

## F. Decisions of the National Executive Council

The Commission examined five (5) matters, which concerned and/or arise from decisions of the National Executive Council CNEC).

Joel Aundambui Thomas Murowo Mathew Pawen  
Moale Haus and Sambra Haus AOG Jubilee University

The Commission's findings specific to each matter are contained in the respective investigation reports. Generally, the findings are:

5> Processes to be strengthened to avoid fabrication of documents emanating from NEC (decisions, minutes, letterheads, instruments etc)

^ NEC refrain from making decisions that concern the merits of claims against the State without consultation with the Attorney General

y State-owned institutions should not be established without the full consultation with the key agencies concerned

y There is immediate need for improved processes and procedures for monitoring and implementation of NEC Decisions in a timely manner

^ Appropriate action is promptly taken where there is non-compliance with Decisions of the NEC

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(a) Joel Aundambui

### PARTIES:

For the State:

Department of Justice and Attorney General ('DJAG') Department of Finance (ToF)  
Department of Prime Minister & NEC ('DPMNEC') Post (PNG) Ltd ('PPL')

Claimants:

(a) Joel Aundambui, Ivo Aundambui, Felix Tambui, Mathew Tambui, Philip Boindu, Robert Tangapi and Eric Tambui ('Claimants')

### NATURE OF CLAIM:

The claimants alleged that their copyright to certain clay pot images was breached by PPL on 22

January 2003 when PPL issued postage stamps featuring those clay pot images.

The claimants commenced proceedings (WS No. 584 of 2004) in the National Court against PPL and another for damages for breach of copyright. The State is not named as a party and the claim is still pending.

#### DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

1. On 23 February 2003, PPL's Managing Director, Peter Maiden, referred to this Commission by way of a brief, PPL's file on the claim, particularly to

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inquire into the authenticity of a purported NEC Decision No. 172 of 2008 at Special Meeting No. 29 of 2008 dated 19 September 2008.

Although the State was not named as a party to the court claim, commenced by the claimants on 24 May 2004, the purported NEC Decision No. 172 of 2008 directed PPL to pay K52 million in settlement of the claim.

The claim is still pending determination on liability and damages.

No payments made by PPL.

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

In the circumstances, this matter falls within Terms of Reference No. 1, 2, 3, 5, 8 and 12.

#### SOURCES OF INFORMATION AND DOCUMENTATION

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

National Court Registry — original Court file referenced WS No. 584 of 2004

Department of Justice & Attorney General –

a. Evidence of Dr Allan Marat, Minister for Justice & Attorney General

(c) Post (PNG) Ltd –

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(i) Evidence of Peter Maiden, Managing Director

National Executive Council – (i) Evidence of—  
o Winnie Kiap, former Secretary

Claimants —  
(i) Evidence of—  
o Sam Kemaken, lawyer, Kemaken Lawyers

The relevant transcripts of proceedings are provided with this Brief.

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

## CHRONOLOGY OF EVENTS

1997

On 1 January 1997, Post (PNG) Ltd (TPL') was corporatized becoming a separate legal entity from the State.

2003

On 22 January 2003, PPL issued postage stamps featuring clay pot images on K0.65 and K4.00 stamps.

On 25 November 2003, Joel Aundambui of Kolmang Claypot Products offered in writing to David Pank, Post Master, PPL, Wewak, K200,000.00 as commission for providing research, investigation and supply of information in relation to the quantity of production and sale of the K4.00 and K0.65 stamps currently sold in the last 12 months ('Offer'). The Offer was payable within 4 weeks subject to the outcome of the court proceedings and payment received from PPL ('Offer').

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4. On 25 November 2003, David Pank, Retail Manager, Wewak, PPL confirmed his telephone conversation with Kent Pato, Legal Officer, PPL earlier that day in which he:

(a) Reported his conversation with an Ivan Hurst of Wewak Tourism Office at approximately 1:35 p.m. in which he was rejected a K200,000.00 offer for information about IC0.65 and K4.00 clay pot stamps;

Provided 3 signed copies of the Written Offer, which was left with

(b) PPL counter-officer, Sixtus Juavi, by Ivan Hurst

on 24 November 2003 and 25 November 2003 prior to (a)

above and without his knowledge.

On 26 November 2003, David Pank, Retail Manager, Wewak, PPL confirmed his telephone conversation with Kent Pato, Legal Officer, PPL earlier that day in which he:

2004

Reported the counter-officer, Sixtus Java, told the Assistant Retail Manager, Robert Yahimbu ('ARM5) that two (2) male adults, who did not disclose their identities, were out at the counter waiting to see him;

Reported the ARM to attended to the counter and a person who identified himself as Jerome Mot, a terminated PPL employee, requested the return of the Written Offer

On 24 May 2004, Bayam Lawyers filed Writ of Summons No. 584 of 2004 endorsed with a statement of claim on behalf of seven plaintiffs. The plaintiffs named are Joel Aundambui, Ivo Aundambui, Felix Tambui, Mathew Tambui, Philip Boindu, Robert Tangapi and Eric Tambui ('Claimants'). The defendants are PPL and Tony Sipa trading as Grafox Studios.

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By letter dated 24 July 2007 to PPL, Apo & Co Lawyers offered settlement of WS 584 of 2004 for a sum between K39,060,000.00 and K42,315,000.00 representing 12% and 13% respectively of the earnings from the sale of the postage stamps by PPL.

On 24 July 2004, PPL filed a Defence in WS 584 of 2004 denying liability. 2008

By letter dated 4 April 2008 to Hon. Arthur Somare, Minister for IPBC, Joel Aundambui requested his political support to get PPL to consider the claimants' proposal and for settlement of the court proceedings.

By letter dated 15 May 2008, PPL's Legal Officer, Kent Pato briefed Sumasy Singin, Chairman, IPBC on the status of WS 584 of 2004 and the basis for defending the claim.

By letter dated 31 August 2008, Joel Aundambui instructed Kemaken Lawyers to represent the plaintiffs in WS 584 of 2004 as Jimmy Apo of Apo Lawyers practicing license had expired.

By letter dated 21 October 2008 to Hon. Patrick Tamur, Minister for Communication & Information, Kemaken Lawyers provided to PPL copy of a purported NEC Decision No. 172 of 2008 at Special Meeting No. 29 <?/2008 dated 19 September 2008. PPL was circulated a copy of this letter. The purported NEC Decision read as follows:

" Subject: Payment o f c l a i m f o r Kolimangh Clay Product f o r K 52 mil l i on Kina – On 19 th September 2008 , Council: 1. Referred the above mentioned claim to Post PNG Ltd for payment to the claimant.

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Approved and directed that claim payment of K52 million be paid in full to Kolimangh Clay Product

by Post PNG Ltd (claimant) within the next 21 days.

Approved and advise the claimant to submit proper legal documents for payment to Hon. Patrick Tammur, Minister for Communication and Information."

By letter dated 27 October 2008 to Ms Winnie Kiap, Secretary, NEC, PPL's Managing Director, Peter Maiden, requested a copy of NEC Decision No. 172 of 2008 via special meeting number 29/2008 and supporting submissions. Copies were circulated to Managing Director, IPBC; Legal Counsel, IPBC; Secretary, Minister for Communications & Information.

By letter dated 28 October 2008, Winnie Kiap, Secretary, NEC informed PPL that

the NEC Decision No. 172 of 2008 does not relate to payment of K52 million resulting from WS 584 of 2008 between Joel Aundambui & others v PPL & others; the document NEC Decision No. 172 of 2008 is fraudulent;

She would refer the matter to the Commissioner of Police for investigation.

By letter dated 28 October 2008 to Apo & Co Lawyers, PPL's Legal Officer, Kent Pato, sought confirmation on whether the plaintiffs had changed legal representation in view of correspondence received from another law firm purporting to represent the plaintiffs.

By letter dated 28 October 2008 to Kemaken Lawyers, PPL's Managing Director, Peter Maiden, confirmed their telephone conversation earlier that day requesting a formal notice of change of lawyer be filed and served on PPL.

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18. By letter dated 30 October 2008 to Kemaken Lawyers, PPL's Managing Director, Peter Maiden, sought to ascertain the source from which the NEC Decision No. 172 of 2008 was obtained.

By letter dated 30 October 2008 to the Chairman, PNG Lawyers Statutory Committee, PPL's Managing Director, Peter Maiden, lodged a formal complaint against Sam Kemaken of Kemaken Lawyers on three (3) grounds:

Purporting to act for the plaintiffs in WS 584 of 2004 without filing and serving an appropriate notice;

Supplying a fraudulent NEC Decision No. 172 of 2008\

Requesting payment of K52 million when the fraudulent NEC Decision No. 172 of 2008 directs PPL to make payment to Kolimangh Clay Product.

2009

On 1 February 2009, Post Courier published a report on the NEC Decision No. 172 of 2008.

By letter dated 18 February 2009, PPL's Managing Director, lodged a formal complaint with Mathew Damaru, Detective Superintendent, Fraud & Anti- Corruption Unit to investigate the source of the fraudulent NEC Decision No. 172 of 2008.

By letter dated 18 February 2009 to Apo & Co Lawyers, PPL's Legal Officer, Kent Pato enquired whether that firm was still acting for the plaintiffs in WS 584 of 2004.

By letter dated 18 February 2009 to PPL, Apo & Co Lawyers confirmed they still acted for the plaintiffs in WS 584 of 2004.

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24. By letter dated 23 February 2009, PPL served on Apo & Co Lawyers sealed copy of an Amended Defence and Cross-claim filed 9 October 2007.

On 23 February 2003, Post Courier published another report on NEC Decision No. 172 of 2008 as informed by lawyers for the plaintiffs in WS 584 of 2004.

On 2 March 2009, Post Courier published another report on NEC Decision No. 172 of 2008 as informed by the office of the Attorney General.

On 20 March 2009, the National Court made consent orders transferring WS 584 of 2004 from Madang to Waigani.

## F. FINDINGS

### (c) Liability In Issue

### (d) Non-compliance with Section 5 – Claims By and Against the State Act 1996

The claimants did not give notice of their intention to make a claim against the State in accordance with Section 5 of the Claims By & Against the State Act 1996 ('Claims Act'), or at all.

The claimants' cause of action accrued on 22 January 2003 when PPL issued the postage stamps. The claimants had six (6) months from that date to give notice of their intention to make a claim against the State. That is, by 22 July 2003.

However, PPL is a separate legal entity from the State. As such, the claimants were not required

to give such notice under Section 5 of the Claims Act for purposes of the claim.

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Nevertheless, to the extent the court proceedings were purportedly settled by the alleged NEC Decision 172 of 2008 on 19 September 2008, the claimants may seek enforcement of that decision for which their notice of their intention to make a claim was to be done no later than 19 March 2009.

No such notice was ever given nor was extension sought to give such notice, as confirmed in evidence by the Attorney General JDr Allan Marat, and Sam Kemaken of Kemaken Lawyers for the claimants.

Therefore, NEC Decision No. 172 of 2008 is not enforceable as against the State.

Rb It is recommended that the Solicitor General and Attorney General refuse any notice given, or extension to give such notice, by the claimants under Section 5 of the Claims Act to enforce purported NEC Decision No. 172 of 2008

(e) No merits in claim against State

a. . No reasonable cause of action disclosed against State

The State is not named as a party to WS 584 of 2004. The Statement of Claim endorsed to WS 584 of 2004 purely relates to alleged breaches of copyright by a State-owned entity that has separate legal personality from the State.

There is no reasonable cause of action disclosed against the State.

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p 3 It is found that there is no reasonable cause of action disclosed against the State

a . Fraudulent NEC Decision 172 of 2008

The claim was purportedly settled by NEC Decision No. 172 of 2008 in which PPL was directed to pay K52 million in settlement of the claim.

Dr Allan Marat, Attorney General & Minister for Justice gave evidence that he was the Minister for Justice & Attorney General at that time. He denied knowledge of the claim. Further, there were no records on the proceedings in the offices of the Attorney General or Solicitor General's office, including no Section 5 notice. Moreover, he was neither aware of nor privy to any submissions to, or decision by, NEC recommending settlement of the matter, including by another Minister to NEC at all. He also commented that the purported NEC Decision:

"was a very good attempt forging the Prime Minister's signature. I am not a forensic expert but Prime Minister does not sign like this, I know."

There was also written evidence by Ms Winnie Kiap former Secretary, NEC that her signature on the purported NEC Decision No. 172 of 2008 is forged, not genuine and that NEC never made a decision to that effect.

Sam Kemaken pursued payment for the claimants on the basis of the NEC Decision No. 172 of 2008 without conducting due diligence in ascertaining its authenticity. Further, the NEC Decision No. 172 of

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2008 directed payment to be made by PPL to "Kolimangh Clay POF and not"Kemaken Lauyers".

It is found that Sam Kemaken was grossly negligent in not conducting due diligence to ascertain the authenticity of the fraudulent NEC Decision No. 172 of 2008

It is recommended that Sam Kemaken's referral to the Lawyers Statutory Committee by PPL's Managing Director be pursued. It is recommended that Joel Aundambui should be referred to the Royal PNG Constabulary for fraud investigation

Assessment of damages

The claim under WS 584 of 2004 is an active matter in which both liability and damages have yet to be determined. Nevertheless, the State is clearly not a party to which the claim relates.

However, despite PPL's separate legal status from the State, it is a State-owned enterprise. Thus, the State must assist PPL in ensuring that any claim based on the fraudulent NEC Decision No. 172 of 2008 is vigorously and successfully defended.

It is recommended that the Solicitor General assist PPL in ensuring that any claim based on the fraudulent NEC Decision No. 172 of 2008 is vigorously and successfully defended

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

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29. This aspect does not arise for consideration as the State is clearly not a party to which the claim relates.

#### Settlement

The State is not named nor joined as a party to WS 584 of 2004. However, those proceedings were purportedly settled by NEC Decision No. 172 of 2008 in which PPL was directed to pay K52 million in settlement of the claim.

The Commission adopts the findings and views expressed above in respect of the fraudulent NEC Decision No. 172 of 2008.

R) It is recommended that the Solicitor General assist PPL in ensuring that any claim based on the fraudulent NEC Decision No. 172 of 2008 is vigorously and successfully defended

#### (a) Processing of claim and Pay-out

There has been no payment in respect of this matter. At this stage, this aspect does not arise for consideration.

#### RECOMMENDATIONS

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

#### Referral to the Attorney General

Instruct Solicitor General not to entertain clearance on claim for payment based on fraudulent NEC Decision 172 of 2008, and ensure any future claim

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on this matter is pursued in accordance with Claims By & Against the Stats Act 1996

Referral t o t h e Royal PNG Constabulary

Joel Aundambui in seeking payment relying on fraudulent NEC Decision 172 of 2008

Sam Joseph Kemaken for being an accomplice in seeking payment on behalf of his client, Mr Aundambui, based on fraudulent NEC Decision 172 of 2008

Referral t o t h e Lawyers S t a t u t o r y Committee

Sam Joseph Kemaken for dishonourable, improper and unprofessional behaviour by seeking payment on behalf of his clients' based on a fraudulent NEC Decision 172 of 2008 without conducting due diligence

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(b) Thomas Murowo

Parties

For the State  
Police  
University of Papua New Guinea Solicitor General

For the Claimant:  
James Towa  
James Mobie Genaboro Paul Paraka Lawyers  
Blake Dawson Waldron Lawyers

Others (if any)  
None

Matter  
James Towa submitted a claim on behalf himself and the family of late Thomas Moruwo, one of the persons killed by Police during the 2001 student led anti- privatisation campaign

The NEC approved the submission by then Minister for Justice to compensate the death of late Mathew Pawen and Thomas Moruwo. NEC submission stated that K1 million be approved and be paid equally amongst the relatives of the deceased. The submission was approved but the amount of compensation was to be determined following proper consultation

A Deed of Release was signed on 3 September 2002 for the sum of K800,000.00

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Recommended Findings  
K800,000.00 is very excessive. No proper assessment of damages Claimants asked for compensation of K500,000.00  
Solicitor General failed to comply with NEC decision  
Solicitor General failed to take note (comply) with the CACC recommendations/advice to the NEC  
Mr Zachaary Gelu's actions were unreasonable and amount to a conflict of interest Other persons benefitted from this claim. The immediate family may have benefitted but most were received by some other persons.

Terms of Reference

Attached herewith is the copy of the Terms of Reference. This is a case which falls within the terms of the reference of this inquiry. The relevant and applicable terms of references in respect of this case are Terms of Reference No.s' 1 (i-iii, vii &ix) and 5(i-iii). Also attached are copies of abstracts of relevant statutory legislation and NEC Decisions pertinent to this case.

Documents and investigations conducted at:

Office of Clerk of Parliament (OCP) Office of the Secretary to NEC (SNEC) University of PNG (UPNG)

## Brief Facts /Evidence

1. This is a claim by one James Towa on behalf of the family of late Thomas Moruwo. James Towa claims to be the cousin of late Thomas Moruwo. It

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is alleged that late Thomas Moruwo was killed by Police during the student led anti- privatisation campaign conducted between 21 to 26 June 2001.

As a result of the UPNG student lead protest, it is believed that four people were killed, several persons injured and there was widespread destruction of properties. A Commission of Inquiry headed by Justice Sir Robert K. Woods was established to inquire into the student unrest. Annexure cl- OCP' is the copy of the Commission of Inquiry Report tabled in Parliament on 22 February 2002 by then Prime Minister Rt Hon. Sir Mekere Morauta.

The Commission of Inquiry Report highlighted that on 25 June 2001 the fifth day of protesting, the students' refused to present their Petition to a deputation of Ministers without the Prime Minister having to accept the petition himself.

The Report indicated that the students after refusing to present their Petition went into destroying public properties and caused disruptions to the community along the University Campus vicinity and the main road past the University to Gerehu was blocked. Several vehicles were forcefully removed from their owners and destroyed.

The Report highlighted that there were some non-students amongst the students and gun shots were allegedly fired within the campus. Couple of students were believed to be seeing holding firearms.

Police were called in to quell the situation. However the mass of students together with some non-students took their frustration out on the Police by throwing missiles and petrol bombs. The Police having realised of being outnumbered by the frenzied mob fired their rifles into the air. In the process some students were hit by shotgun pellets and fell injured and there were two cases of mortally wounded.

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The Report further revealed that on 26 June 2001 the students and their supporters continued to destroy or loot properties and also attacked shops, which was spurred by rumours of fatal confrontation at the University Campus the previous day. Police resources were stretched

throughout the city to disperse crowds assembling to further protest. Serious confrontations were reported around the Waigani area resulting to a police barracks building being set alight and destroyed, two police were injured by thrown missiles and several people injured by gunshot pellets.

Several witnesses giving evidence in the Commission of Inquiry made references to two people being allegedly killed on 26 June 2001. However the Report stated that no relatives or friends came forward before the Commission of Inquiry to confirm the deaths. As such Justice Sir Woods in his summary of the Report concluded only two deaths.

Annexure '2-UPNG' are copies of relevant documents provided by University of PNG Registrar, Mrs Jennifer Popat as requested by the Commission to confirm the legitimacy of the following:

- number of students killed names of the students killed
- documents proving the alleged killed students' registration with the University at the time of death
- other relevant documents

The documents provided only confirmed Simon Noki and Steven Kil as the only legitimate students killed during the protest. Records of the other UPNG institutions in respect of EduAdmin (formerly Centre of Distance Education) and Open College also reveal that the claimant was not registered with them.

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Significant reference should be made to the letter dated 28 June 2001 by Professor Mathias Sapuri Executive Dean School of Medicine and Health Science UPNG addressed to the Vice Chancellor, Professor Leslie Eastcott In the letter Professor Sapuri reports a list of the deaths and injuries sustained during the unrest, which was confirmed by himself and Dr. Kaptigau senior surgeon at Port Moresby General Hospital. The letter is pertained to part of the annexure '2-UPNG'.

The deaths or fatally wounded are identified in the list are as follows:

- Steven Kil – UPNG student from WHP. Died prior to arrival at PMGH from chest gunshot wound
- Simon Noki – UPNG student from WHP. Died in operating theatre from chest gunshot wound. He was in severe haemorrhagic shock.
- Thomas Maino – Not a student from Asaro EHP. Died prior to arrival at PMGH from gunshot wound.
- Mathew Pagun – Not a student from WNB. Admitted with left chest gunshot wound. Arrested from internal bleeding and fortunately responded to resuscitation and later had a left pneumonectomy. He is in ICU in critical condition.

Note that the claimant's second name was spelled as Maino and not Moruwo as identified in this

claim.

On 23 April 2002 the then Minister for Justice, Hon. Puri Ruing, MP filed a Policy Submission No. 94/2002 to NEC. The submission was made to advise compensation claims lodged by the relatives the students allegedly killed by Police and sought NEC approval for compensation payments. Annexure '3-SNEC' is the copy of this Policy Submission.

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The Policy Submission recommended NEC to approve and direct the Secretary for Treasury to make ex-gratia payment of K1 million to be equally shared between the next of kin of the late Simon Noki and Steven Kil.

On 29 April 2002 the Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1 deliberated on Policy Submission No. 94/2002 and advised NEC that the claim of the dead students' relative was knocked out of court and hence the State should not concede liability as there was no basis to make the ex-gratia payments. In addition the Solicitor General was cited to having advised against the payment as the amount recommended was excessive and the law does not allow this payment. Where the State was to admit liability the appropriate amount would have to be K50,000.00 up to K100,000.00. Annexure '4-SNEC' is the copy of the CACC Meeting No. 15/2002 Paper. No. 2.1.1.

Following the CACC advice, on 2 May 2002 NEC in its Decision No. 142/2002 Special Meeting No. 19/2002 agreed to make ex-gratia payments to the parents of the two deceased students. It was decided that the Prime Minister in consultation with the Minister for Privatisation & Corporation and Justice & Attorney General will determine the level of the ex-gratia to be paid in consultation. Annexure '5-SNEC' is the copy of the NEC Decision No. 142/2002 Special Meeting No. 19/2002.

No further correspondence were received by the Office of the Secretary to NEC to ascertain the Prime Minister's decision on the level of ex-gratia payments made to the two deceased students' parents. However the Commission's review of the Department of Finance cash book listings revealed the following:

Steven Kil — no payments noted

Simon Noki – K300,000.00 on 9 May 2002 on cheque ref# 638770.

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Despite the findings of the Commission of Inquiry, UPNG Administration and the Minister for

Justice and Attorney General having confirmed that Thomas Moruwo was not a student at the time of his death and NEC having endorsed to pay ex-gratia to only two students. The Solicitor General, Zacchary Gelu in his letter dated 18 September 2002 to the then Acting Secretary for Department of Finance, Thaddeus Kambanej advised that Thomas Moruwo was one of the deceased students. Clearly, Mr Gelu mis-lead the Finance Secretary. Annexure '6-DF' is the copy of this letter.

Parts of the said letter reads (quote) as follows:

"...The UPNG students lead protest against Government Privatisation program in June 2001. The four (4) students were shot dead by Police. The National Executive Council have already approved and settle payment for two (2) students from Mount Hagen but not Thomas Moruwo and Mathew Pawen for Compensation claim.

Parties decide to negotiate a settlement and agreed to settle at K800,000. There will be no further claims on this matter...

Following the death of Thomas Moruwo, sometime in November 2001 a letter of demand was addressed to the Prime Minister and the UPNG SRC President seeking compensation. They demanded that K500,000.00 be paid by the State whilst the other K500,000.00 be paid by the UPNG SRC body (or the UPNG). A second letter of demand was again addressed to the Prime Minister on 10th May 2002 requesting approval of K500,000 or an the Government (State) offered to the two UPNG students.

On 20th August 2002, another letter of demand was addressed to the Solicitor General, Mr Zachary Gelu stating (quote), "...Our demand for K500,000.00 still stands or we would consider accepting an amount the Government would offer to the two Western Highlanders already approved by the NEC."

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A Deed of Release was signed on 3 September 2002 for the sum of K800,000.00. Annexure '7-DF' for copy of the Deed of Release. The parties involved in the signing of the Deed of Release are as follows:

Releasor – James Towa acting for Thomas Moruwo. Releasee – Zacchary Gelu being the Solicitor General

So far K710,000.00 has been paid.

The following persons were called to give evidence in respect of this claim. They are:- James Mobie Genaboro;

James Towa;

Francis Kuvi;

WaiHerumaho;

Thaddeus Kambanej; ix. John Kawi.

Evidence-James Mobie Genaboro

Mr Genaboro was engaged by the claimant, James Towa to assist pursue the claim. He is not related to the deceased or the claimant. Asked how is he (Genaboro) related to the deceased, he answered:-

"A: In fact I am well known in Daulo. Because I am a Public Servant and they know who I am, the relatives in here found it very difficult to communicate, to get through into Waigani. They are finding it very difficult so even though they wrote their petition to the Prime Minister, no response were forthcoming.

Q: You mean this is the petition, the first —

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A: The first one.

Q: Yes, it is dated November 2001?

A: Yes. So in one of my campaigns while I was up in upper Asaro, I met the relatives there, they asked for me and I said I will look into it and that is how I got myself involved after the voting. That is why I came down and I started making contacts, enquiries.

Q: So you are not related by blood in any family connection?

A: No."

It is clear that apart from James Towa (claimant) who holds himself out as the brother of deceased, all the persons who had signed the petition are not related to the deceased but are said to be from the same village. Asked about their relationships, he answered:-

j2-' Then you are saying James Towa, community church leader, Morata, and you say James Towa – what is James Towa's relationship to the deceased?

A: He is the deceased's blood brother.

Q: You mean to say they share the same mother and father, is that correct? A: Yes.

Q: The other four are all from the same village, but you cannot say whether they were related by blood, that is fine. I also note from some of the documents that Mr Thomas Murowo was described as being married?

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Asked if the deceased, he fksdy answered "yes" but later stated that bride price was no paid and they were just living together. He did not know the name of the wife and further stated that they had no children.

Asked as to why the deceased Thomas Moruwo and James Towa (claimant) had different surname although they come from the same parents, he answered, "...I do not know, I cannot explain."

In relation to the assessment of damages to be paid, that is how was the figure K500,000.00 arrived at? He answered there was no method of calculation but a person had died. Mr Genaboro was further asked:-

"Q. I am curious to see that you are askingfor KJ00,000, yet Mr Gelu signed a deed to say K800,000. Why was that an increase of K300,000, you only asked for ¥500,000?

A: No, we askedforK1 million.

THE CHAIRMAN: Your letter of 20 August says, "we are demanding for K500,000, still stands and that we would consider accepting an amount tk government offered to the other two already approved by the NEC." That was K500,000. So you were askingfor K500,000 and even if you did not know, you are saying we would accept whatever the NEC approved. So how did it jump to K800,000?

A: Through ourpetition we askedfor K500,000 each from the State.

f): Butyou were working for the Prime Minister's Department, you know tk difference between the students union at University and the Government, that is not the -you said K500,000. In other words you are going to take it on both accounts. When you went to Mr Gelu, you are still writing in your letter K500,000. You are not

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saying, by the way you are responsiblefor the students as well at the University. How did itjump from K500,000 to K800,000?

A: We asked for a million in our petition, K500,000 from JTRC President—

Q: We have moved on from the petition, the petition is way back. From the time you were talking to Gelu, it was 20 August, September coming up. You are about to get paid out and you still talking about K500,000, you are not talking about millions anymore.

A: We also said K500,000 or any amount that the government would offer to the two Western Highlands.

Q: What did they offer to the two Western Highlanders?

A: I do not know so I assume that the Western Highlanders were probably paid a million.

O: They were not.

MR KASSMAN: So the jump from K500,000 to K800,000, you cannot explain?

A: We were asking for any amount that the government would offer.

Q: Anything?

A: Any amount that would apply to the Western Highlanders. So I assumed, if we were offered K800,000 and then probably the Western Highlanders were offered K 800 , 000 .

Q: Did Mr Gelu invite you to ask for more?

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A: No, he never. We fought for it, the relatives fought for it to get what we wanted.

Q: Did he ever tell you why he was agreeing to pay K800,000 and not K500,000.00? Did Mr Gelu ever tell you why he was going to commit the State to K800,000 and not K500,000, which is what you have claimed?

A: As I have said, we really fought to get what we wanted apart from what we believe the Western Highlanders were already paid. So we fought for it and eventually we agreed to that K800,000 that was offered so we accepted it. Q: The Western Highlanders only got K500,000.

A: Then we are happy.

Q: Sorry?

A: We are happy. I mean if they were offered K500,000 and we were offered K800,000 then what is wrong? We are happy because we are asking for compensation from the State.

Q: By that I am making reference to what you said in your letter to the Trims Minister Sir Mekere and then to Mr Gelu. You said we will tab K500,000 or whatever the Western Highlanders get, and they got ¥500,000.

THE CHAIRMAN: So on what you say, you should have got K500,000 becauss you have being askingfor K500,000. You said, "we will take K500,000 ", it is in your letter. A demand for K500,000 still stands or we will consider accepting the amount the government offered to the two Western Highlanders already approved by NECfor K500,000. So where did the actual K300,000 come from? I mean you went into the meeting wanting K500,000.

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A: As we said we lost a life and we have to – we fought with Mr Gelu and—

Q: There was no incentive offered at all to up the price or you did not get a bit more because you had an agreement to pay out other people?

A: No Commissioner.

