIT 37] which gives an analysis of expected revenue on the assumption that certain parts of the Spring Garden Road network would become subject to a toll.

"Appendix C: Port Moresby to (Jacksons) Airport Arterial Road Link via Burns Peak Tunnel Technical Feasibility

Report

April 1990". [EXHIBIT 7B]
This is the document which, Mr Kramer said, had been submitted to the Department of Transport in 1990.

[22.8] THE "FINANCIAL TERMS" DOCUMENT

This was the second part of the Kinhill Kramer proposal.

Mr Kramer stated that this two-page stapled document - which he referred

to as "the Financial Envelope" - was "attached" to the "Turnkey Proposal" document. Though the "Financial Envelope" was physically separate from the spirally bound main proposal, the two documents were clearly meant to be read together.

It is apparent that the purpose of the "Financial Envelope" was to

elaborate on the rather general terms in which the corresponding section of the "Turnkey Proposal" document was expressed.

Chapter 22

261

[22.9] THE KINHILL KRAMER PROPOSAL WAS PREPARED IN A RUSH

It is also apparent, from the way in which the Kinhill Kramer proposal was presented (e.g there were a number of typographical errors and the "Key Personnel" section did not mention the company's Executive Chairman) • that the Kinhill Kramer Proposal was prepared in a rush.

Also, the fact that the Financial Terms document was physically separate from the Turnkey Proposal document, shows that the proposal was hurriedly put together.

Mr Kramer admitted as much in his evidence to the Ombudsman ■ Commission. He testified that, as soon as he got the phone call from the Department of Transport on 17 February 1992, inviting him

to "update" the
Kinhill Kramer bid, he contacted Kumagai Gumi Ltd to see
if they were still
interested.

When Kumagai Gumi said they were not still interested, Mr
Kramer was
put in quite a predicament: he had to lodge a proposal
without a
consortium partner. And because he didn't have a
consortium partner, he
could not say who the financier would be.

Kinhill Kramer Pty Ltd had always intended to arrange
finance for the
project through an export finance corporation such as the
EXIM Bank of
Japan or the Export Finance Insurance Corporation of
Australia. But these
institutions invariably insist that the major contractor
is a resident of the
country exporting finance for the project. So, if Kinhill
Kramer didn't have
a contractor, they also didn't have a financier.

When these findings were made available in our preliminary
report, Mr
Kramer made the following comments:

Chapter 22

'The heading under this section [Le.'the Kinhill Kramer
proposal was prepared
in a male] is subjective and improper. It is further
evidence of the bias shown
in the report. Paragraph 2 under this heading is absurd.
I do not understand
how the physical presentation of a document could show
'that it was hurriedly
put together'. Indeed if it was 'hurriedly put together'
what does this mean?
Presumably it means it was done in a hurry.' [EXHIBIT
253, para

We note that Mr Kramer did not deny that the proposal was
done in a
hurry. There is no other conclusion that can be drawn.

The finding that the proposal was prepared in a rush is not
meant as a

criticism of Kinhill Kramer or its Executive Chairman. It is simply a finding of fact, which is reported here to illustrate the unusual circumstances leading to and in which the National Executive Council came to make its decision on 24 February 1992.

THE PRICE OF THE PROJECT

[22.10] DIFFICULTIES IN PRICING THE PROJECT

As to the task of quoting a lump sum price for the project, this also presented Mr Kramer with some difficulty. He stated to the Ombudsman Commission that he was concerned that the company did not have sufficient information on which to base a price. He said that Kinhill Kramer Pty Ltd, was reluctant to submit a price to the Department of Transport without having had an opportunity to consider the geotechnical report of Coffey Partners International, which had been arranged by the Department of Works (see Chapter 8).

Chapter 22

263

[22.11] DEPARTMENT OF TRANSPORT HAD CONSISTENTLY FAILED TO SPECIFY THE SCOPE OF THE PROJECT

Mr Kramer's claim that he had insufficient information on which to base a price is an understatement. As we have noted a number of times

previously, the scope of the Spring Garden Road/Poreporena Freeway project was poorly defined from the very beginning – when the National Executive Council decided that "the Burns Peak Road" should be constructed.

It was, by February 1992, more than two years since that vague decision was made and in all that time the Department of Transport had been unable to define, with any precision, the route of the freeway or its basic engineering characteristics. Even in February 1992 – almost a year after the results of the geotechnical investigation were released – no decision had been made on the tunnel/cut option.

Mr Kramer said that, when the Kinhill Kramer proposal was lodged, the company had not seen the results of the geotechnical investigation. In these circumstances, any figure that Kinhill Kramer Pty Ltd were to quote would, at best, have to be a rough "guesstimate".

This was a very unsatisfactory situation. In the opinion of the Ombudsman Commission it is very poor administrative practice – and it defies common sense – to expect companies to submit firm proposals when the exact scope of a project is not known. The Department of Transport must be held responsible for allowing this unsatisfactory situation to develop. The Terms of Reference released – selectively – in early 1991 did not specify the end points of the freeway. Twelve months after that, the Department of Transport still hadn't specified exactly what it wanted.

Chapter 22

There is one part of Kinhill Kramer's February 1992 proposal that needs to be specially noted: the substantial increase in the price of the project.

When Kinhill Kramer submitted its "Technical Feasibility Report" to the Department of Transport in April 1990 it quoted a price for the Spring Garden Road/Poreporena Freeway project of K40 million (see Chapter 19 and Exhibit 7B, page 15).

But, when the February 1992 proposal was submitted, the price had increased to K65 million.

This obviously should have been a matter of concern to the Department of Transport when it was evaluating the February 1992 proposal. How can the cost of a road project increase – without explanation – by more than 60% in less than two years? How could such a huge increase be overlooked by the Department of Transport in its evaluation?

The following explanation of the K25 million increase in the price of the project was provided by Mr Kramer:

'The 1990 figure (MOM) was a highly qualified ESTIMATE of the likely cost of the project, on 1990 prices. A price produced some 2 years later must, first, be adjusted for inflation (escalation) at 10%.

That, alone, escalates the K40M to around the project bid calculated to the medium point of actual constructions period.

Much more importantly, the February 1992 bid was no longer an ESTIMATE but fl2(1:2AMMMAPMa accepting liability for all and any increases and contingencies'. [EXHIBIT Z53, para 181

Chapter 22

265

[22.13] 1990 PRICE ALTERED BY KINHILL KRAMER

We noted earlier in this chapter that the 1990 document was included as

one of the appendices to the February 1992 proposal. However, pages 10

and 15 of the 1990 document – which deal with the project cost – were

altered when these pages were annexed to the 1992 proposal.

Page 10 of the 1990 document stated:

"Subject to prevailing costs, at the time of commissioning of the new proposed Arterial Road and Tunnel the cost of construction would be in the range of KINA 40.0 million, and the cost breakdown is given in Table 3.'

[EXHIBIT 7B, page 15]

By contrast, the altered version, attached to the February 1992 proposal,

stated:

"Subject to prevailing costs, at the time of commissioning of the new proposed Arterial Road and Tunnel the cost of construction would be in the range of KINA 60,0 million, and the cost breakdown is given in Table 3 based on 1992 construction rates." [EXHIBIT 150, page 15 of Appendix C]

Page 15 of the 1990 document, which contained the cost breakdown, was

also altered when it appeared in the February 1992 proposal. A

comparison of the different versions of the cost breakdown reveals that all

cost items were increased markedly, as follows:

DESCRIPTION	COST SHOWN IN ORIGINAL 1990 DOCUMENT	COST SHOWN IN ALTERED VERSION ANNEXED TO 1992 PROPOSAL
Relocation cost	K 500,000.00	K 750,000.00
Roadworks	K12,600,000.00	K 24,250,000.00
Bridgeworks	K 2,100,000.00	K 7,000,000.00
Tunnel Works	K16,250,000.00	K 20,000,000.00
Traffic Lights	K 1,500,000.00	K 2,000,000.00
Contingencies	K 3,295,000.00	K 5,000,000.00
Fees	K 2,295,000.00	K 6,000,000.00
Total Say	K40,000,000.00	K 60,000,000.00

[See EXHIBIT 7B, page 15 & EXHIBIT 150, page 15 of Appendix C]

The point to be emphasised here is that, since the April 1990 document was attached as an appendix to the February 1992 proposal, it was reasonably to be expected it would be a replica of the April 1990 document. There was no indication that the figures in the appendix had been altered or 'updated'.

Mr Kramer stated that the amendment of the 1990 schedule to 1992 values was made expressly at the direction of the Department of Transport, which had the 1990 document. He rejected the suggestion that the alteration of the figures could have been misleading. [EXHIBIT 253, para 18]

[2214] DEPARTMENT OF TRANSPORT SHOULD HAVE EXPLAINED K25 MILLION PRICE INCREASE

Having considered Mr Kramer's explanation, we still do not believe it was right for the Department of Transport to allow a document dated April 1990 to be annexed to a 1992 document and altered without any indication being given that the 1990 document had been altered.
[EXHIBIT 253, para 18]

The Department of Transport should not have asked for or accepted the document in that form. At the very least, the Department should have indicated in the Policy Submission to the National Executive Council that the 1990 figures had been updated. The Department should have explained why the estimated price of the project had appeared to have risen K25 million in less than two years and whether this was reasonable.

KINHILL KRAMER PTY LTD GIVEN FAVOURABLE ASSESSMENT DESPITE ITS VAGUE PROPOSAL

[22.15] THE RECOMMENDATIONS OF POLICY SUBMISSION NO 33 OF 1992

The aspect of Policy Submission No. 33 of 1992 which made it very different to the previous one prepared by the Department of Transport was that it gave the National Executive Council a choice of two consortiums:

Chapter 22

The Chinese consortium, which the Submission referred to

as the "Tunson Engineering consortium".
.QB

The "Kinhill Kramer consortium", which was referred
to as a consortium, even though the proposal had been lodged
by Kinhill Kramer on its own.

The recommendations of the Policy Submission were expressed
in the following terms:

"It is recommended that either consortium can be
selected. Tunson Engineering consortium is proposing a better financial package
provided the source of funding is confirmed. The Kinhill Kramer consortium has
advantage of experience and quality product.

It is also recommended that NEC direct Department of
Finance and Planning and Department of Transport to carry out further
negotiations with the approved consortium in consultation with the Department
of Attorney General. Alternatively, it may be desirable to seek B.O.T or full
turnkey proposals for design, construction and finance from all the companies
and consortiums who registered interest' [EXHIBIT 148, page 10]

[22.16] NEITHER CONSORTIUM DESERVED TO BE SELECTED

This was a very strange set of recommendations. The third
paragraph seems to be an admission that all companies and consortiums
which had expressed interest in the project had not been asked for
proposals. This was, of course, quite true.

Chapter 22

269

In making this recommendation the Minister for Transport and the Department of Transport seem to have expressed a lack of confidence in their recommendation in the first paragraph that "either consortium can be selected". The Ombudsman Commission considers that such a lack of confidence was warranted.

In the opinion of the Ombudsman Commission, neither consortium deserved to be selected. The decision-making process that led to the National Executive Council being faced with this choice of two proposals was a shambles. There was insufficient information on which the National Executive Council could base an informed decision.

Unfortunately, the Department of Transport was under pressure from the Minister to expedite the project. So, rather than recommending to the Minister that the project be put to tender in the normal and lawful manner, the Department inserted the vague recommendation that "it may be desirable" to seek more proposals.

[2217] THE FAVOURABLE ASSESSMENT OF KINHILL KRAMER PTY LTD

Though the submission recommended that "either consortium can be selected", this was not actually consistent with the comparison of the two proposals provided. On page 8, five criteria were identified and the proposals were ranked as follows:

Chapter 22

270

CRITERION	KINHILL KRAMER	TUNSON
Financier's credibility	excellent	not clear
Financial package	satisfactory to good	excellent
Relevant experience	excellent	confined to China and not clear
Expected quality of tunnel	excellent	satisfactory
Employment	Papua New Guinea at least for unskilled work	could be Chinese for unskilled labour

[EXHIBIT 148, page 8]

Kinhill Kramer was ranked more favourably than the Chinese consortium on all but one of the criteria (the financial package). It is not surprising therefore that, though the final recommendation was that either proposal could be selected, the National Executive Council decided in favour of Kinhill Kramer.

However, a dose examination of Kinhill Kramer's ranking on four of the

five criteria shows the whole decision-making process to be very suspect and verging on a farce.

Chapter 22

271

FINANCIAL CRITERIA

[22.18] THE CRITERION OF "FINANCIER'S CREDIBILITY"

On this criterion, Kinhill Kramer was ranked "excellent". The Ombudsman Commission finds this quite remarkable, because there was no indication given in the Kinhill Kramer proposal of who the financier was going to be.

The Ombudsman Commission is at a loss to see how any reasonable person could conclude from the Kinhill Kramer proposal that their financier's credibility was "excellent". Nobody – including Kinhill Kramer – knew where the finance was going to come from. The reason for this was explained earlier: after Kumagai Gumi dropped out of the negotiations, Kinhill Kramer did not have a consortium partner to do the construction work and so their source of finance was not known.

Mr Kramer explained to the Commission that the documents were drafted in such a way that it was a matter for the consortium to obtain the proper finance within the parameters set in the proposal. We accept that that was, in fact, the situation. [EXHIBIT 253, paragraph 19] •

Nevertheless the Ombudsman Commission concludes that it was irresponsible of the Department of Transport to give the company an "excellent" ranking on the issue of "financier's credibility", when the

proposal did not name who the financier was going to be.

Chapter 22

272

[22.19] THE CRITERION OF 'FINANCIAL PACKAGE'

On the issue of "financial package", Kinhill Kramer was said to be "satisfactory to good". But satisfactory to good, compared to what? The Policy Submission made the following comments:

"From the cost point of view, Kinhill Kramer at K60m would be a less attractive consortium to Tunson Engineering at US\$49383m. From the point of view of financial package, Tunson Engineering consortium has proposed a better package." [EXHIBIT 148, page 71

It is apparent that the only benchmark against which the Kinhill Kramer financial package was being judged was the financial package contained in the contract agreement the Minister for Transport had signed with Tunson Engineering Co. Ltd on 15 October 1991 (see Chapter 14).

