The Commission of Inquiry Generally into the Department of Finance

FINAL REPORT

Justice Cathy Davani Commissioner

Maurice Sheehan, CMG Chief Commissioner

Don Manoa Commissioner

29 October, 2009

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Foreword

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

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

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

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

29 October, 2009

I. ESTABLISHMENT

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

" Commission o f Inquiry Act (Chapter 31)

COMMISSION OF INQUIRY

Into

THE MANAGEMENT GENERALLY OF PUBLIC MONIES BY THE DEPARTMENT OF FINANCE

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

STATEMENT OF CASE

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

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

B. The Department of Finance (the Department) was established under the Public S e r v i c e s (Management) Act 1995 . By notice published in National Gazette No. G65 of 26th August, 1977, the Head of State, acting on advice of the National Executive Council, determined in accordance with Section 21 of the Public S e r v i c e s (Management) Act 1995 that the Department shall have the following functions:-

(a) To be responsible for the management of policies, regulations and laws pertaining to the collection and disbursement of public monies;

(b) To administer and provide advice on debt management and foreign aid;

(c) To formulate and administer the annual estimates of revenue and expenditure;

(d) To control and administer Government revenues.

C. In the exercise of its functions, the Department manages and disburses public funds in accordance with the Public Finances (Management) Act 1995 and the Regulations and Financial

Instructions made thereunder.

D. The offices of Attorney-General and Solicitor General are established under the Attorney-General Act 1989 . Under Section 7 of the Act, the Attorney- General is the principal legal adviser to the National Executive Council and, as principal legal advisor, is required to tender legal advice and opinion to the National Executive in accordance with Section 8. Under Section 9 of the Act, the Attorney-General appoints the Solicitor-Genera whose primary function is to appear as an advocate for the State in matters coming before the courts in Papua New Guinea. As part of his function, the Solicitor- General recommends to the Department matters before the courts that are to be settled out of court or by consent judgment.

E. The controversies surrounding the Department, in particular in relation to payments made in satisfaction of out-of-court settlements, default or consent judgments or other claims against the State, have given rise to concerns that the management of the Department particularly since 2000 was not done transparently and in accordance with good management and accounting practices, and that public monies have been made falsely, fraudulently, improperly or in a manner not authorised by law.

F. The Commission of Inquiry into the Management of Public Monies by the Department of Finance is hereby established pursuant to Section 2(1) of the Commissions o f Inquiry Act (Chapter 31).

COMMISSION OF INQUIRY

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

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

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

(i) the extent of illegal and improper claims; Judgments or out- of court settlements against the State; and

(ii) the identity(s) of those persons who have made or been paid such claims; and

(iii) the value of such claims for each year in the period 2000-1st July, 2006; and

(iv) the number of illegal, false or improper claims, Judgments or out-of-court settlements, approved for payment by the Department of Finance in the period 2000 - 1st July, 2006; and

(v) the number of illegal claims that have been paid by or from the Department of Finance in the period 2000 - 1st July 2006; and

(vi) the amount so paid in each year during the period 2000 - 1st July 2006; and

(vii) whether, in the opinion of the Commission, the Department of Finance failed to detect and disallow illegal, false or improper claims and if so, how and why those failures occurred; and

(viii) the degree to which the bona fides of each illegal, false or improper claim was investigated by the Department of Finance before approval and/or payment; and

(ix) the involvement (if any) of officers of the State in the making approval and payment of illegal, false or improper claims against the State; and

(x) how and by whom such illegal, false or improper claims were approved; and

(xi) the degree and extent of involvement of legal firms in the making and payment of illegal claims against the State; and

(xii) whether all tax or other imposts arising from the payment of illegal, false or improper claims, Judgments or out-of-court settlements by the State during the period 2000 - 1st July, 2006, were paid either by the State or payees from the State; and

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

2. The Commission is to inquire into all Consent and Default Judgments entered against the State in the period 2000 - 1st July, 2006 and-conclude as to the number and value of these judgments and the circumstances in which they came to be entered against the State; and

3. The Commission is to inquire and conduct whether the entry of any Default Judgment was the result of negligence or failure by any Officer of the State and to make recommendations for action against those Officers; and

4. The Commission is to make recommendations for action by the State in respect of Consent and Default Judgments made against it and the liabilities therefrom; and

5. The Commission is to examine each out-of-court settlement made against or entered into by the State in the period 2000 - 1st July. 2006 and conclude as to:-

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The facts and circumstances in and by which each out- of-court settlement made; and

The legality of each out-of-court settlement; and

Whether liability should have been admitted by the State; and

The involvement of the Offices of the Attorney- General and the Solicitor-General in each out-of-court settlement; and

The quantum accepted and agreed by the State and the propriety and legality of that agreement; and

Whether the interests of the State have been prejudiced in respect of any out-of-court settlement entered into by the State; and

(vii) What changes should be made to protect the State and public monies from the making or payment of improper out-of-court settlements; and