Q: You see, the Commission of Inquiry is looking into how it happened and we know that the NEC approved K500,000for each student, not for anybody else so there was no NEC decision that said K500,000for non students. So we ask the questions of the Solicitor General's office, why thy are settling at allfor anybody outside of the NEC approval, and we asked the Solicitor General, why this K300,000 more as well. So we are askingyou the same question and you do not seem to have come up with any answer either. So the process of the claim does not look very good, does not look as though itfollowed reasonable procedures. Suddenly there is a K300,000 gap which nobody seem to quite understand – can explain.

A: As I have said in our petition, we asked for K1 million.

Q: Hut you did not ask forK1 million from the State?

A: No, in our first petition.

Q: I know but even then you did not ask from the State.

A: We wrote to Sir Mekere because of the NEC decision that any amount thy offered to the Western Highlanders, and we believed that K800,000 is what was offered to the Western Highlanders.

MR KASSMAN: Who offered that?

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A: The State.

Q: Who?

A: Government.

Qj Who, a person?

A: The NEC.

THE CHAIRMAN: Who offered the K800,000 to you?

A: The Solicitor General of Papua New Guinea.

MR KASSMAN: You mean Zacchary Gelu?

A: Yes.

Q: He offered K800,000?

A: Yes.

Q: Did he offer that in writing?

A: No the deed of release.

Q: Sony, before you signed the deed, you had a discussion?

A: We had a discussion, we had to meet to fight to pursue our claim.

Q: Who came up with the figure of K800,000?

A: We agreed with the Solicitor General because we were asking for K1 million.

Q: Mr Genaboro, who put forward the figure K800,000, did you put it forward, did Mr Gelu put it forward?

A: Mr Gelu for K800,000.

Q: He offered K800,000?

A: Yes."

Mr Genaboro confirmed that K710,000.00 was paid. About K80,000.00 was paid to or received by Mr Genaboro for what he claimed as services provided to the claimant.

It is submitted that Mr Genaboro was not sure of most of evidence in relation to the claimants (i.e. persons who spearheaded the claim) relationship to the deceased. On most occasions he appeared to assume and was asked by Counsel not to assume provided evidence that he is aware. He also was evasive. Further, it is clear from the evidence that Mr Genaboro was actively used to pursue the settlement because of the various positions he held within the public service. He was instrumental in pursuing the claim because of the people whom he knew. This is confirmed by an email from Mr Ron Ganarafo, former member for Daulo electorate.

It is submitted that the claim was pursued by persons not directly related to the deceased as such other persons like Genaboro benefitted from this claim. This is because when the matter was listed for hearing in Mt. Hagen, Wai Herumaho called the Commission expressing concern why the matter was listed for hearing Mt. Hagen and stated that all relatives of the deceased

live here in Port Moresby and copies of all the documents have already been provided so there was no real reason for the matter to be called in Mt. Hagen.

Furthermore, Mr Genaboro confirmed that they asked for K500,000.00 or whatever that was paid to the two UPNG students. The K800,000.00 was offered by Mr Gelu. The claim should be referred to the Police for further investigation as clearly, persons directly related to the deceased never benefitted from the claim. If they did ever benefitted, it would be minimal as most of the monies were paid to persons not directly related for instance Mr Genaboro admitted receiving about K80,000.00. It is submitted that Mr Genaboro received more than K80,000.00 because he appeared he evasive and further he was not comfortable answering the question.

Evidence – James Towa ("claimant")

James Towa is the claimant. He advised that the deceased was his small brother. Asked why there was a difference in the surname of the deceased and his, he answered:-

"Q: Sorry, full name of your father?

A: TongiMurowo.

Q: The full name of your mother? You said your brother's name, the deceased is Thomas Murom and your name is James Towa. Why is it that, that you have two different surnames?

A: My names are James and Towa is my grandfather's name. They named me after my grandfather, my old man. They put his name. My name is James, Towa is my grandfather and he is already dead.

Q: What about Thomas? Thomas's surname is Murom? A: Thomas

Murowo, is my father."

It is submitted that when questions were asked in relation to the names of his father, mother, small brother, James Towa appeared confused. It is submitted that this is a claim pursued by persons (including James Towa) who are not even directly related to the deceased. He stated that there are only three of them, James, late Thomas and Towa Dongi. It is submitted that these names are all fabrication and appears to be no real connection with the deceased.

James Towa confirmed that he had no meetings with Mr Gelu. The only meeting was when he went to sign the deed of release. Mr Genaboro in his evidence stated that he met Mr Gelu about 3 — 4 times. This confirms that Mr Genaboro was the person who actively pursued the matter resulting in the payments.

James confirmed that some of the cheques were collected directly from the Finance Department, from one Boas Hembehi an officer with Finance Department.

It is evident from the evidence of James Towa that other persons benefitted from the payments

received as he was not able to properly account for the monies received. This resulted in the difference between James Towa and Wai Herumaho.

Evidence — Wai Herumaho

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Wai Herumaho stated that the late Thomas Moruwo and him are first cousins. Wai's evidence contradicts the evidence of James Towa (and Genaboro). They are:-

James said late Thomas and him are blood brothers (one father and one mother), but Wai said they are cousins not blood brothers;

James said they were only three in the family, i.e. himself, late Thomas and Towa Dongi, small brother living in the village. But Wai's evidence is that late Thomas had only one brother, James Murowa (not Towa Dongi, confusing names) and he lived in the village;

Wai said late Thomas has some sisters but they may have all got married and are currently live in the village. Again contradicting evidence by James that there were no sisters only three of them, contradictory;

Wai stated that Genaboro received about K100,000.00. This confirms our submission that Mr Genaboro was evasive and looked un-easy when answering the question. It is submitted that Mr Genaboro received K100,000.00 (or more) and not I C80,000.00. Mr Genaboro may have mislead the Commission as such was not a truthful witness.

It is submitted that the claimants in this case are not directly related to the deceased. The question is how can you mix up/confuse the names of your brothers, sisters, cousins, father, and grandfather. Clearly, all this persons were not related to the deceased. It may have been the case that the deceased was living with the Asaro (Goroka) community at Morata during his demise. The claimants took it up to make a claim without the knowledge of the immediate relatives.

Mr Herumaho stated that he instructed Narokobi Lawyers to stop any further payments to James Towa or otherwise appoint Wai Herumaho instead of James Towa as the claimant. As a result, a Memorandum of Understanding was signed between Wai Herumaho and James Towa

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effectively replacing James Towa as the claimant. Mr Herumaho was asked about the MOU.

"Q} Mr Herumaho, I will refer you to the memorandum of understanding. During signing of this document, the memorandum of understandings did the lawyer explain to you – did you understand the contents of this memorandum of understanding?

A: Yes.

jQ: Did the lanyer explain to you?

A: Yes, he did.

Q: What was the basisfor entering into this memorandum of understanding? Sorry, Mr Herumaho for purposes of Mr Geroro to translate, you will have to speak more or less in sequence. Speak then Mr Geroro can have the time to translate.

A: This MOU was to basically removed James from pursuing the claims. So whatever monies that were received from Department of Finance would then be distributed. So this MOU was basically to remove James from pursuing the claim on our behalf so we could deal with the claims in person.

Q: What was the basis to remove James from pursuing this claim?

A: The monies that were paid by Finance were not paid out to the rightful beneficiaries. So by way of illustration K200,000 was paid out but only K100,000 was received by the intending beneficiaries or the rightful beneficiaries. That was the reason why we had to remove James from pursuing the claim so that we could recover the balance of the entitlements outstanding."

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There is sufficient evidence to show that other persons (persons not directly related to the deceased) benefitted from this claim as such the matter be referred to the Police for further investigations. This is a clear case were the relatives or families of the deceased live in the village whilst some other relatives or distant relatives take advantage of the circumstances to unjustly enrich themselves. It could amount to fraud.

Mr Francis Kuvi in evidence basically stated that he had no knowledge of this claim nor did he have any carriage of this matter whilst been employed by the Solicitor General's Office.

It is clear from this case that the National Executive Council ("NEC") played a major part in the

settlement of this matter. It may be a political decision. It is submitted that clearly this is a dependency claim. The laws adequately address issues arising from dependency claims. In this case, it is submitted that the NEC should not interfere with the work of the relevant State agencies, such as the Solicitor General's Office and Public Curators Office perform their roles in such circumstances.

John Kawi in his evidence also commented that this was a dependency claim and the figure proposed in the NEC submission was way above the amount awarded in a dependency claim. When asked what he knew about the claim, Mr Kawi stated (quote, only part):–

". ..... So I said, until I am satisfied I am sorry but this is one instance where I will have to defy the NEC direction to settle for K500,000. I made that very clear. I said I will not settle this for K500,000 because although I sympathise with the death of the students which was at the hands of police, we also got in touch with police to give us instructions on this. Assuming that police would be responsible, this was the line I was taking that we do not settle the amount, these two deaths in the amount of  
¥500,000 each. My thinking was that it must be properly calculated using dependency claims. As a

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dependency claim using the three per cent tables, if it was not a dependency meaning if the students who died did not have any families on their own, kids on their own, this at its best could be treated as a contingent type of customary dependency. That is how I viewed it and so I made a file notation on this. It is true there was no court proceedings issued in these two matters. But my file notation I recall was that these matters must be looked at from the line I was advocating and so that is the reason why I said I will defy NEC instructions to settle at K500,000 each. That is my only argument in this matter. As you pointed out Gelu, I do not know how he could justify this but he comes in and settles it from an amount higher than the NEC directive."

In regards to payments made, Mr Thaddeus Kambanei stated that it would be unusual to change the name of payee half way through or that is after some payments had already been made, because once the name of the payee is changed the "system" cannot pick-up how much has so far been paid in respect of the same claim the payments have been made.

Mr Kambanei was asked:–

"Q: In relation to obviously the same incident was the claim of Thomas Murowo, and again here the deed of release signed this time by a James Towa for Thomas Murowo. The records – again the deed of release for it was for a sum of K800,000. You can see from the sheet that we have handed over and in addition to that what is stated in the summons itself, in this case it was settlement again for K800,000. The records of the Department of Finance indicate that the sum of only K30,000 has been paid to Thomas Murowo. Again, I note here the payee on the cheque is the deceased person himself. That again would be strange or unusual issue of the cheque.

A: Correct. It is very unusual, yes."

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#### Findings:

James Towa is not the blood brother of the deceased nor is he directly related to the deceased.

James Mobie Genaboro, Wai Herumaho and others are not directly related to the deceased.

Other persons benefitted from this claim.

Deceased is not a UPNG student.

No proper assessment of damages. Damages awarded by Mr Gelu is very excessive.

Claimants asked for K500,000.00.

Zacchary Gelu failed to properly assess the claim. Mr Gelu acted in contravention of the NEC decision. Further, Mr Gelu acted beyond his powers because the claimants only asked for K500,000.00 yet he offered K800,000.00 (K300,000.00 more than what was claimed).

James Mobie Genaboro used his influence to pursue this claim.

#### Recommendations

1. Matter be referred to Police for further, investigations as other people benefitted from this claim.

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James Towa, James Mobie Genaboro , Wai Herumaho and those persons involved in pursuing this claim be referred to Police for further investigations.

Zacchary Gelu must be referred to the Police Fraud Squad for possible investigation and charges to be laid. Further, Mr Gelu be referred to the Lawyers Statutory Committee for unprofessional

conduct.

Since all claims against the State are reviewed and sanctioned by the a Solicitor General, it is recommended that all payments processed by the Department of Finance should be forwarded to the Office of Solicitor General to effect settlement to respective claimants/plaintiffs or their agents.

Department of Finance prior to processing any payments being advised by the Solicitor General should request for the Solicitor General officially authenticated/ sealed documents as in the cases of Consent Orders, Certificate of Judgements and Deed of Releases.

All payments requested by claimants or their legal representatives and or agents should be forwarded to the Office of the Solicitor General for authentication prior to being processed for settlement.

Immediate instructions be given to Finance Department to stop any further or balance of the payments.

Solicitor General file proceedings to set aside the Deed of Release as soon as possible.

9. Mr Gelu be banned from ever holding onto or been appointed to any public service position in the future.  
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#### Index of Relevant Documents

OCP – Copy of the Commission of Inquiry Report into the 2001 UPNG student-led unrest.  
UPNG – Copies of confirmatory documents provided by UPNG Registrar as requested.  
SNEC– Copy of Minister for Justice, Hon. Puti Ruing, MP filed a Policy Submission No. 94/2002 to NEC  
SNEC– Copy of Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1  
SNEC– Copy of NEC Decision No. 142/2002 Special Meeting No. 19/2002  
DF – Copy of letter dated 18 September 2002 from Solicitor General to Acting Secretary for Department of Finance.  
DF – Copy of the signed Deed of Release DF – Copy of FF3 form  
DF – Copy of FF4 form

(b) Mathew Pawen

## A. Parties

For the State

Police

University of Papua New Guinea Solicitor General

For the Claimant: Josepha Pawen Tony Pawen Patterson Lawyers

a. Others (if any) None

## B. Matter

Claim by one Josepha Pawen for and on behalf of her family for the death of Mathew Pawen (younger brother) killed by the Police during the UPNG student unrest.

The NEC approved the submission by then Minister for Justice to compensate the death of late Mathew Pawen and Thomas Moruwo. NEC submission stated that K1 million be approved and be paid equally amongst the relatives of the deceased. The submission was approved but the amount of compensation was to be determined following proper consultation.

No court proceedings were taken out against the State.

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- A Deed of Release was signed on 3 September 2002 for the sum of K800,000.00.

## Findings

K800,000.00 is very excessive. No proper assessment of damages Solicitor General failed to comply with NEC decision

Solicitor General failed to take note (comply) with the CACC recommendations/advice to the NEC

Mr Zacchary Gelu's actions were unreasonable and amount to a conflict of interest

Gilbert Maki and Zacchary Gelu actions amount to unprofessional conduct Patterson Lawyers costs issued to Tony Pawen are very excessive

Patterson Lawyers and Zacchary Gelu benefited from the claim

## Terms of Reference

Attached herewith is the copy of the Terms of Reference. This is a case which falls within the terms

of the reference of this inquiry. The relevant and applicable terms of references in respect of this case are Terms of Reference No.s' 1 (i-iii, vii & ix) and 5(i- iii). Also attached are copies of abstracts of relevant statutory legislation and NEC Decisions pertinent to this case.

Documents and investigations conducted at:

Office of Clerk of Parliament (OCP) Office of the Secretary to NEC (SNEC) University of PNG (UPNG)  
Department of Finance (DF)

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- Other Sources relevant this case (OD)

Brief facts /Evidence

This is a claim by one Josepha Pawen on behalf of her family for the death of Mathew Pawen. Mathew Pawen was shot by the Police during the UPNG student led anti- privatisation campaign conducted between 21 to 26 June 2001.

Following the Student un-rest, a Commission of Inquiry headed by Justice Sir Robert K. Woods was established to inquire into the student unrest. Annexure '1-OCP' is the copy of the Commission of Inquiry Report tabled in Parliament on 22 February 2002 by then Prime Minister Rt. Hon. Sir Mekere Morauta.

The Commission of Inquiry Report highlighted that on 25 June 2001 the fifth day of protesting, the students' refused to present their Petition to a deputation of Ministers without the Prime Minister having to accept the petition himself.

The Report indicated that the students after refusing to present their Petition went into destroying public properties and caused disruptions to the community along the University Campus vicinity and the main road past the University to Gerehu was blockaded. Several vehicles were forceful removed from their owners and destroyed.

The Report highlighted that there were some non-students amongst the students and gun shots were allegedly fired within the campus. Couple of students were believed to be seeing holding firearms.

Police were called in to quell the situation. However the mass of students together with some non-students took their frustration out on the Police by throwing missiles and petrol bombs. The Police having realised of being outnumbered by the frenzied mob fired their rifles into the air. In the process

some students were hit by shotgun pellets and fell injured and there were two cases of mortally wounded.

The Report further revealed that on 26 June 2001 the students and their supporters continued to destroy or loot properties and also attacked shops, which was spurred by rumours of fatal confrontation at the University Campus the previous day. Police resources were stretched throughout the city to disperse crowds assembling to further protest. Serious confrontations were reported around the Waigani area resulting to a police barracks building being set alight and destroyed, two police were injured by thrown missiles and several people injured by gunshot pellets.

Several witnesses giving evidence in the Commission of Inquiry made references to two people being allegedly killed on 26 June 2001. However the Report stated that no relatives or friends came forward before the Commission of Inquiry to confirm the deaths. As such Justice Sir Woods in his summary of the Report concluded only two deaths.

Annexure '2–XJPNG' are copies of relevant documents provided by University of PNG Registrar, Mrs Jennifer Popat as requested by the Commission to confirm the legitimacy of the following:

number of students killed names of the students killed  
documents proving the alleged killed students' registration with the University at the time of death  
other relevant documents

The documents provided only confirmed Simon Noki and Steven Kil as the only legitimate students killed during the protest. Records of the other UPNG institutions in respect of EduAdmin (formerly Centre of Distance Education)

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and Open College also reveal that late Mathew Pawen was not registered with them.

11. Significant reference should be made to the letter dated 28 June 2001 by Professor Mathias Sapuri Executive Dean School of Medicine and Health Science UPNG addressed to the Vice Chancellor, Professor Leslie Eastcott. In the letter Professor Sapuri reports a list of the deaths and injuries sustained during the unrest, which was confirmed by himself and Dr. Kaptigau senior surgeon at Port Moresby General Hospital. The letter is pertained to part of the annexure '2–UPNG'.

1–2. The deaths or fatally wounded individuals are identified in the list are as follows:

Steven Kil – UPNG student from WHP. Died prior to arrival at PMGH from chest gunshot wound  
Simon Noki – UPNG student from WHP. Died in operating theatre from chest gunshot wound. He was in severe haemorrhagic shock.

Thomas Maino — Not a student from Asaro EHP. Died prior to arrival at PMGH from gunshot wound.

Mathew Pagun – Not a student from WNB. Admitted with left chest gunshot wound. Arrested from internal bleeding and fortunately responded to resuscitation and later had a left pneumonectomy. He is in ICU in critical condition.

13. Note that the claimant's second name was spelled as Pagun and not Pawen as identified in this claim. It may have been a typographical error.

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Following the death of late Mathew Pawen, as mentioned above, Josepha Pawen issued what appeared to be a Section 5 notice pursuant to the Claims By and Against the State Act 1996 to make a claim against the State for the death of Mathew Pawen. Mr John Kawi, then Solicitor General acknowledged receipt of the section . 5 notice and advised Josepha Pawen that he would seek instructions and provide a response by way of a letter dated 25th January 2009.

Letters were also written to the then Prime Minister Sir Mekere Morauta and Mr Augustine Molongos, then UPNG SRC President for some form of compensation to assist with the funeral arrangements etc. It must be noted that in all the letters seeking compensation and the notice of claim lodged with the Solicitor General, no amount was sought by the claimant. During evidence, Josepha Pawen was asked if any amount was proposed and she stated that "...no amount was proposed."

On 23 April 2002 the then Minister for Justice, Hon. Puri Ruing, MP filed a Policy Submission No. 94/2002 to NEC. The submission was made to advise compensation claims lodged by the relatives the students allegedly killed by Police and sought NEC approval for compensation payments. The submission also noted that apart from the two UPNG students killed there were also two non-students, presumably referring to Mathew Pawen and Thomas Moruwo. However, the NEC submission stated that no compensation demand was received from the relatives of the two non-students. The submission noted that the relatives of the two UPNG students demanded K800,000.00. Annexure '3-SNEC' is the copy of this Policy Submission.

The Policy Submission recommended NEC to approve and direct the Secretary for Treasury to make ex-gratia payment of K1 million to be equally shared between the next of kin of the late Simon Noki and Steven Kil, the two UPNG students.

On 29 April 2002 the Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1 deliberated on Policy Submission No. 94/2002 and advised NEC that the claims of the dead students' relative was knocked out of court and hence the State should not concede liability as there was no basis to make the ex-gratia payments. In addition the Solicitor General was cited to having advised against the payment as the amount recommended was excessive and the law does not allow this payment. Where the State was to admit liability the appropriate amount would have to be K50,000.00 up to K1 00,000.00. Annexure '4-SNEC' is the copy of the CACC Meeting No. 15/2002 Paper. No. 2.1.1.

Following the NEC meeting, it was decided that the Prime Minister shall determine the level of the ex-gratia to be paid in consultation with the Minister for Privatisation & Corporation and Justice & Attorney General. Annexure '5- SNEC' is the copy of the NEC Decision No. 142/2002 Special Meeting No. 19/2002.

No further correspondence were provided by the Office of the Secretary to NEC to entail the Prime Minister's decision on the level of ex-gratia payments made to the two deceased students' parents. However the Commission's review of the Department of Finance cash book listings revealed the following:

Steven Kil — no payments noted

Simon Noki -K300,000.00 on 9 May 2002 on cheque ref# 638770.

Despite the findings of the Commission of Inquiry, UPNG Administration and the Minister for Justice and Attorney General having confirmed that Thomas Moruwo was not a student at the time of his death and NEC having endorsed to pay ex-gratia to only two students. The Solicitor General, Zacchary Gelu in his letter dated 18 September 2002 to the then Acting Secretary for Department of Finance, Thaddeus Kambanei advised that Mathew Pawen was

one of the deceased students. Clearly Mr Gelu mislead the Finance Secretary. Annexure {6-DF' is the copy of this letter.

22. Parts of the said letter reads (quote) as follows:

"...The UPNG students lead protest against Government Privatisation Program in June 2001. The four UPNG students were shot dead by Police. The National Executive Council have already approved and settle payment for two (2) students from Mount Hagen but not Thomas Moruwo and Mathew Pawen for Compensation claim.

Parties decide to negotiate a settlement and agreed to settle at K800,000.00 There will be no further claims on this matter...

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Total 710,000.00

A Deed of Release was signed on 3 September 2002 settling the claim for K800,000.00. The deed was not affixed with the seal of the Solicitor General's Office seal as required. Annexure '7-DF' for copy of the Deed of Release. The parties involved in the signing of the Deed of Release are as follows:

Releasor – Josepha Pawen Suvulo acting for Thomas Moruwo. Releasee — Zacchary Gelu being the Solicitor General

Following tabulate illustrates payments made to the claimants by Department of Finance as being abstracted from the electronic Cash Book listings provided:

Annexes '8-DF', '9-DF' and '10-DF3' are the only supporting payment vouchers provided in the Department of Finance file. Note that annexes 8-DF and 10-DF are in respect of FF3 whilst annexure 9-DF consist of FF3 and FF4 for a payment of K300,000 which is marked as cancelled on the remittance advice. Despite the cancellation of this cheque, there is no reference on the Department of Finance cash book listing highlighting such a cancellation in respect of this payment.

Also note on annexure 8-DF that Thomas Moruwo being identified for payment of K30,000.00 is the other non-student allegedly killed by Police during the unrest for which the Solicitor General had also endorsed dependency payment of K0.8 million.

Annexure 8-DF relates cheque ref# 710215 of K30,000.00 was made payable to the claimant/plaintiff but annexes 9-DF and 10-DF3 are for cheques ref# 797254 of K300,000.00 and ref# 806532 of K210,000.00 both being made payable to Patterson Lawyers.

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Note that all settlement payments between 25 January 2003 to 1 April 2004 totalling K120,000.00 were made to the claimant during which time Zacchary Gelu was still the Solicitor General and the claimant had no legal representative. However the settlement payments between 25 May 2004 to 2 August 2005 totalling K590,000.00 were made payable to Patterson Lawyers, in which time Mr Gelu had apparently resigned as Solicitor General and was presumably a partner with Patterson Lawyers. As such the claimant also began using Patterson Lawyers as legal representative.

Annexure '11-DF' is the copy of the letter from the Solicitor General, Zacchary Gelu to the Secretary for Department of Finance dated 19 February 2003 advising that the cheque ref# 710215 was not accepted by the Bank due to the misspelling of the name of the payee. However the Commission is unable to verify whether the Department of Finance had actually cancelled the cheque ref# 710215 and issued a replacement cheque.

In spite of a total of K120,000.00 being purportedly paid by the Department of Finance as verified in paragraph 28 above between January 2003 to May 2004, the Acting Solicitor General, Francis Kuvi (successor to Zacchary Gelu) wrote to the Secretary for the Department of Finance on 24 June 2004 advising clearance for settlement payment of K800,000.00 to be made payable to the claimant's lawyer, Patterson Lawyers Trust Account based on item 3 of the NEC Decision No. 150/2003. Annexure T2-DF' is the copy of the subject letter.

Note that item 3 of the NEC Decision No. 150/2003 does not specifically relate to this case but declares the rescinding clause 10 of NEC Decision No. NG 07/2002. Clause 10 of NEC Decision No. NG 07/2002 directs no more out of court settlements by any State body or authority, including by the Attorney General and Solicitor General, without the approval of NEC, acting on CACC advises.

On 14 December 2004 the Acting Solicitor General, Francis Kuvi again wrote a follow-up letter to the Secretary for the Department of Finance, reiterating the

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settlement of Mathew Pawen's total claim of K800,000–00 as noted in paragraph 29. Mr Kuvi disputed this letter in evidence and stated that the letter was a fabrication (see paragraph 48 below). Annexure '13–DF is the copy of the subject letter.

Note that payments between 25 January 2003 to 1 April 2004 totalling K120,000.00 were allegedly paid under the payee name Mathew Pawen whilst the payments between 25 April 2004 to 2 August 2005 totalling K590,000.00 were allegedly paid under the payee name Mathew Pawen Suvulo. Such circumstances together with two different Solicitor General facilitating clearances of the same claim in totality during their respective terms of their appointment amounts to fraud.

Apart from the material (documents) evidence received, evidence were received from:– Josepha Pawen Suvulo, claimant;  
Tony Pawen, claimant;  
Francis Kuvi, former Solicitor General; Zacchary Gelu, former Solicitor General;  
Michael Steven Wagambie, Principal M.S Wagambie Lawyers. John Kawi.

Evidence – Josepha Pawen Suvulo ("Josepha")

Josepha is the elder sister of late Mathew Pawen. Josepha confirmed having lodged her intention to make a claim against the State. Several letters were also written to the then Prime Minister Sir Mekere Morauta and the then UPNG SRC President, Mr Augustine Molongos. In evidence, she stated that no amount was proposed to the State (or in the letters written).

It appears the amount of K800,000.00 was suggested by Mr Gelu as Josepha said she was not aware of how much she was claiming but at the material time, she

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admitted attending at Office of the Solicitor General and was asked to sign some documents which appear to be the deed of release.

After the signing of the deed of release she was called to pick up a cheque for K30,000.00. The said cheque was presented at the bank but refused as such was returned to one John Sam an Officer with Finance Department. The cheque was written to Mathew Pawen (deceased) as such it was refused. Josepha stated that this happened about three times on all occasions, either the name was misspelt or it was made payable to a deceased person, Mathew Pawen as such all three cheques for the sum of K30,000.00 were all returned to one John Sam. This would mean a total of

K90,000.00 was returned (i.e. K30,000.00 x 3 cheques).

It was only on the fourth occasion when the cheque was written correctly for the sum of K30,000.00 of which she received and deposited the cheque in her account. In evidence she stated that was the only monies she received and was distributed amongst her families.

Sometime later she was advised by Tau Tau from the Solicitor General's Office that a cheque of K210,000.00 was collected by Patterson Lawyers. She attended at Patterson Lawyers asked to see Mr Gelu but on all occasions she was advised that Mr Gelu was not available. She then attended at Finance Department and obtained a copy of K210,000.00 cheque from one Boas, an officer with Finance Department. The Cheque was made payable Mathew Pawen, C/- Patterson Lawyers and picked up by one Gabriel Dusava, a Consultant with Patterson Lawyers.

In evidence, Josepha stated that she never gave instructions to Patterson Lawyers to act for her. As a result, Josepha wrote a letter dated 28th April 2005 to Jack Patterson of Patterson Lawyers threatening to refer the matter to the Law Society, Police and relevant Authorities. In the letter Josepha demanded that K210,000.00 be repaid forthwith.

As a result Patterson Lawyers issued proceedings against Josepha for defamation. As a result, Josepha instructed M.S Wagambie Lawyers to defend her against the

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proceedings. In the meantime, M.S Wagambie Lawyers filed an application seeking to have the sum of K210, 000.00 be deposited into the National Trust Account pending determination of the entire proceedings. Mr Wagambie in his evidence confirmed acting for Josepha and the filing of the said application. Mr Wagambie confirmed that he had spoken with Mr Gelu to have the matter resolved out of court but never materialised. Mr Gelu had advised Mr Wagambie that he would call him for discussion on the possibility of an out court settlement proposal but never did so. The application together with the entire proceedings is still pending.

Josepha confirmed that she received only K30,000.00.

Evidence – Michael Steven Wagambie

Mr Wagambie confirmed receiving instructions to act for Josepha on 14 June 2005. Mr Wagambie advised that on instructions, Notice of Intention to Defend and a Defence and a Cross-Claim was filed for the sum of K210, 000.00. An application was also filed to have K210,000.00 removed from Patterson Lawyers Trust Account and placed in the National Court Trust Account pending determination of the entire proceedings.