We have already remarked on the atrocious quality of that document. It was so bad it could not be taken seriously. There was also the problem of whether that financial package truly represented the Chinese Consortium's proposal. The Minister for Transport had been negotiating deals with at least three different Hong Kong-based companies during 1991, as well as a couple of different agencies of the Chinese

Government; so how could it be said that the package referred to in the Tunson contract was the real one?

There was also a huge question-mark surrounding the bona fides of the Tunson company. The Department of Transport had still not established whether the company was genuine.

Chapter 22

273

[22.20] THERE WAS NO GENUINE STANDARD AGAINST WHICH THE KINHILL KRAMER PROPOSAL COULD BE JUDGED

In these circumstances, it was very dangerous to use the Tunson financial package as a basis for comparison with the Kinhill Kramer package. The point is, there was no genuine standard against which the Kinhill Kramer financial package could be judged. Kinhill Kramer was quoting an all-up cost of K65 million, but there was no guarantee that that figure was realistic or that it represented value for money.

[2 91] THE SECRETARY FOR TRANSPORTS COST ANALYSIS

When we suggested in our preliminary report that the Department of Transport had failed to check Kinhill Kramer's price, the Secretary for

Transport , Mr Amini, disagreed:

This statement is incorrect The Department did check the price of 1065 million. The Department in accepting the cost was guided by the World Bank financed Port Moresby Road Needs Study which was undertaken by Ow Arup Consultants. The study estimated the cost of the section of the project The report was reviewed by Department of Transport, Department of Works, Department of Finance and Planning and the World Bank and was accepted.'

[EXHIBIT 254, pare 191

Mr Amini's cost analysis can be summarised as follows:

Town to Boroko Drive	K40 million
Boroko Drive to Airport	K 5 million
Fly-overs	K 5 million
Detailed design	K 5 million
Cost increases	K16 million
TOTAL COST	K 71 MIWON

Chapter 22

274

With respect to the Secretary for Transport, we find his explanation unsatisfactory. The analysis he provided was in the form of a response to the preliminary findings of the Ombudsman Commission. However, there was no document in the Department of Transport files which supported his analysis.

It appears that the Secretary has only provided the Ombudsman Commission with a retrospective justification of why, in his view, the price of K65 million was acceptable.

He has been unable to convince us that any proper cost analysis of the project was undertaken before the Kinhill Kramer financial package was described in the Policy Submission as "satisfactory to good".

Even if we accept that the analysis presented by Mr Amini was undertaken when the Kinhill Kramer proposal was being evaluated, it was, in our opinion, a bad piece of administration to evaluate the cost of a definite proposal for a project by comparing it with (what could only have been) a rough estimate made in the course of a general study of the road needs of Port Moresby.

The Ombudsman Commission maintains the view, expressed in the preliminary report, that there was no genuine standard against which the Kinhill Kramer proposal could be judged and that the Department of Transport failed to properly check Kinhill Kramer's price.

Chapter 22

275

[22.22] WAS THE PRICE QUOTED BY KINHILL KRAMER TOO HIGH?

In making the finding that there was no genuine standard against which the Kinhill Kramer financial package could be judged, the Ombudsman Commission is not saying that the price quoted by Kinhill Kramer was definitely too high.

This point needs to be emphasised because, in his response to our draft report, the Executive Chairman of Kinhill Kramer Pty Ltd was concerned that the Ombudsman Commission had made a judgment on this issue. Mr Kramer stated:

'Repeatedly, your investigators show bias in

their treatment of our February
1992 bid price – wrongly putting it in a
context of Tunson's figure of K47114 –
odd. This was NOT the comparable figure.

Was it deliberate malice that led your
investigators to omit the further K17M
– odd for overpasses? Any why do they fail to
disclose the 'strings' attached
to the Chinese bid?

The relevance of these comments is that the
writer was repeatedly dismayed
upon reading your draft to note the repeated
and plainly malicious
characterisation of our bid as incapable of
comparison. There cannot always
be a convenient benchmark for the indolent
investigator – in this case, our bid
has to be judged on its own merits. If that
requires careful expert engineering
assessment of our bid's component elements, so
be it.' [EXHIBIT 253, para 11]

Mr Kramer also provided copies of submissions made to
the Ellis
Commission of Inquiry concerning the price of the
project, to support his
claim that the price of K65 million was not excessive.
(A Commission of
Inquiry into the Spring Garden Road/Poreporena Freeway
project was
established on 30 August 1992; see Chapter 34.)

Chapter 22

Counsel for Kinhill Kramer, S.M. Littlemore, made the following submissions during the course of the Inquiry:

The Kinhill Kramer February bid was not excessive, in all the circumstances.

It represents no more than 10% escalation of the 1990 estimate (NB that was an estimate and not a guaranteed maximum price); it is less than Mr Clark would have fixed it at; it is much more favourable than the Chinese Bid - which was highly qualified, open-ended, conditional upon the granting of further mad building contracts at, obviously, massive budgets, and was plainly contrary to the National Interest in that it would have imported coolie labour; yet had been Ministerially approved!

It is a figure at which the mad would have been built - at a high standard (Mr

Sharp agrees) and with the customary high quality of Kinhill Kramer projects (see Commission Document 0.181page 10).

My clients are entirely confident that hindsight will prove the State lost a bargain when it cancelled this Contract.

Nobody else has offered to build this mad at any price under these conditions, and nor will they in future." [EXHIBIT 249B, Page 9]

The Clark report

A report from J A Clark, of the Australian consulting firm Jackson Clark Pty Ltd, emphasised the considerable risks undertaken by the Kinhill Kramer consortium as a result of the special nature of the design-finance-construct contract that was to be entered into:

"I consider that the terms of the Contract impose risks and obligations on the Consortium that would usually be borne by a Principal to the

Contract I

believe that the terms of the Contract had the effect of making the Contract

Amount a fixed price inclusive of any claims the Consortium may make and

thus the Consortium was prudently required to make some judgment as to the

risks of carrying out their obligations under the Contract and to include what

they considered to be an appropriate monetary allowance in the Amount they

agreed to perform those obligations.

Chapter 22

277

In the usual form of Contract for mad works of this nature used in Papua New

Guinea or elsewhere allowances for the costs of many of the those risks would

not be included in the Contract Amount but would be the subject of additional

payments by the Principal to the Contractor if and to the extent those risks

emerged as actual events." [EXHIBIT 249A, page 4]

This report emphasised the substantial cost risks arising from the unknown quality of the material accruing from the excavation of Burns

Peak, the inability of the consortium to recover the costs of any delays by

way of claims on the State, the uncertainty surrounding the extent of

relocation of public utilities, the likely problem of land acquisition and the

consortium's obligation to arrange finance for the project within the

maximum rate provided for in the contract of 9.5%.

The report concluded:

'n my opinion and experience all of the above matters represent substantial risks which are likely to occur on a mad construction project in Papua New Guinea. In my experience significant costs would result from their occurrence. The question of what financial provision should be made for those risks is a matter for those who would be accepting the risks and their assessment of them together with their ability to overcome them as they arose. Whatever provision was allowed would be additional to costs which were taken from the more usual type of construction contract. The events giving rise to such cost allowance may not occur at all, occur in part, or occur in excess of the allowance but that is the risk a contractor accepts in such a contract as this.

In return the Principal has obtained the benefit of a fixed cost for the project without him being exposed to the cost of these substantial risks.

If the Contract Amount for the Poreporena Freeway is to be compared against the cost of other freeway projects it is important that the comparison be made with a project having a similar work content and similar risk to the contractor.'

[EXHIBIT 249A page 8]

Chapter 22

GIVEN TO THE KINHILL KRAMER FINANCIAL PACKAGE

We reiterate that we have not concluded that the price of K65 million for the Spring Garden Road/Poreporena Freeway project was definitely too high. Nor have we said that the State obtained a bad deal when this price was agreed to.

But what we do say is this: if the State was getting value for money or as Kinhill Kramer asserted – “a bargain”, that situation had only come about by pure accident.

During the course of this investigation, nothing could convince the Ombudsman Commission that the decision to award the project to the Kinhill Kramer consortium had been made in a competent, rational, methodical or professional manner.

Many other companies had expressed interest in this project, but they were prevented from providing any competition for the Kinhill Kramer proposal by the arbitrary and mysterious short-listing process that occurred in 1990 and 1991 and by the Minister for Transport's decision to invite only Kinhill Kramer to update its proposal, when the National Executive Council was on the verge of making its decision in February 1992.

So, although the Kinhill Kramer financial package was described in the Policy Submission as “satisfactory to good”, it could well have been one of the most expensive options available to the Government, since there was no public tender.

The Ombudsman Commission therefore concludes that, at the time the National Executive Council made its decision in favour of Kinhill Kramer, nobody could possibly have known how good the Khill Kramer financial package was. It was entirely irresponsible for the Department of Transport to proffer the view that it was "satisfactory to good".

ENGINEERING CRITERIA

[22.24] THE CRITERIA OF "RELEVANT EXPERIENCE" AND "EXPECTED QUALITY OF TUNNEL"

On both of these criteria Kinhill Kramer was ranked "excellent". These rankings reaffirmed the comparisons drawn earlier in the Policy Submission, where it was stated:

'From the point of view of experience, Kinhill Kramer consortium offers tunneling and construction expertise having the region's largest engineering design capabilities. Turman Engineering Consortium's, and more specifically the Second Surveying and Designing Institute's experience is confined to China which still uses old Russian methods of design.' [EXHIBIT 148, page 7]

The claim that Kinhill Kramer has "the region's largest engineering design capabilities" is a direct quote from the letter to the Department of Transport from the then Kumagai Gumi-Kinhill Kramer Consortium dated

25 June 1990. [EXHIBIT 16, page 1, para (iii) referred to in Chapter 19]

Chapter 22

280

In his response to the Ombudsman Commission's preliminary report the Executive Chairman of Kinhill Kramer Pty Ltd maintained that Kinhill Kramer is the region's largest engineering design firm. [EXHIBIT 253, para 20] We make no comment on this claim. Our point is that the direct quote from one of the consortium's own letters to the Department is not the sort of objective assessment that should have been contained in a Policy Submission of this nature. It must be comparatively assessed independently.

As to the claim that the Chinese consortium "still uses old Russian methods of design", the Ombudsman Commission was unable to find any basis for this very prejudicial statement.

The most alarming aspect of Kinhill Kramer's "excellent" ranking on "relevant experience" and "expected quality of tunnel" is, as pointed out earlier, Kinhill Kramer had not decided on a contractor to undertake the construction phase of the project.

[22.25] KINHILL KRAMER DID NOT HAVE A CONTRACTOR

In Part 2 of their proposal Kinhill Kramer described their own role as being confined to project management, preliminary design, detail design and construction supervision:

"Construction works including detailed tunnel design shall be undertaken by a Major contractor (yet to be named). The Contractor shall also arrange the financing of the project. The background of the Contractor shall be provided at a later stage." [EXHIBIT 150]

Chapter 22

281

This was reaffirmed in Part 3.6 of the submission:

The Major Contractor shall undertake all the construction works for the project including the construction of the tunnel through Burns Peak."

[EXHIBIT 1501

In these circumstances, it was almost deceitful to suggest that the Kinhill Kramer consortium's experience and the expected quality of the tunnel they would build were "excellent". How could Kinhill Kramer possibly be given such a favourable assessment when it was not known what company was going to build the tunnel and the rest of the freeway?

WHO WAS RESPONSIBLE FOR THE IMPROPER ASSESSMENT OF KINHILL KRAMER?

[22.26] SUMMARY OF THE DEPARTMENT OF TRANSPORTS ASSESSMENT OF
THE KINHILL KRAMER PROPOSAL

The Kinhill Kramer proposal evaluated by the Department of Transport was given a very favourable assessment.

On each of the criteria "financier's credibility", "relevant experience" and "expected quality of tunnel", Kinhill Kramer was given an "excellent" ranking. This was despite the fact that nobody – including Kinhill Kramer Pty Ltd – knew who was going to build or finance the freeway.

We can only assume that a great deal of credit was being given to Kinhill Kramer on account of its past performance and experience in project supervision.

Chapter 22

tw

282

No proper checks had been done on whether Kinhill Kramer's quote of K65 million plus interest represented value for money. And no mention was made of the fact that Kinhill Kramer's price in 1990 was only K40 million.

There was no genuine standard against which the figure of K65 million could be judged. The only other option offered to the National Executive Council was the proposal of Tunson Engineering Co. Ltd. But there were

so many problems with it, it simply should not have been taken seriously.

The favourable assessment of the Knhill Kramer proposal was therefore quite unjustified. Not only that, it was irresponsible. It was the Department of Transport who made this assessment. However, the blame for allowing this situation to arise does not rest only with the Department of Transport.

(22-27]THE IMPORTANCE OF FOLLOWING CORRECT PROCEDURES

The problem of having to make a last-minute evaluation of a very late proposal from only one company would not have arisen if proper procedures had been followed by the Minister for Transport in the first place.

If the project had been put to public tender, all interested parties would have had an equal opportunity to lodge a proposal.

A competitive bidding environment would have been created and there would have been ample time for a careful and methodical assessment of the available alternatives, by an experienced Supply and Tenders Board - not by the Minister for Transport or a self-appointed "Ministerial Committee" or a selected group of officers within one Department.

Chapter 22

283

Furthermore, if normal procedures had been followed, the rumour and innuendo which have surrounded the National Executive Council's decision to award the project to the Knhill Kramer consortium would not have flourished.