6. To inquire into the systems that protect public monies from illegal claims, to identify the core failures that have exposed the State to improper liability and allowed public monies to be applied to payment of illegal, false or improper claims Judgments and out-of-court settlements and make recommendations to secure or further protect public monies from such misapplication; and

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

8. To inquire into the involvement of the Office of the Attorney- General, the Solicitor-General, the Department of Finance and the Registry of the National Court of Justice in the making and payment of illegal, false or improper claims or judgments against the State in the period 2000 - 1st July, 2006; and

9. To inquire into and identify the source of monies used to pay all identified illegal, false and improper claims and conclude as to the legality of the use of those sources; and

10. To inquire into and conclude as to the involvement of legal firms in the making and paying of illegal, false or improper claims, Judgments or out-of-court settlements against the State; and

11. Inquire into and identify any improper or illegal involvement in or benefit or payment to any State Officer made for or in any way arising from false, illegal or improper claims, Judgments or out-of-court settlements against the State in the period 2000 - 1st July, 2006; and

12. To inquire and conclude as to whether the relevant Attorneys- General and Solicitors-General in the period 2000 - 1st July, 2006 have advised and protected the Sate to an acceptable and competent standard in negotiating, entering and processing for payment Consent Judgments and out-of-court settlements; and

13. Make any further recommendations arising from the inquiry; and

14. Make such referrals for prosecution as the Commission deems appropriate; and

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

AND I FURTHER direct that the inquiry shall be held in public, but I approve that you may permit to be given in private, any evidence that in the course of your inquiry you, in your absolute discretion, consider needs to be given in private in accordance with Section 2(5) of the Commissions of Inquiry Act;

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

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

Dated this 12th day of May 2008.

M.T. SOMARE Prime Minister"

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

II. HISTORY OF COMMISSION

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

In the two years to September 2008, the Commission was suspended and reestablished five times. This was substantially because of active opposition to the work of the Commission, controversy as

to over expenditure in set up costs in 2006 by the departments then administering the Commission funds, and failure by those Departments to provide any or adequate budgeted funds for 2007 and 2008. In that period the Commission was unable to function except briefly between February and May 2007, and March 2008.

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

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

III. CONDUCT OF INQUIRIES

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

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

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

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

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

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

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

A. Natural Justice: Right of Parties to be Heard

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

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

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

. CLAIMS PAID AND AWAITING PAYMENT BY DEPARTMENT OF FINANCE

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

against the State in sums of K300,000.00 or over.

That total was made up by payments in the years:

> 2000 K38.646.701.44
> 2001 K44.835.549.77
> 2002 K89.462.673.55
> 2003 K70.666.461.76
> 2004 K152.428.905.38

> 2005 K121.716.446.76
> 2006 to July K54.834.610.34
? ? K572,591,348.70

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

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

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

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

v. CONSTITUTIONAL BASIS FOR CLAIMS AGAINST THE STATE

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

A. Claims By & Against the State Act 1996
The key procedures under the Act provide:
® Formal notice of a claim against the State to be made within 6
months of events giving rise to the cause of action, o Determination by the Court of the liability of the State and an award of proven damages. This is evidenced by the Court issuing a Certificate of Judgment.
• The Solicitor General within 60 days to endorse the Court Certificate, confirming the judgment may be satisfied (or that the State will take further action)
• The Secretary of Finance on receipt of a Certificate endorsed for satisfaction of the judgment is authorised to meet the judgment from legally available funds.

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

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"5. Notice of claims against the State.

(1) No action to enforce any claim against the State lies
against the State unless notice in writing of intention to make a claim is given in accordance with this section by the claimant to —
(a) the Departmental Head of the Department responsible for justice matters; or
(b) the Solicitor-General

(2) A notice under this section shall be given —
(a) within a period of six months after the occurrence out of which the claim arose; or
(b) where the claim is for breach of a contract, within a period of six months after the claimant became aware of the alleged breach; or
(c) within such further period as —
(i) the Principal Legal Adviser; or
(ii) the court before which the action is instituted, on sufficient cause being shown, allows—."

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

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

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

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

B. Public Finances (Management) Act 1995

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

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

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

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

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

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

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

Section 47D(2) states -
"A claim for the price arising from the sale of property or stores or for the supply of goods or services to the State shall not be enforceable, through the courts or otherwise, unless the seller of the property or stores or the supplier of the goods or services produces —
(a) an Integrated Local Purchase Order or Claim (ILPOC); or
(b) an Authority to Pre-commit Expenditure."

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

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

C. National Executive Council Decisions

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

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

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

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

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

This Order remained in force for the year following.

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

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

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

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

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

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

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

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

D. National Executive Council Directions Ignored

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

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

The Commission finds:
• In all settlements so far examined by the Commission, not one has been conducted in compliance or in accordance with any NEC direction. The officials involved simply disobeyed

direct orders of the government.
• This is the most significant breach of duty by public officers that the Commission has found in its inquiries.