In relation to the further conduct of the defamation proceedings and the application seeking to have the monies put in the National Court Trust Account, Mr Wagambie stated:-

"...Even after we have filed the Notice of Motion, every time we go to court, the matter is either not on the list or the file is not in court. That has been the case up until about 2007, when I lost contact with my client but I actively, still have the file with me and so far as the instructions are concerned, I still have instructions to act for her, I have not filed a notice of ceasing to act as yet. That amount of money has not been returned to my client. Further, during the course of our going to court for the prosecution of the Notice of Motion, Mr Zachary Gelu intimated to me and to my

client which 1 relayed the information to my client that he intends to settle this matter out of court....

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The terms of settling of the matter would be that he would refund the money to her and that he would withdraw the proceedings for defamation of character against her. Despite the suggestion, Chief Commissioner, nothing that eventuated to date. Not that I am aware of. If any, my client would have informed me. From the court's record up until now, our motion is still pending in court....

... The last time we communicated with Mr Gelu would be on 30 June 2006. If you look at their letter to my firm on 4 July, it says, 'We acknowledge receipt of your letter of 30 June 2006, together with the notice of motion and affidavit and support filed on 29 June 2006 where the motion is fixed for bearing on 17 July. We have taken note of paragraph 4 of your letter, we are happy to discuss this matter with you to consider options to settle the matter. We are also considering to discontinue the proceedings, a matter, we will discuss together with you.' Formally, on record that would be the last communication."

In relation to payments received, Mr Wagambie confirmed that according to his instructions, his client (Josepha) had only received K30,000.00. Further, they (i.e. Mr Wagambie and Josepha) were not aware of any other payments apart from the IC30, 000.00 she received and the K210,000.00 paid to Patterson Lawyers (subject of court proceedings).

Mr Wagambie also expressed concern in relation to the conduct of Mr Gelu when the question was asked:-

Q. Mr Wagambie, you mentioned something that Mr Gelu was the Solicitor General at that time when settlement was made and then when he moved over to Patterson Lawyers, it appears the file was then - he then took up the matter. You have any comments to comment on the manner in which—?

A: Yes, I feel in my own personal view, I feel this would be highly inappropriate for Mr Gelu to be requesting funds to be diverted to the firm of Patterson Lawyers where he is part of, because prior to him joining Patterson Lawyers, he was with the office of the

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Solicitor General, holding the position of Solicitor General, and therefore in my view, personal view, it would not be appropriate for such a thing to be done unless of course the funds have been

properly acquitted or otherwise received and given to the beneficiaries of those who are entitled to receive the funds. Further, one thing to note would be that the funds went into was picked up directly from Finance Department and my years of practice, I understand that any funds that has to be by way of State settlement, would go to the office of the Solicitor General to be picked up by the claimant at the office of the Solicitor General. In this particular instance, the cheque of K210,000 was picked up at the Finance Department by one of their consultants called Gabriel Dusava, and in my view, I personally think that is not the proper way of doing things; that is not the proper way of doing things in the sense of accountability and as professionals, that is not a proper way of doing things, and Mr Gelu being the former Solicitor General knows this procedure very well"

#### Evidence – Francis Kuvi

Mr Kuvi gave evidence stating that he had no knowledge of the claim until he was appointed as Acting Solicitor General and upon receipt of a letter from Mr Suvulo, the National Statistician on behalf of Josepha following up on the claim. He advised that the deed of release was signed prior to his appointment as the Acting Solicitor General.

Asked if he was the author of the letters to the Finance Secretary dated 24 June 2004 and 14 December 2004, Mr Kuvi denied any knowledge of having drafted the letters sighting serious discrepancies and stating that his name and signature was forged. Further, Mr Kuvi stated that the assessment of K800, 000.00 may have been excessive. Furthermore, a search of the Solicitor General's file revealed that it had no copies of these two letters purportedly written by Mr Kuvi. It is submitted that the letters were a fabrication and certainly.

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Both of these letters were attached to the Affidavit of Zachary Gelu filed on 17 June 2005 in the defamation proceedings they (Patterson Lawyers) filed. It is submitted that the letters emanated from Patterson Lawyers as clearly the letters were drafted with a view to diverting all the payments to Patterson Lawyers Trust Account. The letter clearly stated, "...make the cheque of K800, 000.00 payable to the claimant's lawyers, PATTERSON LAWYERS TRUST ACCOUNT...." The letter was never copied to Patterson Lawyers yet, Mr Gelu had a copy of the said letters.

Furthermore, records show that some payments were already made, as such there was no basis at all to state that make a cheque of K800,000.00 payable to Patterson Lawyers. It is submitted that this was clearly an intention to defraud the State. As lawyers, in this case if the letter was written by Mr Kevin, he is required to confirm/ verify with his file as to the amount still outstanding and that could have been stated clearly as the amount still outstanding and not K800,000.00. It is submitted that the letter emanated from Patterson Lawyers. It is further submitted that Mr Gelu may have took with him copies of the Solicitor General's letter head.

## Evidence – Tony Pawen

Tony Pawen is the younger brother of Josepha Pawen, the claimant. Tony stated that he gave instructions to Patterson Lawyers following his discussions with Zacchary Gelu as to how to go about following up on the balance of the payments from Finance Department. Tony stated that he was not happy with Josepha's handling of the first payment being K30,000.00 as such issued instructions to Patterson Lawyers. Asked if he had obtained the consent of Josepha before issuing instructions to Patterson Lawyers, he answered in the negative. Clearly, he had no lawful instructions as Josepha is deemed to be the claimant. Josepha initiated the claim from the outset on behalf of her family (i.e. including Tony Pawen). All the documents bear Josepha name. If it was a

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case of mishandling of K30, 000.00 it was a family issue that could be resolved amongst the Pawen family.

It is submitted that Zacchary Gelu was instrumental in having Tony Pawen to issue instructions to Patterson Lawyers. Tony admitted that it was Zacchary Gelu ("hereafter known as 'Gelu") who advised him to see Patterson Lawyers. This is further confirmed by the fact that Tony Pawen lived with Gelu for three years during the time in which the claim was lodged and subsequent settlement of the claim by way of deed of release. Certainly, Gelu had an influence to remove the file without the consent of Josepha (claimant).

Tony confirmed that the only payment from the claim he is aware of is the payment of K30,000.00 paid/received by Josepha and K210,000.00 paid to Patterson Lawyers. Note that this is the payment (K210,000.00) that is the subject of court proceedings between Josepha and Patterson Lawyers, Gelu & Others. In evidence, Tony said he only received K10,000.00. The balance, K100,000.00 was retained by Patterson Lawyers.

The K10,000.00 was paid in three lots, two cheques from Patterson Lawyers one for the sum of K37,000.00 (pay cash) and the other cheque for K70,000.00 pay Gelu Zacchary and Tony Pawen. K3000.00 was paid in cash to Tony Pawen.

Tony stated that the K37,000.00 was cashed and paid into his personal account at Westpac Bank, Waigani. Asked what happened with the K70,000.00 cheque payable to Gelu and Tony Pawen he stated that it was paid into his personal account. Tony was asked that to have deposited into his personal account it certainly may have problems as it is made payable to two people (Gelu/Tony). He later stated that they (i.e. Gelu/Tony) had a "join bank account" at BSP Boroko. Asked what was Gelu's share from the K70,000 was. 00 he said Gelu did not receive anything. It is submitted that there is a real possibility that Gelu

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received some monies from this payments. This must be further investigated further as Tony seemed uncomfortable in the witness stand during question time when questions were asked along the issue of who benefited from the payments received'.

56. During evidence, Tony provided a copy of a letter from the Lawyers Statutory Committee. Asked what was it about, he answered:-

A: I wrote to the Statutory because of that K165,000, the cost of the (inaudible). J was not happy about the amount that is why I wrote to the lawyers Statutory Committee.

Q: You were charged K165,220 by Patterson Lawyers for their services?

A: They were going to charge me that amount.

Q. And that was the reason you —

A: I wrote to the Lawyers Statutory body.

Q: As a result of 'your complaint to the Lawyers Statutory Body, was the fees revised? Did Patterson lawyers say, put the fee down?

A: Never.

Q: So it is correct to say that as at today —

A: I still them owe them that amount.

j g : You still owe them K165,220?

A: Yes.

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Tony had not received any response from the Lawyers Statutory Committee in regard to his complaint. Asked what happened to the K100,000.00 that was retained by Patterson Lawyers, Tony answered:-

"A: K100,000 was in Patterson Lasers' trust account. I am not sure if that K100,000 is going to pay for this cost but what they told me was that this K100,000 sitting in that trust account is going to be for my security and their security. They did not mention anything concerning the payment of their costs.

Q: It is still in the trust account?

A: Yes.

Q: At Patterson Lanyers? Who told you that? A: Jack Patterson."

Tony advised that often he saw Jack Patterson instead of Gilbert Maki.

In relation to some "other payments apart from K30,000.00 and the K210,000.00, Tony was asked:—

"..Q: Apart from the K210,000 and the K30,000 which you are aware of brings the total to K240,000, are you aware of any other payments that have been made by Finance to Patterson Lanyers or which were—

A: Never. After that payment, we have not received any payment and I never know of any payments made.

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Q: Mr Pawen, as you may have heard during the course of hearing, our record show that a total of K710,000 has been paid, that is including the K210,000 and the K30,000 which you are aware of. Do you still confirm—

THE CHAIRMAN: K500,000 unaccounted for. Did you know that your family received K500,000?

A: No.

f): It had been paid out.

A: I never know of any payment after that K240,000.

Q: If the extra K500,000 was made up, what are those cheque amounts?

MR GORUA: Our records show that the first payment that was made was on 25 January 2003, the cheque number being 710215 for K30,000; second cheque was on 4 April 2003, cheque number 716817 for K30,000; third cheque 17 October 2003, cheque number 736901 for K30,000; another cheque on 1 April 2004 cheque number 774166 again for K30,000; another cheque for the sum of K30,000 on 25 May 2004, cheque number 779313; a cheque for the sum of K300,000, cheque number 797254 on 7 December 2004; another cheque for K210,000, which you have confirmed that is cheque number 806532 on 29 March 2005; and another cheque of K50,000 that being on our records being the last payment made in respect of this claim, that cheque number 816796 on 2 August 2005. You confirm you or even your family never received any?

A: This is a surprise to me.

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THE CHAIRMAN: And the evidence says that Mrs Josepha Suvulo, she has not received them either.

A: No.

Q: The money has not gone to anybody in your family, not Josepha or anybody?

A: No.

j2' Yes, you might care to think about that because it seems that money that had been paid out. According to the Finance Department, to your family.

A: My family never received any more payment after this R240,000, never.

there is a lot of it has been paid out

MR GORUA: That has been confirmed by Josepha who appeared before the Commission. The family has not received any other payments. Commissioner, I have no further question."

What is even more serious in this case, is that a cheque for the sum of K300,000.00 was made payable to Josepha Pawen Suvulo who is the claimant, yet it is not clear as to how Patterson Lawyers were able to collect the cheque and deposit it into Patterson Lawyers Trust Account when the cheque was made payable to Josepha Pawen who is the claimant and when no instructions were ever received from Josepha. An investigation be conducted into who actually benefited from this payments.

Evidence – Zacchary Gelu ("Gelu")

Mr Gelu appeared twice before the Commission following serious issues raised in relation to his conduct as the former Solicitor General and as a private

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lawyer having carriage of this matter whilst been the Solicitor General. He confirmed that Tony lived with him for three years during the time in which the claim was pursued.

Gelu confirmed that Patterson Lawyers received instructions from Tony Pawen following what he described as the alleged failure by Josepha to properly account for the first payment of K30,000.00. He confirmed that they (Patterson Lawyers) never contacted Josepha about the instructions by Tony Pawen.

Gelu confirmed that they (Gelu/ Tony) had a joint account but stated that it was not at BSP Boroko but Westpac, Waigani. It is submitted that either Tony or Gelu may have mislead the Commission or it was simply a case of coming up with an answer that was false. Further, investigation be conducted into this issue, if they both maintained a joint bank account.

Asked in relation to the creation of the joint bank account. Mr Gelu was asked:–

"...Q: Was it with the consent or were the family members aware of such a joint account being created between you and Tony Pawen?

A; The family members from home were in contact with Tony that was the arrangement they wanted. Mr Tony Pawen —

THE CHAIRMAN: With pardon?

A: Mr Tony Pawen.

Q: Yes, who gave you instructions? So he has got a claim by Josepha, has already by tk Solicitor

General's office through the Finance Department and then you get instructions

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from a member of the family, so he says, was there any contact with Josepha to say, "we are intervening" or?

A: Yes, that happened, she in fact objected.

Q: Yes, but now, has she objected after you had already done —your firm had taken over the claim?

A: Yes.

Q: Without any notice to her?

A: We were more or less acting on the instructions —

Q: I know you were, you were very much acting on the instructions to purely of one person only. Did you have any information that he was acting for the family other than the fact that he said so?

A: From the information instructions he gave was that —

Q: Yes, I know but did you have any confirmation that he was representing the other family? You see, I am just looking at what you have got. She gets the first R30,000. He comes in and gets the next R37,000 and then you decide you will have a joint account. It is two sides of the family obviously chasing the money at this stage, did you give any notice to the Solicitor General's office that you were acting against the interest of Josepha? Or taking over her role?

A: If I may recall, I think there was a letter made, in fact, I did not personally handle the matter in Patterson Lanyers. It was Gilbert Maki, who was handling that matter, Mr Maki."

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Mr Gelu confirmed that proceedings were filed against Josepha Pawen but was not aware if the proceedings were discontinued.

In relation to the payments received from Finance Department, Mr Gelu was asked:-

Q: Mr Gelu, Mr Pawen advised the Commission that up until now he was aware of only two payments been made. First being the K30,000 that was paid to Josepha and other one being K210,000 and he advised that he was only aware of that payment. When there any other payments made apart from those two payments to Patterson lawyers?

A: I have checked with our Accounts, there were three payments made in fact; first one was the K210,000.

Q: Sorry?

A: K210,000.

Q K210,000?

A: Yes, the second payment was K50,000 and the third payment is about K300,000. That is the payments that I confirm from the Accounts, our Accounts section.

THE CHAIRMAN: K210,000, K50,000 and K300,000?

A: Yes.

Q: That is to your firm?

A: To Patterson lawyers, yes.

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MR GORUA: And how much was paid to Tony or the family?

A: There were legal fees to be paid and then there were cash advances requested by Tony whilst awaiting payments from Finance. I have to verify that with our Accounts, if I can recall about

K170,000. Q:

¥170,000?

A: Yes, paid to Tony.

£): Mr Gelu, Mr Pawen advised the Commission that he was only aware of, like I said, only two payments; one of which was made payable to Josepha. The other payment of which he is aware of ¥210,000 that means – what effectively he said he is not aware of the ¥50,000 payment and the ¥300,000 payment. From the ¥210,000 he advised the Commission that he only received ¥110,000.

A: Chief Commissioner, I have to verify that with the accounts but if I may be able to recall about ¥170,000 was paid – ¥170,000.

Q: Mr Gelu, to back him up those are the cheque copies which he provided to say that those are the only payments he received and his evidence to the Commission is that as to the balance – that is the ¥210,000 we are talking about – as to the balance he was advised that that money will be retained by Patterson Tayyers for what he said was security. He may have meant legal fees and all those but up to date he said that he has not received the balance of the amount of money that was retained. That is, only ¥100,000, we are not talking about the ¥300,000 and ¥50,000?

A: Commissioner, if I could come back to the Commission sometimes next week to assist the Commission in producing the accounts from the accounts section. I would not be in a position right now to assist very much in the payments.

Q: Mr Gelu, when do you think you will be able to provide records?

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A: Monday, Tuesday, depending on your time.

Q: Tuesday?

A: Yes, Tuesday."

Mr Gelu never provided any response or the information as he undertook to do so. In relation to the fees charged by Patterson Lawyers, Mr Gelu was asked:–

Q: Are you saying the fee is justifiable?

A: That is the amount, as I said, Gilbert Maki may have estimated but just looking at it, it may be a bit more, meaning the assessment is done by Mr Maki himself so my view is \$ the amount is excessive, I may not say on behalf of Mr Maki but looking at the amount, it may be unreasonable.

O: You say it is unreasonable?

A: Yes, it may be unreasonable.

Q: Mr Gelu, that could be the reason why Mr Pawen actually referred this matter to lawyers' Statutory Committee.

A: Yes.

Q: You are aware of that referral by Mr Pawen?

A: Yes, I am aware of that referral, yes Commissioner,

jQ: Was the matter resolved or did the Lawyers' Statutory Committee respect of the complaint?

make a decision in

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A: If I may recall it has not been deliberated on by the Lawyers' Statutory Committee.

jQ: Did you or Mr Maki ever do a response to the Lawyers' Statutory Committee in respect of the complaint?

A: Chief Commissioner, I cannot really recall now whether a response was made but that can be — I will check that one out.

Q: Could you provide a copy together with those documents by Tuesday, the response to Lawyers' Statutory Committee?

A: Yes, I will check the response."

Mr Gelu has not provided any response despite his undertaking to the Commission. Mr Gelu was then asked in relation to the issue of whether or not he received any payments from Tony Pawen (or benefited from this matters) and as to his conduct in relation to this matter. He was asked:—

"...Q: That would in essence more or less provide the details of all the work that was done. Mr Gelu, we come back to that cheque that was made payable to you and Mr Pawen. Did you receive any money from these payments?

A: If any monies are to be received by me, it would be through the cost that is payable to Patterson Lawyers. Chief Commissioner, it would be improper for me to receive any monies that are paid into a joint account or to any that is paid by way of cash. In relation to the joint account, I am only facilitating the process of payment to go to the family. In receiving the amount directly from Mr Pawen, no, that would be double dipping if I do that because we have already received our cost, when the cost was paid and as a relative it would be bad for me to get monies from him directly in relation to this particular case.

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Q: On that aspect I am just thinking as you would appreciate from the start you bang as the former Solicitor General was involved in the settlement, and then if you like towards the end, you have now created a joint account with Mr Pawen, this time if you like to facilitate the payments, would that be proper?

A: That may not be seen proper but I joined Tony Pawen to the joint account basically in a balance and check that Tony should not misuse this money. We paid directly to Us account and then to the family and I made sure that he goes home to the family to make sure this money reaches the village, basically that is the whole idea."

69. It is submitted that Mr Gelu knew very well that his involvement into the further conduct of this matter raises serious issues that amount to unprofessional conduct as a lawyer and may border on fraud. The reasons are:-

He was involved in the settling of the case. He signed the deed of release;  
He admitted in a similar case (Thomas Moruwo) that the amount of K800,000.00 may seem unreasonable. Furthermore, he deliberately refused to take note of the NEC decisions and the CACC advice of which the Solicitor General/ Attorney General is a member of the CACC; It is possible he came up with the amount of K800,000.00 as Josepha never claimed a specific amount; Tony lived with him for three years, he certainly played a part in getting Tony to issue instructions to Patterson Lawyers;  
The letters purportedly written by Mr Kuvi, how did they come into his possession and attached to his affidavit;  
The letter asked for a cheque of K800,000.00 to be paid when evidence clearly indicates some payments were already made;  
Created a joint account with Tony Pawen; Cheque was made payable to Gelu and Tony;

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Patterson Lawyers never got instructions from Josepha;  
A cheque for the sum of K300,000.00 was made payable to Josepha Pawen yet Patterson Lawyers picked it up and deposited the cheque;  
Court proceedings were filed against Josepha simply to frustrate her attempts to recoup K210,000.00.

The above are some of the issues relating to the conduct of Mr Gelu. It is submitted that Mr Gelu, Patterson Lawyers and other persons may have benefited from this payments as evidence clearly indicate that the immediate family members only received K140,000.00. The rest is unaccounted for.

It is clear from this case that the National Executive Council ("NEC") played a major part in the settlement of this matter. It may be a political decision. It is submitted that clearly this is a dependency claim. The laws adequately address issues arising from dependency claims. In this case, it is submitted that the NEC should not interfere with the work of the relevant State agencies, such as the Solicitor General's Office and Public Curators Office perform their roles in such circumstances.

John Kawi in his evidence also commented that this was a dependency claim and the figure proposed in the NEC submission was way above the amount awarded in a dependency claim. When asked what he knew about the claim, Mr Kawi stated (quote, only part)>

" .....So I said, rntii I am satisfied I am sorry but this is one instance where I will have to defy the NEC direction to settle for K500,000. I made that very clear. I said I will not settle this for K500,000 because although I sympathise with the death of the students which was at the hands of police, we also got in touch with police to give us instructions on this. Assuming that police would be responsible, this was the line I was taking that we do not settle the amount, these two deaths in the amount of K500,000 each. My thinking was that it must be properly calculated using dependency claims. As a dependency claim using the three

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per cent tables, i f i t was not a dependency meaning, i f the s tudents who died did not have any families on their own, kids on their own, this at i t s best could be t r eated as a contingent type o f customary dependency. That i s how I v i ewed i t and so I made a f i l e notation on this. I t i s t rue there was no court proceedings i s sued in these two matters. But my f i l e notation I r e call was that these matters must be l ooked at f rom the l i ne I was advocating and so that i s the r eason why I said I will defy NEC instructions to s e t t l e at K 500 , 000 each. That i s my only against in this matter. As you pointed out Gelu, I do not know how he couldjustify Ms but he comes in and s e t t l e s i t f rom an amount higher than the NEC directive."

In regards to payments made, Mr Thaddeus Kambanei stated that it would bp unusual to change the name of payee half way through or that is after some payments had already been made, because once the name of the payee is changed the "system" cannot pick-up how much has so far been paid in respect of the same claim the payments have been made.

Mr Kambanei was asked:-

"Q: Mr Kambanei, if you go to page 2 under the schedule it says, "the releasor is Josepha Pawen Suvulo", and in fact the signature appears on the third page apparently is that of Josepha Pawen Suvulo. From your experience of the practice in the office of the Department of Finance, is this an item that you expect your officers to cross check to ensure that the payee on your cheques that you release is consistent with what is set out in the deed of release? That is really the crucial document as far as law is concerned or liability of the State is concerned, put it that way. I guess, just generally speaking would this be one aspect that you would expect your officers to check with?

A: Absolutely, yes.

Q: So the fact that mid way through payments of –first off, we have the payee on the cheque being the name of the deceased person, Mathew Pawen — sorry, as stated in the summons. That is obviously very unusual?

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A: It is very unusual, yes.

Q: It is not the releasor, the person that is releasing the State off responsibility?

A: No.

Q: But your recollection, you have no recollection of this ever passing through your desk? A: No, not at

all."

Findings:

Zacchary Gelu's actions amount to conflict of interest. Further, actions amount to unprofessional conduct. Failed to comply with NEC decision.

Mathew Pawen was not a UPNG student.

K800,000.00 was far in excess.

The two letters purportedly written by Mr Francis Kuvi were a fabrication and act to defraud the

State. Mr Kuvi denied having any knowledge of this matter nor did he draft and or sign the two letters. Fraud.

Patterson Lawyers had no instructions from Josepha Pawen as such had no authority to act on behalf of her. Tony Pawen had no lawful authority to give instructions as it was Josepha who had initiated the claim as such she was the legitimate appointee to pursue the claim. No application was made to remove Josepha to continue to represent the family of late Mathew Pawen.

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Gilbert Maki or Patterson Lawyers had no lawful instructions to act for Josepha.

Patterson Lawyers bills were far excessive.

#### Recommendations

Zacchary Gelu be referred to the Lawyers Statutory Committee for unprofessional conduct. Further, he be referred to the Police for further investigations if he actually benefited from this claim.

Furthermore, Zacchary Gelu be banned from been employed by the State or any of its Statutory bodies.

Patterson Lawyers be referred to the Law Society for acting without lawful instructions and receiving payments from the Finance Department.

Investigations be further conducted into the conduct of Gabriel Dusava. Mr Dusava had no instructions to collect the cheque of K210,000.00 from the Finance Department.

Patterson Lawyers bills were very excessive.

Payments to this claim were purportedly made payable under two different payee names by the Department of Finance, which might be fraudulent in nature. Investigation be further conducted in relation to the cheques that were returned. Were they cancelled?

Matter be referred to the Police to further investigate the beneficiaries of this claim.

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89. No more payments be made.

## Index of Relevant Documents

1- OCP

2- UPNG

3- SNEC

4- SNEC

5- SNEC

6- DF

F

F

F

13- DF

Copy of the Commission of Inquiry Report into the 2001 UPNG student-led unrest.  
Copies of confirmatory documents provided by UPNG Registrar as requested.

Copy of Minister for Justice, Hon. Puri Ruing, MP filed a Policy Submission No. 94/2002 to NEC  
Copy of Central Agencies Coordination Committee in its Meeting No. 15/2002 Paper No. 2.1.1  
Copy of NEC Decision No. 142/2002 Special Meeting No. 19/2002  
Copy of letter dated 18 September 2002 from Solicitor General to Acting Secretary for Department of Finance.  
Copy of the signed Deed of Release  
Copy of FF3 form for payment of K30,000  
Copy of FF3 & FF4 forms for payment of K300,000 Copy of FF3 form for payment of K210,000  
Copy of letter dated 19 February 2003 from Solicitor General to Secretary for Department of Finance.  
Copy of letter dated 24 June 2003 from Acting Solicitor General to Secretary for Department of Finance.  
Copy of letter dated 14 December 2003 from Acting Solicitor General to Secretary for Department of Finance.

(c) Moale Haus and Sambra Haus

Investigation Report on Moale Haus (Tripoli Building) lease and fit-out – by Paul Paraka Lawyers and Acanufa & Associates Lawyers 20 May 2004

Investigation Report on Sambra Haus lease — by Pacific legal Group Lawyers 13 September 2006

By letter of 11 May 2009, the Attorney-General referred to this Commission the abovementioned Reports and the two NEC Decisions that concern the said Reports:

NEC Decision No. 296/2003 made 18 December 2003 and dated 19 December 2003; and

DEC Decision No. 94/2005 made 18 May 2005 and dated 20 May 2005.

The Commission also received copies of the following correspondence that are relevant:

Letter dated 13 May 2009, Hon. Dr Allan Marat MP, Minister for Justice & Attorney-General to Hon. Peter O'Neill CMG, MP, Minister for Public Service – with copy of NEC Decision No. 220/2008 made 15 October 2008 and dated 17 October 2008; and

Letter dated 14 May 2009, Hon. Peter O'Neill CMG, MP, Minister for Public Service to Hon. Dr Allan Marat MP, Minister for Justice & Attorney-General.

The exchange of correspondence between the Minister for Justice & Attorney-General and the Minister for Public Service suggested there had been no (or

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limited) follow-through of directions of the National Executive Council following consideration of the said investigation reports which were both commissioned by the NEC at different times.

This brief comprises three (3) arch lever folders:

Counsel's Brief of documents and the transcript  
Investigation Reports and documents from Attorney-General  
Payment Vouchers from Finance Department and Briefs from Alfred Vele

Relevance to the Commission's Terms of Reference

On 18 December 2003, the NEC approved the fit-out cost of Moale Haus (Tripoli Building) at an amount of K12,684,549.00.

On 18 May 2005, NEC resolved:

that Department of Finance further negotiate the cost below K8 million.

Department of Justice & Attorney-General refer the Investigation Report to relevant authorities including the Ombudsman Commission for investigation of leaders implicated

Payments had been made by Department of Finance in part settlement of the said fit-out costs. It is clear the claim exceeds K300,000, the claim was made within the period of the TOR 1 January 2000 to 31 July 2006 and payments have been made by Department of Finance

Essential background for purpose of investigation

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At the request of the NEC, investigations were conducted into the lease and fit-out of the two buildings that accommodate departments of the State.

Controversy surrounds claims by the Attorney-General that despite directions of the NEC for referral for prosecution of those implicated, no action has been taken to make such referral to the Ombudsman Commission, police or such other appropriate authority.

This is all now referred to this Commission of Inquiry for inquiry by the Attorney-General and the

Commission has also received a copy of the letter from the Minister for Public Service.

The following persons were invited to assist the Commission:

Hon. Dr Allan Marat MP Attorney-General and Minister for Justice – as to his letter to the Commission dated 11 May 2009 and his exchange of correspondence with the Minister for Public Service

Hon. Peter O'Neill, CMG, MP Minister for Public Service – as to his letter to the Attorney-General dated 14 May 2009

Mr Gabriel Yer, Secretary Department of Finance – as to payment vouchers for all payments made in respect of these claims

Secretary to NEC — as to the NEC decisions referred to above and compliance (if any) with the same — by whom, when and what etc.

This matter was opened on 19 August 2009 and the Commission took evidence on 27 August 2009 from:

1. Hon. Dr. Allan Marat MP, Attorney-General and Minister for Justice

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Mr Manly Ua, Acting Secretary, National Executive Council

Mr Alfred Vele, Investigator and Account with the Commission

By the NEC Decision No. 94/2005 dated 20 May 2005, the NEC after noting the findings and recommendations of the Investigation Report:

"3. directed the Department of Personnel management in consultation with the Department of Justice and Attorney-General, to take appropriate disciplinary action against public servants implicated in the Investigation Report in accordance with the Recommendations in part "G" of the Report"

"4. noted that the Office fit-out cost has been negotiated downward from K12,684,549 to K8 million and that part-payment has been made, however, directed the Department of Personnel Management to further negotiate the cost below K8 million "

y "6 directed the Department of Justice and Attorney-General to refer the Investigation Report to the relevant authorities including the Ombudsman Commission for investigation of leaders implicated under the leadership Code."