* * * * *

Chapter 22

284

23. NATIONAL EXECUTIVE COUNCIL DECIDES TO AWARD
PROJECT TO KINHILL KRAMER CONSORTIUM:
24 FEBRUARY 1992

[23.1] DECISION MADE ON MONDAY 24 FEBRUARY 1992

The National Executive Council made its decision on which consortium would be awarded the Spring Garden Road/Poreporena Freeway project on Monday 24 February 1992.

NEC Decision No. 36/92 was recorded in the following terms:

On 24th February, 1992 Council:-
1, approved Kinhill Kramer consortium as the successful tenderer

Freeway; and to finance the construction of the Spring Garden

General and 2. directed the Departments of Transport, Attorney
further Finance and Planning to immediately carry out
finalising all negotiations with Kinhill Kramer with a view to
(2) months contractual and financial arrangements within two
as of the date of this decision." [ITT 153)

[232] CIRCUMSTANCES IN WHICH THE DECISION WAS MADE

The best thing that can be said about this decision is that
it was made without a proper regard for normal procedures. But there are
many other inferences that might be drawn from the circumstances in
which it was made.

Chapter 23

285

To recap, it must be borne in mind that on 17 February 1992 –
only seven days before the National Executive Council made its
decision – the

Department of Transport knew nothing about the approved
proposal. It

was hastily put together on 18 or 19 February 1992 and the
Department

of Transport was instructed by the Minister for Transport to
quickly evaluate it. The proposal was, by necessity, short on detail
and vague.

The company awarded the project did not, at that stage, have a
consortium partner to build the freeway and no finance had been
arranged. Nevertheless, the proposal was rated highly by the
Department
of Transport.

The proposal went to the National Executive Council without being evaluated by the Department of Works or the Department of Finance and Planning. Normal tender procedures were ignored.

Despite the obvious shortcomings in the proposal and the fact that there was no other against which it could properly be compared and despite there being no evidence that anybody had properly checked whether the quoted price of K65 million was realistic, the National Executive Council decided to approve it.

L3] ALLEGATIONS OF BRIBERY AND CORRUPTION
L3] ALLEGATIONS OF BRIBERY AND CORRUPTION

The Ombudsman Commission is not surprised that following announcement of the decision, there were numerous allegations of bribery and corruption. We do not propose to recite them because they were not supported by evidence.

Chapter 23

286

However, we refrain from finding that there was no bribery or corruption involved in the decision-making process which led to the National Executive Council decision. Having considered all the circumstances which led to the decision and, in particular, the consistent failure to follow normal procedures, we cannot say that there was no corruption.

[23.4] CHALLENGES TO OPEN FINDING ON THE CORRUPTION ISSUE

When we stated in our preliminary report that we refrained from finding there was no bribery or corruption we were challenged by two respondents.

The Executive Chairman of Kinhill Kramer Pty Ltd. Mr Kramer, stated:

'The draft report asserts that 'many other inferences can be drawn from the circumstances in which (the decision) was made'.

That is wrong.

It is trite to say that inferences can only be drawn from proves facts.

There is - as you acknowledge -- NO EVIDENCE of any bribery or corruption.

The 'environment of corruption" reference - is patently borrowed from the findings of the NSW LC.A.0 inquiry into the Metherell allegations and, as such, is superficial and unworthy. [EXHIBIT 253, paragraph 211

The Chairman of the National Executive Council at the relevant time. Prime Minister Namallu stated:

With due respect, I must beg to take issue with your highly offensive words.-

To suggest that you "refrain from finding that there was no bribery', is completely unnecessary.

In stating what you stated * you clearly intended to place in the minds of the readers that the Cabinet members have been corrupted, but you can't prove it!

You next ... create the environment "under which a reasonable mind could assume corruption'. We suggest this is defamatory. Your allegations are unbecoming and unfitting for a high constitutional office:

The dangerous trend you now set whereby the National Executive Council decisions are exposed to adverse public comment and

The consequent danger of exposing State Ministers to ridicule and unfounded, unsubstantiated scandalous comment.

You, as Constitutional Office holders owe a duty to conduct your affairs with dignity, proper decorum and to suggest nothing or insinuate nothing that is not a fact or truth.

We respectfully suggest you delete from your report, the [paragraphs where the Ombudsman Commission indicated that it refrained from finding that there was no bribery or corruption]. It adds nothing to your general objectives, suggests corruption and bribery and creates distress and anxiety amongst all former National Executive Council members.

Questions of bribery and corruption should be taken up specifically so that individual leaders, if any, may be dealt with according to law and not tried and convicted by innuendo, insinuation and suspicion.' [EXHIBIT 256, page 2]

[23.5] THE DECISION-MAKING PROCESS MUST BE ABOVE SUSPICION

With respect to the two respondents who challenged our preliminary findings, the Ombudsman Commission states categorically that it reserves

the right, in investigations of this nature, to form and
report an opinion on
the likelihood that corruption was involved in the decision-
making
processes of government.

If, as in this case, we have found no proof of corruption, it
does not follow
that we will ignore the issue altogether.

One of the central themes of this report is that the decision
- making
process must be above suspicion.

Chapter 23

288

Decisions such as who is going to be awarded a multi-million
kina
contract to build a freeway and how much it is going to cost
should be
made fairly, openly and in accordance with law.

When decisions are not made in this way, people become
suspicious,
allegations of corruption inevitably arise and reputations
suffer. That is the
price paid by all those involved in the making of these
decisions, and also
by those who benefit from them.

Procedures are provided by law and they must be followed for
the benefit
and interests of all concerned.

[23.61 MEEIMBORMENTIDELGOBERIEMON

In the opinion of the Ombudsman Commission, the environment
for
corruption was created by the way in which normal and
established
procedures were disregarded soon after the National Executive

Council

decided in January 1990 to go ahead with the project; in particular by the way in which the Minister for Transport, Mr Temo, took control of the decision-making process.

Many of the ingredients of corruption were present, due to:

- a flagrant disregard of normal tender procedures
- selected companies being invited to lodge proposals
- private negotiations involving the Minister for Transport being conducted in overseas locations without the knowledge of his own Department or the National Executive Council

Chapter 23

289

one a very late proposal being invited from only
presentation of company, and
a disregard of proper procedures for
submissions to the National Executive Council.

This is the sort of situation in which corruption can flourish.

Put simply, the National Executive Council decision to approve the contractor for the Spring Garden Road/Poreporena Freeway project was made in very unusual circumstances – not in the way we would expect decisions involving large amounts of public money to be made.

In the following chapters, the Ombudsman Commission records the events that took place after that decision was made. Many of the things that happened – though they did not prove that corruption was involved – did nothing to alleviate our concerns about the circumstances which led to the decision.

* * * * *

Chapter 23

290

24. OVERVIEW OF EVENTS BETWEEN APPOINTMENT OF KINHILL KRAMER CONSORTIUM AND SIGNING OF CONTRACT: FEBRUARY – MAY 1992

[24.1] THREE MONTH PERIOD UNDER REVIEW

The National Executive Council decided to award the project to the Kinhill Kramer consortium on 24 February 1992. Three months later, on 27 May 1992, the Governor-General signed a contract for the design, finance and construction of the Poreporena Freeway.

Chapters 25 – 32 trace the events that occurred during that period. It was a hectic and turbulent time, especially in the second half of April and early May 1992 when the National Executive Council received conflicting advice on the course of action that should be taken.

In this chapter we provide an overview of what happened, before recording the events in detail in the following chapters.

[24.2] THE NATIONAL EXECUTIVE COUNCIL DECISION NO. 36/92 OF 24 FEBRUARY 1992

There are two aspects of National Executive Council Decision No. 36/92 that need to be noted:

Chapter 24

1. The failure to include a number of key Government agencies in the negotiating team.
2. The imposition of a deadline for completion of negotiations.

[24.3] KEY GOVERNMENT AGENCIES. E G. DEPARTMENT OF WORKS, NOT INCLUDED IN THE NATIONAL EXECUTIVE COUNCIL DECISION

The National Executive Council directed that negotiations with the Kinhill Kramer consortium be carried out by the Department of Transport, the Department of Finance and Planning and the Department of Attorney-General. There was no mention of other key government agencies such as the Electricity Commission, the National Capital District Commission and the Department of Works.

It appears that this was not an oversight. The Minister for Transport's Policy Submission, which led to the National Executive Council decision, made no reference to any of these other agencies. [EXHIBIT 148, at page 10]

It is regrettable that these key agencies were not included in the National Executive Council decision. The Department of Works, in particular, is one of the National Government's key implementing agencies for public works projects and its administrative structures are geared to negotiation of contracts for road projects and the construction and maintenance of roads. It was necessary for the State's negotiating team to have access to the experience of the Department of Works and its skilled officers, so that an informed position could be taken on the technical engineering aspects of the contract documents. It is also one of the discrete functions of the Department of Works to "design, plan, supervise,

execute and

Chapter 24

292

maintain Government works". (See the Determination of the Functions of Departments made under the Public Services (Management) Act, discussed in Chapter 40 of this report.)

Though it transpired that the Department of Works was later involved in the negotiations, the Ombudsman Commission can see no good reason for that Department not being formally included in the National Executive Council decision.

[24.4] DEADLINE IMPOSED BY THE NATIONAL EXECUTIVE COUNCIL,

The second significant aspect of the National Executive Council decision of 24 February 1992 is that there was a time limit imposed: "all contractual and financial arrangements" were to be finalised within two months. Thus 24 April 1992 became regarded as the deadline for completion of negotiations.

This was a disastrous decision, in the circumstances. The meeting of the deadline became an overwhelming pre-occupation of the Department of Transport; so much so, that insufficient attention was paid to ensuring the interests of the State were properly protected by the terms of the contract.

We believe it was inappropriate for the National Executive Council to set a deadline for conclusion of contractual negotiations in this particular case.

In view of the complexity of the technical engineering aspects of the project and its vast budgetary implications the National Executive Council should have realised it would be dangerous to rush the negotiations. If there was a concern about getting the project started – but we do not see why there should have been – this could have been dealt with

by asking
the relevant Departments to report back to the National
Executive Council
at regular intervals on the status of the negotiations.

Chapter 24

293

When we expressed these views in our preliminary report, the
Chairman
of the National Executive Council at the relevant time, Mr Namaliu,
responded as follows:

'You suggested the National Executive Council decision 3W92 was
inappropriate
and dangerous. That is a matter of opinion.

Experience suggests that unless you give deadlines to
departments, you are not
likely to get any immediate responses. Evil minded people see
evil in
everything, we discharged our constitutional duties in good
faith, taking into
account the Government's policies to create employment and to get
the work
done quickly.' [EXHIBIT 256, page 3]

Notwithstanding Mr. Namaliu's views, the Ombudsman Commission sees
no good reason for the National Executive Council wanting to impose
a
strict limit on the negotiations.

We appreciate that it is sometimes necessary to give deadlines to
departments, as an incentive to get policies implemented
efficiently. But
this was a very special project. It was not being implemented in the
normal manner. The legal issues created by the use of the turnkey
contract were quite involved. There were also complex engineering
issues
to address. None of the customary land in the vicinity of Burns Peak
had
been acquired. The budgetary and financial implications of a project
of this
magnitude were vast, and it should have been obvious that, because
normal budgetary procedures had not been followed, it would be
necessary for the State's negotiating team to take special care to

ensure
that Papua New Guinea was getting a good deal and value for money
from the successful consortium.

The Ombudsman Commission strongly maintains the view that it was
vital,
in this case, for the State's negotiating team not to be put under
unnecessary pressure by the National Executive Council.

Chapter 24

294

Unfortunately, the fact that a strict deadline was imposed
added to the
suspicion of corruption created by the unusual circumstances
leading to
the selection of the consortium to undertake the project.

[24.5] CHRONOLOGY OF EVENTS

The following chronology highlights significant events in the
period
between the National Executive Council decision of 24
February 1992 and
the signing of the contract on 27 May 1992.

An asterisk ("*") is used to highlight meetings of the
National Executive
Council at which the Spring Garden Road/Poreporena Freeway
issue was
discussed.

FEBRUARY 1992
*24 February National Executive Council Decision 36/92 to
award project
to Kinhill Kramer consortium. [EXHIBIT 153]

MARCH 1992
2 March First meeting between Kinhill Kramer and the State,
represented by officers of Department of Transport
and
Department of Works. [EXHIBIT 155]

6 March Meeting between Kinhill Kramer and the State.
[EXHIBIT 157]

Chapter 24

295

10 March Department of Works expresses serious concerns to
Department of Transport about the Kinhill Kramer proposal:

“... Kinhill Kramer have simply pulled their estimates
out of the air”. [EXHIBIT 158]

13 March Steering committee meeting. [EXHIBIT 159]

13 March Secretary for Works writes to Secretary for Transport:

am very surprised that.. a very late submission dated
February 1992 by Kinhill Kramer which seemed to say
almost the same terms and conditions in the Chinese proposal
is the favourable one.

owned Already there are complaints from other 100% national
companies-.• [EXHIBIT 160]

18 March Secretary for Transport writes to World Bank seeking urgent
assistance in the form of a legal adviser and technical
expert.