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

E. Procedure for claims

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

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

Of the matters investigated, the Commission has found that less than five (5) of all claims were decided on trial and assessment by the National Court; all others were determined, on failure to defend by default judgment, out of court settlement and consent orders sealed by the National Court in the claimants' favour.
The Act stipulates the processes from first notice of claim, through to trial, judgment and how settlement by the State is to be carried out. Essentially, the Courts have the authority to decide the liability of the State and determine the

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

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

F. Settlement of Claims from Legally Available Funds

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

G. Time for Payment of Judgment at Discretion of State

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

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

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

'M Court giving judgment against the State may not include any order as to time or method of payment for satisfaction of the judgement." (Section 12(2)) "In any suit, execution or attachment or process in the nature of attachment may not be issued against the property or revenue of the State (Section 3(1)"

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

These issues are presently before the Supreme Court in SCA No. 53 o f 2008 Yama ~ v s - Yer} Louma, The Commission o f Inquiry and The S t a t e . This is a matter in which the Commission was joined as a party and where it supported the provisions of the Claims Act. The ruling of the Court will hold great significance for the integrity of the Claims Act and the statutory

process of claims against the State.

I. Summary of Commission's findings

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

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

(a) Statutory Process Appropriate

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

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

(b) Failure of State Agencies

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

(c) Reasons for Failure by State to Defend Claims
Typically where a claim lodged in the National Court has not been defended the reasons most commonly advanced in evidence by the Justice and Attorney General's Department before the Commission have been;

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• The department concerned having being given notice of claim has failed to instruct the Solicitor General to defend the matter.

• The department the subject of a claim concerned has failed to respond to the Solicitor General's request for instructions on the receipt of a Notice of Claim. The Solicitor General as a result has been unable to respond to Court action and advises the Court accordingly – more often, takes no action at all.

• The Solicitor General because of error, or inadequate staff failed to respond to the notice of claim or court action within the time allowed by the Court rules.

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

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

(d) Breach of Duty

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

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

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

(e) Default Judgments

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

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

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

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

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

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

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

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avoid a court assessment yet obtain the court seal of authority by filing a consent order for

endorsement of the negotiated sum.

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

(f) Court and Out-of-Court Settlements

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

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

From the Commission's inquiries it is clear default judgments followed by consent orders on damages settled by State officers out of Court constitute the majority of claims resulting in loss to the State. The essential fact is that it is impossible to know whether the claims made were genuine or not because the great bulk of them were never tested or defended in the Courts to ascertain validity or merit.
The resolution of claims against the State by the Courts is the public and statutorily intended procedure. When the Courts acting upon evidence, decides liability and

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

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

(g) Brief Outs

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

undertake the work itself.

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

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

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

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

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VI. DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL

Terms of Reference No. 8 requires the Commission:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Department Restructure

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

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

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

B. Attorney General

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

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

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

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

C. Solicitor General

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

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

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

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

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

D. State Solicitor

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

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

VII. DEPARTMENT OF FINANCE

A. Introduction

Terras of Reference number 7 requires the Commission:

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

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

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

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

B. History

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

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

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

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

C. Inquiries

(a) The Department Structure & Responsibilities

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

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

The Operations Division has the following sub-divisions:

> Corporate Services - this includes Human Resource, Financial Training and Administration Services.
> Non-Tax Revenue — this includes Social Law & Order, General & Administration and Economic Infrastructure
> Cash Management & Expenditure - this includes Cash Management, Expenditure and Accounts Payable.
> Provincial & District Treasury Financial - this includes Highlands, Southern, New Guinea Islands and Momase.
The sub-division of interest to the Inquiry is Cash Management and Expenditure. This sub-division has the responsibility of processing the setdement of lawful claims of claims against the State. The Strategy Division comprises of the following sub-divisions:

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

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

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

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

> Defines the responsibilities of those responsible for financial management including the Minister, Secretary and other Departmental Heads as well as Accountable Officers.

> Defines the Public Accounts Trust Fund and CRP for handling of all public monies.

> Provides for the annual National Budget, allows for transfers between budget head within limits set by the annual budget.

> Provides for warranting of expenditure in accordance with parliamentary appropriations.

> Provides for issuance of Financial Regulations.

> Regulates tender procedures for procurement of goods and services by- public bodies.
Part II of the PFMA defines the responsibilities of the Minister and the Department Head. The Minister is responsible for—
(a) the supervision of the finances of the State so as to ensure that a full account is made to the Parliament of all transactions involving public monies; and
(b) the supervision of the finances of public bodies; and
(c) the formulation of the National Budget and overseeing its implementation on behalf of the National Government.

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

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

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

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> Exercise responsibility in managing all policies, regulations and laws pertaining to die collection and disbursement of public monies;
> Administer and provide advice on debt management and foreign aid;

> Formulate and administer Government's annual estimates of revenue and expenditure.
The payment procedures for the Department of Finance are stipulated under Financial Instructions Part 5 and Public Finance Management Manual Section 28 to 33.