In evidence, the Attorney-General and Minister for Justice confirmed that there had been no action taken by his Office and his Department in compliance with the abovementioned NEC directions. Dr Marat also stated he was not aware of any other officer of the State referring the persons implicated to any law enforcing agency for further investigation or prosecution.

When asked generally as to systems and processes for the dissemination of NEC Decisions and monitoring compliance with same, Dr Marat said "I think it is an area that needs to be monitored, not only monitored but there needs to be some mechanism in place to ensure that ministers and their departmental heads are actually carrying out any directives by NEC."

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Mr Manly Ua, Acting Secretary NEC said there was no record as to compliance or otherwise of the abovementioned NEC directions. Up until 1989, the role for monitoring compliance with NEC Decisions was the responsibility of the NEC Secretariat but that was shifted to the Department of Prime Minister in the Performance Management Unit. It was also suggested the Central Agencies Coordinating Committee played a role. The Commission has also received the following:

Payment vouchers from the Department of Finance.

A file from Dr Marat containing a brief on a Writ recently filed in the National Court seeking CPI adjustments on rent on Moale Haus.

Documents from Manly Ua Acting Secretary NEC being the policy submissions and NEC Decisions

On 7 September 2009, Mr Joshua Mule, Manager Government Office Allocation Committee (GOAC) and Mr Sam Koim, Legal Officer Solicitor-General Office (SG) attended in conference with Counsel Assisting and Technical Counsel.

The GOAC:

y is established and functions in accordance with "General Order 20". Mr Mule was to provide the Commission with a copy of this General Order.

is chaired by the Secretary Department of Personnel Management

membership includes State Solicitor, Secretaries of Lands & Physical Planning, Finance, Works, National Planning.

> is located within the Department of Personnel Management

The Commercial Lease (prepared by the State Solicitor) was dated 27 September 2002 and executed under common seal by the Lessor (landlord) and by the "Minister for Lands" for the Lessee (tenant). The term of the lease is ten (10) years and rental payable is K3,300,750 per annum.

It was not disclosed whether the document was lodged at Stamp Duties Office and registered with Registrar of Tides. The lease terms appear normal with one exception and that is Clause 3.3(d) which requires the State to paint the interior once every three years.'

The building "Moale Haus" is occupied by divisions of a number of Government Departments including Migration (Foreign Affairs), Labour, Commerce & Industry and Co-operative Societies.

The management of the State Departments' occupation of the building and the payment of rent is a major problem area. GOAC merely facilitates arrangements to occupy the building and have nothing to do with receipt and payment of rental invoices.

GOAC say that function is performed by Finance Department Corporate Services Division. Clearly there is no auditing of invoice records prior to and after payments are made. Neither GOAC nor Finance Department can conclusively say that invoices have been correctly raised by the Lessor and then audited and paid by the Lessee (State).

In the Writ of Summons WS 539 of 2009 filed 14 May 2009, the Lessor (now known as Moale Enterprises Limited) claims CPI adjustments on rental for the period January 2003 to September 2007. The Plaintiff claims a total of K2,371,301.67.

From the Commission's analysis of payment vouchers obtained from the Finance Department:

CPI adjustments have already been made by the Lessor in 2005 and 2007 invoices which have been paid.

There may have in fact been an overpayment on CPI adjustments to rental payable.

The Lessor invoiced and the State paid for car parking in the period 2002 to 2006 totalling K469,333.33 which is not provided for in the lease. The State is entitled to a refund of such payments.

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The Solicitor-General's Office has advised that the State was out of time to file a Defence and has applied for leave to file or to extend time. The application has yet to be listed and the Court file cannot be found in the National Court Registry. Options discussed included:

^ State to pursue recovery of payments for car parking and excessive CPI adjustments on rent by filing a Defence and Cross-Claim or commencing fresh proceedings or seeking adjustment on the next rental invoice

^ State to insist on the Lessor providing full and complete particulars of the claim and discovery of documents and the Lessor establishing its case as to liability and damages.

## Findings

On the documents produced and the evidence provided, the Commission makes the following findings:

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There is no system in place that tracks compliance with decisions and directions of the NEC. That function was performed by the Secretariat to the NEC and was then transferred in about 1989 to the Department of Prime Minister in what is now known as the 'Performance Management Unit' which is within the Policy Division.

The non-compliance with Decisions of the NEC does not appear to be cause for discipline or other corrective action with or concerning Departmental Heads or other agencies of the State.

The claim filed in the National Court on 14 May 2009 by Moale Enterprises Limited against The State WS 539 of 2009 must be defended. On examination of the payment vouchers obtained from Finance Department, CPI adjustments appear to have been factored into invoices raised and payments made in 2005 and 2007. As such, there is no basis for the claim.

y There is immediate need to have rental claims and payments reconciled periodically. Unless monitored by the GOAC, payments may be made over and above what is payable by the State (through Finance Department).

Recommendations:

1. The Department of Prime Minister and National Executive Council immediately improve its systems and processes to ensure that

Decisions of the NEC are complied with fully and in a timely manner.

Appropriate action is promptly taken where there is non-compliance with Decisions of the NEC

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The Solicitor-General and Government Office Allocation Committee must take all necessary steps to defend the claim filed in the National Court on 14 May 2009 by Moale Enterprises Limited against The State WS 539 of 2009 as there is no legal basis for the claim and to take necessary action as discussed above.

The Government Office Allocation Committee and the Department of Finance shall immediately improve all processes and systems to ensure that all rental claims and payments are reconciled periodically so as to avoid payments being made over and above what is properly payable by the State (through the Finance Department).

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## (e) AOG Jubilee University

### 1. Introduction

Investigations in this matter were not completed fully before the Commissions term came to an end. However the Commission has sufficient evidence from which certain clear conclusions and findings can be made. At the end of the day there is little doubt that the AOG Jubilee University began with very good intentions but a lot of short cuts and outright illegality was committed along the way leaves no doubt that in this instance, the means did not justify the end.

Up to the date of this report the AOG University is still not recognised as a University or Tertiary institution. Despite this fact, K4.5 million of tax payers money has already been spent on what is essentially a privately run institution. The K4.5 million was used to build classrooms (K1.7 million) and even to pay the fees of chosen students (K2.8 million) to study courses on Finance. Very senior executives of the AOG church including the current General Superintendant Reverend Phillip T Dalaka gave evidence to the Commission of his bewilderment as to where all the money supposedly given to the AOG University had gone to.

Dr. William Tagis, the Director of the office of Higher Education told the Commission that he had advised the 'chancellor' of the institution Mr. Thadeus Kambanei, not to proceed with the inaugural graduation that took place in mid 2009. Earlier in 2005 when moves were made to establish the University, Dr. Tagis also advised the National Executive Council that the submission done by Mr. Kambanei who was also Finance Secretary at the time was not a convincing one because of factual errors and weaknesses in other areas including the Finances of the University and how exactly it would source funds to run its programmes. Dr. Tagis told the Commission that there was a lot of Political Pressure at the time the submission to NEC was done.

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## Source of Information & Documents

This brief is based on information and documents from the following:

NEC Decisions No. 191/2005 of Special Meeting No: 44/2005;

NEC Decision No. 34/2006 of Meeting No: 04/2006;

Various Reports in the Newspapers;

Department of Finance Cashbook, Ledgers and Payment Vouchers;

Publicity in print medias by AOG Spokes Man, OHE and General Superintendent of AOG Church

Dept of Finance Cashbook, payment vouchers and correspondences.

Evidence given by Dr. William Tagis on the 09th of July 2009,

Evidence given by Reverend Phillip Tony Dalaka on the 09th July 2009. Facts

The NEC in its Decision No. 191/2005 of Special Meeting No. 44/2005 held on 24th August 2005, approved in principle the establishment of Jubilee University and also approved the drafting instructions for the Jubilee University Bill.– [Refer Exhibit NEC 1].

On 15th February 2006, the NEC made Decision No. 34/2006 in Meeting No. 04/2006 – [Refer Exhibit NEC 2]. The NEC deferred consideration of the Policy Submission No.219/2005 and referred it to the Central Agencies

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Coordination Committee (CACC). It directed the CACC in collaboration with the Office of Higher Education and Secretary for Education to thoroughly vet the submission and determine the National Government's commitment in terms of finance towards the Jubilee University.

No Financial commitment was ever made by the Government Despite that a total of three (3) payments aggregating K3 million were made from three (3) different Trust Accounts that were never intended for AOG Jubilee University, thus breaching Sections 14 and 17 (a) of the PFMAAct.

The first payment of K500,000.00 made out of Trust Fund Suspense Account No. 2 on 18th November 2003 was for the construction of classrooms at the University. The Decision to commit funds was made even before the two (2) NEC Decisions – [Refer Exhibit DF 21].

A letter dated 11th April 2005, from the Prime Minister (Grand Chief Somare) addressed to Secretary for Finance (Mr Thaddeus Kambanei) that was attached to the payment vouchers for the payment of K1.2 million, asked the Secretary to identify funds to fund projects in East Sepik Province – [Refer Exhibit FD 26]. The projects mentioned in the Prime Minister's letter included the Sepik Agriculture College and the Westbrook Technical College to be funded with K500,000.00 each. Despite the request for K1 million to be identified, K1. 2 million was accessed from the Sepik High Way Trust Account (Account Code 450 – 448) and paid to Jubilee University on 7th December 2005, for the establishment of that University.

The Requisition for expenditure (FF3) was approved by the Acting Deputy Secretary Operational Services Mr George Gwina as Section 32 Officer on 6th December 2005.

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This approval for expenditure was made based on a Brief dated 5th December 2005, received from the Acting FAS Cash Management & Expenditure Mr Otto Wangillen – [Refer Exhibit DF 26]. Mr Wangilkn recommended in his Brief to the Deputy Secretary Operations that a formal approval be given for the transfer of K1.2 million from Sepik Highway Trust Account to Jubilee University as per the Government's decision. He even stated that the K1.2 million has been approved as Government grant for the University to develop the run down facilities at Sepik Agriculture College and Westbrook Ganba Technical College at Hayfield in Maprik to become School of Agriculture and School of Education respectively for the University and located in East Sepik Province whilst School of Business and School of Bible & Theology are located in Port Moresby.

The sourcing of funds out of the Sepik Highway Trust Account to fund the establishment of the University was done in breach of Section 17 (a) of PFM Act which clearly states that "Moneys may be paid out of a Trust Account only for the purposes of the Account or as authorised by law ...". Also the payment was made despite there being no decision by the Government to allocate funds to AOG Jubilee University.

The Sepik Highway Trust Account consisted of monies contributed by Members of Parliament from East Sepik Province. The funds were intended to be used as counterpart funding for upgrading and sealing of the two (2) Sepik Highways, bridges and other roads in the Province. On 29th December 2006, the misuse of funds in that Trust Account were referred to by the then MP for Wewak Open Electorate Mr. Kimson Kare and was reported in the National Newspaper – [Refer Exhibit COR 16].

On 31st December 2005, an amount of K1,500,000.00 was drawn out of the Cash Adjustment Account Code 410-03 on cheque No. 829208 and described as cCourse fees for District Treasuries Officers'- [Refer Exhibit DF 24].

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This cheque was then described as been cancelled and credited back into the accounts through Journal Entry No. 349/05 on the same day – [Refer Exhibit DF 24].

On the same day a replacement cheque for a lesser amount of K1,300,000.00 was drawn out of the same Cash Adjustment Account through cheque No. 829256 – [Refer Exhibit DF 21]. As the payment was made from the Cash Adjustment Account, it is in breach of Section 14 of the PFM Act, as that account was exclusively intended to facilitate payables and receivables adjustments at year end during the preparation of the Public Accounts Financial Statements. Therefore the action is

deemed as accessing funds in the Government's bank account (Waigani Public Account) illegally and without authority through Appropriation Act legislated by Parliament.

Originally it was planned that 89 public Servants would be enrolled at Jubilee University and have their course fees paid for by the Government. As there were only 49 enrolled instead of 89, in effect it had cost the State K26,531.00 to enrol one of its District Treasury Staff as Student (that is dividing K1.3 million by 49 Students). This amount is excessive compared to those enrolled at the recognised Universities in the Country.

The three (3) payments aggregating K3 million made to Jubilee University out of Public Funds as discussed above, were done without proper and clear basis of authority, thus breached Section 14 of the Public Finance Management Act. The details of these payments as noted from the cashbook are disclosed below:

699-	
Date	
Cheque No.	
Account	
Transaction Description	
Amount K	
18/11/2003	
740063	
TFS	
Account No.2	
Construction Jubilee Uni	
of	
Classrooms	
500,000.00	
07/12/2005	
4	
Sepik	H-wy
Trust	
Establishment	
University	
of	
Jubilee	
1,200,000.00	

31/12/2005  
829208  
Cash Adj Account  
Pmt DT students, Banking

studies  
1,500,000.00  
31/12/2005  
J/E No. 349/05  
Cash Adj Account  
Chq # 829208 cancelled  
(1,500,000.00)

31/12/2005  
829256  
Cash Adj Account  
Payment of C/Fees(89 DT Officers)  
1,300,000.00

?  
?  
?  
?  
?  
Total  
?  
?  
?  
3.000.000.00

The payment vouchers for the cancelled cheque No. 829208 drawn for K1.5 million only was furnished. Request has been made with Department of Finance to furnish vouchers for the other payments were made — [Refer Exhibit DF 22], To date the requested vouchers were not furnished.

#### D. Findings

The AOG Jubilee University is not established by Law as is required. The AOG Jubilee University is not recognised by the Office of Higher Education  
Government Funds were used to establish and pay running costs of the AOG Jubilee University without any money being appropriated through the normal budgetary process.  
Payments accessed were derived from the East Sepik Highway Trust Fund and so was illegal transfer of monies appropriated for a specific purpose. Mr. Thadeus Kambanei abused his position as Secretary for Finance to access funds illegally from monies legally set aside for other purposes.

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#### F.. Recommendations

Mr. Thaddeus Kambanei be referred for investigations by the Police.

## G. Bougainville Crisis

The Commission examined five (5) matters, four (4) of which were claims against the State for losses that are alleged to have occurred during the Bougainville crisis and one (1) concerned claims for consultancy services which were alleged to have been provided to the State.

Angela Dyra Morgan NakituLtd  
Kareana Estates Jimendi Enterprises  
John Jaintong & Joseph Bare Onguglo

The Commission's findings specific to each matter are contained in the respective investigation reports. Essentially, the findings of the Commission were that all claims were settled despite – being time-barred

Lack of notice pursuant to section 5 of the Claims By & Against the State Act 1996

No cause of action disclosed — all alleged breach of duty on the part of the State in failing to protect their property and business interests that were destroyed

Claimants failure to identify wrongdoer primarily responsible Solicitor General accepting documents provided by claimants only Gross failure by Solicitor General to effectively seek instructions

In one (1) matter, the claimant sought payment for consultancy services to the State allegedly rendered at the time the claimant was a serving Member of Parliament. The Acting Solicitor General denied having executed the deed of release.

The Commission recommends the following:

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Investigation and prosecution of officers implicated Recovery of proceeds

(a) Angela Dyra Morgan

Parties

For the State:

(a) Attorney-General & Solicitor -General

For the Claimant:

(a) Angela Dyra Morgan

Others (if any)

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Eda Ruma Pty Ltd

Tuluan Enterprises Pty Ltd

Mr. Henry Onsa (Director of Tuluan Enterprises-Director & Shareholder)

Terms of Reference ("TOR")

The applicable Terms of Reference to this claim are TOR a (1), (5), (7), (8), (9)  
(12) and (14)

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Documents and investigations conducted at:

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The documents were accessed from the SG file No. 491 of 2002. The matter was settled by the Solicitor-General and that no proceedings were ever filed in the National Court. In addition the team also conducted investigations into the other aspect of the claim on the following State/Corporate institutions:- |

Attorney-General (AG) Solicitor-General (SG)

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Department of Finance

Department of Lands & Physical Planning (DOL) Registry of Companies-IPA

The Matter

Mrs. Angela Dyra MORGAN submitted a claim to the State by way of a letter addressed to Mr. Damem, Attorney General and dated 12th January 2002 (SG "1") for the sum of K6S6,800.00. Mrs. Morgan sought compensation for loss of rental and business between periods August 1986 to October 1996. Mrs. Morgan alleged that both her property and facilities on Buka were used during the Bougainville crisis and that "the State was the custodian of her people and property". That was the major substance of her claim against the State and included two (2) Invoices.

Invoice 1 of the claim related to the loss of rental and land charges for the period 1st January 1989 to 31st August 1994 for the property known as Buka Lodge and situated on Portion 301 Milinch of Buka. An amount of K117,800.00 was claimed against the State

Invoice 2 of the claim related to the loss of wharfage, rental and land charges for the period 26th October 1989 to 21st July 1996 for the use of the facilities on the property known as Kokopau Passage which is situated on Portion 316, Milinch of Buka. An amount of K539,000.00 was claimed against the State.

The period of which the claim was submitted and payments made in respect of the claim are within the COI TOR.

REVIEW OF MATERIALS RELATED TO THE CLAIM

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The Commission's review of the file(s) held at the Office of the Solicitor General, the Department of Finance, IPA and Department of Lands disclosed material facts that are of significance to the findings of the Inquiry.

The Claim had no supporting documentation to show that the State and/or its agents had ever used the facilities/properties on the said land during the Bougainville Crisis.

There was no section 5 notice made by the Claimant to the State was sighted on the records of the Solicitor General's file.

There was no application made to the SG or the Principal Legal Advisor to extend time to file the claim.  
No proceedings were commenced in the National Court by the Claimant to pursue the claim lawfully.

5> Despite the lack of compliance with the provisions of the Claims by and Against the State, 1996, the then Acting Solicitor General, Mr. Zacchary Gelu executed a Deed of Release [on behalf of the State] with Mrs. Morgan on 7th September 2002 without admitting liability, for the full and final settlement of K656,800.00.

Mr. Gelu also failed to consult the then Attorney General and Secretary for Justice Mr. Damem as required by section 13 of the Attorney General's Art.

That commitment made by the State on the Deed of Release was setded by way of five (5) installment payments made by the Department of Finance either to Mrs. Morgan direcdy or through the Solicitor Generals Office. The payments made are:-

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No
Date
Cheque No.
Amount ("K")
Details
1
24.12.02
707315
10,800.00
See GE 883923 (Refer to "FD 22")
2
25.12.03
710209
31,000.00
See GE 890397 (Refer to "FD 23")

3  
07.04.03  
717119  
100,000.00  
Refer to "SG 18"  
4  
17.08.04  
787309  
315,000.00  
See GE 996323(Refer to "FD 24")  
5  
14.12.04  
797900  
200,000.00  
Refer to "FD 24A"  
?  
?  
Total  
656,800.00  
?

> Despite the effect of NEC Decision 150.of 2003 to the Solicitor General on conducting review of settlements of claims against the State, part payments of the claim was processed and paid by the Department of Finance.

y There was however stop– payments directives issued by Mr. Kumura on his appointment as Acting Solicitor General. The stop payments were later reviewed and cleared by his successor Mr. Kuvi on the final two payments which was settled by the Department of Finance.

The Department of Lands

The Department of Lands provided information to the Commission on the land described as Portion 316. The information provided shows that

^ Eda Ruma Pty Ltd (from documents sighted on the SG File and provided by the Claimant) was the registered legal lessee of the land known as Portion 301 Milinch of Buka (Buka Lodge) .Portion 301 Milinch of Buka was leased to Eda Ruma PL on 8th August 1986 and up to 08th September 1994. The land was later sold to Hamamas P/L on 8th September 1994. (Refer to "SG 1.3 & 1.4")

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Tuluan Enterprises Pty Ltd was and is currendy the registered legal lessee of Portion 316 Milinch of Buka (Kokopau Buka Passage). According to documents attached to the Claimants submission, Portion 316 Milinch of Buka (KOKOPAU BUKA PASSAGE) was leased to Tuluan P/L on 26th October 1989 and up to 21st July 1996. The records indicate however that the land was sold by PNGBC [when the company defaulted on its PNGBC mortgage payments] to Selau Corporation on or about May 1996. The former Managing Director of BSP, Mr. McIlwraith confirmed that no mortgage sale was conducted by PNGBC on Bougainville during crisis and therefore any sale transaction including

that of Portion 316 was illegal. The Registrar of Tides has confirmed that Tuluan Enterprises is the legal lessee.

Investment Promotion Authority

Investment Promotion Authority documents show that:-

Eda Ruma Pty Ltd was incorporated as a Company on 23rd June 1981. The shareholders are Angela Marisse Morgan, Leo Robert Morgan, Leonora Beta Morgan, Robert Polomi Morgan, Brigitte Takoi Morgan and Winifred Vavine Morgan.

The Directors of the Company include Leonora Morgan, Angela Dyra Morgan (also named as the Company Secretary), Leo Robert Morgan and Michael Newall WILSON. The Company was de-registered on 12th September 1996.

Tuluan Enterprises Pty Ltd was incorporated as a company on 3rd January 1979 and was de-registered on 19th December 1996.

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The Shareholders to the Company include Leo Robert MORGAN (1000 issued ordinary shares) and Henry Peter ONSA (1000 issued ordinary shares)  
The Directors of the Company are Henry Peter ONSA, Leo Robert Morgan and Angela Dyra Morgan (also named as the Secretary of the Company).

Witnesses

The following persons gave evidence on oath;

- Mrs. Angela Dyra MORGAN (The Claimant)

She confirmed that she had filed a claim against the State but did not institute any proceedings in the National Court. She also did not engage a lawyer to pursue her claim with the State. She confirmed that she received the full amount of K686,800.00 from the Department of Finance. ( Refer t o ' Transcript o f p r o c e e d i n g s COIFinance 32 dated 13 October 2008 f r o m pages 850 t o 884 )

- Mr. Zacchary GELU  
(Former acting Solicitor General)

He said in evidence that the basis for settling the claim was the fact that the Bougainville crisis was due to the failure of the State to negotiate the Bougainville Copper Agreement. Based on humanitarian consideration he did not undertake any due diligence on the claim despite the lack of compliance with the provisions of the Claims by and Against the State Act. It was his opinion that because these were claims for services rendered the claim based on Invoices, therefore should be settled without going to court and that section 5 notice was not required.

(Refer to COIFINANCE 57 dated 21st January 2009 and COIFINANCE 58 dated 22nd January 2009)

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Mr. Francis KUVI  
(Former acting Solicitor General)

He confirmed issuing instructions to the DoF to uplift Mr. Kumura's stop payment and directed Finance to make the final installment payment. The reason for this decision was that the claimant had provided sufficient documentation to the SG which was satisfactory and acceptable, though it was quite clear that the claim did not meet the statutory requirement of CBAS Act.

Mr. Kuvi also confirmed that Mrs. Morgan had contacted not only the Attorney General but also the Prime Minister and others in government on her claim, and that there was numerous times the Department of Finance was pressuring the Office to clear the matter for payment (after Mr. Kumura's stop payment directive. (See pages 1515-1516 of COIFINANCE61).

(Refer to COIFINANCE61 dated 28th January 2009)

Mr. Andrew Numbasa  
(Former acting First Assistant Secretary-DoF)

He confirmed that the full amount of K686, 800.00 was paid to Mrs. Morgan. (Refer to Transcript of Evidence dated 13th October 2008 COIFINANCE 32)

Mr. Francis Damem  
Former Attorney General and Secretary for Justice at the time the claim was submitted to the Department by Mrs. Morgan. His evidence was that in 1992 there was a policy initiated by the Mr. James Baker, then first Solicitor General not to settle claims arising out of Bougainville because of the crisis, Under the policy, State Lawyers were required to seek instructions and

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defend the claim concerning Bougainville. (Refer to COIFINANCE 72 dated 18th February 2009- pages 2011 to 2016).

Mr. Henry Onsa

Mr. Onsa provided information to the Commission and informed the Commission he wrote to the Attorney General and the State Solicitor advising not to entertain the claim. He further advised the office that she (Angela) was neither a shareholder nor a director and had no authority and power to make decisions and act for Tuluan Enterprises Ltd. He confirmed that no claims have been filed by his company or personally against the State with respect to the use of the facilities on Kokopau. In his letter to the Commission he said that the claim was false, because the Defence Force [Royal PNG Constabulary and other government agencies] had never used the facilities or properties as claimed by Mrs. Morgan. (IPA records indicate that she was both Director]Secretary of the Tuluan Enterprises United)

Mr. John Kawi

Mr. Kawi said in evidence that section 5 of the CBAS Act does not provide any 'discretion' to the Solicitor General or Attorney General to negotiate a settlement without going to court or initiating proceedings as required under section 5 of the Act. (See his evidence at COIFINANCE 74 dated 24th February 2009 at pages 2133 to 2136)

711-

Findings:

The Deed of Setdement ( Attorney Generals Act)

The Deed of Setdement was executed without the consent and approval of the then Attorney General, Mr. Francis Damem. There was a standing policy that all Bougainville claims were to be defended by the lawyers within the Office of the Solicitor General. (Refer to the evidence of Francis Damem and John Kawi above).

The Office of Attorney General/Solicitor General

(Claims by and Against the State Act and Attorney Generals Act)

The Claim was not filed in accordance with section 5 of the Act.

y There were no proceedings instituted by the Claimant in the National Court.

The claim was filed with the Office of the Solicitor General well outside of the statutory six months time period as required by CBASAct.

The claimant failed to seek extension of time to file its claim against the State.

712-

Due Diligence

The then acting Solicitor General (Mr. Gelu) failed to liaise and consult the PNGDF on the claims made by Mrs. Morgan that the property was used by members of the security forces during the period of the crisis. The Invoice was not scrutinized by the State and accepted on its face value without any inquiries carried out as to its authenticity.

There is no cause of action alleged against the State for the use of the property under any contract.

The State failed to carry out a search of the Investment Promotion Authority to ascertain the registration and directorship of the two companies. The records of the company show that these companies have been de-registered and thus all the assets are vested in the Registrar of the Company until all outstanding fees/returns owed to IPA are discharged. (See Transcript of Proceedings COIFINANCE 55 19/12/08 at pages 1293 to 1295).

The State also failed to carry out a land titles search of the two properties to ascertain the ownership of the property.

NEC Decision 150 of 2003

Clause 3, 5, 9 and 12 of NEC Decision 150/2003 was not complied by the Solicitor General and the Attorney General. The claim was subject to the Decision and that Mr. Kuvi failed to institute proceedings in the National Court for a declaration that the Deed of Release was null and void and to commence full recovery of the amount paid by the DoF to the Claimant.

S t a t u t e o f Limitations and Fraud Act

713-

The claim was time barred pursuant to the Statute of Frauds & Limitations Act

F. Public Finances ( Management) Act., 1996

The Office of the Solicitor General failed to refer the claim to the Ministry of Finance for approval as required by section 61 of the PFMA. The claims have budgetary implications on funds lawfully available on the claims in excess of K500,000.00.

Recommendati ons

Attorney General and Solicitor General

The Solicitor General to institute proceedings to declare the Deed of Release null and void and to recover K686,800 from Mrs. Morgan.

Mr. Zacchary Gelu

Mr. Gelu should not be considered for any future appointments in the public service having being negligent in the manner he handled the claim without having regard for statutory provisions dealing with claim against the State.

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(b) Nakitu Ltd

Does the matter fall within the Terms of Reference?

The matter does fall within several Terms of Reference of the inquiry. Firstiy, it relates to the Deed of Release ("Deed") which was the basis on which settlement of K7 million was negotiated with the State and signed on the 10 September 2002. Secondly it relates to the continuous defiance of various NEC Decisions by the Solicitor General's office, Attorney General's office and the Secretary-Department of Finance, to obtain approval and clearance before making payments to the Claimant. Thirdly, it relates to the NEC Decision, authorizing the engagement of private law firms by the Attorney General to issue recovery proceedings against fraudulent claimants.

This matter is therefore covered under the Terms of Reference: 5, 6, 7, 8, 9, 10 and 12.

Source of Information and Documentation

This brief comprises of facts and findings from the files and records of: The Attorney-General's Office  
The Solicitor-General's Office Department of Finance &  
Evidence given at Hearings, including Statements from various people happy to assist.

Background: Relevant Facts

The Matter

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On 05th January 2002, Claimant by a letter to the Attorney General purportedly gave Notice of Intention to make a Claim against the State, (Doc: 1-AG)

By another letter dated 4th March 2002, the Claimant wrote to the Minister for Finance, Planning and Rural Development, and copying Minister for Justice, Attorney General's Office and Secretary for Finance, alleged that since the State had failed in its duties to the claimant by failing to curtail the Bougainville conflict in 1998, he had sustained loss to his trucking business and service station and other property and assets and therefore the State should be held liable for his loss.

Attached to the said letter were: a bound document titled "A Claim for Compensation against the Independent State of Papua New Guinea for Loss of Business due to the Bougainville Rebellious Uprising" & "Nalritu Financial Projection Notes & Assumptions". (Doc: 2-AG)

The Claimant claimed a total of K13.1 million, as the "projected" loss suffered.

Zacchary Gelu, then the Acting the Solicitor-General at the time, entered into an agreement with the Claimant's Lawyers to settle the claim out of Court and by signing a Deed of Release on the 10\* September 2002, (Doc: 11-SG) setded the claim by Nakitu in the sum of K7,000,000.00.

Following the settlement by Deed of Release, a number of part payments were made to Nakitu by the Department of Finance.