(But there was no response.) [EXHIBIT 162]

20 March Meeting between Kinhill Kramer and the State. [EXHIBIT
164]

23 March Steering committee meeting. Department of Works
representatives indicated:

done. Let
Kinhill
to design

“...even at this late stage, something else should be
Kinhill Kramer complete the design, Government pay
Kramer for the design, renegotiate with Kinhill Kramer
to Department of Works standards and call tenders for
construction.” [EXHIBIT 166]

23 March Beca Worley write to Department of Works offering
consultant
assistance. [EXHIBIT 167]

Chapter 24

296

APRIL 1992

3 April
Department
Planning

Meeting between Kinhill Kramer and the State.
of Attorney-General and Department of Finance and
absent. [EXHIBIT 168]

6 April
General

Steering committee meeting. Department of Attorney-
and Department of Finance and Planning absent again.
[EXHIBIT 169]

WEEK COMMENCING MONDAY 13 APRIL 1992

15 April
Department
Planning
Kramer's

Morning: steering committee meeting called by
of Attorney-General and Department of Finance and
- concerned that they did not have a copy of Kinhill
financial proposal. [EXHIBIT 175]

15 April
State,
documents.

Afternoon: meeting between Kinhill Kramer and the
1.00 pm, to discuss second draft of the contract
[EXHIBIT 176]

16 April Beca Gure commence review of contract documents.
[EXHIBIT 178]

16 April Consortium agreement signed between Kinhill Kramer
Pty Ltd and Curtain Bros (Old) Pty Ltd. [EXHIBIT 179]

Chapter 24

297

WEEK COMMENCING MONDAY 20 APRIL 1992

21 April Maunsell Consultants commences review of draft contract.
[EXHIBIT 180]

22 April Department of Transport files National Executive Council
Policy Submission No. 82/92, recommending execution of
draft contract. [EXHIBITS 181, 183]

THURSDAY 23 APRIL 1992

23 April Results of Beca Gure review delivered to Department of
Works:

heavily i 'In its present form the proposed contract is very
documents as weighted in favour of the consortium – the draft
rewritten.' reviewed are seriously flawed and should be totally
POIDITT 184]

23 April Department of Works advises Department of Transport:
1

1- at this time and date we do not believe that the

State should agree with the documents as they now stand.' [EXHIBIT IBS]

23 April Preliminary review by Maunsell Consultants given to Department of Works, advising that certain:

1-fundamental requirements must be met without which the project cannot proceed in any proper fashion.' [EXHIBIT 187]

Chapter 24

298

*23 April National Executive Council meeting: Departments of Transport, Attorney-General and Finance and Planning directed to finalise the contract for presentation to National Executive Council on Wednesday 29 April. [EXHIBIT 186]

FRIDAY 24 APRIL 1992

24 April Secretary for Transport advises officer in charge of negotiations that a number of Departments are not supporting the signing of the draft contract and instructs him to ensure "everything is in order" before National Executive Council meeting on 29 April. [EXHIBIT 190]

24 April Department of Works formally advises Department of Attorney-General that if the draft contract is signed in its

present form:

EXHIBITS 191, "...the State will be seriously disadvantaged".
192]

MONDAY 27 APRIL 1992

27 April Secretary for Works writes to Chairman of Resource Management Committee, to express:

'...deep concern about the way this project is proceeding without due protection for the interests of the State'.
[EXHIBITS 193, 196]

Chapter 24

299

27 April Secretary for Transport advises Department of Works that because of their delaying tactics, he was directing the Kinhill Kramer consortium to deal only with the Department of Transport. [EXHIBITS 194, 195]

27 April Second part of Beca Gure review delivered to Department of Works, raising further concerns about draft contract:

New Guinea.' "...overall, this contract is not sufficiently defined to identify the full costs of the project to the Government of Papua Guinea." [EXHIBIT 1961]

27 April Department of Transport arranges overnight review of contract documents by Cardno & Davies. [EXHIBIT 201]

TUESDAY 28 APRIL 1992

28 April Secretary for Works advises Secretary for Transport:

continue to We are in favour of the project in principle but
contract advise that unsatisfactory aspects of the current
out Infos documentation and the land issues, should be sorted
a final agreement is signed.

but to These objections are not raised to frustrate and delay
interest.' [EXHIBIT M0] provide proper protection of the State's

28 April ElQom formally advises Department of Transport of serious concerns about the draft contract:

work The Terms of Payments seem generously biased to the 11
contractor and progress payments are not linked to
performance." [EXHHHT 2021]

Chapter 24

300

28 April Cardno & Davies review given to Department of Transport, pointing out defects in the draft contract. [EXHIBIT 204]

28 April Department of Works drafted letter to Prime Minister for signature of Minister for Works, strongly objecting to execution of the contract in its present form. [EXHIBIT 209]

WEDNESDAY 29 APRIL 1992

29 April Morning: Department of Finance and Planning prepares analysis of alternative methods of financing the project, emphasising disadvantages of turnkey financing. [EXHIBIT 199]

29 April Morning: Secretary of Department of Attorney-General hand-delivers letter to Office of Prime Minister, advising he will not issue a certificate of legal correctness for the draft contract. [EXHIBIT 211]

*29 April Afternoon: National Executive Council meeting: Department of Attorney-General given nine days in which to complete the certificate of legal correctness. [EXHIBIT 210]

FRIDAY 1 MAY 1992

1 May Senior Department of Transport officer suggests that Department of Works be re-involved in contract negotiations. [EXHIBITS 215, 216, 222]

Chapter 24

301

1 May Acting Minister for Finance and Planning suggests that NEC meeting be brought forward to 6 May. [EXHIBIT 217]

MONDAY 4 MAY 1992

4 May Secretary for Transport advises Secretary of the Department of Attorney-General against complete re-draft of the contract. [EXHIBIT 219]

WEDNESDAY 6 MAY 1992

6 May Acting State Solicitor (Department of Attorney-General) gives legal clearance for the contract, but draws attention of National Executive Council to numerous serious defects in the contract documents. [EXHIBIT 224]

*6 May National Executive Council Meeting Decision No. 83/92:

directed the Department of Transport and the State Solicitor's Office to Immediately confer and verify" some of the defects in the draft contract; and

advised the Governor-General to execute the contract "upon finalization of ... above". [EXHIBIT 225]

Chapter 24

302

THURSDAY 21 MAY 1992

21 May Acting State Solicitor advises Governor-General to sign the contract. [EXHIBITS 230, 231]

WEDNESDAY 27 MAY 1992

27 May Certificate of Technical Correctness presented by Secretary for Transport. [EXHIBIT 232]

27 May CONTRACT SIGNED

[24.6] RECORD OF EVENTS

The Ombudsman Commission records and comments on the events of the period from 24 February to 27 May 1992 in the following way:

Chapter 25 deals with the initial negotiations between Kinhill Kramer and the State, paying particular attention to the concerns raised by the Department of Works.

Chapter 26 assesses the Department of Transport's reaction to the efforts by the Department of Works to delay execution of the contract.

Chapter 27 documents the National Executive Council meeting on 23 April 1992, at which it was decided to go ahead with execution of

the contract.

Chapter 24

303

Chapter 28 deals with developments between the National Executive Council meetings on 23 April and 29 April 1992 and assesses the action taken by the four key Departments during that period.

Chapter 29 documents the National Executive Council meeting on 29 April 1992, as a result of which the Department of Attorney-General was directed to finalise the draft contract within nine days.

Chapter 30 focuses on the legal clearance that emerged from the Department of Attorney-General, just prior to the National Executive meeting on 6 May 1992.

Chapter 31 records the National Executive Council meeting on 6 May 1991, as a result of which the Department of Transport and the State Solicitor's Office were directed to verify certain defects in the draft contract prior to its execution by the Governor-General.

Chapter 32 examines the events that occurred after the National Executive Council meeting on 6 May 1992, up to and including the execution of the contract on 27 May 1992.

Chapter 33 provides an overview of the contract between the State, Kinhill Kramer Pty Ltd and Curtain Bros (Old) Pty Ltd.

* * * * *

Chapter 24

CONCERNS RAISED BY DEPARTMENT OF WORKS
ABOUT DRAFT CONTRACT: MARCH – APRIL 1992

[25.1] SIEEMN6GOMMITMEAT GUSHED

Negotiations on behalf of the State were conducted by an interdepartmental steering committee. In accordance with the terms of

National Executive Council Decision No. 36192, it comprised representatives of three Departments:

Transport
Attorney-General
Finance and Planning.

Although the Department of Works was not included in the National Executive Council decision, officers of that Department were nevertheless involved in the initial meetings of the steering committee.

There were also occasions on which officers of other Departments and governmental bodies were involved, such as the Department of Lands and Physical Planning, the Harbours Board, the Post and Telecommunications Corporation, the National Capital District Commission and the Electricity Commission.

A draft contract was prepared by Kinhill Kramer Pty Ltd and made available to the steering committee for perusal.

Chapter 25

305

The Department of Transport assumed control of the steering committee, which met on four occasions between 13 March and 15 April 1992.

There were also four meetings between the steering committee and the Kinhill Kramer/Curtain Bros consortium, at which the terms of the draft agreement were negotiated. These meetings were held on 6 March, 20 March, 6 April and 15 April 1992.

The Ombudsman Commission interviewed a number of members of the steering committee in the course of this investigation. After considering their evidence, and the minutes of those meetings, we are satisfied that there was a considerable difference of opinion within the committee as to the acceptability of the terms and conditions put forward by the Kinhill Kramer/Curtain Bros consortium.

CONCERNS ABOUT THE DRAFT CONTRACT

[252] THE VIEW THAT THE CONTRACT HEAVILY FAVOURED THE CONSORTIUM

Some members of the committee thought the terms were heavily weighted in favour of the consortium. These concerns were aired quite early in the negotiations.

One of the burning issues was the price of K65 million. On 10 March 1992, the Assistant Secretary (Roads and Bridges) in the Department of Works, Mr Bolt, wrote to the Secretary for Transport in the following terms:

Chapter 25

306

"It is difficult to avoid the conclusion that Kinhill Kramer have simply pulled their estimates out of the air and if we accept them without question then there is a real danger that the Government will be paying far more for this project than is necessary." [Exhibit 1581]

One member of the committee testified that on a few occasions the

representatives of the Department of Finance and Planning and
the Department of Attorney-General deliberately failed to attend
meetings, as
a means of protesting against the course of the negotiations.

As a result of these concerns the Department of Works engaged
two consulting firms to separately review the terms of Kinhill
Kramer's draft
contract. The consultants were:

Beca Gure (PNG) Pty Ltd; and

Maunsell Consultants PNG.

[25.3] PART 1 OF THE BECA GURE REVIEW

Beca Gure was engaged by the Department of Works on 16 April
1992
and presented its review in two parts.

The first part was made available on 23 April 1992 – the day
the Minister
for Transport advised the National Executive Council that the
contract
should be signed (see Chapters 26 and 27).

Beca Gure provided a detailed commentary on two documents:

Chapter 25

307

the draft contract agreement between the State and the
Consortium; and

the draft "Particular Conditions of Contract for Payment".

[Exhibit 184]

The commentary was stated to be "an aggregate of concurrent reviews carried out by Beca Gure (PNG) and Beca Worley International (NZ) with specialist legal advice from Rudd Watts and Stone in New Zealand".

[25.4] SERIOUS RESERVATIONS EXPRESSED BY BECA GURE

Beca Gure presented a clause-by-clause analysis of the documents and expressed many serious reservations. Some of these were:

The financing agreement between the consortium and its financiers was not included in the list of contract documents.

If this agreement were not integrated within the documentation, the State would have no idea of the terms on which finance was being arranged.

The scope of the works was not well defined.

The contract amount was fixed in United States dollars, thus exposing the State to the risk of currency fluctuations.

The contractors were entitled to import all plant and equipment duty free, but there were no limits on its use after completion of the project.

Chapter 25

308

The State only had three months in which to transfer possession of the site to the consortium. This was insufficient, in view of the landowner issues that were likely to be encountered and the problem of relocating squatters.

The consortium was only required to use its "best endeavours" to complete the project on time. There were no

of penalties for delayed completion or evaluation or award
over extensions of time: "the State effectively has no control
progress".

the There was inadequate provision for the State to monitor
and progress of construction by a nominated representative
defects no provision for the State to inspect the works for
prior to delivery.

one- The terms of the contract relating to termination were
sided: they gave the consortium innumerable grounds on
which to cancel the contract, but made no provision for
termination by the State.

would No provision was made for the costs and revenue that
be generated by disposal of the spoil from the cut.

5.5] BECA GURE ADVISED THAT THE DRAFT CONTRACT WAS SERIOUSLY FLAWED AND SHOULD BE TOTALLY REWRITTEN

In addition to the commentary on particular terms of the draft
contract, Beca Gure advised as follows:
Beca Gure advised as follows:

Chapter 25

309

'We are of the opinion – that the
issues identified herein are of major significance to the State and
warrant urgent and careful consideration.

In its present form the proposed
Contract is very heavily weighted in favour
of the Consortium with few, if any,
remedies open to the State in the event of
unsatisfactory performance. The
financial burden placed upon the State by the
various provisions of the Contract is
very considerable and is not balanced by
reciprocal obligations upon the
consortium. The General Conditions of
Contracts as represented by AS2124

(1981) are largely inappropriate to lump sum independent and impartial action by the Superintendent, a situation not inherent in the contractual arrangements represented by the current documentation.

The requirements for exemption and/or reimbursement of personal and corporate taxation, customs duties and levies, both within PNG and offshore, together with the requirement for all payments to be made in foreign currency, are unusual and further increase the exposure of the State during the ten year period covered by the Agreement.

It is in the opinion of ourselves and associated specialist advisers that the draft documents as reviewed are seriously flawed and should be totally rewritten.

In their present form the documents do not provide the level of protection and recourse for the State that would normally be contained in contracts between the State and contractors providing goods and services.

There are numerous and onerous obligations placed upon the State and any default exposes the State to substantial additional costs, over and above the Contract Amount of US\$67.6 million. There is a danger that claims against the State for default may be translated into pressures to make concessions to the Consortium.

We earnestly recommend that the Agreement is not signed until the issues we

have identified have been resolved to the full satisfaction of the State.

the State may wish to consider requesting competitive tenders for this project.

It is our experience that road construction costs are comparable internationally and in Indonesia current costs for dual two lane urban motorway, inclusive of land costs, taxes, duties and levies and the like are generally US\$4 million/km or US\$33.6 million for 8.4 km. While the Burns Peak excavation is an extraordinary item it is difficult to

see why the costs for this project are some
USS34 million (or double) the cost of
similar projects elsewhere, and exclude
land costs and all taxes, duties and
the like'.