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

(c) Budget Process

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

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

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

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

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

> The Original is sent to the head of the department/agency

y The duplicate is sent to Public Accounts Division (Cash Management Division) to liaise with Bank of PNG to transfer the cash equivalent on the Warrant Authority to the stated beneficiary.
> The triplicate is retained by Department of Treasury to update the warrant control registers kept by the Budget Division.
The Department of Finance administers and maintains only two expenditure allocations:
> Division 206 - recurrent expenditure items involving the department's operational costs except for personnel emoluments.

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

(d) Accounting Principle

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

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

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

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

Parliamentary Appropriations, either for start-up assistance in the form of initial working capital or budget subsidies for operations, are paid into a separate fund known as Trust Fund and the balances under this fund are carried forward from year to year. These also include monies for third

parties held in trust that will be repaid at a later date. The monies raised by such activities get paid into the Trust Fund and are subject to vigorous control and expended for the purpose as intended.

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

(e) Accounting Information System

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

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

A key feature of PGAS is that a cheque will not be printed unless there are funds available in the relevant vote. This suggests there is an inbuilt control mechanism
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however the system is open to manual journals which can be posted to process cheques.

(f) Payment Procedures

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

> The claim is forwarded by the Attorney General under cover of a letter to the Finance Secretary requesting setdement of the claim.
> The Finance Secretary would then make appropriate footnote on the letter and pass it onto Deputy Secretary Operations for the amount to be included in the schedule of Court Ordered payment.
> FF3 & FF4 is raised by Commitment Clerk based on availability of funds,

> FF3 signed by Commitment Clerk,

> FF3 & FF4 is signed by Financial Delegate,

> FF3 signed by Section 32 Officer,

> FF3 & FF4 are pre-audited by the Internal Auditor,
> FF4 examined by Examiner to ensure FF4 is fully completed and signs to verify that,

> FF4 is verified by Certifying Officer and also signs FF3,

> FF3 & FF4 is verified by the Paying Officer known as Audiorising Officer just prior to cheque print,

> Pay Office cheque machinist draws cheque,

> Cheque printed verified against the FF3 & FF4 by Paying Officer,

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

(g) Filing and Storage of Records

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

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

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

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

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

misplaced.

The C ommission noted the following;
• The files were not numbered in any numerical order to correspond to the

cheque sequence number.
• No register was kept on site to record movement of files or vouchers within that file.
• No staff permanendy allocated to maintain and monitor the movement of

documents.

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

(h) Integrity of the Accounting System

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

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

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

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

^ Cancelled cheques being credited into wrong votes,

> Cheques raised were denoted in the Cashbook as being cancelled and replacement cheques issued were presented for payment yet the original cheque was also presented for payment,
> Refund cheques being credited into wrong votes, y Stale

cheque being carried as yet to be presented,- •

y Journal entries entered into cash book for the purpose of balancing the books at year end with no basis in accounting.
The Auditor General's Audit Report for the relevant periods covered by the Terms of Reference has in each year raised significant issues with respect to how the Department accounts for Public Funds. Some of the main issues raised by the Auditor General over the years include;

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

> Numerous manual journals were processed at year end, most of which had no accounting basis for the journal to be raised
> Non-reconciliation of key accounts including non-clearance of un-presented cheque which have built-up over the years,
> No records of Trust Accounts and their reconciling balances at year end,

> Transfer of Appropriation in direct violation of Section 25 of PFMA,

> Lack of proper accounting resulting in various overdrawn accounts, These audit issues were raised by the Auditor General over many years but were continuously ignored by the Secretary.

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

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

The Commission has noted that in the period 2000 to 2006, funds for settlement of claims against the State were drawn from various sources including;
> Court Order Appropriation - lawfully available

> Trust Accounts - not lawfully available; and

> Other votes - not lawfully available.

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

A-Year
B - Amount Appropriated
C - Amount Paid to Settle Claims
D - Funds Illegally Sourced to Settle Claims

2000
0
K38,646,701
K38,646,701
2001
0
K44,835,549
K44,835,549
2002
K14,100,600
K89,462,673
K75,362,073
2003
K24,174,200
K70,666,401
K46,492,201
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** Half year appropriation used in this analysis.

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

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

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

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

?
2000 2001 2002 2003 2004 2005

Year

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

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

Account Code
Description
Amounts Paid
207
Miscellaneous
K205,930,732
460
Trust Suspense Account No.2
K130,608,570
410

Cash Adjustment Account
K6,986,017
216
Internal Revenue Commission
K5,200,025
577
SH Provincial Government
K2,239,915
589
WNB Provincial Government
K684.636
573
Central Provincial Government
K334,370
221
Public Service Commission
K111,054
258
State Enterprises
K210,000
252
Dept of Lands & Physical Planning
I<211,003
299
Debt Servicing Vote
K260.581
571
Fly River Provincial Government
K420,760
579
WH Provincial Government
K49,031
?
Total
K353,246,698

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

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

A "Suspense" account or a "Cash Adjustment" account are by accounting definition only temporary accounts holding reconciling items to be cleared at year end. An example would be the holding of

funds from third parties temporarily such as court bail, child maintenance etc.