Payments by the Department of Finance.

716-

The record of payments to Nakitu kept by the DoF indicates that Nakitu has been paid a total of K3.259 million. These part payments are as follows:

10/03/2005

102258

207

4201

2107

135 Nakitu Ltd

Pmt for o/s Dor Clai CQ

804832

10/05/2005  
8  
207 207  
4201  
2107  
135  
Nakitu Ltd  
Settlement of Debts  
CQ  
810030  
1/08/2005  
103088  
4 207 4  
201  
2107  
135  
Nakitu Ltd  
Pymntof CHS SettLo  
CQ  
816745  
31/08/2005  
5  
207 4  
201  
2107  
135  
Nakitu Ltd  
Pmt for o/s court or  
CQ  
818838  
25/01/2003  
104236  
207 4  
201  
4123  
135  
Nakitu Ltd Trading  
Part Pay.-SG344/02  
CQ  
710211  
12/02/2003  
7  
207 4  
201  
4123  
135  
Nakitu Ltd Trading  
Deed of release debt  
CQ  
711710  
20/03/2003

104678  
207 4  
201  
4123  
135  
Nakitu Ltd Trading  
Pmt for O/S deed of  
CQ  
715414  
4/04/2003  
8  
207 207  
201  
2107  
135  
Nakitu Ltd Trading  
Paymnt O/Standing De  
CQ  
716807  
3/06/2005  
8903S3

4201  
2107  
135  
Nakttu Ltd Trading  
Pmt for o/s DOR sett  
CQ  
812545  
3/06/2005  
892642

4201  
2107  
135  
Nakitu Ltd Trading  
Pmt for o/s DOR clai  
CQ  
812570

Total K 3259000.00

## Chronology

Claimant claims that prior to the Bougainville Crisis which started in 1988, it had a successful trucking business which had just entered into a contractual agreement with Bougainville Copper Limited (BCL) to lease its 12 trucks, when the crisis started, which then forced the Claimant to abandon the business and leave Bougainville for Lae.

Thirteen years after Kandaso Napi left Bougainville, he wrote to the Attorney General's office on 5th January 2002, giving his intention to make a claim against the State for compensation for loss of his business in Bougainville.

About two months later, the Claimant wrote to the Minister for Finance and in that letter, which is dated 4th March 2002, the Claimant amongst other things, stated his claim to be K13.1 million and requested settlement of same.

In pursuing the claim, the Claimant relied on compiled documentations titled, "Nakitu Pty Ltd Financial Projection Notes and Assumptions" and "A Claim for Compensation against the Independent State of Papua New Guinea For Loss Of Business Due To The Bougainville Rebellious Uprising".

717-

By a letter dated 17 April 2002, and again on 29th May 2002, the Claimant, through their lawyers Harricknen Lawyers, sought from the Attorney General, extension of time for their Client to give the relevant Notice pursuant to the Claims by < & against the State Act 1996. (Docs: 7-AG & 8-SG)

On 5th June 2002, in response to a request by the Attorney General to provide an advice on the State's position on the claim, to the Minister for Finance, John Kumura, as the Acting Solicitor General at that time, wrote to the Minister For Finance, essentially advising the Minister that there was no basis for such claim, however, taking into account the State's inability to address the landowner issues, Mr. Kumura added that the Claimant should be compensated by way of an exgratua payment. (Doc: 9-SG).

Despite this advice, a Deed of Release was signed on 10th September 2002, by the Claimant and Mr. Gelu, who was the Solicitor General at that time, effectively settling the claim for a sum of K7 million.

Following the signing of the Deed of Release, Mr. Gelu wrote to the Secretary – Finance, then Mr. Kambanei, advising him of the settlement and requesting settlement of same. (Doc: 12-SG)

By this time, NEC Decision No. NG 07/2002 had been made, but it seemed, Mr. Gelu gave no consideration to it and proceeded with the settlement. (Doc: 10-AG)

On 25th July 2003, NEC Decision No. 150/2003 was made and amongst other matters, it gave approval to the Attorney General to apply to the Court for Judicial Review of any questionable claims or out of Court settlements in excess of K500,000.00. (Doc: 17-AG)

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The same decision also gave approval to the Attorney General to engage a private law firm to institute recovery proceedings against persons or corporate entities that have made questionable or fraudulent claims and have been paid by Finance Department through out of court settlements.

In compliance with the NEC Decision .No. 150/2003, Mr. Damem, then the Attorney General, wrote to the Secretary – Finance, requesting the Secretary to refrain from making payment to any out of court settlements, unless cleared by his office. (Doc: 18-AG).

Also in accordance with the said NEC Decision, Attorney General, Mr. Damem, gave instructions to Paraka Lawyers to issue proceedings challenging the validity of the Deed of Release and pursue recovery of the money already paid pursuant to the Deed of Release. (Doc: 20-AG)

Paraka Lawyers filed a Writ of Summons (WS 1006/04) on 30th July 2004 in accordance with Attorney General's instructions.(Doc: 21-SG)

8th September 2004 – Prime Minister, Sir Michael Somare wrote to Attorney General, Damem, and directed immediate settlement of the claim. (Doc: 23- AG).

However, in another letter, dated 8th October 2004, the Prime Minister withdrew his instructions of 8th September. (Doc: 25-AG)

On 30th December 2004, Acting Solicitor General, Mr. Kuvi, writes to Finance Secretary, Mr. Kambanei and amongst other matters, advised that, he had reviewed the claim and found no plausible reason for further delay of payment and directed Finance Secretary to pay the balance of the claim to the Claimant's Lawyer's Trust Account. (Doc: 26-SG).

719-

Following this letter, several part payments were made on: 10th March 2005 10th May 2005, and 3rd June 2005. (refer to record of payments above)

24th August 2005, Paraka Lawyers obtained a restraining order (Doc: 30-SG) against the Finance Department from making further payments. In support of the application, Mr. Kuvi, who was the Acting Solicitor General then, put on an affidavit (Doc: 27-SG) stating amongst other things that:

He was aware of the facts giving rise to this matter and further stated that Mr. Gelu, then the Solicitor General had purportedly entered onto a Deed of Setdement with the Claimant for and on behalf of the State, following purported negotiations with the Claimant.

Despite, court proceedings being filed, the Claimant was still pursuing further payments of the balance of the claim, which he believed had to be stopped, hence his support of the application.

Following the filing & service of the Writ of Summons, the Claimant through Harricknen Lawyers

filed a Defence on 24th October 2005 (Doc: 31-SG).

Whilst that is the case with this proceedings (WS 1006 of 2005), the Claimant filed Court Proceedings WS 1182 of 2006, (Doc: 37-SG) essentially seeking specific performance of the Deed of Release dated 10th September 2002 and in addition claimed that, had the Bougainville crisis did not come about, the Claimant would have prospered up to 2005, but because there was the crisis, it made a loss of profit up to 2005. Based on this allegations, the Claimant made a claim for K53 million.

After the proceedings, WS 1182/06 was filed, the Attorney General withdrew instructions (Doc: 38-AG) from Paraka Lawyers and the matter was taken back to the Solicitor Generals Office to deal with.

720-

31. To date, both matters have been consolidated are pending before the Court with progress to trial and the State is now represented by Greg Manda Lawyers.

List of Documents

?		
DATE		
DOCUMENT		
COMMENTS		
1		
AG		
5 January 2002		
Letter from Kandaso Napi, Managing Director, Nakitu Trading Limited to Attorney General		
Notice of Intent to claim Against the State pursuant to section 5 Claims Bv andAgainst the State		
Act.		
2.		
AG		
4 March 2002		
Letter from Kandaso Napi, Managing Director, Nakitu Trading Limited to Minister for Finance		
Setting out claim history and stating value of K13.1 million and requesting minister to deliberate		
on his claim,(including enclosures)		
3.		
AG		
14 March 2002		
Letter from Nakitu Limited to Minister for Justice & Attorney General		
This was to further provide further notice of intention to claim against State and seeking assistance		
in settling the claim		
4.		
AG		

28 March 2002

Letter from Hon. Andrew Kumbakor, MP, Minister for Finance, Planning and Rural Development to Attorney General

Advise of receipt of claim by the claimant and request legal advice before settlement

5.

AG.

28 March 2002

Minute by Minister for Finance to the Secretary Department of Finance

Request for advice on whether similar claims have been settled before and the criteria employed to settle

6. FD

8 April 2002

Letter from Lionel Manua, Harricknen Lawyers to the Attorney General

Provide notice of legal representation to the AG and setting out claimants claim and inviting the A.G to consider their claim in light of the Peter Goodenough matter with a view to settle

7. FD

17 April 2002

Letter from Lionel Manua, Harricknen Lawyers to the Attorney General

Refers to their letter of 8 April 2002 seeking extension of time to give notice Pursuant to CBASA. They also set out the claimant's claim again

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8.

AG.

29 May 2002

Letter from Lionel Manua, Harricknen Lawyers to the Acting Solicitor General, John Kumura

Referring to meeting between the lawyer and the Solicitor general on the 28/5/02 and enclosed copies of document entitled: A

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Claim for Compensation Against the State....,

9.

AG.

5\* June 2002

Letter from John M. Kumura Acting Solicitor General to Hon. Andrew

. Refers to, the Minister's letter to A.G of 21/3/02, and advised that A.G has referred to him, (Acting Solicitor

Kumbakor, MP Minister for Finance,  
General) to provide advice on State's position

Planning & Rural Development  
regarding claim, Kumura Advises that after considering

various correspondences, the State's position would be

that all claims arising from the Bougainville Crisis

were to be denied.

He mentions that though the claim may be genuine,

the State was not responsible for the acts complained

of by the claimant

He further mentions that he is aware of settlement of

the Department of Finance of similar claims and states

that under the circumstances an ex gratia payment

would be appropriate.

10..

SG.

28th August 2002

NEC Decision No. NG 07/2002

Setting out among other things a direction that, there be no more out of court settlement by any State body or authority including any by the A.G and Solicitor general without the approval of the NEC acting on advice from the CACC.

11.

SG

10th . .September 2002

Deed of Release Between: Nakitu Limited trading as Kandaso Napi and the Independent State of

Papua New Guinea

Setting out terms of settlement, and agreeing not to issue proceedings against State for same subject matter

12.

AG.

17th September 2002

Letter from Zachary G. Gelu, Solicitor General to Mr. Thaddeus Kambanei, Acting Secretary, Department of Finance

Advice to Secretary that claim was genuine and that parties had agreed to settle the matter for K7million and requesting that a cheque in that amount be raised and paid to the claimant care of Harricknen Lawyers

13. SG

5th March 2003

Letter from Napi Kandaso, Managing Director, Nakitu Trading Limited to Mr. Thaddeus Kambanei, Secretary, Department

This was an urgent request for payment of the claim

722-

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of Finance

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14.

SG.

26th March 2003

Letter from Napi Kandaso, Managing Director, Nakitu Trading Limited to Mr. Thaddeus Kambanei, Secretary, Department of Finance

Follow up letter further requesting urgent payment of claim

15. FD

2nd April 2003

Letter from Napi Kandaso, Managing Director, Nakitu Trading Limited to Nino Sarufa, First Secretary — Budget, Department of Treasury

Follow up letter further requesting urgent payment of claim

16. FD

16\*April 2003

Letter from Katherine Kakaraya Agiru, Southern Consultancy Limited to Mr. Thaddeus Kambanei, Secretary, Department of Finance

Follow up letter further requesting on behalf of claimant urgent payment of claim

17.

FD.

25th July 2003

NEC Decision No. 150/2003

Among other matters was directive:

That, all out of court settlement including consent orders are to be reviewed and cleared by the A.G or his nominee.

Also directed that all out of court

settlement in excess of K1 million are to be approved by the NEC prior to any payments by Finance;

and further approved that out of court settlement payment for any claims against the State in excess of K1million must at all times be deferred unless S.G in consultation with the A.G furnishes in writing to Secretary Finance that in his

723-

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deliberate judgment State has no Defence or no reason to challenge the claim or appeal against the amount awarded.

proved that A.G immediately apply to the court for Judicial review of any questionable claims or out of court settlements in excess of K500,000.00

18. FD

11th September 2003

Letter from Francis Damem, Attorney General to Secretary Department of Finance

Provides that in compliance with NEC decision 150/2003, a review of all out of court settlement by suspended S.G Gelu be reviewed.

Further states that he has commenced review of some major questionable settlement effected by Deed of Release by suspended A.G. and amongst other files found the claim by Nakitu Limited a questionable settlement and stated that Finance cease payments forthwith until it was cleared by his office

19 AG

20 September 2003

Letter by Kathy Kakaraya Agiru to Secretary Finance, Thaddeus Kambanei

Alleges among other things that the A.G has lied to the Deputy Prime Minister and Mr. Dusava intending to induce the secretary to pay claimant's claim

20 AG

16th February 2004

Letter from Francis Damem, Secretary and Attorney General to Paul Parka Lawyers

Instruction to issue proceedings to challenge the legality of the Deed of Release and recover all monies paid out to the claimant

21. FD

28th July 2004

Writ of Summons WS NO. 1006 OF 2004, Filed: 30/07/2004

Statement for claim issued by Paraka Lawyers seeking to declare Deed of release illegal and void

22. AG

27th August 2004

Letter from Lionel Manua, Harticknen Lawyers to the Right Honourable Prime Minister

Request to Prime Minister to direct A.G to pay the balance of the claimant's claim and that further the claimants had met with the A.G who advised the claimant to send the request to the Prime Minister who would then authorize payments

724

23.

8th September 2004

Letter from M T Somare GCMG KStJ CH,

This states he has received a request from claimant SG

Prime Minister to Mr. Francis Damem,

and letter states that PM is aware of adverse legal

Attorney General

implications if it failed to comply with the Deed of

release. He also directed the A.G to immediately notify

Finance to release payments and settle payments of

K6.3 million

24 AG

4 October 2004

Minute from John Kumura DSG to Francis Kuvi Acting SG

Kumuar states that he has carriage of the claimants matter and that the file has been with the AG since 2002. He further states that he has responded to the PM's letter on behalf of the AG and that Francis should take the matter up with the AG

25.

8\* October 2004

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Letter from M T Somare GCMG KStJ CH,

This is a request by the PM to the A.G advising that AG.

Prime Minister to Mr. Francis Damem,

the letter he signed on the 8/9/04 to settle the

Attorney General

claimants claim was done in error, and was withdrawn

and that they not take further notice until further

instructions

26.

30th December 2004

Letter from Francis G. Kuvi, Acting

Advice that matter was settled by a Deed of Release

SG

Solicitor  
General to  
Mr. Thaddeus  
and further stating that after first payment a stop was

Kambanei,  
Secretary,  
Department of  
issued. He further states that he saw no reason why

Finance  
the matter could not be settled as the only controversy

surrounding the matter were certain allegations made

against officials of the Department He also stated that

he reviewed the claim and found no reason for

delaying" payment any further.

27.

20\* July 2005

Affidavit of Francis Kuvi; WS NO. 1006 OF

States that he was aware of the background of the  
AG.

2004, Filed: 21" July 2005

matter, and that it was settled by a Deed of Release on

the 10/9/02. He goes on to outline the process for

payment of claims, where he says that he checks the

claims and when satisfied approves same.

He also states that he was aware of two payments

made to the claimant before the recovery action was

commenced, and that at the time of swearing the

affidavit, was aware that the claimant was seeking

further

725-

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payment, and accordingly sought to stay any payments to maintain the "status quo".

28.

SG.

14th July 2005

Affidavit In Support By Dickson Gwaina; WS NO. 1006 of 2004, Filed: 21" July 2005

Deposes the inability of Paraka Lawyers to serve WS and SOC on the claimant as he was not resident in Lae.

29.

SG.

27 July 2004

Finance Department Minute from Otto Wangillen Acting FAS, Public Accounts Division to Deputy Secretary Operations

Outlines a list of matters including the" claimants claim earmarked for payment by Finance

30 SG.

24th August 2005

Court Order WS NO. 1006 OF 2004, Entered 31" August 2005 by Paraka Lawyers for State Restraining the Secretary Finance from making any payments on the Deed of Release, and further for substituted service of the Statement of claim

31 FD

24th October 2005

Defence WS NO. 1006 OF 2004

Stating that

the state had a policy to settle claims arising from the Bougainville Crisis, which was endorsed by Acting SG Kumura; and by Sir Peter Batten in a statement to the Government.

Accordingly the Claimant issued its notice of intention to claim from the State;

Whilst litigation remained an option negotiations were pursued and accordingly the Deed was signed;

Illegality of the deed, statutory time bar issue, and lack of the SG powers to settle matters is denied

32 FD

4<hJanuary 2006

Letter from Lionel Manua, Lionel Manua Lawyers to Paul Paraka Lawyers

Serving Notice of change of lawyers and providing copies of the PM's letter of 8 September 2004 (withdrawn by PM in 8/10/04) and SG letter to Finance Secretary (later denied in his affidavit). And advising the State to discontinue the action.

33

31st July 2006

Letter from Paul Paraka Lawyers to

Report to Attorney General setting out the

726-

SG

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Acting Attorney General

basis of the claim and the manner in which the claim was settled by the Deed of Release and the options available to the State and the chances of success it had of declaring the Deed void.

34. SG

18th July 2006

Consent Notice to Set Down for Trial, W.S. NO. 1006 OF 2004, Filed: 2nd August 2006

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35 AG

9th August 2006

Brief from Hitelai D. Poluneh-Kiele, Acting Solicitor General

Setting out the background of this matter, and the legal position faced by the State and the issues raised in the brief inter alia, provided, was the status of a void agreement. The brief essentially states that with all NEC directives in place it was highly improper for the settlement to take place between the claimant and the State. Accordingly it was the State's duty to recover the money or if to be settled in accordance with the S.61 of the Public Finance (Management) Act and or by the approval of the NEC.

36 SG

11 August 2006

Letter from Fred M. Tomo, Acting Attorney-General to Mr. Paul Paraka, Paul Paraka Lawyers

Advising Paraka Lawyers to continue pursuing the action commenced and not to settle the claimant's claim until the proceedings were determined in the State's favor

37 SG

15 August 2006

Writ of Summons, WS NO- 1182 OF 2006, Filed: 15.8.06

Statement of Claim by claimant seeking relief for breach of Constitutional rights by reason of the

State's failure to provide police etc.. by reason thereof the Claimant sustained losses to his business.

38 AG

15 November 2006

Letter from Fred M Tomo, Acting Secretary & Attorney General to Mr. Paul Paraka, Paul Paraka Lawyers

Withdrawal of instructions from the State to Paraka Lawyers

39 SG

19 March 2007

Letter from Hitelai D. Polume– Kiele, Acting Attorney General to Mr. Aaron Mirana Nawason  
Hitelai Polume's explanation to Aaron Mirana on the claimant's claim, that nature of the claim was dubious, the Deed being illegal and the settlement was orchestrated and facilitated

727–

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persons without lawful authority. ~

40 AG

4 May 2007

Affidavit of Neville Devette WS NO. 1182 OF 2006, Filed: 04.05.07

That a Writ Of Summons was served on~the~ State but since no section 5 Notice was issued the State was not aware of the impending claim

41 AG

Undated /unsigned

Draft Defence, WS NO. 1182 OF 2006

ing issues that.

No section 5 Notice was given under the CBASA for the claim;

The entire claim is statute barred;

The onerous duty placed on the State which it could not have reasonably been expected to achieve.

42 SG

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Finance Department Cash Book Record and Payment Advice / Vouchers

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43 SG

24th January 2008

Letter from Mr. Kandason Napi, Managing Director, Nakitu Fast food & Restaurant Ltd to Hon. Dr. Allan Marat, Minister for Justice & Attorney General

Request by Napi Kandaso for approval to setde part payment of claim on the basis that he had been paid K2.9 million with the balance of K4.1mn still outstanding. And that he had commenced an action purportedly to enforce the Deed of release in proceedings WS 1182/2006, hence

the request for intervention by the Minister.

## D. Findings

### Cause of Action/Claim

1. As can be seen from the documentation compiled by the Claimant, their claim is essentially based on projections and assumptions for their alleged loss of business arising from the forced closure of the Bougainville Copper mine as a result of the crisis.

728-

In other words, the Claimant is saying that, it had been operating a successful business, largely based on contracts from BCL and that due to the State's failure in handling the landowner issues properly the crisis forced BCL mine to close, consequently the claimant suffered a loss which the State is now somewhat responsible.

Obviously from these claim one can see that there is no cause of action known at law to support such claim and to link the State and make the State liable for loss of business which the claimant claims as suffered. The losses, if any at all, which the claimant claims has suffered, arose as a result of an act of war on Bougainville caused by the rebel elements. In the circumstances the State cannot be blamed for such losses which in the legal sense are extremely remote and that the cause was by the intervention of a third party.

On examination of Mr. Gelu, as the Solicitor General on this issue, he essentially agreed that there was no cause of action, (see transcript of proceedings no. 81, pp2677-2678) but yet he proceeded to settle the claim.

### Compliance with Statutory Requirements (Preliminary issues)

#### > Fraud & Limitations Act 1988 (The Act)

The Commission's first finding as set out above is that, the claimant does not have a cause of action.

However, assuming that there is one based on Tort, as claimed by the claimant's lawyer, Mr. Manua (see Transcript of Proceedings No. 16, p.468), the cause of action would accrue from 31st December 1989 and continued till 31st December 1995.

729-

The finding by the Commission that the cause of action would accrue from 31st December 1989, is based on the evidence by the claimant who says that the said date was the start of the Bougainville crises that forced him to leave Bougainville and eventually destroyed what he owned on the island. (see Deed of Release–Doc: 11–SG)

In light of this, the notice by the claimant of his intention to make a claim against the State given on 5th January 2002 was time barred.

In spite of this, and the fact that there was no cause of action, Mr. Gelu, as the Solicitor–General at the relevant time, still went ahead and accepted the Claimant's offer and settled the claim for K7 million.

> Claims By & Against the State Act 1996(CB&ASA)

By 31st December 1989, Section 21(2) of the CB&ASA had not been enacted. This would mean that the requirement for notice of intention to make a claim against the State did not exist then.

However, after the enactment of the current Act, which includes Section 21(2), which came into operation on 20th February 1997, two situations were created in respect of a cause of action that accrued against the State as at the time of the enactment and the commencement date of this Act

The first situation relates to cases in which proceedings had already been instituted whilst the second relates to cases in which no proceedings had yet been issued.

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The claimant in this matter had until 20th August 1997 to give the required notice or in the event that he is out of time, to seek leave to give notice out of time, but he failed to do that and after, almost 13 years had passed and he sends his letter of 5th January 2002.

The said letter by the claimant which he relies upon as the Section 5 Notice under the Act, cannot be accepted as the required Notice, for the simple reason that, no leave was given to the claimant to give his notice out of time.

Actions/Steps taken to Defend Claim & Outcome

This is one of the matters that clearly show that, State was not properly represented by its lawyers, the Solicitor General in particular. In other words, no steps were taken by Mr. Gelu to defend the claim.

It is very clear that by his conduct in not questioning the claim put forward and the preliminary issues as referred to above, he was not acting in the best interest of the State.

At all relevant time, Mr. Damem was the Attorney General, who after becoming aware of Mr. Gelu s actions, took steps to correct the errors by Mr. Gelu.

## Consideration of relevant NEC Decisions

1. Both NEC decisions numbered 7 of 2002 and 150 of 2003, were not complied with by the Solicitor General, in particular Mr Gelu and Mr Kuvi and the Secretary of Finance, Mr Thaddeus Kambanei

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By the time the Deed of Release in this matter was signed, there was already in place the NEC Decision, Decision No. NG 07/2002 which directed inter alia matters that:

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

Despite these clear directive, the then Solicitor General moved to settle this claim and committed the State to K7Million without first obtaining the approval from the NEC or securing the necessary clearance from either the Attorney General and the Secretary for Treasury to make this commitment as required by NEC Decision No. NG 07/2002.

## Payment

See paragraph 8 above.

## Witnesses called & examined/produced statements or documents

Lionel Manua Zachery Gelu Francis Kuvi Francis Damen  
Hitalai Polume-Kiele Thaddeus Kambanei

## Recommendations

1. Amendments to relevant Legislations

## Claims By and Against the State Act & Attorney General Act

- Amend both legislations to include specific provision as to:

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The type of matters that can only be determined by the Courts The type of matters that can be settled out of Court

The Officer who would be authorized to settle claims out of Courts The amount, the Officer with the authority to settle can settle on

In addition include provisions to:

Make it compulsory for the State officer handling a claim consider preliminary issues, such as Standing and time limitation.

Require the claimant to also give a copy of the section 5 notice to the head of department responsible for the claim.

The Departmental Head/his delegate must be required to provide instructions within 30 days to the SG.

Make provision for offences/charges to be laid on officers of both SG and the respective Government or Department, who fail to comply with the requirements to give instruction.

If a matter is to be settled out of Court, the appropriate Officer/Officer with authority must get written consent of the Departmental Head to settle. In the absence of such approval, a claim must progress to Court.

SG must always consult the AG & or report to the AG for all claims against the State

If a matter is to be settled out of Court on agreement by parties, such claim must be sanctioned by the Court first.

- The Deed of Release must be signed and sealed with the Seal of the State to be endorsed by both the SG & the Action Officer of SG

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Re: Finance, payment must be only made on advice of the SG on production of all necessary documents.

Possible Recovery Actions

The DoF has already made a total payment of K3.259 million to the claimant, who is still pursuing the balance.

In the meantime, Court Actions have been instituted by the State to have the Deed of Release set aside. If that action is successful, the State will stop making further payments and given that the claimant is operating a business in Lae, the State could also issue proceedings to recover the K3.259 million already paid to the claimant.

Prosecutions/Referral/Other

Action by Mr. Gelu — unacceptable for someone holding such position, who agreed that his action was wrong.

In the circumstances, he should not be considered to hold such positions ever again.

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(c) Kareana Estates Ltd

For the State

(a) Attorney General and Solicitor General

For the Claimant

Nelson Wahune Kareana Estates Limited

Others

(a) Department of Finance

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

Court documents show that a claim for K 5 . 441 . 369 . 00 was instituted by Nelson Wahune, Managing Director of Kareana Estates in the National Court on 2nd June 2003. On 3rd July 2003 Mr. Damem then Attorney General and Secretary for Justice by way of a letter to the Mr. Kambanei, then secretary for Finance cleared the amount of K4million for payment. On 24 May 2004, Department of Finance paid an amount of K2million to Mr. Wahune.

The claim falls within the TOR (a) (1) (2) (3) (4) and (5)

## THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

The claimant Nelson Wahune from East Sepik Province married Rose Audrey Sipaiovi from Kareana village, Tinputz, Bougainville in 1997. He registered the Sipa family cocoa fermentary business which was operating in Tinputz. The Wahune family moved to Port Moresby in 1989 due to Bougainville crisis but Rose returned to her village in 2000. Nelson and Rose separated/divorce in 2002. Wahune remarried. Kareana estate belong to the Sipa family and not Wahune.

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On 19th May 2003, Wahune intimidated to Mr. Mayberry that he owned a cocoa trading business in Tinputz. Mayberry confirmed that the claim appeared reasonable. On 2nd June 2003, Mr. Wahune initiated proceedings against the State claiming K5,441,369.00 for loss and destruction of business due to Bougainville crisis. On 7th July 2003, the State filed the Notice of Intention to defend and Defence within time. Then Attorney General and Secretary for Justice (F. Damem) initiated an Out of Court Settlement with Wahune at K4 million and gave clearance to Mr. Kambanei, then Secretary for Finance to process the payment. At the time Wahune filed the proceedings Kareana estates was deregistered on the IPA records.

Wahune's claim was processed in two parts. The first part was made by Cheque No. 779268 for K2,000,000.00 dated 24th May 2004 which was deposited into his Maybank Savings Account. The second payment made by Cheque No. 788313 for K2,000,000.00 dated 26 August 2004 was made payable in Wahune's name, payments were made out of the Trust Fund Suspense Account (TFS A/C 460-31)The second payment was stopped on instructions from the Ombudsman Commission.

It is to be noted that as a result of this claim, Nelson Wahune was charged by the police for making a false claim against the State. In that respect the following persons were also charged by Police for conspiring together with "Mr. Wahune to defraud the State namely Francis Damem ( former AG & Secretary for Justice ) , Boas Hembehi, John Vailala ( BSP), Jacob Yafai,( Do F) Margoni Wamanimbo ( Private Businessman) and Simon Maniha ( Private Business Man).

## DOCUMENTS PRODUCED FOR EXAMINATION AND REVIEW BY THE COMMISSION

A. The documents referred to below are significant to the findings of the inquiry into the claim. (Refer to SG 698/03-Supplementary File)

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Payment Vouchers confirming the amount of K2 million was paid and deposited into Mr. Wahune's

account.

Letter of 3rd July 2003 from Damem to Kambanei on the purported clearance to pay Wahune K4million.