[EXHIBIT 184, pages 2-3, emphasis added]

[25.6] PART 2 OF THE BECA CURE REVIEW : FINANCIAL RISKS
HIGHLIGHTED

The second part of the review was given to the
Department of Works on

27 April 1992, i.e. just two days before the
National Executive Council

meeting on 29 April 1992 at which final approval
of the contract was

planned to be given (see Chapter 29).

Chapter 25

310

It incorporated an analysis of financial risks, prepared by Deloitte
Rosg
Tohmatsu, Chartered Accountants, of Auckland New Zealand. This
highlighted a number of additional matters of concern. For example:

The State was not protected against the financial failure of
members of the consortium. There were no performance
bonds or similar guarantees and no provision for the State
to take over the contractors' plant and equipment in the event
of liquidation.

The effect of six monthly interest periods would make the real
interest rate in the vicinity of 12%.

Interest charges could add a further US\$51 million to the cost of the project.

Exchange rate fluctuations could add to the cost of the project. A 10% change in the value of the US dollar by June 1995 could increase the contract price by another US\$15 million.

There was no provision for early re-payment by the State.

Deloitte Ross Tohmatsu concluded by stating:-

'Overall, this contract is not sufficiently defined to identify the full costs of the project to the Government of Papua New Guinea – In terms of negotiating position, the State should ensure that all contingencies are identified, quantified and satisfactorily addressed prior to making any commitment to such a Contract.' [EXHIBIT 196]

Chapter 25

311

[25.71 THE MAUNSELL REVIEW : KINHILL KRAMER'S PRICE SHOULD NOT BE ACCEPTED

A preliminary review of the draft contract by Maunsell Consultants was made available on 23 April 1992, the same day on which the first part of the Beca Gure review was given to the Department of Works. [EXHIBIT 187]

A more comprehensive review was delivered on 12 May 1992. [EXHIBIT

228] This indicated the value of the project was probably only K50 million and pointed to the dangers of entering into turnkey contracts. By the time it arrived, however, it was too late to have any effect, because the National Executive Council had decided on 6 May 1992 to approve the draft contract and the price of K65 million.

The preliminary review by Maunsells emphasised that the first thing that should be done was to engage Kinhill Kramer to complete a conceptual design for the project:

"I.C.K. should be engaged as soon as possible to complete a conceptual design for the Project. This should be paid for by the Government, either on an agreed Lump Sum or on a Time basis, with a budget limit. If and when an agreement is entered into this sum is deducted from the Contract Sum payable. • [EXHIBIT 187, at page 3]

Maunsells further advised it was necessary to establish a reasonable market price for the project. It was not satisfactory to accept the price quoted by the Kinhill Kramer/Curtain Bros consortium at face value:

Chapter 25

Surveyors experienced
in the field of the types of construction work
contemplated should be engaged
by the Government to prepare a confidential budget
valuation of the total
Project, including the cost of all site investigation,
design, construction,
supervision, and all ancillary costs such as insurances
and sureties. This would
form a basis for comparison with the Consortium's Payment
proposals.'

[EXHIBIT 187, at page 3]

[25.8] CREDIBILITY OF THE BECA GURE AND MAUNSELL REVIEWS CHALLENGED

In the course of his response to the Ombudsman Commission's
preliminary report, the Executive Chairman of Kinhill Kramer
Pty Ltd, Mr F
M Kramer, CBE, challenged the credibility of the reviews
undertaken by
Beca Gure and Maunsells.

First, Mr Kramer queried the source of some of the reviews:

"I find, with respect, this part of the report [dealing
with the Beca Gure and
Maunsell reviews] to be incredible. Throughout the report
you have constantly
stated that the State was not properly advised or indeed
received proper
independent advice in relation to the documentation and
other matters in
respect of the project. You then deal with 2 reports
obtained from Beca Gure
and Maunsells Consultants together with a report put
together by Deloitte Ross
Tohmatsu.

In relation to both Beca Gure and Deloitte Ross Tohmatsu
it was interesting
to note that both reports were carried out by experts from
New Zealand. I fail
to see how any New Zealander could comment upon matters
relating to Papua
New Guinea. I find this part of the report offensive and
quite obviously
irrelevant to the matters in hand. In relation to the Beca
Gure report I would

refer you to the report of Jackson Clark Pty Limited and more importantly the submissions by Counsel in relation to the pricing of the project."

[EXHIBIT 253, page 8, paragraph 23; note that the Jackson Clark document and counsel's submissions to the Ellis Commission of Inquiry are highlighted in Chapter 22 of this report]

Mr Kramer also challenged the independence of the reviews:

'Quite obviously the engineering consultants are competitors of Kinhill Kramer Pty Limited and for that reason alone their independence has to be questioned.'
[EXHIBIT 253, page 9, paragraph 23]

Chapter 25

313

Mr Kramer then suggested that much of the advice contained in the reviews was ill-informed:

'In relation to the list where Beca Cure expressed many serious reservations I make no comment other than to say such comments are obviously ill-informed. for example, in respect of point 4 if your investigations had made proper enquiry they would have ascertained that the Customs Department would not allow the use of duty free plant and equipment to be utilised on any other projects. Should this happen duty is immediately payable. This is only one example of your investigators lack of partiality and consideration of the proper facts.1133CHIBIT 253, page 9, paragraph 231

The Ombudsman Commission makes three points about the matters raised by Mr Kramer.

1. Source of the reviews

As to the fact that two of the reviews emanated from New Zealand, we regard this as irrelevant to the question of their credibility. The draft contract was one that might have been executed in any country having a common law legal system similar to ours. As Papua New Guinea does not have an indigenous body of contract law, the commentaries on the draft contract did not require a detailed knowledge of Papua New Guinea.

2. Reviews obtained

As to the reviews being obtained from Kinhill Kramer's competitors, this is a fact. But the specialised nature of the advice being sought meant that whoever gave it was likely to be a competitor of some sort. The important thing was the substance of the reviews, not their (WINCE).

Chapter 25

314

3. Use of imported plant and equipment

We are very sceptical of the claim that the lack of restriction on the use of imported plant and equipment was not a problem because the Bureau of Customs would not have allowed it to be used on any other project.

If the duty-free exemption was supposed to be conditional on the plant and equipment being used only on the Poreporena Freeway project, it was very important for that to be expressly stated in the contract, for a number of reasons:

- (a) It would have avoided the possibility of disputes arising in the future. If the State executes a contract which imposes no restrictions on the use of duty-free plant and equipment, the party importing it may have a strong case when, say, three years later, the plant and equipment is used on another project and duty is sought to be imposed.
- (b) While the present policy of the Bureau of Customs might be to impose duty in these circumstances, there was no guarantee that that policy would have remained in force for the next few years.
- (c) There is no guarantee that the Bureau of Customs can monitor the use of all plant and equipment imported duty-free.

Chapter 25

315

(d) The lack of any restriction on its use left open the possibility of abuse: an item might be imported duty free, used for only a very short time on the freeway project and then sold at market price.

Our understanding is that contracts conferring duty-free status on plant and equipment almost always include a term imposing restrictions on its use.

For all of these reasons, we consider the concern raised by Beca Gure as to the duty-free provision in the draft contract (and such a provision was contained in the final contract) to have been legitimate and certainly not ill-informed. [EXHIBIT 231A, Article 10.1(e)]

[25.10] WERE THE BECA GURE AND MAUNSELL REVIEWS CREDIBLE?

11

Having examined each of the reviews obtained by the Department of ■ Works, the Ombudsman Commission does not find in them any evidence of "bias" against Kinhill Kramer. Each of them appears to have been competently and professionally compiled. We do not necessarily endorse all of the comments and recommendations they contained. But there is no doubt, in our opinion, they raised legitimate matters of serious concern about the terms of the draft contract.

It was imperative, if the State's interests were to be adequately protected, for the issues raised by the various reviews to be comprehensively dealt with in the course of the negotiations with the Kinhill Kramer/Curtain Bros consortium. But this did not happen. re

Chapter 25

316

THE PRICE OF THE PROJECT WAS NOT PROPERLY CHECKED

[25.11] DEPARTMENT OF TRANSPORT MADE NO PROPER ATTEMPT TO CHECK THE PRICE OF THE PROJECT

In the opinion of the Ombudsman Commission, the advice of Maunsells and Delloite Ross Tohmatsu was eminently sensible. One of the critical flaws in the National Executive Council decision to award the project to the Kinhill Kramer consortium was that there was never any proper attempt to evaluate whether the price of K65 million quoted by Kinhill Kramer was realistic. Kinhill Kramer was awarded the project without

having to justify
its price (see Chapter 22).

Until the contract was signed, it was not too late to negotiate the price.

However, during the course of negotiations, no attempt was made to get an objective, independent valuation of the project. This was just plain financial irresponsibility. The Ombudsman Commission is very concerned that such an abuse of public money was made possible.

When we made these findings in our preliminary report, the Secretary for Transport responded in the following terms:

"The project cost was K65 million, however, the Department negotiated the project cost down from K65 million to K57 million by changing the terms. The difference of ICS million was classified as contingency subject to the State approval of the need to commit such funds. It may or may not be used. The Department of Finance and Planning was aware of this and did not raise objection. This is not defective administration.'
[EXHIBIT 254, para 191

With due respect to Mr Amini, his assertion that the Department of Transport negotiated the price downwards by K8 million is not supported by the facts.

Chapter 25

317

The "contract amount" actually contained in the contract executed by the State was US\$67,619,500.00 plus interest. This was expressed to be inclusive of a general contingency sum of \$5,201,500.00. There was no

term in the contract which made liability to pay the contingency sum subject to "State approval". That is, the contract amount was a flat sum and all payments due by the State to the Kinhill Kramer/Curtain Bros consortium were to be calculated in accordance with that amount. [See EXHIBIT 231A, Article 5.1 and EXHIBIT 231B, Article 2.1]

Again, we are forced to conclude that the Department of Transport – being the Department in charge of the negotiations – was guilty of gross administrative incompetence and neglect.

DEPARTMENT OF WORKS RAISES CONCERNS WITH DEPARTMENT OF TRANSPORT AND STATE SOLICITOR

[25.12] ACTION TAKEN BY DEPARTMENT OF WORKS FOLLOWING CONSULTANTS' ADVICE

The first part of the Beca Gure review and the advice of Maunsells were made available to the Department of Works on 23 April 1992. On that day, the Acting First Assistant Secretary (Technical Services), Mr. D Gole, sent a fax to the Secretary for Transport.

Writing on behalf of the Secretary for Works, Mr Gole stated:

Chapter 25

318

We write to advise that at this time and date we do not believe that the StEt(should agree with the documents as they now stand.

We have only yesterday received some of the documents to study (e.g. concept and specification and the consortium agreement and contract agreement) and note that there are a number of issues outstanding in the drawings. Some of

the issues previously discussed have not yet being resolved.

We are currently studying the documents and continue to give full cooperation to resolve the outstanding issues in the near future, providing full cooperation is given by the consortium.' [T BIT 1851

The next day, 24 April 1992, Mr Gale, together with Mr M Sharp, the First Assistant Secretary (Operations) in the Department of Works, sent a letter by fax to the State Solicitor. This letter summarised the main concerns raised by Beca Gure and Maunsells:

°It is the professional opinion of the officers of this Department that =kw these and related matters are adequately addressed then the State will be seriously disadvantaged should the agreement in its current form be adopted.'

[a= 192, at page 1]

The letter to the State Solicitor also raised a number of technical matters:

'Consideration of the technical proposals has raised concern in the following cases.

(I) Geometric Design Standards have not been strictly adhered to
Geometric Designs are therefore incorrect,

- Horizontal Alignments
- Vertical Alignments
- Cross-.Section
- Grades
- No spiral curves shown

There is inadequate Definition of Accesses to and from the proposed roadwork and the existing road network and properties.

Inter-sectional treatments are not detailed and consequently are not approved by DOW, NCD.

Chapter 25

319

Plans are incorrect and incomplete and require changes with respect to,

Scales
labelling of features
Reference of Cross-Section Types

At the time of signing the agreement, the land required for the project will not have been acquired. This is an undesirable, and possibly illegal situation and could threaten the progress of the works and leave the State exposed to claims."

[EXHIBIT 192, at page 3]

The covering letter to the first part of the Beca Gure review (which recommended that the contract not be signed) was faxed to the State

Solicitor's Office on 24 April 1992. [EXHIBIT 191] A copy of the letter was also made available to the Department of Transport, which received it on 28 April 1992.

[25.13] DID THE DEPARTMENT OF WORKS ACT RESPONSIBLY?

As we report in Chapter 26, the suggestion was made in some quarters that the Department of Works was acting irresponsibly in raising these concerns and protesting about the way in which the negotiations were

proceeding.

In the opinion of the Ombudsman Commission, the Department of Works acted properly in obtaining the reviews from private consultants. However, once the results of the reviews were available, the Department of Works could have handled the matter more effectively and professionally.

The Department of Works' letter of 24 April 1992 to the State Solicitor [EXHIBIT 192] did not indicate that "the professional opinion" of the officers of that Department was based on the reviews that had been obtained from private consultants. This letter should have clearly conveyed that the views

Chapter 25

320

being expressed were not only those of the Department of Works' officers. Furthermore, although a copy of that letter was given to the Department of Transport, the Department of Works should have expressly stated to the Department of Transport that it had obtained the reviews from private consultants and given the Department of Transport copies of those reviews the moment they became available.

We appreciate the difficult position that the Department of Works was in. However, if that Department had been willing to communicate more openly and promptly with the Department of Transport, the relations between those two departments may not have deteriorated to the extent that they did in this case.

We also note that the letter of 24 April 1992 to the State Solicitor was signed by two senior officers of the Department of Works – not by

the
Secretary for Works. In a matter as important as this, this letter
should
have been signed by the Secretary for Works. Correspondence of this
nature must be signed by, or on behalf of, the departmental head
concerned. If it is not, the impression can easily be obtained that
senior
officers of a department are attempting to by-pass their
departmental
head.