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

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

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

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

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

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

The financial implications are:

• that total expenditure under the respective Votes were overstated to the extent of the amount transferred to TFS Account No. 2.

• If such amount transferred to TFS Account No. 2 had remained in their respective Votes, those amounts would have been automatically taken to Consolidated Revenue at year end.

• Further, the revenue for the following year is understated to that extent,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(k) Mr. Thaddeus Kambanei's Evidence

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

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

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

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

(1) Conduct of Inquiries

The Inquiry has had limited success in obtaining information and explanations from the Finance Department. This lack of co-operation commenced with Secretary Gabriel Yer and continued with

his senior Department officers. The lack of co-operation clearly indicated the department was aware of its failure to. maintain and produce accurate and authentic accounting records. Further, the Department was unable to explain and account (adequately or at all) for its management or indeed mismanagement of vast amounts of public monies.

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

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

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

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

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

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

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

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

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• Attempts to work with the Department staff were largely ineffective as staff would turn up late for work and or disappear during the day drastically hampering the effectiveness of Commission searches.

• Significant payments vouchers in relation to suspicious payments had gone missing.

• There was no acceptable system of filing and archiving of documents.

(m) Auditor General's Reports

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

D. Common Findings in respect of Claims

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

(a) Funds illegally sourced from other Appropriation

Funds to process settlement payments of claims against the State on numerous instances were illegally sourced from other appropriation such as the Trust Fund Suspense Account No. 2, the Cash Adjustment Account, Arrears Vote, etc. instead
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to the Court Order Vote. The sourcing of fonds from other appropriations to process setdement of claims against the State clearly in breach of the Appropriation Act and Public Finance (Management) Act and illegal

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

(b) Failure to comply with NEC Decisions

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

(c) Preferential basis of settlement of Claims

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

The Commission recommends that the Department provide a fair and reasonable method for the

processing of payments. There should be Register of claims lodged for payment which should be updated on a timely basis.

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

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

(e) Overpayment of Claims

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

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

(f) Overpayment of Interest

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

(g) Cancelled Cheques being Presented

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

(h) Incorrect narration of Cashbook

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

(i) Non compliance of Income Tax Act

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

(j) Release of cheques direct to Claimants

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

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

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

(1) Cheque Clearance

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

(m) Payment of Legal Fees without Certificate of Taxation

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

(n) Dysfunction of Internal Audit

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

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

E. Recommendations National Executive Council

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

Audit Issues

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

Systems & Procedures

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

• Immediately establish a proper recording system of all claims against the State.

Settlements

b «Pec< to settlement, Ae M„™g should take pkce pdor to ^ ^ drawn to settie claim;

> Finance Department keep a proper register of all claims received for setdement,

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

Referrals

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

• Former Finance Secretary Thaddeus Kambanei be referred for further investigation in respect of the matters raised above and throughout this Report.

Review of current management

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

Recruitment

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

their knowledge of the accounting standards and relevant laws such as the PFMA.

VIII. INVESTIGATION REPORTS

A. Land

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

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

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

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

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

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

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

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

I. Acquisition of customary land by the State-

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

Mismanagement of State land -

(i) Operations of the PNG Land Board;
(ii) Non-compliance with requirements of Land Act and related legislation and lease covenants (UDL and all other leases);
(iii) Abuse and misapplication of the laws;
(d) Missing land files;
(e) Missing documents;

(f) Ad-hoc creation of supplementary files;
(g) Unreliable filing system;
(h) Unreliable Registers;
(i) Lack of co-ordination within department;
(j) Fraudulent creation of files and documents;
(k) Forgery of signatures of officers;
(1) Failure to notify interested persons;
(m) Uncertainty with appointments for meetings generally;
(n) Lack of supervision of all staff;
(o) Failure to observe business opening hours;
(p) Inefficient service;
(q) Unreliable recording of information on files;
(r) Unreliable custody and movement of files;
(s) Incompetence;
(t) Lack of effective communication with Solicitor General, State Solicitor and related state agencies in protecting State's interests;

Further, the Commission's immediate recommendations are that:

> officers implicated or involved to be suspended pending further investigation; and
y Creation of manual for processes and procedures of the Department.

(a) Toka Enterprises Ltd

PARTIES:
(i) For the State:
1. Department of Lands & Physical Planning ('DLPP')
2. Department of Justice and Attorney General ('DJAG')
3. Department of Finance ('DoF')
4. National Broadcasting Corporation (CNBC)

(ii) Claimant:
1. Toka Enterprises Limited (TEL5)

B. NATURE OF CLAIM:

1. TEL alleged that between 1989 and 2007 the Minister and Secretary for Lands & Physical Planning breached their statutory duties by not issuing title for a State lease granted to TEL.

2. TEL successfully applied to the Court to compel performance of the statutory duties and also obtained damages against the State for the losses it suffered.

C. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

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

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

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

3. The statutory breaches asserted between 1989 and 2007 formed the basis of the court action and orders, including the K27,784,S36 award of damages, which spanned 14 years from 1995 to 2008, falling within
I" the period under inquiry 2000 to l5t July 2006.

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

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

^^gESOFINFQRMATlON^

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

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National Court Registry — original Court file referenced OS No. 240 of 2007
Office of Solicitor General -
(i) Original file SG 185/07
(ii) Evidence of -
o Neville Devete, Solicitor General o Gaure Odu, lawyer Department of Lands & Physical Planning -
(i) Land files for ~
o Lots 9-11, Section 136, Hohola, NCD o Part Portion 1455 (later 2126), Granville, Moresby, NCD o Portion 109 (later 2251), Granville, Moresby, NCD o Lots 10-16,
Section 496, Hohola, Gordon, NCD
(ii) Evidence of—
o Pepi Kimas, Secretary o John Ofoi, Chief Physical Planner o Samuel Kodawara, Surveyor General o

Raga Kavana, Registrar of Titles

National Broadcasting Corporation –
(i) Evidence of Joseph Ealadona, Managing Director

Evangelical Church of Manus – (i) Evidence of –
o Joseph Pokawin, Chairman o Sku Kuyei, Treasurer

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

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O Paul Maiu, Facilities Manager, Solomon Islands & PNG

(g) Toka Enterprises Ltd – (i)
Evidence of–
o Mahuru Dadi Toka, Sole Director o John S Goava, lawyer, Sannel Lawyers

2. The relevant transcripts of proceedings, particularly for Tuesday, 22 September 2009 and Wednesday, 23 September 2009, are provided with this Brief.

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

CHRONOLOGY OF EVENTS

Prior to Independence 16 September 1975

1. The Australian Broadcasting Commission ('ABC') erected transmitter aerials and a number of residential and office buildings on part Portion 1455.

2. The National Broadcasting Commission ('NBC') acquired ABC's interests including part Portion 1455.

1982

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

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1987

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

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

1989

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

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

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

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9. By letter dated 30 June 1989, Secretary, DLPP informed NBC on the grant of the TSL to TEL and urged NBC to either (a) remove the improvements or (b) negotiate with TEL on the use or disposal of the improvements.

10. On 3 July 1989, TEL formally accepted the TSL under a Letter of Grant by execution of the Lease Acceptance Form, and payment of all the prescribed fees.

11. By letter dated 12 October 1989, the State Solicitor advised the Secretary, DLPP to resolve the dispute between NBC and TEL in respect of Portion 2126 (formerly part Portion 1455) in favour of TEL on the basis that NBC did not appeal against the grant of the TSL by the PNG Land Board.

12. By letter dated 10 November 1989 to TEL, DLPP Assistant Secretary Southern Region, Silas Peril confirmed three (3) options offered to TEL to compensate for wrongly including Lot 9, Section 136, Hohola in the TSL. The compensation options were to grant TEL:

(a) Northern part of Portion 2127;
(b) Lot 102, Section 51, Granville; or
(c) Any Business (Light Industrial) block available in NCD.

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

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

(a) DLPP will compensate TEL by granting a parcel of land equivalent to the area occupied by two (2) NBC houses;

(b) Minister for Lands to support NBC's NEC Submission for K12 million to relocate its aerial farm to Lae to allow TEL to proceed with development under terms of TSL;

(c) TEL to proceed with Stage 1 of TSL, and implement Stage 2 immediately after NBC aerial farm is relocated; and

(d) DLPP immediately implement decision (a) and consult TEL.

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

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

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

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

19. On 13 November 1990, the Chairman, PNG Land Board notified TEL of its successful application for Portion 109.

1991

20. On 14 March 1991, TEL was gazetted in National Gazette No. G27 at page 48 as the successful applicant for Portion 109.

21. On 5 May 1991, a Letter of Grant and Lease Acceptance Form in respect of Portion 109 were issued to TEL.

22. On 26 September 1991 a corrigendum was published in the National Gazette G85 advising that Portion 109, Milinch, Granville, Fourmil Moresby was listed in error as it should have read as 109 Rem which should now be described as portion 2251, Milinch Granville, Fourmil Moresby, NCD.

23. On 27 September 1991, TEL was registered as proprietor of Business Lease Volume 1 Folio 185 over Portion 2251, Granville, Moresby, NCD, containing an area of 2.8746 hectares. The Lease period was 99 years commencing on 14 March 1991 and expiring on 13 March 2090.

1992

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

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

1993

26. On 8 February 1993, TEL lodged an application with the NCD Physical Planning Board for planning permission (PPP04 649/93) to subdivide Portion 2251 ('Portion 2251 Subdivision PW).

27. On 2 March 1993, the NCD Physical Planning Board (Meeting No. 2/93) approved TEL's Portion 2251 Subdivision Plan.

28. By Notice dated 26 May 1993, the Minister for Lands & Physical Planning approved TEL's application to conditionally surrender Portion 2251 for sub-division into seven (7) allotments and issuance of separate leases on registered survey plan 49/2082.