Same letter (as above 2) from Damem to Wahune advising of his acceptance of the offer and settlement for K4 million. That very letter was later confirmed by Wahune as acceptance of the offer for settlement by the State and that to treat is as the Deed of Release. (Letter of response dated 8 July 2003)

## Statements and Correspondence of Witnesses

Below is a summary of the statement and correspondence received from persons who assisted the Commission with information

### 1. Statement by Thomas Mane dated 7th July 2009

Tendered as Exhibit Mane 1 on 7th July 2009 (COIFINANCE 113)

He confirmed that he had acted as a Consultant for Mr. Nelson Wahune and had made representations to the then acting Solicitor General, Mr. Kumura to settle the claim at K1million. He submitted a submission on the quantum on 23 June 2003 for the SG to consider and further discussion. No further negotiation took place until several months when he was informed that DoF had paid Nelson Wahune K2million. He expressed surprise that K2million was paid to Nelson Wahune. He expressed his concerns to the then Attorney General and demanded that investigations be conducted into what he considered as irregularities in the payment. He also found out that the file was "hijacked" and went missing. He states that "Nelson Wahune and Thaddeus Kambanei are relatives from the same area of Yangoru in East Sepik."

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### 2. Mr. Peter Pena

Covering letter and Court Documents tendered as Exhibit "PETER PENA 1" (COIFINANCE 113 dated 7th July 2009–Page 3926)

Mr. Pena stated for the record that after further instructions to file the WS, Mr. Wahune never came back to their Office and was uncontactable on telephone numbers he left with them. The firm ceased acting for Mr. Wahune soon after the filing of the writ and advised that the same on 6th October 2003. The Law Firm confirms that it was never a party to the settlement with the State. The Firm confirmed that it acted for Kareana Estates from 12th May 2003 to 6th October 2003.

Also confirms receiving States Notice of Intention to Defend and Defence on 30 July 2003.

### 3. Ms. Evelyn Golman

Finance Officer–DoF

Adopted the evidence presented to the Commission on 12th April 2007 pages 338 to 346.  
(COFINANCE113 dated 7th July 2009 and COIFINANCE 12/4/07)

She was the Claims Examiner in the Public Accounts Division, DoF and gave evidence as to her duties as an examiner to ensure that all claims submitted for payment must comply with financial instructions and the PFMA.

She stated that she was instructed by her immediate superior to certify a blank FF3 and FF4 form with respect to the claim. She admits that there was a directive dated 24th August 2004 issued by Mr. Kambanei and Mr. Yer which approved the claim for payment out of Trust Fund Suspense Account #2 and despite her understanding that the claim did not meet the requirements she went ahead to certify the blank forms, (pages 341 and 342 of Transcript dated 12/4/07)

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4 , Mr. Andrew Numbasa

Then Acting FAS (Public Accounts Division)–DoF

Adopted the evidence presented to the Commission on 12th April 2007 pages 319 to 330.  
(COFINANCE IB dated 7th July 2009 and COIFINANCE 12/4/07)

He issued instructions for the officers to verify the claim and to seek legal clearance. On his perusal of the claim documents he sighted Mr. Damem's letter with any endorsement from Mr. Kambanei to pay half the claim to reduce the interest cost.

He also was not aware of the NEC Directive on settlements in 2002 and 2003 which was issued to DoF for processes to be approved by the Minister. (Communication gap between the DoF, Attorney General and Justice and NEC)

Nelson Wahune

Letter dated 6th July 2009 faxed to COI and read into records.

He advised the Commission that he was not able to appear as he was arrested and charged in November 2006 in Lae in relation to the same matter and was on bail condition which restricted travel out of Lae until the trial at Lae National Court

Thaddeus Kambanei

Former Secretary for Finance and Accountant COI Finance 113 dated 07 July 2009 at page 3926

Mr. Kambanei's responses to our questions are contained in his letter to the Commission dated 8th July 2009 .

cc

"1. There was no reason for me to clarify with the Attorney General if the claim was settled by a Court Order or by a Deed of Release. From my professional judgment it was obvious that the claim was really a deed of release rather than a court order. As a paying office I expected all due diligence to have been complied with by the Attorney General before it

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was forwarded to the Department of Finance for payment. As a colleague department head it was not possible for me to question his signature because he is the Attorney General and his advice is final and binds the State.

I have never at any point in time accepted Mr. Nelson Wahune's letter as confirmation to settle the claim for payment. Mr. Wahune is not the authority and there was no way I could have processed the payment without the clearance from the Attorney General. The cc copy of the letter from Mr. Wahune to Secretary for Finance which was later referred to the Deputy Secretary to confirm with the Attorney General is the normal thing to do when correspondence is received from clients. There is nothing very unusual with such comments because it is normal process.

The payment out of the Trust Fund Suspense Account was meant to be a temporary expenditure intended to be cleared once the Warrant Authorities are received from the Department of Treasury. The trust instrument allows for such expenditures to be made as advised and cleared by the Attorney General...

It should be noted that when approvals are granted by way of an internal memo from the recommendations of the First Assistant Secretary it triggers off the check and balances and the internal control systems and processes. The approval is not a legal approval to circumvent the normal financial procedures as such.

There was no urgency to settle Kareana's claim. My comments on the claim with the notation "Please action ASAP" is a common notation used to expedite the process without any time to it."

#### C. WITNESSES

1. John Kumura

Former Acting Solicitor General, Public Servant and currently employed as a lawyer with Posman Kua Aisi Lawyers

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Evidence on oath at pages 3926 to 3934 COIFINANCE 113 dated 7th July 2009

Mr. Kumura in summary said in evidence as follows :-

Directed Mr. Bokomi, State Lawyer in SG to defend the claim.

Confirmed that Mr. Mane did request through the Office to settle the claim and received the quantum submission.

The Notice of Intention to Defend and the Defence was filed within the time (90 days)

o Writ was filed on 2nd June 2003 o NOID filed on 2nd July 2003 o Defence filed on 7th July 2003.

Expressed surprise that Mr. Damem had approved and cleared the claim for payment. The letter which was later accepted as a Deed of Settlement by Mr. Wahune.

The file went missing at the time the settlement took place. He later heard that it was settled for K4million.

Francis Damem

Former Attorney General and Secretary for Justice

Evidence on oath at pages 3935 to 3938 COIFINANCE 113 dated 7 th July 2009

Mr. Damem referred to an earlier application he made to the Commission by an application dated 12th April 2007 to maintain his silence with regard to the matter. He was actually charged for conspiring with Mr. Wahune to defraud the State of K4million and later discharged on a 'nolle prosequi'.

Jimmy Bokomi

Former State Lawyer with SG and now with Rageau Manua Kikira Lawyers

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Evidence on oath at pages 3941 to 3947

Mr. Bokomi in summary said in evidence as follows:-

He was assigned with the file and was instructed by Mr. Kumura to file the NOID and Defence. He filed the NOID and Defence within time.

The Defence he states related to the section 16(1) of the Statute of Frauds and Limitations.

The file went missing and could not be located in the Office. The matter was settled at the time the file went missing and even though he was no longer in charge of the file, the file register was not amended.

## OUR OBSERVATIONS ON THE FACTS AND EVIDENCE PRESENTED TO THE COMMISSION

Office of the Solicitor General & Attorney -General  
(CLAIMS BY & AGAINST THE STATE ACT, 1996)

The Solicitor General had filed the Notice of Intention to Defend Defence within time.

Section 5 notice was not pleaded in the Statement of Claim and extension was sought by the Claimant for filing the Writ some 14 years claim that the company suffered losses as a result of the crisis.

The Claim was statute time barred

y There was no valid claim against the State.

No Deed of Release was ever signed between the State and Mr. Wahune, principal of Kareana Estates.

and the

also no after the

-742

Mr. Damem had provided an advice on request by the Secretary for Finance on the clearance for the claim. Mr. Damem failed to consult the Solicitor General and had acted on his own free will to provide clear a claim that could have been dismissed by the National Court.

Mr. Damem's reference in the letter that the State had filed the Defence and NOID was out of time was misleading because the records sighted indicate that the claim was filed within time.

Section 61 of the Public Finances ( Management) Act, 1996 ( PFMA)

This claim was settled for K4million and under Section 61 of the PFMA. Ministerial Approval was necessary to enable the State to enter into a legally binding and enforceable contract. There is no evidence that a Deed of Release was entered into between the parties

Department of Finance

(Public Finances (Management) Act, 1995

y The payment of the amount of K2million out of the Trust Fund Suspense Act No. 2 is highly irregular when the account was subject of scrutiny by the Office of the Auditor General and the Public Accounts.

y The request by Mr. Kambanei, then Finance Secretary to Mr. Damem, then Attorney General and Secretary for Finance for clearance was highly suspicious and irregular, given the fact that the process was reversed to facilitate the clearance for payment.

y The most important document for facilitating the claim was cleared even though the FF3 and FF4 was blank at the point where the claim had in fact satisfied the requirements including the need for evidence and documentation.

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#### OUR RECOMENDATION

That the Office of the Solicitor General institute proceedings in the National Court to recover K2million (including interest and other costs associated with the claim) from the Mr. Wahune and Kareana Estates Limited.

That the Office of the Public Prosecutor and the National Fraud and Anti- Corruption Squad advise on the current status involving charges for "Conspiracy to defraud" against Francis Damem and others involved in facilitating the fraudulent claim.

That the conduct of the former Secretary of Finance, Mr. Thaddeus Kambanei in facilitating the fraud by issuance of instructions to his subordinates' be referred to the National Fraud and Anti Corruption Squad for further investigation.

That the Officers of the Department of Finance involved in facilitating the claim through the Waigani Public Accounts Section be dealt with under the disciplinary provisions of the Public Services (Management) Act and the Public Finances (Management) Act

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(d) Jimendi Enterprises Ltd

PARTIES For the State

(a) Office of the State Solicitor

For the Claimants

(a) Mr. Jimmy Kendi

Any others (if any)

Department of Defence Department of Finance

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

Mr. Jimmy Kendi claimed that the PNGDF had unlawfully used his heavy machinery and equipment during the Bougainville Crisis and made a claim for K4. 298,037.33 to the PNGDF. The claim was cleared and approved for payment based on the legal advice provided by the State Solicitor to the Department of Finance for settlement of the claim. The Department having obtained that advice processed and settled the claim for the full amount of K4, 298,037.33 on 14 November 2000.

The claim falls within the TOR (a), (1), (2), (3), (4) and (5).

THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

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Mr. Jimmy Kendi (currently a prisoner of the State at Kerevat CIS) the principal of Jimendi Enterprises Limited instituted proceedings in the National Court for K4 }298 , 037 . 33 against the 'State' for the use of earthmoving equipments by PNGDF on Bougainville during the crisis.

Mr. Kendi operated an earthmoving company in Arawa. It leased, on hire basis, a number of heavy machinery and equipment from Credit Corporation, through a Lease Agreement dated 20 March 1984. The company failed to pay its monthly lease rates and Credit Corporation repossessed its machines in around July 1987. The company went into receivership. At the time of repossession and receivership, JIMENDI was working on a road project construction contract at Inus Plantation which was awarded to it by the then North Solomons Provincial Government. Credit Corporation completed the project. All earthmoving equipments and trucks including the ones leased to JIMENDI were on June/July 1987, shipped back to Moresby. In Port Moresby, the machines were refurbished and sold.

According to Credit Corporation, no machines were left behind on Bougainville before the crisis.

In 1999, by letter dated 14 December, 1999 under the letterhead of Jimendi Enterprises Limited, Mr. Kendi wrote to Mr. Vari Fore, the Secretary for Defence and lodged a claim for K4, 298,037.33 against PNGDF for the unauthorized use of heavy equipment by PNGDF during the Bougainville crisis. Heavy equipment alleged. This letter is important. He claimed that he had owned two machines, which PNGDF were using during the crisis and owing to misuse by soldiers, were rendered useless. This claim was false. The two machines were owned by Itakara Plant Hire (Toru Toru Transport), the owner was a Mr. Peter Goodenough. He fled Bougainville at the height of the crisis.

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At the time Jimmy Kendi sent the letter referred to in the preceding paragraph, he knew that Jimendi Enterprises limited was deregistered around September 1996. It is evident that prior to sending the letter, Jimmy Kendi proceeded to register a new company– BAKANNOYI TRANSPORT Ltd on 16th April, 1999. Although, Jimmy Kendi initiated the claim against the State under Jimendi Enterprises Limited, he in a letter dated 18 October 2000 addressed to the Secretary for Defence wanted the cheque paid out under BAKANNOVI TRANSPORT Ltd.

The claim was processed but the cheque was paid under Bakanovi Transport Ltd. General Expense Forms No. 737643 dated 14 November 2000 were processed for payment of heavy equipment

used by PNGDF during the crisis period 1991–1997. /Jimendi went into receivership around July 1987 and the leased earthmoving equipments and machinery were repossessed by Credit Corporation]. Payments were drawn from the Miscellaneous Vote 207–4201–4123–135. Cheque was raised in the name of Bakanovi Transport. Cheque No. 632311 dated 14 November 2000 for K4,298,037.33 was paid to Bakanovi Transport Ltd. The amount of K4,298,037.33 was paid to the credit of Bakanovi Cheque Account maintained with the then PNGBC. Bakanovi Transport is registered under Jimmy Kendi and his wife Norma Kendi.

The exercise of due diligence and financial prudence in the expenditure decision making process lies on the part of the Secretary of Finance, being the Chief Accountable Officer, in this, was wanting. It is his responsibility to ensure that all accounting and financial procedures in relation to the payment of public monies are strictly observed.

At the time of payment, there was no NEC Policy in place to monitor and control the management of payment of claims against the State. [On 22nd August 2000, NEC issued a directive prohibiting all State body or authority including Attorney General and Solicitor General in executing out-of – court–settlements, unless they obtain approval of NEC, (vide: Clause 10–Decision No (07 f2002), Special Meeting No. NG 05/2002]

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The following persons/entities were paid out of the proceeds of the claim paid to Bakanovi Transport Limited:–

1. Michael Keni (Jim Kendi's brother)  
250,000.00
2. Ambrose Vakinap  
183,000.00
3. Nelson Wahune  
117,000.00
4. Christopher Ningis (Hanks Management)  
420,000.00
5. Thomas Niniga  
149,333.34
6. Philip Polewara  
20,000.00
7. Frank Pomoso  
5,000.00
8. David Nelson  
12,000.00
9. Henry Hanimo  
12,000.00
10. Robert Naris  
60,000.00

11. Jason Naris  
102,000.00  
12. Rally Omoso  
25,000.00  
13. Koseng (PNG) Ltd  
500,000.00  
14. PNG Balsa Company  
165,000.00  
15. Toba Motors  
78,000.00  
16. Andersons Foodland  
61,085.70  
17. Ela Motors Ltd  
43,949.99

Mr. Kendi was charged by the Police with the Misappropriation of K4,98,037.33. He pleaded not guilty and matter proceeded to a full trial. The National Court (Mr. Justice Lenalia) at Kokopo convicted Jimmy Kendi on the charge of misappropriation on 4th July 2006. On 26th April 2007 the National Court sentenced Jimmy Kendi to a term of 9 years IHL of which he is currently serving that sentence at the Kerevat goal.

#### FINANCIAL INSPECTION SERVICES DIVISION INVESTIGATION REPORT

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The Commission has sighted the Report which was based on the investigation into breaches to the PFMA that rendered the payment highly irregular. The report was separate investigation conducted by the Financial Inspection Services Directorate of the DoF in 2003 and submitted to the Secretary of Treasury on 24 April 2003.

The Investigation Report recommended as follows :-

"1. Serious disciplinary action pursuant Section 52 of the Public Services (Management) Act 1995 (PSMA) be initiated against the officers (Lt. Col G. Wiri, Mr. Vari Fore, Lt. Philip Polemra, Lt. Col. T.K Falaniki, Maj. Otto Pandum and Mr. Peter Siune) who have violated Section 102(f) & (i) of the Public Finances (Management) Act, 1995 (PFMA)

Minor disciplinary action pursuant to Section 51 of the PSMA against the officers (Mr. Ravu Paku, Mr. Ben Pokanau, Ms. Nino Saruva, Mr. Tailai, Yeme Kaivila and Ms. Mary Martin) deemed to have committed offences under section 50(e) of PSMA.

Surcharge action pursuant to section 102 of PFMA for breach of subsection (f) & (i) be initiated against all the above officers (Mr. Ravu Paku, Mr. Ben Pokanau, Ms. Nino Saruva, Mr. Luiilai, Yeme Kaivila, Ms. Mary Martin, Lt. Col G. Wiri, Mr. Vari Fore, Lt. Philip Polemra, Lt. Col. T.K. Falaniki, Maj. Otto Pandum and Mr. Peter Siune)) pending result of further investigation carried out by the

National Fraud and Anti Corruption Squad.

Recovery of the payment of K4, 298, 037.32 made on 14th November 2000 should be dependent on the outcome of the Police Fraud Squad's Investigation. In any event, Solicitor General to initiate recovery action for the unauthorised interest amounting to K1, 423, 737.32 paid to Jimendi Enterprises/Bakanovi Transport.

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5. No farther payment to Jimendi Enterprises,/Bakanovi Transport be entertained until such the Police have completed their investigation.

6. Improve internal control procedures as outlined in this report to ensure that proper payment procedures and verification have been followed.

#### REVIEW OF EVIDENCE RELATED TO THE CLAIM

The Commission commenced hearings on this claim on 7th July 2009. A number of persons were invited to attend the hearings and assist the Commission with its inquiry into manner by which the claim was processed [by virtue of the Claims by and Against the State Act) through to the settlement of the claim by the Department of Finance.

#### WITNESSES

The following witnesses gave evidence on oath at the Commission hearing on 7th July 2009.

1. Mr. Ben Pokonau  
(Unattached Officer-DoF)

At the time the Claim was processed, he was the Deputy Secretary Operations and had sighted and authorized the claim for payment. He also gave evidence as to the process by which the DoF processes the claims as soon as a written instruction sealed by the Solicitor General to effect payment is received from the SG/AG. Mr. Pokonau had authorized the FF3 (Requisition for Expenditure), though the claim was submitted to the Department of Defence. He states at page 264 of the Transcript dated 4th April 2007 that, "on or about around 10 November 2000 the then Financial Controller, a Mr. Using who was also the financial delegate brought the claim that is the

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FF4, the FF3 and other supporting documents like the letter from the Secretary of Defence, who

was Mr. Vari Fore. The letters from the ground commanders who admitted using the machineries in question, and of course the letter from the legal, Solicitor General's Office giving clearance to process the claim."... (page 265) Also attached to the claim was the legal clearance from the then Solicitor General Mr. Isikel Mesulam (He was the State Solicitor at the relevant time).

...Upon sighting the documents, I then of course having satisfied myself that all was in order, I signed as section 32 officer approving requisitioning of that expenditure.. At that point in time....I was never aware of the any fraudulent intentions either by my officers or from the documents from the Department of Defence. (Page 266).

(Refer to Transcript of Proceedings COIFINANCE 113 dated 7th July 2009–pages 3898 to 3901; Transcript of Proceedings dated 4th April, 2007 at pages 249 to 344).

Exhibit POKONAU1: Statement examined on and read into record on 4th April 2007 and accepted as part of his evidence on 7th July 2009.

Mr. Vari Fore:

Former Acting Secretary for Defence

He confirmed signing the FF3 giving rise to the claim by Jimmy Kendi but not the FF4 (not completed) on the basis of the legal clearance by the State Solicitor. The FF3 and FF4 was submitted to DoF but was not processed for want of form and the FF4 which was not completed by the Defence Department.

He was not aware that the claim was approved for payment by the DoF and the evidence of Mr. Pokanau confirms that another FF3 and FF4 was filled by DoF and approved by Mr. Pokanau for payment.

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(Transcript of Proceedings COIFINANCE 113 dated 7th July 2009 at pages 3904 to 3907).

VARI FORE "1" Bundle of document including letter dated 14/12/1999 from Jimendi to Department of Defence, FF3 dated ^October 2000 and signed by Mr. Fore and the incomplete FF4. (Document Reference No. 146 to 153).

4. Ambrose Vakinap

Unattached Officer–Former Assistant Secretary–Liaison and Advisory to Provincial and District Treasuries–Department

Mr. Vakinap prepared a written statement dated 26th March 2007 and submitted to the Chief Commissioner under the subject "Statement of Circumstances heading To My Involvement With The Fraudulent Payment To Jim Kendi of Jimendi Enterprises" (Exhibit VAKINAP "1")

The records from the Bank indicate that Mr. Vakinap received K1 83,000.00 from Mr. Jimmy Kendi. His explanation is contained in the statement in which he denies neither colluding nor conspiring with Jimmy Kendi to defraud the State. The statement in part reads;

" . . . I categorically deny any claim that I indicated the whole process of this claim payment. Any such claim can only be attributed to the ignorance of any individual of the financial accounting and claim processing sequence of activities that exists with the Government cash accounting procedures and processes.

(Transcript of Proceedings COIFINANCE 113 dated 7th July 2009 at pages 3901 to 3903).

WITNESSES UNAVAILABLE FOR FURTHER EXAMINATION

753-

Mr. George Minjihau  
Current State Solicitor

The records obtained from the DoF show that the legal clearance was authorized by the former State Solicitor Mr. Isikel Mesulam. The action officer was Mr. George Minjihau, then Deputy State Solicitor who had prepared the advice for Mr. Mesulam.

Mr. Minjihau was invited to come forward and assist the Commission with information, on the fact that the legal clearance allowed the DoF to make the one of payment to Bakanovi Transport which was owned by Jimmy Kendi. On 3rd July 2009, Mr. Minjihau replied and stated as follows: "I have been in poor health in the past few weeks and I have been under medication for the past three to four weeks and was in fact absent from work for these reasons in the past few days. This has compounded by the fact that I have been under immense pressure over the same period for my refusal to give legal clearance for execution of certain project agreements based on legal reasons.

I am requesting for an extension to respond to the notice in writing for up to maybe Wednesday, 8th July 2009.

The Commission reminded Mr. Minjihau on his undertaking to provide a statement to the Commission by letter dated 20 August 2009. Mr. Minjihau has not furnished any document and or statement to the Commission.

The Commission considers this to be very serious in particular where the principal of the company has been convicted of the offence of misappropriation pursuant to the Criminal Code. The actual clearance of the claim on hindsight provided the necessary means to authenticate the fraudulent claim

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The Commission notes that Mr. Minjihau was previously examined by the Commission and the evidence is referred to Transcript of Proceedings COIFINANCE 11 dated 11th April 2007 at pages 283 to 317.

## 2. Jimmy Kendi

Inmate at Kerevat Jail

The Commission was unable to visit the prisoner at Kerevat Goal and to interview him due to the end of term for COI. This should also be the subject of further inquiry to determine if any other persons from within the offices of the State have colluded with Mr. Kendi to defraud the state.

Inclusive of the above hearings, reference is also made to a number of witnesses who have assisted the Commission in its inquiry on the claim in reference to giving evidence on oath. See Transcripts of Proceedings COIFINANCE 8 (3 April 2007); COIFINANCE 9 (04 April 2007); COIFINANCE 10 (10 April 2007) and COIFINANCE 11 (11th April 2007).

## THE LETTER OF 7th NOVEMBER 2000 FROM THE STATE SOLICITOR TO THE SECRETARY, DEPARTMENT OF FINANCE

The Commission considers the letter from the then State Solicitor Mr. Isikel Mesulam has contributed to the payment of this illegal and fraudulent claim. The letter also reflects the ignorance on the part of the State Solicitor to recognize it as a claim against the State and therefore a matter that should have been referred to the Solicitor General and its officers for their action.

The Commission was unable to collect further information and explanation from Mr. Isikel Mesulam, the former State Solicitor; Mr. George Minjihau, current State Solicitor and the then Deputy State Solicitor (Commercial) and the author of the legal advice signed by the Mr. Mesulam, Lieutenant Philip P. K. Polewara, then Officer

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Commanding the small Boat Team on Taurato, Bougainville and Mr. Thaddeus Kambanei, Secretary for Finance, the letter is reproduced below. (Attachment "A") It is also confirmed from the decision of his honor Justice Lenalia that lieutenant Philip PK Polewara and Jimmy Kendi are brothers through their paternal genealogies. (See page 40 of the decision).

Letterhead of the Office of the State Solicitor

7th November 2000

Action Officer : George Minjihau  
Deputy State Solicitor (Commercial)

The Secretary  
Department of Finance and Treasury Vulupindi Haus WAIGANI National Capital District

Dear Sir,

RE: : SETTLEMENT OF CLAIM FOR UNLAWFUL USE OF EQUIPMENT– J IMENDI ENTERPRISES

I refer to your letter of 2nd November 2000 requiring our advice on the above claim by Jimendi Enterprises.

Before our advice is given on the validity of Settlement, I shall briefly outline the relevant facts, the basis of the claim, as disclosed from the appendices to your letter referred to above.

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Prior to and during the early stages of Bougainville crisis Jimendi Enterprises was an Earthmoving National Company operating on Bougainville Island. We are also aware that the same company has been awarded various civil works contracts on Bougainville Island for which payments have been made with the blessing of the National Executive Council.

During the crisis its operations came to a standstill but with all its Heavy equipment intact and still remaining on the island. The Company did not have the time to take the equipment out of the island when the crisis erupted, In any case when the Military moved  
a?

in, the evidence discloses that it took possession of these equipment and used it for its Military efforts and other Civic works programme in particular on Taurato island without any form of payment to the Company or its principal.

The principal of the Company Mr. Jimmy Kendi who moved to and now living in Rabaul made a claim to the Department of Defence in a letter dated 14th December 1999 for use of and destruction of the subject equipment by personnel of the Defence Force (Sea element) for the period specified.

There is no evidence either from the Defence Force, the Department of Defence or from the Department of Finance and Treasury refuting the allegations. To the contrary all documents confirm the allegations and has in fact admitted liability and the use of the equipment as alleged (see Defence Secretary's letter dated 4th October 2000) and the statement by Lieutenant Philip P. K. Polewara, officer commanding the small Boat Team on Taurato island dated 15th February 2000)

and advised Department of Finance and Treasury to settle.

In view of the above, the State's liability is in my considered view a non — issue as there is no evidence to contest liability if the claim is to be contested at all. In fact all the documents attached to show a clear intention of these Agencies to settle the claim.

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The only remaining issue would therefore be quantum of damages, an issue your Department and the Defence Department are better placed to ascertain as is your responsibility.

I assume this has been done as evidenced in your letter referred to above and moreover the attachment of the filled in 'Requisition for Expenditure Forms'. Based on all the above I am of the considered view the claim is in order for Settlement subject to funds being available. You may therefore proceed to organise settlement.

I trust the above is at some assistance to you. If you however, require further clarification on any aspect of this advice, please do not hesitate to contact the writer or myself.

Yours faithfully,

Original Signed ISIKEL MESULAM  
Acting State Solicitor

GM/kke

THE COMMISSIONS OBSERVATIONS AS TO WHAT WAS WRONG WITH THE PROCESSING OF THIS CLAIM BETWEEN THE DEPARTMENT OF DEFENCE, THE DEPARTMENT OF FINANCE AND THE DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL.

The Commission makes the following observations

(1) The Department of Defence received a letter of demand from Mr. Jimmy Kendi for the use of his heavy equipment by the Defence Force. He demanded payment for the period of use.

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The evidence at the criminal trial of Jimmy Kendi was that he had no heavy machinery on Bougainville, because it was repossessed by Credit Corporation (PNG) Ltd and taken back to Port Moresby for refitting and sold. (See The State – v-Jimmy Kendi (2006) N3129)

Then acting Secretary for Finance, Mr. Vari Fore was advised that the PNGDF elements on Bougainville had used Company heavy equipment He signed the Requisition for Expenditure (FF3) but did not sign the General Expense (FF4) as it was blank. The documents accompanying Mr. Kendi's letter was submitted to the Department of Finance. The reason for this was that the Department of Defence was having problems with funding given the Bougainville Crisis

The claim was received by the Department of Finance and immediately actioned by the then Deputy Secretary of Finance (Operations) Mr, Ben Pokanau. The Department of Finance raises the Requisition for Expenditure and the General Expense Form. Mr. Pokanau signs the Requisition as Section 32 Officer and sets the process for raising the cheque. There is no letter from the Office of the Solicitor General with the relevant court orders or any Deed of Release 9if any existed).

The Secretary for Finance, Mr. Thaddeus Kambanei, with reference to the request to the opening paragraph of the above letter which states, "I refer to your letter of 2nd November 2000 requiring our advice on the above claim by Jimendi Enterprises" refers the claim to the Office of the State Solicitor.

The State Solicitor having appraised itself of all the documents (the claimants) does not carry out any further inquiry with the Department of Defence nor do they consider it necessary to refer to the Office of the Solicitor General. The State Solicitor provides a legal advice clearing the claim to be processed for payment.

The State Solicitor has not consulted the Office of the Attorney General or the Solicitor General given the fact that this is claim against the State (Department of Defence) which involves consideration for the assessment of quantum. The letter merely overlooks that fact because there is no submission on quantum referred to the Office for consideration, which in the first place was the statutory function of the Solicitor General.

The Department of Finance relies on the legal advice provided by the then acting State Solicitor and processes the claim for payment.

The payment made to Mr. Vakinap would in our view indicate that other officers of the State within the Department of Defence, the PNGDF, the Department of Justice and Attorney General and the Department of Finance have worked as joint enterprise to defraud the state compromised their position. This matter requires further investigation.

## FINDINGS

The findings following our observations are:

> The Office of the State Solicitor/Department of Justice and Attorney General

Mr. Isikel Mesulam, then acting State Solicitor had acted without authority when he provided the legal advice thereby allowing the State funds to be misappropriated. Mr. George Minjihau, then Deputy State Solicitor is equally responsible for not properly advising the State Solicitor on the request for legal advice, when the matter involved was a claim made against the State.