So, while the Department of Works acted responsibly in arranging the
reviews of the draft contract, it did not disseminate the results of
those
reviews in the correct manner.

* * * * *

Chapter 25

321

26. DEPARTMENT OF TRANSPORT RECOMMENDS SIGNING OF
CONTRACT AGAINST ADVICE OF OTHER DEPARTMENTS:
22 APRIL 1992

[26.1] DEPARTMENT OF TRANSPORT STILL INTENT ON FINALISING THE
CONTRACT

To a large extent the efforts of the Department of Works
to get the
contract renegotiated were overtaken by other events.

Though the Secretary for Transport advised against
awarding the contract
to Kinhill Kramer, he nevertheless saw it as his duty to

implement the National Executive Council decision of 24 February 1992. The National Executive Council stipulated that the contract be signed within two months, which meant that 24 April 1992 was perceived as the deadline. As the deadline drew near, the Secretary instructed the officer in charge of the negotiations with the Kinhill Kramer/Curtain Bros consortium, Mr Amoako, to prepare a submission to the National Executive Council, recommending the action to be taken.

[26.2] DEPARTMENT OF TRANSPORT PREPARES POLICY SUBMISSION RECOMMENDING THAT THE CONTRACT BE SIGNED

Consequently, Policy Submission No. 82/92 was prepared by Mr Amoako, for the Minister's signature. It was filed on Wednesday 22 April 1992, together with five copies of a draft contract. [EXHIBIT 181]

Chapter 26

322

The Policy Submission stated that the steering committee met with the consortium on a number of occasions and that a draft agreement "substantially agreed to by all parties" had been prepared. The features of the contract were described in the following terms:

The Consortium will finance and construct a freeway from Port Moresby Seaport to Port Moresby Airport.

The road will be 4 lanes all the way through.

The Burns Peak section will be an open cut 8% grade four lane.

There will be a minimum of 2 'flyovers' (overpasses) and a

maximum
of t

The mad will be the first of its kind in the city and in the country.

The Consortium made up of Kinhill Kramer and Curtain Brothers will obtain loan to finance the project

Upon satisfactory completion of the project in 36 months the Consortium will hand over the project to the State.

The State will then begin to pay off the principal of the loan.

The loan amount, drawn down will accrue an interest of 95%, (This is expected to be lower at time of signing Contract Agreement). Interest will be paid during construction.

The total project cost is IC65 million, K5 million of which is earmarked for contingencies.

There are other technical details of the project still to be completed but these should not stand in the way of the Contract Agreement being executed, and for works to commence. Understanding has been reached with the Consortium."

[EXHIBIT 183, pages 1-2, emphasis added]

The submission concluded by recommending that the National Executive Council "directs Finance Minister to enter into Agreement by signing the Draft Contract with the Consortium." [EXHIBIT 182, at page 3]

[26.3] RESPONSE BY THE SECRETARY FOR TRANSPORT TO PRELIMINARY FINDINGS

In our preliminary report, we recorded the view that it was wrong of the Department of Transport to recommend to the National Executive Council, through the Minister for Transport, that the Agreement be signed at that time. The Secretary for Transport, Mr Amini, responded as follows:

'The submission did bring to the attention to NEC that there were some outstanding issues yet to be resolved, yet in Department's view they should not stand in the way of the contract being executed because the details in question were to be provided during detailed design and that was part of the consortium's work. Secondly, the Department was of the view that the Legal Correctness Certificate would be issued by the Department of Attorney General and, if they had concerns, they would be addressed at that stage, still not too late, and that is exactly what happened. We took this approach because it became clear that the attendances of the Department of Attorney General representative at the negotiating meetings were being interfered with by Department of Works officials, who wanted to delay the project so that other developer's interests might be promoted. We raised this concern and it was repeated by Mr. Karl Stack in an NEC meeting. NEC cannot be deceived by this means. It should be remembered that the concerns were all technical in nature but the negotiation team's commission was financial and legal issues. The technical issues were to be derived from detailed design. There was risk in this but that is a normal part of any turn-key project. This was not defective administration.'

[EXHIBIT 254, pars 201

The Ombudsman Commission does not regard this as a satisfactory explanation. In this chapter of the report we explain why it was premature to recommend execution of the contract in April 1992.

[26.4] WAS THE DEPARTMENT OF TRANSPORT AWARE OF THE CONCERNS RAISED BY THE DEPARTMENT OF WORKS?

Although the Policy Submission was prepared before the Department of Works officially conveyed its concerns on the draft contract, the Ombudsman Commission is satisfied that those concerns had been conveyed, unofficially, well before the submission was prepared.

Chapter 26

324

There had been a meeting on 3 April 1992 between the steering committee and Kinhill Kramer. The minutes of that meeting show that, after the Kinhill Kramer representatives left, the following discussion took place:

'Assistant Secretary (Roads and Bridges) [in the Dept of Works] expressed serious concern that the committee will not be able to adequately assess/change the agreement documents and drawings by the deadline for submission to NEC.

First Assistant Secretary (POS) Um the Dept of Works] stressed the importance of identifying and clearly stating the shortcomings, dangers and extra costs of the final Agreement to the NEC.

Tony James (World Bank) joined the meeting and suggested that the best way to do this project is by regular procedures. He said that the Government can arrange much better loan terms than a commercial venture, and the cost would be significantly less. He also mentioned that the interpretation of the word 'Turnkey' is situation dependent.

Johnson Amoako mentioned that the DOT - DOW liaison meetings are off, and that meetings and communications will continue on a more informal basis.'

[1•)011Bff 168, at page 4]

It is clear that officers of the Department of Works were conveying their concerns to Mr Amoako informally.

[26.5] CONCERNS ALSO RAISED BY DEPARTMENT OF ATTORNEY-GENERAL AND DEPARTMENT OF FINANCE AND PLANNING

The Department of Transport was also aware the Department of Attorney-General and Department of Finance and Planning were concerned about many aspects of the contract. On 15 April 1992, for example, officers of those departments called a special meeting of the steering committee to protest against the fact they had not yet seen Kinhill Kramer's financial proposal. They had no knowledge of the proposed financing agreement between Kinhill Kramer and the Export Finance Insurance Corporation.

Mr (rung, Assistant State Solicitor, informed the meeting that the Department of Attorney-General "required the financial proposal before they can go through the contract documents for their comments". [EXHIBIT 175, at page 2]

The minutes of the meeting also record the following statements made by Department of Finance and Planning officers:

es. The Chairman informed the meeting that although the financial proposal was not available the committee should proceed to deal other issues where we have information. The committee has a deadline to meet and it should work towards meeting the deadline.

6. DOFF provided the following comments:-

6.1 The financial package and scope of IC65 million to be negotiated.

6.2 RMC did not support the project.

6.3 The World Bank's advise has changed and recommended Government financing.

6.4 Department of Works' cost is IC40-50 million and Kinhill Kramer's cost is IC65 million. The final figure should be established.

6.5 Debt servicing gap needs to be reduced over the years. The gap will be increased if this project proceeds.

6.6 Other Transport projects and overall capital works programme will be affected if the project proceeds. DCA also have a proposal for a turnkey project on Tokua Airport." [EXHIBIT 175, at pages 2-3]

These were important matters which should not have been just swept aside by the Department of Transport and the Minister for Transport.

Chapter 26

326

[26.6] DID THE DEPARTMENT OF TRANSPORT ACT RESPONSIBLY IN RECOMMENDING THAT THE DRAFT CONTRACT BE SIGNED?

The meeting called by the Department of Attorney-General and the Department of Finance and Planning took place on Wednesday 15 April 1992 - just one week before the recommendation that the contract be signed. The concerns that had been raised were not addressed in the intervening period.

The Department of Transport prepared the Policy Submission in the knowledge that the Department of Works, the Department of Attorney-General and the Department of Finance and Planning had serious reservations about the draft contract.

For this reason, we find that it was irresponsible of the Department of Transport and the Minister for Transport to recommend to the National Executive Council, at that stage, that the contract be signed.

It was misleading to suggest that the draft contract had been "substantially agreed to". The fact was, there was vehement opposition to it by the Department of Attorney-General, the Department of Finance and Planning and the Department of Works.

It made no sense to concede that there were "other technical details of the project still to b.g completed", but then to conclude that "these should not

stand in the way of the Contract Agreement being executed".
It was wrong
and not in the best interests of the State.

It was naive to believe that, because an "understanding" had
been reached
with the consortium, the technical details could be sorted
out at some later
time.

Chapter 26

327

The Ombudsman Commission appreciates that the National
Executive
Council had set a deadline and that, at the time this Policy
Submission
was prepared, it was fast approaching. But what is more
important:
achieving a deadline or protecting the interests of the State?

The Ombudsman Commission has formed the view that the
Department
of Transport had no proper appreciation of the complexity of
the technical
and legal issues involved in a contract of this nature.

[26.7] WHAT MOTIVATED THE DEPARTMENT OF TRANSPORT TO IGNORE THE ADVICE OF THE DEPARTMENT OF WORKS?

The Secretary for Transport believed that the Department of
Works was
attempting to "interfere" in what he regarded as a Department
of Transport
project.

Relations between the two Departments had been frosty for some
time.

The situation did not improve when Mr Lohia Hitolo (until
1992, a senior
officer of the Department of Transport and in charge of the
Spring Garden
Road/Poreporena Freeway project) was appointed Secretary for
Works.

In Chapter 18, we noted the tension created when Mr Hitolo, as
Secretary
for Works, briefed the Minister for Transport on the project –
without telling
the Secretary for Transport – just a few weeks before the
National

Executive Council decided to award the project to the Kinhill
Kramer
consortium.

Chapter 26

Mr Arnini's terse response to that incident was:

The matter of Spring Garden Road is the responsibility of the
Department of
Transport until such time as the consortium is selected and all
the detailed
contracting arrangements are completed. At the time of design and
construction, the Department of Works will be fully involved".
[FJCHIBIT 149]

It is evident that, because of the approach taken by the Department
of
Works during the steering committee meeting, the Secretary for
Transport
formed the view that the Department of Works was opposed to the
project. These views were expressed in an internal Department of
Transport memo to Mr Amoako on 24 April 1992:

'As discussed yesterday (23 April), it was revealed that a number
of
Departments is reluctant to give a full support to this
Submission because they
feel strongly that some important technical issues have not been
seriously
addressed by Kinhill Kramer Consortium and unless they are
attended to, they
are of the view that the submission should be deferred. In
particular, is the
Wog
Department in what we have been directed to do by National
Executive
Council.

The General Manager of Elcom also verbally told me yesterday that
he is
writing to us to express his views that we should seriously study
the technical
aspects of the project and seek an independent Consultant to

assist us because

he fears that the Kinhill Kramer Consortium has not addressed these thoroughly and there may be flaws in their submission to the Government through the Department.

If these organizations are expressing their doubts on this project, we should at least try to listen to them and reassess our approach to it.

It could be that these organizations may have been approached by Department of Works personnel who have been opposing this project to get off the ground.

This assumption is based on what you have told me yesterday. This could be wrong but quiet investigation could reveal this one way or another.

It is quite clear that a number of organizations has vested interest in this project and, unless these issues are addressed, these organizations could stifle the project thus discredit the Department and embarrass the Government altogether.

This must not happen at all cost! You are, therefore, directed to ensure that everything is in order before the submission is submitted to National Executive Council on 29 April." [EXHIBIT 190, emphasis added]

Chapter 26

329

The Secretary for Transport expressed the same views when, on 27 April 1992, he replied to the Department of Works' advice that the contract with Kinhill Kramer should not be signed:

'Having tried to frustrate the deliberation of the Committee, it is not surprising

to us to receive such a letter at the last day and put the blame on the Consortium for lack of cooperation, when the Consortium had given the Committee full cooperation by meeting demands placed on them. [EXHIBIT 194]

On the same day, 27 April 1992, the Secretary for Transport directed the Kinhill Kramer/Curtain Bros consortium to deal only with the Department of Transport. [EXHIBIT 195]

[26.8] NO JUSTIFICATION FOR DEPARTMENT OF TRANSPORT IGNORING THE CONCERNS OF OTHER DEPARTMENTS

The Secretary for Transport thought that the Department of Works was motivated more by a desire to embarrass the Department of Transport, than genuine concern for the interests of the State.

But even if this were, in fact, the case, the Ombudsman Commission can see no justification for the Department of Transport ignoring the issues that had been raised. Concerns were being expressed, not only by the Department of Works, but also by the Department of Attorney-General and the Department of Finance and Planning.

These issues were fundamental to the contract and required urgent attention. They were never properly addressed during the negotiations with the Kinhill Kramer/Curtain Bros consortium.

In an internal memo to the Secretary for Transport on 28 April 1992, Mr Amoako advised he had given the comments of a consultant engaged by the Department of Works to the consortium and discussed them in his office:

To my knowledge they did include all the outstanding issues at that point in time."

[EXHIBIT 201, page 2, para 4]

This is nonsense. It is clear from reading the contract actually executed on 27 May 1992, that the vast bulk of the concerns raised in the Beca Gure and the Maunsell reviews were not incorporated in the final contract.

The Department of Transport had ignored the advice and the concerns of three key Departments, namely, the Department of Attorney-General, the Department of Finance and Planning and the Department of Works.

[26.9] SUMMARY OF THE DEPARTMENT OF TRANSPORTS ACTIONS

In the opinion of the Ombudsman Commission the Department of Transport made serious errors in the negotiations with the Kinhill Kramer/Curtain Bros consortium.

The Department was not prepared to listen to the advice of other Departments. The pleas for caution by the Department of Attorney-General, the Department of Finance and Planning and the Department of

Works were consistently brushed aside as the Department of
Transport
pushed ahead in its determined, but careless, pursuit of the
National
Executive Council's deadline.