29. TEL was registered as proprietor of seven (7) separate Business Leases Volume 7 Folio 232-238 (inclusive) over Section 496 Lots 10-16 (inclusive) respectively. The Leases were each for a period of 98 years 206 days commencing on 28 April 1993.

1994
30. By letter dated 27 January 1994 to Secretary, DLPP, Beresford Love, lawyers for TEL followed up on the meeting concerning the non-issuance of title over the TEL 1989 TSL, noting the impending expiration of the TEL 1989 TSL on 16 February 1994.

31. On 16 February 1994, TEL's 1989 TSL expired by operation of law: Sections 38 and 66C of the then Land Act (Ch 185).

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32. By Notice published in the National Gazette No. G28 dated 21 April 2004 the DLPP advertised Tenders No. 56/94 and 57/94 comprising Business (Commercial) Leases over Lots 11 and 12 respectively, Section 136, Hohola, NCD.
33. On 28 July 1994, PNG Land Board No. 1927 (Item 102) recommended that Tatabai No. 24 Pty Ltd be granted a Business (Commercial) Lease over Lot 11, Section 136, Hohola.
34. By letter dated 2 August 1994 to die Secretary, DLPP, Beresford Love, lawyers for TEL informed the Secretary, DLPP that TEL proposed to surrender the TSL in consideration for the grant of a lease over Portion 1437.
1995
35. By letter dated 13 February 1995, Henaos, lawyers for TEL requested a meeting with the Secretary, DLPP to resolve issues relating to the non- issuance of title over the TEL 1989 TSL.

1996

36. By Notice published in the National Gazette No. G9 dated 26 January 1996 at page 55 Tatabai No. 24 Pty Ltd was advertised as the successful applicant for a Business (Commercial) Lease over Lot 11, Section 136, Hohola.

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37. On 23 February 1996, Tatabai No. 24 Pty Ltd was registered as proprietor of Business (Commercial) Lease, Volume 17, Folio 85, over land described as Lot 11, Section 136, Hohola, NCD. The Lease period is 99 years commencing on 26 January 1995 and expiring on or about 25 January 2094.

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

2003
39. After a review of the Waigani City Centre Plan on 27 February 2003, Portion 2126 (formerly 1455) was sub-divided and described as Portions 2538 and 2539.

40. The Waigani City Centre zoning plan was approved by the NCD Physical Planning Board and was subsequently published in the National Gazette No. G681 dated 26 June 2003. Portion 2126 ceased to exist as of this event.

41. On 26 August 2003, the approval of the Waigani City Centre zoning plan was advertised in the Post Courier as Public Notice.

42. On 19 September 2003, T. M. Rei Lawyers objected on behalf of TEL against the Waigani City Centre zoning plan to the NCD Physical Planning Board.

43. On 13 November 2003, T. M. Rei Lawyers appealed on behalf of TEL to the PNG Physical Planning Appeals Tribunal. The Tribunal then made recommendation to the Minister for rejection of the appeal.

44. On 23 December 2003, the Minister for Lands & Physical Planning accepted the recommendation of the PNG Physical Planning Appeals Tribunal and rejected the appeal.

2004

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

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

2007
47. By letter dated 27 January 2007, Sannel Consulting Services Inc, requested a meeting with the Minister of Lands & Physical Planning on the issues relating to the non-issuance of the title over TEL 1989 TSL, failing which legal proceedings would be instituted.

48. On 27 February 2007, by letter dated 26 February 2007, Sannel Consulting Services Inc. gave notice to the Solicitor General of TEL's intention to make a claim against the State for non-issuance of title in respect of the TEL 1989 TSL and also for damages.

49. On 3 May 2007 (18 years after grant), TEL brought proceedings under OS 240 of 2007 by way of judicial review against the Minister for Lands, the Secretary for Lands and the State out of its successful application on 10 February 1989 to be granted the TEL 1989 TSL.

50. On 15 May 2007, the National Court presided over by Justice Salika (as he then was) adjourned the proceedings to 22 May 2007. John Goava appeared for TEL and Gaure Odu appeared for the Minister for Lands, the Secretary for Lands and the State ('State parties').

51. On 22 May 2007, the National Court presided over by Justice Salika (as he then was) further adjourned the proceedings to 7 June 2007 with costs to TEL. John Goava appeared for TEL. Gaure Odu appeared for State parties and applied for the adjournment.

52. On 5 June 2007, Mr Neville Devete, Acting Solicitor General filed a Notice of Appearance in OS No. 240 of 2007 for all the defendants i.e., Pepi Kimas, Secretary, DLPP, Dr Puka Temu, Minister for LPP and the State.

53. On 7 June 2007, leave to apply for judicial review was granted by the National Court in OS No. 240 of 2007. Mr Tauvasa Tanuvasa of the Solicitor General's Office appeared for the State and unsuccessfully applied for an adjournment of the hearing due to the unavailability of Mr Gaure Odu, lawyer in carriage of the matter. Mr John Goava appeared for TEL. Mr Goava submitted to the Court that there were no competing grounds or interests in respect of the land subject of the TSL.