The State Solicitor should have referred the matter to the Office of the Solicitor General and advise the secretary of Finance accordingly

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Further to that, the Commission's findings specific to this matter are that the claim was settled despite –  
being time-barred

No cause of action disclosed – all alleged breach of duty on the part of the State in failing to protect their property and business interests that were destroyed — claimants failure to identify wrongdoer

COMPLIANCE WITH PROCESS- REQUIREMENTS OF THE CLAIMS BY & AGAINST THE STATE ACT, 1996  
– ( CB& SAct, 1996 )

No court proceedings instituted by the Claimant as required by the Act.  
No Section 5 notice was given to the Office of the Solicitor General

The Claim:

This claim was not processed through the National Court and that the Office of the solicitor General was never involved in the matter.

The State Solicitors Office (Minjihau/Mesulam) cleared the claim for payment.

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

The Solicitor General was not served nor advised on the claim requiring payment.

Steps taken (not taken) by the Attorney General in defence of the claim

None

## Settlement

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None considered as the State Solicitor cleared it without any due diligence nor refer the matter to the Solicitor General and or the Attorney General

Pay- out – Department o f Finance c ompliance o r o therwise with Public Finances Management Act and r e l a t e d process.

The Department of Finance was not careful enough to note that the clearance was done by the State Solicitor. The State Solicitor does not have the authority under the CBAS Act to clear claims made against the State. Clearly there was an abuse of the applicable law that led to the illegal payment.

## RECOMENDATIONS

The Office of the Solicitor General initiate a review of the claim and institute proceedings under the Claims by and Against the State Act to recover the payment of K4,298,037.32 made on 14 November 2000.

That the recommendations made by the Financial Inspection Services Division dated 24 April 2003 to the Secretary for Treasury be implemented and in particular to initiate disciplinary actions and pursue surcharge action against the officers of the Department of Finance, Department of Defence & the PNGDF.

The Commissioner of Police to undertake further investigations on those suspected and implicated in the fraudulent misappropriation of state funds.

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## IX. RECOMMENDATIONS ARISING FROM INQUIRY

## Term of Reference Number 13 – Further Recommendations Arising from the Inquiry

By its terms of Reference the Commission focus has been directed to the Department of Finance and the Department of Justice and the Attorney General.

But claims examined originate in disputes with Government Agencies across public administration. Some of the claims investigated have disclosed serious error, unlawful action or failure in capacity of a department, or misconduct by officers affecting operation of the department.

The Commission reports these as matters for further inquiry and or reform. A.

### Department of Finance

In respect of the Department of Finance, the Commission recommends the following:  
National Executive Council

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

#### Audit Issues

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

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

#### Systems & Procedures

Immediately install and implement a proper accounting and information management system that is able to accurately capture and maintain all financial transactions of the State and produce reports and records on a timely basis.

A Section is created within the Cash Management and Expenditure Division to cater for all filings and record management of the Department,

A appropriately skilled person is appointed with additional staff to take stock take of all existing files and establishment of proper filing system,

An appropriate building with proper lighting, ventilation, shelving and security is secured to store files for the minimum statutory period of seven years.

Immediately cease the operations of the Trust Fund Suspense Account and Cash Adjustment Account.

Immediately stop all payments out of the Arrears Vote for settlement of claims against the State.  
Immediately establish a proper recording system of all claims against the State.

#### Settlements

In respect to settlement, the following should take place prior to cheque being drawn to settle claim;

y Finance Department keep a proper register of all claims received for settlement,

Check and verify with external parties such as Solicitor General, Registrar of Courts to ensure that the documents submitted in respect of any claim are genuine and there has been compliance with the Public Finances (Management) Act (TFMA7) and the Claims By against the State Act 1996.

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All claims approved by be forwarded to the Minister for approval as required under the PFMA. Further claims of K1.0 million and above, the Minister should seek NEC approval for settlement. the Financial Instructions and Finance Management Manual be reviewed to incorporate the requirements of Section 47D of PFMA and Section 2A of the Claims By & Against the State Act.

#### Referrals

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

Former Finance Secretary Thaddeus Kambanei be referred for further investigation in respect of the matters raised above and throughout this Report.

#### Review o f current management

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

#### Recruitment

The Department shall recruit qualified and experienced officers to perform competently in all functions as required.

All officers, particularly management, should have the following: o undergraduate degree in accounting

o Associate membership of Certified Practising Accountants of PNG (CPA PNG)

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o Clearance from CPA PNG that he/she is fit and proper person for the to be employed by the

## Department

- o Obtain clearance from Police Fraud and Criminal Divisions stating the persons considered for employment has no record of conviction and is not subject to investigation for possible fraud or other criminal offence
- o Subject all candidates considered for the position of the Secretary to a Interview Committee comprising of accounting (from international accounting firms) and legal experts for assessment of their knowledge of the accounting standards and relevant laws such as the PFMA.

## B. State Law Offices

### ( a) Attorney General

The Commission recommends that the Attorney General:

- create and maintain a Register of notices received pursuant to Section 5 of the Claims By and Against the State Act 1996
- improve communication and maintain constant dialogue between SG and in- house lawyers within State Departments, agencies etc
- establish protocols and manuals for processing all claims, and out-of-court settlements, which shall include that the Attorney General upon receipt of a Section 5 notice shall forward a copy of the notice of claim to the Secretary, Finance; Commissioner General, Internal Revenue Commission; and Governor, Bank of PNG.
- compile a register of all claims against the State in date order, which will be open to public scrutiny. The purpose of such a register is to: –
- Establish priority of claims
- Provide base data for budget forecasts.

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That such Register record all judgments and settlements to establish priority for payment in date order together with protocol that provides that there be no deviation from that priority except by direction of the NEC.

The Case Management System now developed by the office of Solicitor General could constitute such a Register if developed as information system with public access on a 'read only' basis.

The Commission also recommends the following amendments to the Attorney General Act 1989. The Attorney General shall:–

- be a lawyer admitted to practise and has continued in practice for at least ten (10) years in PNG;
- not hold any other public office;
- be appointed on recommendation by the Judicial & Legal Services Commission;

### (b) ) Solicitor General

The Commission recommends that the Solicitor General shall be:-  
called "State Counsel";  
a lawyer admitted to practise and has continued to practise in civil litigation for at least 5 years in PNG; and  
appointed on recommendation by Judicial & Legal Services Commission;

Notwithstanding that the Department of Justice & Attorney General is under course of restructuring pursuant to the White Paper sponsored by the former Minister for Justice, Hon Bire Kimisopa, and approved by the NEC in 2007, there should be an independent review of the operations of the Office of the SG to identify systematic failings and misconduct etc which continue to give rise to the following:

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Absence of competent leadership and crisis management Incompetence  
Abuse and misapplication of the letterhead (both AG and SG) Missing files  
Missing court documents and correspondence  
Ad-hoc creation of supplementary files (see Yama) Unreliable filing system  
Unreliable Registers  
© Lack of co-ordination in filing of documents between offices (Waigani and regional offices) (j)  
Fraudulent creation of files  
(k) Forgery of signatures of AG, SG and other officers etc  
(l) Lack of due diligence  
(m) Excessive taxation of costs  
(n) Failure to attend for motions and trial  
(o) Uncertainty with appointments for meetings generally  
(p) Lack of supervision of lawyers and staff  
(q) Failure to observe business hours  
(r) Poor file management  
File management is the professional responsibility of the lawyer having carriage of the matter and ultimately the Solicitor General. In the ordinary course, the file should contain instructions, all exchanges of correspondence, notes of telephone attendances, conferences, within and externally, court attendance notes, internal memos, court documents, process and other document collection/service forms, searches etc

The Commission examined five (5) Solicitors General who served in 2000 to 1st July 2006. They all spoke of a system or a practice that covered the above mentioned processes. This was not reflected in the files examined by the Commission.

Absence of file-notes, court attendance notes etc Inefficient service at the front counter

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Unreliable custody and movement of files

Failure to manage the release of cheques issued by Finance Department in settlement of claims  
Failure to monitor and audit status of payments (partial and full) and the reconciliation thereof  
Failure to enforce compliance with —  
o Section 2A of the Claims By & Against the State Act o Section 47D & 61, of the Public Finances  
Management Act o NEC Decision NG7 of 2002 o NEC Decision No. 150 of 2003 o NEC Decision No.  
21 of 2006  
Failure to monitor and audit status of payments (partial and full) and the reconciliation thereof

Further, the Commission recommends that the following take place immediately:  
y Officers implicated or involved to be suspended pending further investigation

^ Creation of manual for processes and procedures (c) State Solicitor

The Commission recommends that the Attorney General Act 1989 be amended to: make provision  
for the Office of the State Solicitor and its functions; and  
have the State Solicitor appointed on recommendation by Judicial Legal Services Commission.

(d) National Court

(i) State Court

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The National Court already has a number of "tracks" dealing with specific matters such as the  
Criminal Court, Commercial Court, Judicial Review and Appeals Court, and Election Petition Courts  
etc.

With the Solicitor General's office presently having a register of 11,000 claims and receiving some  
1000 new claims each year, a court administering State cases alone will provide timely and  
consistent resolution.

The Commission recommends that a "State" Court track be established to exclusively deal with all  
claims made by and against the State and related agencies.

(ii) National Court Registry

With regard to the National Court Seal and National Court Imprest, the Commission recommends  
that the:

Court seal be custom made;  
Court seal impressed on originating process, final court orders and certificates of judgment  
Court stamp be used for all other ordinary documents  
the Registrar, Deputy Registrar and Assistant Registrar shall:  
o maintain the security, custody and possession of stamps and imprest o create and maintain a  
"public register" of:  
final Orders; and Certificates of Judgment

In eight (8) matters examined, the Commission has found a common trend of events whereby there are documents purporting to be court orders awarding a judgment sum, Certificate of Judgment and clearance letters given by the Solicitor General to the Secretary, Department Finance for settlement. In all these matters, the Commission has found that there are no National Court nor Solicitor General files. As such, the following matters require further investigation:

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1. IBK (PNG) Ltd;
2. Besalam Investment Ltd;
3. John Toa;
4. Dick Teman;
5. Wesley Aisora;
6. John Jaintong;
7. Rex Leo; and
8. Simon Wapo; and
9. David Imig.

The Commission therefore recommends that an independent inquiry be conducted into the operations of the Registry of the National Court to identify systematic failings and misconduct etc which gave rise to the following:

Abuse and misapplication of the Court stamps / seals Missing court files

Missing court documents

Ad-hoc creation of supplementary files Unreliable filing system

Unreliable Registers

Lack of co-ordination in filing of documents between Registries Fraudulent creation of files

Forgery of signatures of Registrar etc

(j) Certificates of taxation on excessive costs

(k) Listing of matters for motions and trial without adequate notice

(l) Uncertainty with appointments for: Taxation

Call-overs Meetings generally

(m) Lack of supervision of Registry staff

(n) Failure to observe registry opening hours

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(o) Inefficient service at the Registry

(p) Unreliable recording of information on court file:

Endorsements / notations (pronouncements of the Judge)

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(q) Unreliable custody and movement of files

( e ) District Court Registry

With regard to the District Court Seal and District Court Imprest, the Commission recommends that the:

Court seal be custom made;

Court seal impressed on originating process, court orders and certificates of judgment; Court stamp be used for all other ordinary documents;

Secure custody and possession of stamps and imprest with the Clerk of Court. Clerk of Court create and maintain a "Public Register" of: o final Orders; and o Certificates of Judgment

In the matters examined, the Commission has found that there were lack of proper records to ascertain the reasons concerning the determination of liability, damages and costs. As such, the Commission recommends that the transcription services be introduced for recording of all District Court sittings.

Further, in respect of both Courts, the Commission recommends that the following take place immediately:

That manual for processes and procedures of the Registry be created; That register of actions and process be accessible on-line.

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C. Amendments to Claims By & Against the State Act 1996

( a ) No Default Judgments against The State

The great majority of claims for which the State has become liable have occurred without contest – by default judgment. They constitute the most significant single factor in the loss of public funds. With the claim stamped as fact, the State law officials have assumed that the only role left to them thereafter is to "negotiate" the compensation. This is a disaster that is still happening. The Commission continues to be notified of present day settlement of default judgments in outrageous sums.

i?

It can be stopped simply by excluding the State from the Court's default rules process.

It is clearly not appropriate that the State should by failure to defend in time or just by inaction of its officers, or agencies incur unspecified and unlimited liability. The State must always be a participant in the process of resolution of any claim against it.

It is therefore a recommendation for immediate implementation that the Claims By and Against the State Act be amended to provide that no judgment may be entered against the State by default. With such amendment the relevant Rule of the National Court Rules would cease to have effect (Section 184(4) Constitution)

This would effectively turn off the flow of uncontrolled settlements and return claims to actual resolution of fact, liability and damages by Court hearing or other transparent process. There is no reason why this action should not be taken forthwith.

Instead a procedure should be substituted that requires an order of the Court directing that the action proceed to trial on its merits including evidence of compliance with statutory process.

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It is not required or suggested that the Courts should be compelled to take a particular role in protecting the State in such matters, but, in exercising their judicial authority of the State the Court does have the duty to see that the laws of the country are not flouted. That duty must include an obligation not only to see the Court's own rules are followed but that the statutory process of the Claims By and Against the State Act 1996 is followed as well. The Supreme Court has in fact acknowledged such a duty of supervision.

In *NCDC -vs- Yama Security Services Pty Ltd* (2003) SC 7007 the Court said:  
"As part of the Courts constitutional duty and mandate as guardian of the laws of the State, the Court has a public duty to protect the public interest sought to be protected by relevant statutes  
3 )

It is also a recommendation of the Commission that, that constitutional duty be manifested by requiring evidence of compliance with Claims By and Against the State Act be proved before the Courts before judgments and/or consent orders are made against the State.

Executive Action Required

With key findings of Departments and public officers failing to carry out functions and duties lawfully even in defiance of Government direction, it is the Commission's strongest recommendation that Government reassert authority and control under a programme of reform and integrity review. This is enlarged below.

## Notice of Claim to be Served on Attorney General

Section 5 presently provides that service of notice of claim be served on the Departmental Head," or "the Solicitor General" and that the "Principal Legal Advisor" may, on cause being shown extend the time for notice.

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Provision for service on three officials, (when two may also hold the same position) is and has been shown to cause confusion and error.

Evidence before the Commission has disclosed that there has been inadequate communication between the offices of the Attorney General, Secretary and the Solicitor General resulting in none being aware or certain or consulting on whether a notice had been served on another or at all.

The essential requirement for notice matter under the Act is that it be served, in time, on the legal representative of the State, the Attorney General. There is no need to provide for alternate service on a subordinate in the same premises.

The Commission therefore recommends that the Section 5 of the Claims By and Against the State Act be amended by deleting the "Secretary" and "Solicitor General" from Section 5(1) and substituting the "Attorney General" alone.

### ( d) Amendments to Notice of Claim

For State lawyers to respond to claims against State agencies, time is required for inquiry from client agency and instruction. The ninety (90) day response time from service provided by the Court Rules is intended to accommodate that. But given that claims can arise across the country, ninety (90) days is in fact little enough time. The record of default judgments graphically demonstrates the failure of State to comply, whether failure is because of State lawyers failing to seek instruction or the agencies to respond.

The need for prompt response to claims could be resolved, by adding the State agency to the Section 5 Notice that a claimant must lodge with the Attorney General. It would impose no greater burden for a claimant. And further, to ensure the State lawyers are supplied with necessary facts to formulate proper response to the claim, Section 5 could be further amended to provide that the Departmental head of the agency

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concerned shall be obliged to supply to the Attorney General the agency's response to such claim and a statement of facts in support.

The Commission also recommends the following amendments:

Definition of 'suit' in Section 1 be amended to read — "any claim, action or original proceeding between parties in any court of competent jurisdiction, including applications under Order 16 of the National Court Rules."

Section 5 of the Claims By and Against the State Act be amended to provide that such notice shall be served on:

o the Attorney General (not Solicitor General and Secretary for Justice); and

the relevant head of department or State agency intended or required to be named as a Defendant;

Section 5 "Notice" shall be in the form of a statutory declaration and shall contain details as to the following:

o Full name of claimant or claimants o Authority to act (where more than one claimant) o Full details of the claim (to enable Attorney General to ascertain time– bar issues and to obtain instructions)

Date Place

Nature of claim

Loss or injury sustained witnesses

State parties

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There shall be no discretion to extend time to give Section 5 notice where the cause of action is time–barred by operation of law.

Definition of 'State' to include all governmental bodies as defined in the Constitution, Schedule 1.2

Form 1 Certificate of Judgement be replaced with certificates signed separately by: " Registrar – Form 1 A; and

? Attorney–General – Form IB (on presentation of form 1A), in the forms set out in the Appendix.

i?

To provide that no judgment may be entered against the State by default. Instead a procedure substituted requiring the action proceed to trial of the merits including evidence of compliance with statutory process.

To provide that no settlement of a claim against the state be made without the approval of a National Court judge. Such a process is already provided in the National Court rules in court supervision of administration of Trusts and Estates and settlements for infants in personal injury cases. Such a course ensures a transparent factual assessment according to Law.

To provide that any application for a consent order for judgment against the State shall be endorsed with a certificate by the Attorney General in his own hand signifying compliance with the provisions of the Claims By and Against the State Act and that the payment of the consent sum has the approval of the Minister of finance under Section 61 of the Public Finances (Management) Act.

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To define the term "claim" (for the purposes of Section 5 notice) to cover all claims, whether by Court action or otherwise and including claims that may be made outside of court process.

Upon receiving Section 5 notice, the Attorney General shall forward notice of the claim to the Secretary for Finance, Internal Revenue Commission and Bank of PNG for their records and advice.

Section 5 to be amended to provide simultaneous service of the claim on the head of the government agency with which disputes arise.

That Section 5 be amended to provide that the head of the Government agency with which the dispute arises shall supply to the Attorney General his agency's response to such claim and a statement of act in support.

Require the Attorney General and Solicitor General to obtain the written opinion and/or consent of the head of the government agency primarily responsible for the claim before settling the claim out of court.

To provide that any deed of settlement (or other instrument compromising a claim against the State) is of no force or effect unless it is "endorsed" by the National Court similar to trust settlements of Estates and Trusts, for infant settlements. Such a course would preclude "internal" settlement and ensure transparent factual assessment of damages according to law.

D. Amendments to Public Services (Management) Act 1995 :

The Commission recommends that the Public Services (Management) Act; related legislation,

instruments and standard terms and conditions of contracts for departmental heads and senior officers employed under contracts with the State be amended to provide the following:

a. Prescribe "serious disciplinary offence" is also committed where:

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State line agency named as defendant fails to provide full and proper instructions to Solicitor General –without reasonable excuse to comply:

comply;

investigate and provide the Attorney General and Solicitor General with instructions on any claim within a reasonable time (say 1 month from service of Section 5 notice on the departmental head); State suffers loss as a result of negligence or failure to exercise due care in performance of duties

b. A finding of "serious disciplinary offence" –

- i. is a ground for termination;

- ii. renders a person ineligible for re-appointment to any public office for ten (10) years

E. Brief-Outs

Section 7 (i) of the Attorney-General Act 1989 provides that the Attorney General has the duty, function and responsibility to instruct lawyers within or outside the country to appear for the State in any matter. Therefore, a lawyer or a law firm cannot act for the State unless specifically briefed by the Attorney General.

Terms 1, 7, 10, 12 of the Commission's Terms of Reference and paragraph E of the Commission's Statement of Case deals with brief outs. Paragraph E of the Statement of Case reads:

"The controversies surrounding the Department, in particular in relation to payments made in satisfaction of out of court settlements, default judgment or consent judgments or other claims against the State, have given rise to concerns that the management of the Department particularly since 2000 was not done transparently and in accordance with good management and

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accounting practice, and that public monies have been made falsely, fraudulently, improperly or in a manner not authorised by law." (Emphasis added)

Essentially, this Commission's task is to consider all payments and claims for payments by the Department of Finance in excess of K300,000 made during the relevant period, including brief outs.

The Commission commenced inquiries but due to limited time was not able to fully investigate and sufficiently report on matters involving brief outs.

Guided by its Terms of Reference, the Commission commenced its inquiry in the following manner: The current Attorney General was requested to provide information on all matters briefed out within the relevant period;

All law firms were also requested to provide information on all matters brief out to them by the Attorney General, and to also provide information relating to their fees; and

Various former and current Solicitors General and Attorneys General gave evidence. Apart from the current Attorney General, the Hon. Dr. Allan Marat; Solicitor General, Neville Devete; and Acting Secretary, Hitelai Polume-Kiele, the Commission also examined Francis Damem, John Kawi, David Lambu, Francis Kuvi and Zacchary Gelu.

All those examined stated that they had in place a system that dealt with brief outs. However, none of them were able to produce a manual/instruction document/policy document of their system of brief out. All agreed with the matters as stated below:

The Attorney General has the power to brief out matters upon recommendation of the Solicitor General. However, Francis Damem disagreed maintaining that the discretion rested with the Attorney General with or without consultation with the Solicitor General. The circumstances warranting a brief out:

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Conflict of interest; Lack of expertise; and Shortage of lawyers.

The letter of instructions in the brief out would address the essential facts, issues arising, the law applicable, the State's position and matters to attend to. Further, the law firm was required to submit its bill in taxable form.

The Solicitor General maintained custody of the file briefed out and was required to provide instructions in the conduct of the matter

The Commission finds that there was no systematic approach to the exercise of powers and responsibilities in brief-outs by the Attorney General. In the ordinary course, procurement of a service is regulated by Public Finance (Management) Act 1995 [s39(l)(b)] and all engagements that exceed K100,000 require Ministerial Approval [s. 61(2)].

The Commission recommends some immediate actions as set out below: Establishment of "Attorney General Brief-outs Tenders Board"

Membership

- o Chief Secretary or alternate
- o Attorney General or alternate
- o President Law Society or alternate
- o President Certified Practising Accountants or alternate
- o Chairman, Central Supply & Tenders Board ('CSTB5) or alternate

o Chairman, PNG Council of Churches or alternate Meeting procedures consistent with CSTB procedures  
Tender procedures consistent with CSTB and Public Finances (Management) Act 1995, Attorney General to issue Certificate of Inexpediency

Alternatively, the Attorney General (on his own or through a system as described above) engage a panel of PNG law firms periodically for up to three (3) years

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The State must provide separate annual budgetary appropriation for brief-outs.

All fee-notes issued for brief-outs shall be in taxable form.

## F. Taxation

Where claims are pursued in court, once liability and damages are ascertained, the court may be asked to order that a party pay the costs of the other party. The State like any other party in court proceedings may be found liable to pay the costs of the other party or where the State is successful, the Court may order that the other party pay the State's costs. In either case, where there is no agreement as to the amount payable for costs, the avenue available under the National Court Rules is to have the successful party's costs taxed.

Taxation is also available to a client who is entitled to dispute the lawyer's legal fees. As such, unless there is prior agreement as to costs payable, the State is entitled to dispute the legal fees of the law firm briefed by the Attorney General.

Of the matters investigated, the Commission has found:

In one matter costs were awarded against the State following dismissal for want of prosecution of proceedings commenced by the State. Costs were taxed at K2 million. The matter warrants further inquiry to ascertain whether the costs were justified;

In four matters involving the same person, the taxing officer signed four (4) Certificates of Taxation each in the sum of K200, 000.00 following the lodgement of four (4) "instrument of consent" signed by the Solicitor General and the claimant's lawyer for the said sums. The rules of court do not make provision for taxation by consent and the "instrument of consent". The Certificate of Taxation can only be issued upon the conduct of taxation

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following consideration of a bill of costs in taxable form. No bill of costs was filed;

As part of a settlement in another matter, the Solicitor General signed the deed of release committing the State to pay the claimant's costs of K100, 000.00. The Commission found that

there was no plausible explanation for the Solicitor General's actions;  
In one matter involving 130 claimants (each filing separate Complaints arising from the same police raid), the District Court ordered that costs to be paid by the State in each matter be taxed. Costs were not taxed. For no plausible reason the Solicitor General advised the Department of Finance to pay the claimant's costs totalling K456,281.49;  
Also in another matter involving 112 claimants (each filing separate Complaints arising from the same police raid), the District Court ordered costs at K3, 800.00 for each of the 112 matters making a total of K425, 600.00. There was no appearance by the State. All 112 matters were heard and determined on the same day by the District Court;  
In another matter, the State was made to pay the costs of a party (K2, 598, 130.00) in the absence of orders to that effect.

In evidence before the Commission, a taxing officer acknowledged having no training or knowledge in taxation law and practice. This person was responsible for exorbitant amounts paid by the State.

The Commission recommends amongst others that:-

The Taxing Officer shall be a lawyer admitted to practise and has continued to practise in civil litigation for at least three (3) years in PNG;

The State shall be afforded every opportunity to be heard on an application for taxation; Scale of Costs in need of review (District/ National and Supreme Court) to reflect actual costs incurred

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## Out of Court Settlements

In regard to out of court settlements, the Commission recommends that:

(a) NEC direct immediate freeze on any further payment in respect of settlements; (h) For amounts above K100,000, the Attorney General may settle on approval by the NEC following recommendation of Attorney General;

For amounts up to K100,000, the Attorney General may settle;

All settlements to take place following informed consultation with:- i Solicitor General; Lawyer having carriage of the matter at the Solicitor General's Office;

Principal Defendant/party;

Internal Revenue Commission on assessment, including the conduct of appropriate due diligence, particularly as to assessment of loss and interest

There shall be no settlement as to costs;

All claims for costs shall be taxed in accordance with the relevant rules of the Court; Prescribe terms and form of Deed of Settlement

No settlement where claim time-barred (Frauds & Limitations, Claims By & Against the State Act

etc)

No settlement where lack of Section 5 Notice

## Referrals of Leaders & Professionals

Based on the investigation reports, the Commission recommends the following persons be referred to the appropriate authorities mentioned below.

(a) Ombudsman Commission

Isaac Lupari Gabriel Yer

Thaddeus Kambanei

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### 4. Francis Damem

#### Lawyers Statutory Committee

1. Zacchary Gelu
2. Francis Kuvi
3. Paul Paraka
4. Guguna Garo
5. John Sinaka Goava
6. Nicholas Tame
7. Mundua Kua
8. Joseph B Nanei
9. Francis Damem
10. Peter Pena
11. Danny Gonol
12. Simon Norum
13. Dan Kakaraya
14. Kumuro Sino
15. Dawa Agu-Klewaki
16. Bob Marley Nani
17. Eric Kiso
18. Gaure Odu
19. Daniel Kop
20. Jeffrey Abone
21. Neville Devete
22. Laias Paul Kandi

Attorney General/LTI Council 1. Billy Bonner

## I. Civil Actions and Recovery

Pursuant to recommendations in individual matters investigated, the Commission recommends the State to –

I. Set aside–

the following Judgements – National Court

Toka Enterprises Ltd Leo Kainam

Pacific Paradise Corporation Manoburn Earthmoving Ltd Pacific Engineering & Repairs Ltd Pacific Helicopters Ltd

Peter Yama

District Court

? Andeka Tepoka

the following Deeds –

Peter Yama Andrew Maid Isaac Lupari Umba Y Gabriel

Mountain Pearl Ltd Pioneer Construction Ltd Angela Dyra Morgan Jimendi Enterprises Ltd Kareana Estates Ltd Nakitu Ltd

Tau liu

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Ben Noel "Wilfred Bongali Lynette Malu Paiyo Bale

3. the following Certificates of Taxation – .

(i) Party-party

Mirupasi Lawyers – K2m Paraka Lawyers – K800,000

Simon Norum Lawyers – K465,000 Simon Norum Lawyers – K462,000 Paulus Dowa Lawyers– K200.000

II. Commence recovery action against the following – Walala Trading

Andeka Tepoka

Simon Wapo (Moko Esso) John Poro

Jimmy Kendi Nelson Wahune

. Criminal Prosecutions

Benny Balepa Wilfred Bongali

Wesley Aisora, Paul Kamakande, Dan Kakaraya, Dawa Agu-Klewaki Dick Teman

5– Directors of IBK (PNG) Ltd

James Mobie Genaboro, James Towa, Wai Herumaho Paiyo Bale

Paul Paraka, Gabriel Yer, Kumuro Sino

Tom Rangip

Daniel Kop, Jack Herepe Dadi Toka, John Goava Peter Yama

Hon. Andrew Maid, MP; Peter Pena; Jeffrey Abone Joel Aundambui; Sam Kemaken Moko Esso; Boas Hembahi; Alphonse Silas; Mary Martin; John Vailala Kandaso Napi Simon Norum, Raphael Appa  
Jerry Luru, Thaddeus Kambanei, Simeon Manihia  
Isaac Lupari, GugunajGaro<sup>^</sup>illy Bonnerj Paul Paraka, Eric Kiso Bruno Kaupa  
Nelson Wahune, Francis Damem, Boas Hembahi, Jacob Yafai, Margoni Wamanimbo, Simeon Manihia, Thaddeus Kambanei  
Ben Pokanau, Ambrose Vakinap John Poro  
ZacchajxGglu Francis Kuvi Mundua Kua Joseph B Nanei Francis Damem Peter Pena

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## X. REMEDIAL ACTION AND RECOMMENDATIONS

It is recommended that the Government of PNG declare its commitment to eradicate corruption and to promote integrity in public administration and that the initiatives of this Commission of Inquiry be integrated into a programme of reform for this purpose.