Chapter 26

[Paragraph unreadable in the original]

An information paper could have been file for the National
Executive
Council's consideration, explaining the for not meeting the
deadline and asking for an extension of time in order to
to attend to certain important issues.

Instead of doing this, the Department of Transport pretended that
the

concerns raised by the other Departments were not legitimate and
recommended that the contract be signed.

This was wrong and defective administration.

* * * * *

Chapter 26

NATIONAL EXECUTIVE COUNCIL DECIDES THAT CONTRACT MUST BE FINALISED 23 APRIL 1992

7 I POLICY SUBMISSION TO NATIONAL EXECUTIVE COUNCIL HAD IGNORED CONCERNS OF KEY DEPARTMENTS

As we reported in Chapter 26, the attempts by the Department of Works to have the terms of Kinhill Kramer's draft contract renegotiated were thwarted by the Department of Transport.

The Policy Submission of 22 April 1992 not only ignored the serious concerns raised by the Department of Works, it also failed to mention the concerns of the Department of Attorney-General and the Department of Finance and Planning.

The Policy Submission recommended that the contract be signed and was considered by the National Executive Council at its meeting on Thursday 23 April 1992.

[27.2] NATIONAL EXECUTIVE COUNCIL DECIDES TO POSTPONE APPROVAL OF CONTRACT

Rather than approving the draft contract, the National Executive Council

decided to defer formal consideration of the matter until
its next meeting,
on Wednesday 29 April 1992.

Chapter 27

333

However, the National Executive Council made it clear that negotiations were to be concluded by that date.

The Departments of Transport, Attorney-General and Finance and Planning were given a formal direction in the following terms:

"to finalise contracts on the Spring Garden Freeway with Kinhill Kramer and Curtin Bros for presentation to the NEC on 29th April 1992".
[EXHIBIT 186]

As this new deadline was only six days away, the Departments which were opposing execution of the contract, as it then stood, had to act quickly if they were to achieve their objective.

The next chapter of the report focuses on the events that occurred in the lead-up to the National Executive Council meeting of 29 April 1992.

* * * * *

Chapter 27

334

28. ACTION TAKEN BY FOUR KEY DEPARTMENTS PRIOR TO THE NATIONAL EXECUTIVE COUNCIL MEETING ON 29 APRIL 1992

[28.1] THE POSITION OF THE FOUR KEY DEPARTMENTS: TRANSPORT, WORKS, ATTORNEY-GENERAL AND FINANCE AND PLANNING

On 23 April 1992 the National Executive Council directed that the contract between the State and the Kinhill Kramer/Curtain Bros consortium be finalised by 29 April 1992. This decision put the Department of Works, the Department of Attorney-General and the Department of Finance and Planning in a difficult position.

These Departments were opposed to the contract being signed, in its existing form. They wanted more time to negotiate. The Department of Finance and Planning also wanted to examine the financing agreement between Kinhill Kramer and the Export Finance and Insurance Corporation, which had not been made available.

Only the Department of Transport was interested in seeing that the new deadline was met.

This chapter of the report assesses the action taken by these four key departments in the lead-up to the meeting of the National Executive Council on Wednesday 29 April 1992.

Chapter 28

335

THE DEPARTMENT OF WORKS

[28.2] CONCERNS RAISED WITH RESOURCE MANAGEMENT COMMITTEE

With the meeting of 29 April 1992 only a couple of days away, the Secretary for Works, Mr Hitolo, tried a different way of airing his Department's concerns.

On 27 April 1992, he wrote to the Chairman of the Resource Management Committee (the Secretary of the Department of Prime Minister, Mr Brown Bai CBE) in the following terms:

I write to advise the Committee of my Department's deep concern about the way this project is proceeding without due consideration for the protection of the best interests of the State, and urge that the Committee advise the National Executive Council mg to agree to the signing of the proposed contracts until the documents have been amended accordingly and made good? [EXHIBIT 193] Executive Council mg to agree to the signing of the proposed contracts until the documents have been amended accordingly and made good? [EXHIBIT 193] documents have been amended accordingly and made good? [EXHIBIT 193]

The other official action taken by the Department of Works during this period was the drafting of a letter for the Minister for Works, the Hon. Lukas Waka MP. The letter was directed to the Prime Minister. It stated:-

'My Prime Minister, as I have stated above I would be failing you if I did not draw my serious concerns to your attention. I fully support the project and appreciate the need for rapid implementation. I would however strongly recommend that the current contract should not be signed until adequate time has been given to review and amend the documents and in particular the main agreement between the State and the Consortium- This would ensure that the State's interests are protected and that the land related matters could also be addressed'. [EXHIBIT 209, at page 2] addressed'. [EXHIBIT 209, at page 2]

Chapter 28

336

THE DEPARTMENT OF TRANSPORT

[28.3] APPROACH REMAINED THE SAME

During the lead-up to the meeting on 29 April 1992 the Department of Transport maintained the approach it had taken since the National Executive Council decided in favour of Kinhill Kramer: it had an overriding duty to comply with the direction from the National Executive Council to finalise the contract.

The officer in charge of the negotiations, Mr Amoako, advised the Secretary for Transport on 28 April 1992 that all the amendments suggested by other members of the steering committee had been incorporated in the draft contract. [EXHIBIT 201, at page 1]

Mr Amoako also advised that, apart from the Department of Works and the Electricity Commission, no other Department or governmental body had expressed their objections in writing to the Department of Transport or the steering committee.

The Ombudsman Commission accepts that the latter advice was correct: though the concerns were widespread amongst the membership of the steering committee, only the Department of Works and the Electricity Commission had formally put them in writing.

However, Mr Amoako's advice that all the suggested amendments had been incorporated in the draft contract was wrong and misleading.

Chapter 28

337

[28.4] ELCOM RAISES CONCERNS WITH DEPARTMENT OF TRANSPORT

On 28 April 1992, the General Manager of the Electricity Commission, Mr P K Amini, wrote to the Secretary for Transport, expressing concerns about the draft contract. The Electricity Commission had an interest in the project, because its transmission lines would be affected by the route of the freeway.

These concerns mirrored those raised by the Department of Works; particularly about the conflict of interest created by having Kinhill Kramer act, on the one hand, as project manager on behalf of the

consortium,

and, on the other hand, as superintendent of the project on behalf of the State.

The Electricity Commission letter was received in the Department of Transport on 29 April 1992, but there appears to have been no response to it. [EXHIBIT 202]

[28-5] DEPARTMENT OF TRANSPORT AWARE OF WIDESPREAD CONCERN ABOUTRIEDRAELCONIBACI

The Department of Attorney-General and the Department of Finance and Planning did not formalise their concerns in the same manner as the Department of Works and the Electricity Commission. However, the Department of Transport was well aware that these other departments were also very concerned about the terms of the draft contract.

Unfortunately, the Department of Transport attributed this to the efforts of the Department of Works to embarrass the Department of Transport and did not take them seriously (see Chapter 26).

Chapter 28

Nevertheless, the Department of Transport decided to get a "second opinion".

[28.6] DEPARTMENT OF TRANSPORT ARRANGES OVERNIGHT REVIEW OF DRAFT CONTRACT

On the afternoon of Monday 27 April 1992 - just two days before the contract was due to be approved by the National Executive Council - the Department of Transport asked the consulting firm Cardno & Davies (PNG) Pty Ltd to review some aspects of the draft contract. [EXHIBIT 201, at page 2]

Cardno & Davies reported back to the Department of Transport the following day, 28 April 1992. Given the very short period of time, the analysis was, understandably, not as comprehensive as that given to the Department of Works by Beca Gure and Maunsells (see Chapter 26). Nevertheless a number of matters of concern were raised.

[28.7] THE CARDNO & DAVIES REVIEW

Cardno & Davies suggested, for example:

The scope of the project had to be defined in more detail.

Specific provision had to be made for delays in land acquisition.

Chapter 28

It was necessary to identify and list all codes and standards for each item of structural work.

The specifications for bridges did not meet the normal requirements of earthquake engineering for bridges in Papua New Guinea.

The role of the superintendent had to be defined and clarified to minimize confusion. [EXHIBIT 204]

On Wednesday 29 April 1992, the Secretary for Transport instructed Mr Amoako to incorporate the issues raised by the Cardno & Davies review and take them up with the parties concerned. This was a very strange instruction. It was given on the very day the National Executive Council was due to approve the contract. Surely it was too late for a major revision of the contract.

[28.8] THE CARDNO & DAVIES REVIEW WAS TOO LATE TO HAVE ANY EFFECT

It is not surprising that none of the concerns raised by Cardno & Davies were addressed in the final contract. In fact nothing was really achieved by this whole exercise.

It was simply a belated and rather half-hearted attempt by the Department of Transport to get confirmation that the contract was in order.



Chapter 28

340

But clearly the contract was not in order. This was the third independent review of the contract. In each review, there were serious matters of concern raised. They were not minor matters that could be negotiated later. They were issues which went to the heart of the contract, such as who would be the superintendent of the project and who would protect the State's interest during the construction phase.

[28.9] DEPARTMENT OF TRANSPORT MADE NO PROPER ATTEMPT TO HAVE THE CONTRACT REVIEWED

We recorded these views in our preliminary report and emphasised that the Department of Transport had not made a proper attempt to have the contract reviewed. The Secretary for Transport responded in the following terms:

This statement lie. that the Department of Transport made

no proper attempt
to have the contract reviewed] is totally incorrect. The
negotiating team were
doing precisely that. The consultant's work was only a
supplement. Remember
the draft document had been reviewed clause-by-clause,
paragraph-by-
paragraph and page-by-page prior to that. This was the
role of the Committee.
This is not defective administration. There was no need to
ask NEC to defer
because the issues raised by the Consultant were adopted
before the submission
to NEC. The Consultant review was in contrast to that
pursued by the
Department of Works. Clearly, the Department of Works was
on the wrong
path. The person in charge was not a qualified Highway
Engineer but an
architect, who had recently taken the Highway Engineering
job as Acting First
Assistant Secretary." [EXI-HBIT 254, pars 22]

The Ombudsman Commission does not accept Mr Amini's
explanation.

Three key departments were expressing serious concerns about
the draft
contract in the course of the negotiations. In these
circumstances, it was
incumbent on the Department of Transport to arrange its own,
independent review before recommending the contract be
executed.

Chapter 28

341

When the Department did receive the results of the review by
Cardno &
Davies, it should have realised that it was dangerous to
proceed with the
existing draft contract

The Ombudsman Commission reiterates the finding made in
Chapter 26:
it was irresponsible of the Department of Transport to pursue

execution of
the contract when so many doubts, from so many different
quarters, were
being expressed. It was irrelevant that only the Department
of Works and
the Electricity Commission had put their concerns in writing.
All the
concerns were genuine and deserved close consideration.

Though it may have been embarrassing for the Department and
the
Minister for Transport to postpone execution of the contract
on the eve of
its approval, common sense should have prevailed: the
National Executive
Council should have been advised that it would be safer to
re-negotiate
the contract properly in the interests of the State.

THE DEPARTMENT OF ATTORNEY-GENERAL

pa 10] ACTION NOT TAKEN UNTIL ONE DAY BEFORE THE NATIONAL
EXECUTIVE COUNCIL MEETING

On Tuesday 28 April 1992 – the day before the contract was
due to be
approved – the Secretary of the Department of Attorney-
General, Mr P
Paliau ISO, sent a letter by fax to the Secretary for Works.
He said he
agreed the draft contract did not adequately protect the
interests of the
State and advised he would not be issuing a legal clearance
for the
contract. [EXHIBIT 205]

Chapter 28

342

Mr Paliau also asked the Secretary for Works to brief the
Minister for
Works and get the Minister to write a letter to the Prime
Minister,
recommending execution of the contract be delayed.

[28.11] SECRETARY OF THE DEPARTMENT OF ATTORNEY-GENERAL ADVISES
PRIME MINISTER THAT LEGAL CLEARANCE WOULD NOT BE ISSUED

On the following day, Wednesday 29 April 1992, Secretary Paliau wrote to the Chairman of the National Executive Council, Prime Minister Namaliu. He advised he had perused the contract documents and concluded as follows:

(a) this project did not comply with the rules and procedure for Tender under the Public Finances (Management) Act;

(b) the execution and performance of the Agreement and the Contract Documents in 1(b) - (f) above at this stage will mean that the Contract amount of K65,000,000.00 authorized by the Loans Overseas (Borrowing) Act and also the Loans Overseas (Borrowing) (No. 2) Act, will be exceeded, hence Section 209 of the Constitution will be breached.

(c) the Agreement in 1 (a) above and the Contract Documents in 1(b) - (f) above do not protect or appear to protect the best interest of the State;

(d) the execution of this Agreement and the Contract Documents therewith be delayed until they are adequately and satisfactorily finalised to protect the best interests of the State, the Consortium, the Project Manager and possibly the Export Finance Insurance Corporation of Australia.

Accordingly, I decline to issue a Letter of Legal Clearance on the Agreement'
[EXHIBIT 211]

This letter was hand-delivered to the Prime Minister's office on the morning of Wednesday 29 April 1992 by Secretary Paliau.

Chapter 28

343

[28.12] DEPARTMENT OF ATTORNEY-GENERAL ACTED PROPERLY BUT ADVICE SHOULD HAVE BEEN GIVEN SOONER

In view of the widespread concern expressed about the draft contract, the Ombudsman Commission considers the decision by the Secretary of the Department of Attorney-General to write the letter to the Prime Minister on 29 April 1992 to have been responsible and entirely proper.

It is unfortunate, however, that it was not written sooner, as this was the first occasion on which the Department of Attorney-General had formally put in writing the defects perceived in the draft contract.

So, while we praise Secretary Paliu for writing the letter of 29 April 1992 to the Prime Minister, we must also criticise his Department for not taking action sooner. It was not sufficient for his officers to simply raise their concerns in the steering committee. This was a case which called for a thorough briefing to the Attorney-General in writing.