54. 17 July 2007 was the 40th day on which the State was required to file an appeal against the decision of 7 June 2007: Section 17 of Supreme Court Act.

55. By letter dated 10 August 2007, the Solicitor General provided the Secretary, DLPP with copies of the court documents in OS No. 240 of 2007, and sought instructions.

56. By letter dated 16 August 2007, the Secretary, DLPP instructed the Solicitor General to seek adjournment of OS No. 240 of 2007 as relevant files had yet to be located and reviewed to provide

full and proper instructions.

2008
57. Ten (10) months later, on 27 June 2008, the National Court granted TEL an order in the nature of mandamus requiring the defendants to issue TEL
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with title to the TEL 1989 TSL. TEL was also directed to file evidence of damages suffered with submissions within 7 days. Costs were awarded to TEL. Mr Gaure Odu of the Solicitor General's Office appeared for the State. No evidence or submissions were provided to the Court by the State for its consideration and determination prior to the issuance of those orders.

58. 6 August 2008 was the 40th day on which the State was required to file an appeal against the decision of 27 June 2007: Section 17 of Supreme Court Act.

59. On 7 July 2008, Sannel Consulting Services Inc served on the office of Solicitor General, a copy of sealed Court Order dated 27 June 2008 under cover of letter dated 30 June 2008 addressed to the Solicitor General and circulated to the Minister and Secretary, DLPP ('SCS' letter').

60. On 14 July 2008, Secretary, DLPP made a notation on SCS' letter seeking Manager Manager, Legal Services, Ian Kundin's advice and expressing his understanding that the Court Order would be challenged.

61. On 14 October 2008, Neville Devete, Acting Solicitor General caused a letter dated 1 September 2008 to be faxed to DLPP's Manager, Legal Services, Ian Kundin in which the Court Order of 27 June 2008 was enclosed with advice to issue title over Portion 2126, Granville and Lots 9, 11, 12 (Consolidated), Section 136, Hohola, NCD as soon as possible to avoid possible contempt.

62. In a separate hearing on 27 November 2008, the National Court awarded TEL damages in the sum of K27,784,536.00, consisting substantially of past and future economic losses spanning 14 years from 1995 to 2008. Mr Goava appeared for TEL. No appearance was made on behalf of the State.

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1990

63. 6 January 2009 was the 40th day on which the State was required to file an appeal against the decision of 27 November 2008: Section 17 of Supreme Court Act.

64. On 16 March 2009 (20 years after grant), TEL was registered as proprietor of Urban Development Lease, Volume 34, Folio 49, over land described as Portion 2538, 2539 (19), Milinch Granville, (Section 136 Hohola)(Cons), Moresby, NCD, containing an area of 3.950 hectares ('TEL UDL March 2009').

65. By letter dated 26 May 2009, Sannel Lawyers proposed to the Legal Officer, DLPP that TEL be compensated with parcels of land under a new title in consideration of the following:

(a) TEL surrender TEL UDL March 2009 on 26 May 2009.
(b) The new title be prepared for TEL as "one title" replacing the TEL UDL March 2009.
(c) TEL be allocated with new land covering area of 0.8670 hectares as compensation for loss of Lot 9, Section 136
(d) TEL be allocated with new land covering area of 2.833 hectares as compensation for loss of road severance or slightly greater size based on economic value of road land.
(e) TEL has identified Lot 3, Section 439, Waigani City Centre as an appropriate compensatory package.
(f) TEL considered Portion 2537, Waigani City Centre as compensatory land.

66. On 4 June 2009, TEL applied for the surrender of the TEL UDL March 2009.

67. On 10 June 2009, the Registrar of Titles cancelled the TEL UDL March 2009.

68. On 16 June 2009, TEL was registered as proprietor of Urban Development Lease, Volume 34, Folio 173, over lands described as Portion 2534, 2535, 2538,2539 & (DC/136/019)(CONS), Granville, Moresby, NCD, containing an area of 6.227 hectares (TEL UDL June 20090-

69. The TEL UDL June 2009 is for a term of five (5) years commencing 11 June 2009, but erroneously records the expiration date as 10 June 2104 (a term of 95 years).

70. No appeal was filed against any of the National Court decisions within the statutory time limit. However, on 11 September 2009 the Solicitor General endorsed the Certificate of Judgment stating that "the State proposes to take further action in this matter and satifaction of judgement cannot take place".

Land area granted to TEL

71. The TEL 1989 TSL originally granted to TEL contained an area of 8.81 hectares.

72. The compensatory land of Portion 109 granted to TEL as replacement for Lot 9, Section 136, contained an area of 2.8746 hectares. Lot 9 contained an area of 0.8670 hectares.

73. TEL's TEL UDL June 2009 contains an area of 6.227 hectares.

74. In sum, TEL has received a total land area of 9.10 hectares, an excess of 0.29 hectares from the TEL 1989 TSL.