Remedial action is detailed by recommendation in each of the Investigation Reports. Central to these are recommendations that:  
the Government continue enquiry into the validity of debts of the State incurred by unlawful settlements,  
immediate legislative action be taken to halt the default process of judgment against the State, and  
the Government, the NEC itself, oversee the executive action required to implement recommendations.

Acceptance of recommendations made, in this Report raises concerns for their implementation.

These recommendations include recommendations for the recovery of funds, recommendations for discipline of officers or criminal prosecution of personnel or claimants.

The Commission is firmly committed to a recommendation that actions for recovery of funds should be implemented. Notwithstanding that there will have been substantial dissipation of settlement payouts, there will remain equally substantial balances, which if not in cash, will be recoverable from investments or assets.

In addition there are those claims settled but not yet paid out. Setting aside those deeds or judgments found to be unlawful and or fraudulent constitutes possible savings to the State of tens of millions.

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In the ordinary course, civil actions for recovery of State funds should be instituted by the Attorney General through the Solicitor General's office. Criminal prosecution should be pursued by the Public Prosecutor or by the Police. However the record of implementation of recommendations in the past for recovery and or the pursuit of prosecutions by the departments concerned is lamentable. Indeed there is a public perception that there is no follow through on Commissions of Inquiry revelations and recommendations.

A major reason for lack of action on the part by those offices is a fundamental lack of capacity – shortage of professional and support staff. Burdened with current tasks, and lack of the necessary organisation to undertake the work, the offices of Attorney General and Public Prosecutor have demonstrated little or no capacity for the additional workload that recovery and prosecution referrals generate.

With the Department of Justice and Attorney General undergoing substantial restructuring and still massively undermanned, these offices are not well placed to undertake referrals in the immediate future.

Another reason is that the fact/evidence required for each office to take court action must be supplied by other agencies. Neither the Solicitor General or the Public Prosecutor has the support staff of its own to assemble necessary witnesses and evidence.

The findings of a Commission of Inquiry do not constitute instructions or supply evidence. They may constitute a road map to where fact and evidence may be found, but such findings cannot on their own be the evidence of prosecution or recovery. Those agencies must develop their own fact/evidence from such road maps. But without instructions or capacity to source witnesses and evidence themselves, references fail.

The Commission has accordingly considered whether there should be another authority to ensure implementation of recovery and prosecution.

Part VIII of the Constitution provides for Supervision and Control of public finances and State services, establishing the Auditor General and the Public Accounts Committee to audit and oversee the management of public accounts; while the Ombudsman Commission is tasked with supervising the conduct of the Public service and the Leadership Code. Although each has extensive powers of investigation and inquiry none of themselves have authority or capacity to implement remedial or disciplinary action. They are essentially tasked to report and make recommendations only, reliant on other agencies, for implementation of needed action.

There have been calls for another investigator policeman, an Independent Commission Against Corruption with draconian powers of investigation, arrest and prosecution of offenders. The Commission however does not support the creating of yet another "department" to take over the tasks of others already in place. It does not represent good governance.

Quite apart from the Constitutional anomalies establishing such a body would generate, and the time delay necessary to set up, staff and mobilise such a force, it would mean creating another authority to carry out what others are already Constitutionally tasked and empowered to do and are doing. There must be cause to overturn the Constitutional plan. Before adding to the list of investigating or enforcement bodies there must first be reason that shows these bodies are inadequate for the task and if their performance is unsatisfactory whether or not they may be improved or restored.

If it was found an ICAC is needed, there is one constitutionally ready to hand. Except for powers of arrest and immediate prosecutions the Ombudsman Commission has all the powers proposed for an ICAC. Simply repealing the constitutional restrictions on enforcement (Section 219(6)) would do much to enable the Ombudsman Commission to ensure more effective action on its findings. "With amendments to the Organic Laws allowing, indeed requiring that it conducts its inquiries openly and publicly would enable the Ombudsman Commission to demonstrate its ready action on corruption and show

that complaints are actively pursued. This Commission recommends that consideration be given to such change.

#### A. The Government, the National Executive Council to Implement Recommendations

Today corruption is recognised as a major challenge to the integrity of the People and Government of Papua New Guinea. Public outcry continues to demonstrate that confidence in public agencies and officials is being eroded by seeming lack of response to complaint of corruption and maladministration.

Positive Government leadership is essential in stamping out corruption, demonstrating commitment to action and reforms necessary to restore integrity in public administration.

Papua New Guinea has already ratified the United Nations Convention Against Corruption and it is timely that Government declare that its commitment to the eradication of corruption and the promotion of integrity is fundamental to a policy of reform of public administration in the development of PNG.

The Commission considers that the implementation and reinforcement of action recommended by this Commission be undertaken by the Government, the National Executive Council itself as a demonstration of such a commitment.

"While Ministers have political responsibility for their Departments, the Constitution (Section 148) specifies they have no powers of direction or control over the actual administration of those agencies. Similarly supervisory committees lack action officers and it is effective executive action that is required.

Some recommendations require immediate action, others implementation through legislative change or programmes of departmental reform. The NEC has the Constitutional responsibility for executive government of Papua New Guinea and only

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the NEC has the authority to direct and ensure all such tasks are carried through by the appropriate agencies, not as matters of discretion as when or whether to implement, but as directions requiring performance.

Further, with the Commission's primary findings of Government agencies ignoring specific Government directions, indeed usurping the function of Government, proceeding independently, and dealing with public funds on an immense scale, contrary to law, there is urgent need for the Government to reassert authority and control over public administration. It must do this by ensuring the Departmental agencies still maintain the capacity for their functions, are well instructed in Government's directions to them and are indeed performing them as required.

Importantly, there is no legal impediment to the NEC taking such action immediately. Constitutional and statutory authority is already in place, with the Prime Minister and National Executive Council Act 2002 supplying the machinery and executive secretariat under the Chief Secretary.

Under this Act the Chief Secretary is designated the Senior Officer of the National Public Service. He is Chairman and Chief Executive of the CACC. He is in effect the General Manager. His major function as with the CACC is to ensure that the decisions of Government are implemented by an accountable Public Service under his authority. These functions are as in Section 20.

"SECTION 20, FUNCTIONS OF CHIEF SECRETARY TO GOVERNMENT.

The functions of the Chief Secretary to Government are —  
to be the principal adviser to the Prime Minister and to the National Executive Council; and to co-ordinate policies and initiatives of the National Executive Council; and

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? to ensure that decisions, directions and policies of the National Executive Council are implemented by the National Public Service and by public bodies; and  
to ensure that the National Public Service and public bodies perform effectively and are accountable to the National Executive Council and to the Parliament; and  
to oversee public sector reform; and  
Such other functions as are determined by the National Executive Council, or any other lan>."

To enable those functions Section 21 gives the Chief Secretary comprehensive powers of investigation and direction.

Section 21 ~ POWERS OF THE CHIEF SECRETARY TO GOVERNMENT. (1) The Chief Secretaiy to Government may at any time, for the purpose of the performance of hisfunctions under this Act or any other law —  
Enterpremises occupied or used by — a Department; or  
a Provincial Government; or (i) a public body; and  
question a person who appears likely to have information relevant to thefunctions of the Chief Secretary to Government; and  
require any person to provide information relative to the functions of the Chief Secretaiy to Government; and  
require any person to produce documents within his possession or subject to his control where such documents are relevant to the functions of the Chief Secretary to Government; and  
make and retain copies of any document produced under Paragraph (d); and  
Issue directions relative to his functions to a Departmental Head and to the head of a public body.

2. All Departmental Heads, heads of public bodies and officers of the National Public Service and of public bodies shall—

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co-operate with the Chief Secretary to Government in the performance of his functions and the exercise of his powers under this Act; and  
Comply with any directions issued under Subsection (1)(j)."

With the functions already designated and the authority of a standing Commission of Inquiry within the National Public Service, the office of the Chief Secretary is ideally placed to head a Government task force, with importantly, the capacity to implement needed action.

The Commission accordingly recommends that a Supervision and Control Authority – an NEC Commission – be set up under the Chief Secretary to oversee:

implementation and compliance with Government/NEC policy and directions, Conduct capacity and integrity reviews of Government agencies to ensure efficient, accountable management systems and protocols and that ensure transparent exercise of discretionary function.

To oversee immediate actual implementation of needed reforms, and Implementation of the recommendations of this Commission.

Continuation of investigations of this Commission of Inquiry in similar terms as are set out in its Terms of Reference.

Such authority would be staffed by senior professionals whether from the Public Service or Private Sector with the expertise experience and authority to conduct necessary examination and or audit of the performance of functions of any Department or Agency and to determine whether they maintain necessary standards of accountability for their functions.

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To enable prompt and concerted action across public administration, multiple ad hoc teams of professionals with expertise in the particular field (e.g. accountants, bankers, lawyers, law enforcement) acting under a delegated Commissioner could be engaged for simultaneous reviews of specialised agencies.

A task force of lawyers/investigators under a Secretary delegate/Commission could enable provision of necessary fact, evidence for consideration by the Public Prosecutor as to prosecution or otherwise of referrals made to him. Similarly it would enable fact/evidence for recovery action by the task force itself, or as consultants through the Attorney General as needed.

An NEC Commissioner with a staff of lawyers/investigators could undertake the balance of the task of this Commission of Inquiry. Under the authority of the Prime Minister and NEC Act investigation and report could continue, with the particular advantage that needed action could be carried out forthwith.

B. Whistle-blowers

It is important the Commission record that the great majority of public officers assisting the Inquiry exhibited high ethical standards and sound professional ability. They demonstrated that there is a majority within public administration with a determination to perform duties impartially and with integrity despite the frustrations of observing unchecked corrupt behaviour by fellow officers.

Reluctance to challenge and report misconduct or enforce work force discipline is plainly caused by uncertainty of support and or fear of retribution.

Those concerns can be addressed by statutory protection for those who confront corruption and enforce rules of conduct.

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It is recommended that a Whistle Blower Protection Act be promulgated to provide legal protection for persons and public officers who report corrupt practices by public officials.

### C. Freedom of Information Act

Section 51 of the Constitution states;

"Every Citizen has the right of reasonable access to official documents— "

As the Constitutional Planning Committee explained: (CPC Report Ch5)

For our citizens to be able to participate effectively in the public affairs of this, it is essential that they have access to official information. Without information as to governmental activity a person cannot make a meaningful contribution to discussion of the issues involved in government policies and programmes. The degree to which citizens are able to fully participate in debate on the public affairs of the country will be a good measure of the extent to which our system of government is truly democratic. ...

In developing countries such as Papua New Guinea, it is an unfortunate fact that often foreign businessmen know far more about the actions and policies of the Government than do all but a select few of its own citizens. Thus these business interests are in a position to exercise influence on the government without any reaction from nationalist groups being felt by the Government until it is too late for it to take any positive action in response to such reaction."

An informed public can also be effective in combating corruption.

The Commission, therefore, recommends that a Freedom of Information Act to provide clear processes to regulate access to official records and documents pursuant to Section 51 of the Constitution be promulgated.

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#### D. Trial By Jury

The Constitution (Section 186) provides for trials by jury.

Trial of a person charged with an offence, by a jury of fellow citizens is the final step in an effective criminal justice system. Jury trial is already part of the laws of the Solomon Islands, Vanuatu and Fiji. PNG is the only Melanesian country where trials before a judge remain alone. Trial by a jury ensures that each and every citizen is eligible to take part in responsible action in the administration of justice in PNG.

Participation as a juror also constitutes a very effective method of broadcasting knowledge of the rules of law.

The Commission recommends legislation be enacted that promotes the use of assessors in criminal trials preparatory to eventual adoption of a system of jury trials for major crime.

#### E. The Commission of Inquiry be Continued

With less than half of the claims reviewed the work of the Commission is far from completed. The remainder of settlements are known to result from default judgments and out of court settlements for compensation under similar circumstances to those already examined raising the probability of unlawful settlement and the need for recovery action.

Added to those are the claims certified but as yet unpaid amounting to some K211 million which must be examined as to validity. These give opportunity to reduce State liability and a substantial saving of public funds.

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It is therefore recommended that a Commission of Inquiry be appointed to continue the inquiries in the same or similar terms as the Terms of Reference of this Inquiry.

The period of this Inquiry is now 3 years in the past.

It is therefore recommended that the period for review of the new Commission of Inquiry be extended to 31 October 2010 .

## XI, COURT ACTIONS INVOLVING THE COMMISSION

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Since its commencement, the Commission of Inquiry has been party to National Court and Supreme Court actions. These include:

### A. Challenges to Jurisdiction of the Commission

There were numerous Court actions filed against the Commission, the Prime Minister (as appointing authority) and the State, essentially claiming:

That the Commission lacked jurisdiction to inquire into their claims against the State; and That their interests were adversely affected by the Inquiry.

Those challenges are grouped into two (2) categories. The first category concerns Court actions relating to the challenge to the Decision of the Prime Minister, Sir Michael Somare made on 2 and 12 April 2008, establishing this Inquiry, whilst the second category comprises Court actions challenging the Decision of the Prime Minister, Sir Michael Somare made on 14 July 2009, extending the term of the Inquiry to 31st October 2009.

(a) First Category Court Actions The Court actions in the first category include:

OS (JR) 654 of 2008 – Zacchary Gelu, Isaac Lupari & Tau liu –v– Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

SC OS 2 of 2008 – In the Matter of an Application by Zacchary Gelu, Isaac Lupari & Tau Liu pursuant to Section 18 (1) of the Constitution of Papua New Guinea

and in the Matter of the Constitutional validity of the Prime Minister's Decision to set up the Commission of Inquiry

SCM 15 of 2008 – Prime Minister, Sir Michael Somare, Commission of Inquiry & the State – v– Zacchary Gelu, Isaac Lupari & Tau Liu

SCM 17 of 2008 – Zacchary Gelu, Isaac Lupari & Tau Liu –v– Prime Minister, Sir Michael Somare, Commission of Inquiry & the State  
SCA 138 of 2008 – Zacchary Gelu, Isaac Lupari & Tau Liu –v– Prime Minister, Sir Michael Somare, Commission of Inquiry & the State  
SCA 141 of 2008 – Prime Minister, Sir Michael Somare, Commission of Inquiry & the State, – v– Zacchary Gelu, Isaac Lupari & Tau Liu

(JR) 654 of 2008 – Zacchary Gelu, Isaac Lupari & Tau Liu – v – Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

This Court action was commenced by Messrs Gelu, Lupari & Liu (Plaintiffs) on 22nd October 2008. In this action, the Plaintiffs applied for Judicial Review of the decision of the Prime Minister dated 2 and 12 May 2008 to appoint the Commission of Inquiry. On 17 November 2008, the National Court granted the Plaintiffs Leave for Judicial Review.

The Plaintiffs Application was dismissed for want of prosecution on Application by the Commission on 16 April 2009. The Plaintiffs were also ordered to pay the costs of the Respondents to be taxed "if not agreed". The Commission's draft Bill of Costs will be finalised and forwarded to the Solicitor General.

SC OS 2 of 2008 – In the Matter of an Application by Zacchary Gelu, Isaac Lupari & Tau Liu pursuant to Section 18 (1) of the Constitution of Papua New Guinea and in the Matter of the Constitutional validity of the Prime Ministers Decision to set up the Commission of Inquiry  
This is a Supreme Court Application filed by Messrs Gelu, Lupari and Liu (Applicants) on the same day they filed the Application for Judicial Review in the National Court (OS

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654 of 2008) referred to above. In both proceedings they sought similar orders. The relief sought included a request pursuant to Section 18 of the Constitution to declare unconstitutional the Prime Minister's decision to set up the Commission. His Honour Injia, DCJ (as he then was) raised a preliminary point as to the standing of the Applicants. They were allowed an adjournment to consider their position. Without notice, the Applicants withdrew the proceedings on 31 October 2008 with no Order as to Costs.

SCM 15 of 2008 – Prime Minister, Sir Michael Somare, Commission of Inquiry & the State – v – Zacchary Gelu, Isaac Lupari & Tau Liu

Unlike the two actions referred to above, this Supreme Court Motion was filed on 30 October 2008 by the Prime Minister, the State and the Commission against Messrs Gelu, Lupari and Liu.

This was essentially an Appeal from the decision of Justice Sakora of 27 October 2008 granting an interim injunction in favour of Messrs Gelu, Lupari and Liu in the Court proceedings, OS 654 of 2008 against the Commission.

The intention of Messrs Gelu, Lupari and Liu were to stop the Commission from continuing with its inquiry until their Application for Leave was heard. After the hearing of the Application for Stay on

3 November 2008, the Supreme Court comprising, then Acting Chief Justice Sir Salamo Injia and Justices Kirriwom and Gabi ordered amongst other things that the matter and the application for Stay be remitted to the National Court for hearing of the application for Leave for judicial review and application for Stay before another Judge.

Consequendy, the proceedings were withdrawn with each Party to pay their own costs in connection with the Appeal.

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SCM 17 of 2008 – Zacchary Gelu, Isaac Lupari & Tau Liu – v – Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

This is an Appeal filed by Messrs Gelu, Lupari and Liu (Applicants) in the Supreme Court, from the decision of Justice Cannings made on 21 November 2008 in the National Court proceedings, OS 654 of 2008, refusing the Application by Messrs Gelu, Lupari and Liu for a Stay of the proceedings of the Commission of Inquiry.

At the same time of filing the Appeal, the Applicants also filed an application for various interim relief similarly sought in the National Court proceedings (OS 654/08) of which the decision is being appealed in this matter.

On 4 December 2008, the Commission filed an Objection to Competency of this Appeal. The Objection went before Justices Gavara–Nanu, Lenalia and Gabi on 11 December 2008 and a decision handed down the next day in favour of the Commission dismissing the Appeal as being incompetent, with costs to the Commission. The issue of costs remains outstanding in this matter. The Commission recommends the Solicitor General pursue it.

SCA 138 of 2008 – Zacchary Gelu, Isaac Lupari & Tau Liu – v – Prime Minister, Sir Michael Somare, Commission of Inquiry & the State

This was a second Appeal filed by Messrs Gelu, Lupari and Liu. (Appellants) The Appeal instituted by an Application for Leave to Appeal was filed on 15 December 2008. Essentially this was filed to pursue the grounds raised by the Appellants in the proceedings SCM 17/08 which was dismissed for being incompetent.

This was an Appeal from the decision of Justice Cannings made on 21 November 2008 in the National Court proceedings, OS 654 of 2008, refusing the Application by Messrs Gelu, Lupari and Liu for a Stay of the proceedings of the Commission of Inquiry.

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Like the National Court proceedings and the Appeal, SCM 17/08, Messrs Gelu, Lupari and Iiu also sought various interim relief in the nature of injunctions against the further conduct of the Commission which were heard by the Chief Justice, Sir Salamo Injia on 23 January 2009 and refused on 5 February 2009.

As for the substantive Appeal, the Commission also filed an Objection to Competency of this Appeal. This was heard together with the Appellants' Application for Leave to Appeal on 25 February 2009 before the Supreme Court comprising of Justices Kiriwom, Kandakasi and Hartshorn. The Decision is still pending.

SCA 141 of 2008 – Prime Minister, Sir Michael Somare, Commission of Inquiry & the State, – v – Zachary Gelu, Isaac Lupari & Tau Liu

This is an Appeal filed by the Commission against the Decision of Justice Cannings, granting leave to Messrs Gelu, Lupari and Liu to apply for Judicial Review on 17 November in OS 654/08.

The Appeal was heard on the same day and by the same judges as in the matter of SCA 138/08 and like SCA 138/08, the Decision is pending.

#### (b) ) Second Category Court Actions

The Court actions in the second category include:

O.S No. 352 of 2009 – Mahuru Dadi Toka & Anor –v– Commission of Inquiry & Ors

O.S No. 354 of 2009 – Isaac Lupari –v– Commission of Inquiry & Ors

O.S No. 376 of 2009 – Paul Paraka Lawyers –v– Commission of Inquiry & Ors

O.S No. 377 of 2009 – Umba Y Gabriel –v– Commission of Inquiry & Ors

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Recently, four proceedings were filed by Toka Enterprises Ltd & Mahuru Dadi Toka, Isaac Lupari, Paul Paraka trading as Paul Paraka Lawyers and Umba Y Gabriel challenging the jurisdiction of the Commission to inquire into their involvement in the matters subject of inquiry. Except for the proceedings instituted by Toka Enterprises Ltd and Mahuru Dadi Toka, the other three proceedings also challenged the powers of the Prime Minister to appoint and establish the Commission of Inquiry.

The application was fully contested by the Commission. Decision was made on Friday, 14 August 2009 refusing leave on all four matters.

#### Decision in respect of Paul Paraka

The Court held that none of the matters raised before the Court were argued/raised at the Commission. Those matters should have been raised before the Commission first. Further, the

Court held that the letters by the Commission issued to Paul Paraka inviting him to assist the Commission cannot be regarded as decision capable of review. Paul Paraka further alleged that he was denied natural justice however the Court stated that there was no basis to raise this allegation because Paul Paraka refused to appear before the Commission. Furthermore, there are no decisions of the Commission as such Paul Paraka does not have standing nor does he have sufficient interest in the matters subject of Court proceedings. Leave for judicial review was refused. The Court also ordered that the costs of the Commission be paid by Paul Paraka Lawyers on a solicitor–client basis.

Decision in r e spect o f Toka Enterprises Ltd ( hereafter " TEL")

The main argument raised by TEL is that this matter did not fall within the Commission's Terms of Reference. This argument was refused by the Court stating that there was evidence on file showing that the matter falls within the Commission's Terms of Reference. Further, the Court noted that serious issues of law arise in the manner the matter was pursued in Court. Leave for judicial review was refused. The Court also

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ordered that the costs of the Commission be paid by Mahuru Dadi Toka and TEL on a solicitor–client basis.

Decision in r e spect o f I saac Lupari ( hereafter " Lupari")

Lupari argued that the Commission is estopped from investigating the matter due to the various clauses in the Deeds of Release which he argues raise the issue of estoppel. Further, Lupari argued that the other three Deeds of Release were not paid as such cannot be investigated. The Court refused all arguments raised by Lupari stating that the arguments have no merit and lack legal basis as such leave was refused. Leave for judicial review was refused. The Court also ordered that the costs of the Commission be paid on a solicitor–client basis by Issac Lupari and Nicholas Tame, lawyer for Issac Lupari (50% each).

Decision in r e spect o f Umba Y Gabriel ( hereafter " Umba")

The main argument raised by Umba was that since all the monies, K1.7 million was repaid to the State, there was no basis to investigate the matter. The Court refused the argument stating the Commission was set up to investigate not only payments made but "claims" made. The arguments raised lacked merit and any legal basis. Further, the Court held that some of the arguments were never raised before the Commission. They should have been raised before the Commission first. Leave for judicial review was refused. The Court also ordered that the costs of the Commission be paid on a solicitor– client basis by Kumuro Sino, lawyer for Umba.

Appeal

No appeals were filed in respect of the decision of the Court by Paul Paraka and Mahuru Dadi Toka. The Commission is aware that Isaac Lupari (SCA No. 117 of 2009) and Umba Y Gabriel (SCM No. 15

of 2009) have filed separate appeals on 23 September

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2009 in the Supreme Court (from the decision of the National Court on 14 August 2009). The Commission is yet to be served –with the appeal documents.

#### Immediate Recommendations

The Solicitor General file an application for taxation and have the costs of the Commission taxed and certified. Following taxation, the Certificate of Taxation must be enforced against those ordered to pay the costs of the Commission and such payments should be made to the Consolidated Revenue Fund;

The Solicitor General maintain constant contact with the Deputy Registrar, Supreme Court to ensure the appeals filed by Umba Y Gabriel and Isaac Lupari are opposed and dismissed. If they are pursued, application must be filed to dismiss the appeals on issues of competency;

Commission of Inquiry Act be amended to specifically provide for:–

the powers of the Appointing Authority (Prime Minister) to extend the term of the Commission of Inquiry;

Section 19 be amended to state that prosecutions under that section shall be commenced within three months following the referral by the Commission of Inquiry.

#### B. Related Actions

SCA 53 of 2008 : Yama – v – Yer, Louma, The Commission of Inquiry & The State

This is a Supreme Court Appeal against National Court Orders for the immediate clearance and release of a cheque for K7.75 million supposedly a part payment of a K38 million claim settled under deed by the Solicitor General in 2002 for K15 million.

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The Commission joined proceedings as an appellant because the 2002 deed is a settlement falling

within the Commission's Terms of Reference, because the base transaction demonstrated a total lack of any legal claim; the claim was in any case time barred; there was a continued breach of the statutory process for claims against the State; and the payment in the form of a cheque originated from funds not lawfully available.

In addition, the National Court orders for clearance and release of the cheque, including orders of contempt are clearly in breach of the Claims By and Against the State Act and, therefore, outside the authority of the Court.

This matter also raised serious issues of just how the Solicitor Generals office in 2008 came to endorse the 2002 deed in the face of the gross anomalies displayed. The Commission has established that there was not even a file in the office of the Solicitor General regarding this claim prior to the endorsement of the claim and additional payment. These matters have been the subject of inquiry by the Commission.

#### Recent Response Action by The State

OS 658 of 2008 The State –vs– Yama. Following the Commissions intervention in the proceedings and public examination of the facts and circumstances of the settlement in SCA 53 of 2008 has caused the Attorney General on behalf of the State to file a challenge to the validity of the Deed of Settlement citing grounds similar to the Commissions public findings. This matter is waiting to be set down for hearing.

#### Defence Force Personnel Claim

A similar sudden anomalous "Settlement" occurred in February of this year. A cheque of K12.9 million purportedly in part settlement of a claim by ex Defence Force personnel was drawn to the Commissions attention by the Secretary for Justice. She had had the payment halted for it having issued without any reference to the offices of the Solicitor General and or the Attorney General. Because the bulk of Defence Force personnel

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claims fall within the Commissions Terms of Reference and "final settlements" of them have in many cases been paid out already, new and or additional payments for such claims become a matter for investigation of the sudden issue of a cheque contrary to prescribed processes. The matter was still under inquiry at the close of this Inquiry.

#### C. Unnecessary Delay to Work of the Commission

As discussed above, OS 654 of 2008 Messrs Gelu, Lupari and Liu – vs – Sir Michael Somare, the Commission of Inquiry and the State was dismissed for want of prosecution. However, those proceedings spread over five months constituted unwanted delays to the work of the Commission through diversion of staff and resources to defend them. They also demonstrate the vulnerability of limited-life Commissions of Inquiry to no-limit, time lines of the court processes.

Such actions – as was the case against the Commission – focus on claiming urgent issues challenging jurisdiction, and or matters that purport to render a Commission's task "sub judice." i.e., matters for decision by the court alone, therefore obliging the Commission to refrain from any action till the completion of the court action.

When such actions are backed with orders of restraint pending actual hearing of the Court disposing of the matter, – again as was the case in OS 654 of 2008 – the claimant has effectively won a delay that may out-last the life of a Commission or last until the Court can be persuaded either to dismiss the proceedings for want of prosecution, or at least commit the claimant to a firm hearing of his dispute.

The progress of any action then becomes largely dependant on the willingness of the claimant to advance the claim, an advantage not always taken but one not readily given up. In the absence of action by the parties, the courts take little action to promote completion of the hearing.

These delays in prosecution of the claims can be wholly detrimental to good governance. The process of government is needlessly delayed while claimed rights of a personal dispute is disposed of. The matter may readily be addressed by authorising a requirement for prompt resolution of such matters.

The Commission is of the view that without infringing on citizens rights of access to the courts, it is in the interest of the State as a whole that such matters should be dealt with promptly. A ready solution would be to eliminate long adjournments by a court direction for their prompt resolution. This may be done by requiring the courts to accord the hearing of a dispute all possible speed.

Accordingly, it will be a recommendation of the Commission that the Claims By and Against the State Act (and or the Attorney Generals Act) be amended to provide that where the Attorney General is satisfied that is in the interest of the State as a matter of good governance that a claim against the State be determined as a matter of urgency he may cause an application for urgency to be lodged in the proceedings concerned requiring that the hearing and determination of the action be conducted as soon as possible and in any case within 28 days from the lodging of the application, and unless the court is shown exceptional hardship to a party, it shall accord such urgency.

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## XII. APPENDIX

### A. Form 1A

PAPUA NEW GUINEA.  
Claims By and Against the State Act.  
Sec. 13(2) Form 1A.

#### CERTIFICATE of JUDGEMENT.

A.B. v. The Independent State of Papua New Guinea.

I certify that A.B., o f , on 19 , did obtain a judgement of the (name of court) in his favour, and that by such judgement the sum of K was awarded to him.

Dated... 20.

Registrar (or Clerk). (Name of Court).

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B. Form 1B

PAPUA NEW GUINEA.  
Claims By and Against the State Act.  
Sec. 13(2) Form 1B.

CERTIFICATE of JUDGEMENT.

A.B. v. The Independent State of Papua New Guinea.

I certify that—

OR  
?

Dated... 20.

the judgement of the (name of court) in favour of AB made on day of , may be satisfied

the State proposes to take further action in this matter and satisfaction of judgement cannot take  
pla  
Attorney Genera