[28.13] ATTORNEY-GENERAL SHOULD HAVE BEEN ADVISED

At the relevant time the Attorney-General was the Hon Bernard Narokobi, LLB MP. By virtue of Section 156(2) of the Constitution and Sections 3 and 4 of the Attorney-General Act 1989, he was also the Principal Legal Adviser to the National Executive.

The Department of Attorney-General should have advised him very early in the course of negotiations that there were serious

defects in the draft
contract provided by Kinhill Kramer.

Chapter 28

344

The Attorney-General should have also been formally advised that the Public Finances (Management) Act and other legislation would be breached if the National Executive Council proceeded with the planned course of action.

[28.14] RESPONSE OF THE DEPARTMENT OF ATTORNEY GENERAL

We accept that the Department of Attorney-General representatives on the steering committee had raised a number of concerns during the committee's meetings. Specifically, we accept what the Acting State Solicitor, Mr Z Gelu, said in his response to our preliminary findings:

This project was arranged through the turn key concept. The concept by Finance & Management Act. I may say here that Messrs. hung and Singin raised these concern during their consultative meeting. The Contract was drafted by Kinhill Kramer Pty Ltd and Curtain Brothers (Qld). The Contract was pushed through NEC by the Department of Transport." [EXHIBIT 26.2, parr 41

However, by raising concerns in the committee meetings, the Department of Attorney General had only gone part of the way to protecting the

State's interests.

When this was put to Secretary Paliau in the form of a preliminary finding, he responded as follows:

“Like any project of such nature of any matters that require legal assistance in terms of advise or drafting of agreements, I normally delegate such matters to the State Solicitor to handle consistent with his Duty Statements. The State Solicitor will only come back to me if the matters require my personal attention.

Chapter 28

345

Furthermore, client Departments are at liberty to instruct the State Solicitor directly and I am always informed about such instructions by the State Solicitor. Again apart from such information the State Solicitor deals with the matter directly with the client Department unless the matter requires my personal attention...

As to the findings in Chapter 28, – the matter only came to my personal attention at that particular time and I attended to it there and then on 29 April 1992.

The findings – on myself failing to advise the Attorney-General on serious defects in the draft contract and the breaching of the requirements of the Public

Finances (Management) Act and other Legislation if the
NEC proceeded with
the course of action if proposed is ill founded.

At that period of time when the matter was being
entertained by the NEC, the
Hon. Bernard Narokobi, the Attorney-General was not
available. In fact he was
unable to fulfil the
duties of Office of the Attorney-General.

By virtue of Section 5 of the Attorney-Generals Act, I as
the Departmental
head became the Attorney-General and the Principal Legal
Adviser to the
National Executive Council. Therefore I see no reason why
I should advise
the Attorney-General or advise myself for that
matter." [EXHIBIT 258]

[28.15] POOR COMMUNICATION WITHIN THE DEPARTMENT OF ATTORNEY
GENERAL

The Secretary's defence is that the project had been
delegated to the
State Solicitor and the matter only came to the Secretary's
personal
attention shortly before the meeting of the National
Executive Council on
29 April 1992. He also says the reason the Attorney General
was not
advised was that he (the Secretary) was actually the
Attorney-General on
29 April 1992.

With respect to Secretary Paliu, he has not actually
addressed our
criticisms. If we accept that the matter was not brought to
his attention
until very late in the negotiations, this does not rebut our
findings - it
reinforces them.

Chapter 28

Our criticism is directed at the Department of Attorney General, as a whole, and the State Solicitor's Office in particular, for not formally briefing Attorney-General Narokobi early in the negotiating period. The fact that the Secretary of the Department was also not fully briefed underscores the overall lack of affirmative action taken by officers of his Department. It also reflects poorly on the lines of communication within the Department.

We therefore conclude that the Department of Attorney-General was remiss in its duty to promptly advise the National Executive Council, via the Attorney-General, of all of the legal problems associated with immediate execution of the contract.

THE DEPARTMENT OF FINANCE AND PLANNING

[28.16] CONCERNS RAISED DURING STEERING COMMITTEE MEETINGS

The Department of Finance and Planning had little involvement in the decision to award the contract to Kinhill Kramer. The Department was concerned, as early as June 1990, about the funding of the project.

[EXHIBIT 10B] However, the shortlisting and evaluation of proposals - even when it was based on financial criteria - took place without consulting the Department of Finance and Planning.

The Department of Finance and Planning only became involved when the steering committee was established to negotiate with the Kinhill Kramer consortium.

Like the Department of Attorney-General and the Department of Works, the Department of Finance and Planning had serious reservations about the way the negotiations were proceeding. On 15 April 1992, representatives of the Department of Finance and Planning called a special meeting of the steering committee to protest that they had not seen Kinhill Kramer's financing agreement. [EXHIBIT 175]

This, in itself, was a matter of concern: nobody knew the terms on which the consortium was obtaining finance for the project. In fact, these terms were never made available to the State. On 27 May 1992, when the freeway contract was signed, the agreement with the Export Finance Insurance Corporation was not executed. And the agreement remained unexecuted, even when the contract between the State, Kinhill Kramer Pty Ltd and Curtain Bros (Old) Pty Ltd was terminated on 27 August 1992 (see Chapter 34). The officers of the Department of Finance and Planning suggested that the Kinhill Kramer financial package be renegotiated and that alternative sources of funding be investigated. But this was never done.

If it had been done, implementation of the project would no doubt have been delayed. But there were obvious alternatives to Kinhill Kramer's turnkey proposal: concessional financing from sources such as the World Bank or the Asian Development Bank, which is generally cheaper than finance obtained through institutions such as the Export Finance and Insurance Corporation of Australia.

Unfortunately, the Department of Finance and Planning did not undertake a detailed analysis of the alternative methods of financing the Poreporena Freeway project until the eve of the National Executive Council meeting on 29 April 1992.

[28.17] FINANCIAL ANALYSIS OF ALTERNATIVE FUNDING

The First Assistant Secretary (Loans and Revenue) in the Department of Finance and Planning, Mr Kahona, testified to the Ombudsman Commission that, on 27 or 28 April 1992, he was instructed by the Acting Secretary of the Department, Mr Mulina, to prepare a comparison of the different methods of financing.

The EFIC interest rate was estimated to be 9.5% , which transpired to be the interest rate in the final contract. This was compared with the prevailing interest rates for World Bank (IBRD) and Asian Development Bank Loans of 7.72% and 6.58% respectively. An analysis of the "grant element" and the "effective rate of interest" for each loan regime was then carried out, which took account of the period of the loan repayments, the grace period and the commitment fees.

[28.18] EFIC FINANCING SHOWN TO BE EXPENSIVE

The Department of Finance and Planning analysis was summarised in the following terms:

'Grant Element (GE) and Effective Rate of Interest (ERI) Comparison

Lender	Current Interest (%)	Grant Element (%)	Effective Rate of Interest (%)
EFIC	9.50	13	9.7
IBRD	7.72	13.8	7.9

Chapter 28

349

It is obvious from the above table that the grant element of the EFIC option is very low at 1.3% compared to IBRD and ADB options at 13.8% and 23.3% respectively. The grant element measures the degree of concessionality of a loan in comparison to a direct grant. So, the higher the grant elements the higher the degree of concessionality.

The effective rate of interest on the EFIC proposal is high at 9.7% as compared to either IBRD or ADB at 7.9% and 6.7% respectively.

comparison to financing the proposed project through World Bank or ADB financing. It is also understood that the World Bank has indicated that they maybe able to fund the project at a lower total project estimated cost of around US\$45 million”
[EXHIBIT 199, at page 2, emphasis added]

In the same report, it was estimated that, if the Kinhill Kramer financing

proposal was adopted, the total cost to the State over the life of the loan

would exceed K90 million.

[28.19] REPORT GIVEN TO THE ACTING MINISTER FOR FINANCE AND PLANNING

This report was presented to Acting Secretary Mulina on the morning of

29 April 1992, ie the day on which the National Executive Council was due to approve the contract.

Soon after this the report was given to the Acting Minister for Finance and Planning, Hon. Karl Stack, MP. He faxed a copy of the report to the

Secretary for Transport on the following day, 30 April 1992.
[EXHIBIT 213]

Chapter 28

350

[28.20] DID THE DEPARTMENT OF FINANCE AND PLANNING ACT SOON ENOUGH?

The Department of Finance and Planning report of 29 April 1992 was straightforward:

Kinhill Kramer's turnkey financing was expensive.

The project might be able to be implemented for K20 million
i than what Kinhill Kramer had quoted.

The total project cost of the project over a thirteen year period was in excess of K90 million.

This report was of critical importance to the whole project and the Ombudsman Commission is amazed that it was not prepared much sooner.

It seems that by the time they met on the afternoon of 29 April 1992, a majority of the members of the National Executive Council had made up their minds to approve the Kinhill Kramer/Curtain Bros contract.

Perhaps, if the Department of Finance and Planning report had been available sooner, it may have had some impact.

It is a matter of concern to the Ombudsman Commission that, though the Department of Finance and Planning had serious reservations about this project quite early in the contract negotiations, nothing tangible was done until the last minute. Like the Department of Attorney-General, the Department of Finance and Planning failed to give its advice promptly – when it would have had a much greater chance of being accepted.

Chapter 28

351

[28.21] CONCERNS HAD TO BE RAISED AT A HIGH LEVEL

We accept that the Department's concerns were raised at the steering committee meetings. The Secretary for Finance stated to the Ombudsman Commission that, though his Department failed to follow up these matters in writing, they expected the Department of Transport and the Knhill Kramer/Curtain Bros consortium to respond to the requests at subsequent meetings. [EXHIBIT 255]

In the opinion of the Ombudsman Commission this is simply

not good

enough. The Department of Finance and Planning should have raised its concerns at a much higher level: the Secretary for Finance should have thoroughly briefed the Minister for Finance in writing. And this should have been done very early in the negotiating period. Alternatively, the Secretary for Finance could have raised the matter formally in writing with the Secretary for Transport.

[28.22] ALTERNATIVE FUNDING SOURCES SHOULD HAVE BEEN THOROUGH Y
EXPLORED

The Ombudsman Commission is also concerned that the Department of Finance and Planning was not more enterprising in investigating the possibility of concessional funding for the project, through the Office of International Development Assistance (01DA).

Chapter 28

352

[28.23] RESPONSE BY THE DEPARTMENT OF FINANCE AND PLANNING TO
THE OMBUDSMAN COMMISSION'S ALLEGATIONS

The Ombudsman Commission put the above findings to the Secretary for Finance, Mr G Aopi MBE, in our preliminary report. He responded as follows:

The report correctly states that DFP was not involved in the project (Le. contract negotiations) until after the NEC Decision in February 1992. Prior to this, all discussions were undertaken by the Department of Transport.

However, our comments on the project were consistent – the project was expensive and that alternatives should be pursued. In addition, from a planning perspective, while this project was in the Transport development plans in terms of priorities, consideration should have been given to developing the rural infrastructure which is in dire need of improvement.

In view of DOT not providing the information requested,, we could not provide a detailed brief for the Minister for Finance and Planning, NEC and RMC. Chapter 28 of the report supports this. However, it is unfair on the part of the Commission ... to be critical of the Department's action when other parts of the report state that information requested by the Department from DOT was never received.

I would like to place once again on record that we did not receive any formal offer of financial assistance from the Consortium for financing of the Freeway.

We were also not in a position to realistically and accurately advise the Minister for Finance and Planning on the implications of financing the project either through concessional sources or those proposed by the Consortium. The financial analysis _ was done just before NEC met on the 29th April. This analysis was done on the basis of terms and conditions prevailing at that time and on information obtained through informal discussions.

If the Department had been provided with a formal offer of finance for financing of the project, we would have provided a detailed analysis for the Minister's consideration and other interested parties well in advance. The Minister was however, verbally briefed on several occasions of the Department's position on the project...

– The procurement of goods and services by Government agencies is dearly set out in the Public Finances (Management) Act, and senior government officials should be aware and understand these and other

administrative
procedures.

The Department of Transport also, during various discussions, knew the Department's position together with those of the State Solicitor, and these should have been reflected in various submissions to the National Executive Council. The Department may have been deliberately left out in a lot of the discussions because of its strong views against this project.

Chapter 28

353

As for finding alternative sources of funds, there are certain laid-down procedures which must be followed to secure concessional funds. Projects should be submitted through the normal budgetary process and evaluated prior to negotiating the financial package. Obviously the process is too slow and cumbersome for some people, hence the turnkey proposal.' [EXHIBIT 255]

[28.24] UNSATISFACTORY EXPLANATION BY DEPARTMENT OF FINANCE AND PLANNING

The reasons advanced by Mr Aopi for his Department's failure to provide a prompt analysis of the cost of the project are not convincing.

We appreciate the Department was not in a position to carry out a precise analysis, because of the unavailability of the exact terms of the EFIC financing package. But there was nothing to stop the Department

estimating the cost of the EFIC finance - which is what, in fact, was done on the eve of the National Executive Council meeting of 29 April 1992.

The estimate could have been based on the terms of the financing package proposed by Kinhill Kramer Pty Ltd in February 1992 and considered by the National Executive Council (see Chapter 22, Exhibit 151). And this financial analysis could, and should, have been done as soon as the National Executive Council decision was announced.

It is not a good excuse for the Department of Finance and Planning to say it did nothing because it never received a formal financing proposal. We do not believe any Department of the State is entitled to sit back and make no comment on a major financial commitment by the State because it was not formally approached for advice or not given all the information it wanted.

Chapter 28

[28.25] CONCLUSION AS TO CONDUCT OF DEPARTMENT OF FINANCE AND PLANNING

The Ombudsman Commission concludes that the Department of Finance and Planning was remiss in its duty to ensure that prompt advice was given to the National Executive Council, via the Minister for Finance, on the financial implications of the Kinhill Kramer turnkey proposal.

* * * * *

Chapter 28