



Ombudsman Commission of Papua New Guinea

Investigation into

THE PURCHASE OF THE CONSERVATORY, CAIRNS

**by the Public Officers
Superannuation Fund Board**

**and associated transactions
and arrangements**



**FINAL REPORT
NOVEMBER 1999**

**OMBUDSMAN COMMISSION
OF
PAPUA NEW GUINEA**

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**AND ASSOCIATED TRANSACTIONS
AND ARRANGEMENTS**

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The Ombudsman Commission dedicates this report to:

- **The contributors to the POSF, who have been kept in the dark and misled, too many waiting for their payout, as their hard-earned contributions were carelessly spent.**
- **The people of Papua New Guinea, who are being asked to subsidise the bad decision of the POSFB through an ill-conceived and artificial lease to the State.**
- **The professional and ethical public officials that still exist in our country, and who watch as their less honest and less competent colleagues go unpunished or even rewarded and promoted for their bad advice and wrong conduct.**

EXECUTIVE SUMMARY

This is the final report of an investigation into the purchase of a building in Cairns, Australia, by the Public Officers Superannuation Fund Board (POSFB). The building is called The Conservatory.

Principal findings

- In November 1994, the POSFB purchased The Conservatory for AUD\$18.72 million (then equal to K16.7 million).
- Just a week before that, The Conservatory had changed hands for \$9.75 million.
- The market value of the property in November 1994 was approximately \$7 million. The POSFB paid a price more than two and a half times the market value.
- When the POSFB made the decision to purchase The Conservatory, the company that they were negotiating with - controlled by Mr Warren Anderson and Mr Solly Benn of Western Australia - did not own the property.
- The then Managing Director of the POSFB, Mr Ereman Ragi, kept no records of the discussions he had regarding the purchase of The Conservatory.
- No serious consideration was given to the purchase of any property other than The Conservatory. No professional advice was sought regarding the property market in Cairns.
- The POSFB did not obtain an independent valuation of the property. Mr Ragi left it to the vendor to arrange for two "market appraisals". These concluded that The Conservatory was worth \$18 million to \$21 million. Neither appraisal was independent, objective or carried out by a qualified valuer.
- The POSFB made no attempt to negotiate the asking price, even though it increased by K3.7 million in less than four months.
- The members of the Board of the POSF failed, individually and collectively, to subject the proposed purchase to proper scrutiny and assessment. Each Board member had an opportunity to stop the fast passage of the proposal. Each failed to act.

- Mr Ragi and Mr Tau Peruka (who was then Secretary of the Department of Personnel Management, Chairman of the Office Allocation Committee and a member of the Board of the POSF) were subject to political pressure to push through the purchase of the Conservatory.
- Statutory approval for the purchase was given by Sir Julius Chan as Acting Minister for Finance.
- In the opinion of the Ombudsman Commission, the conduct of Sir Julius, the Prime Minister at the time of the purchase, was wrong in that he had a conflict of interests in relation to the purchase of The Conservatory and a concurrent proposal for a major redevelopment in Port Moresby.
- While Sir Julius was involving himself in the decision to purchase The Conservatory, the same people who were selling the property to the POSFB – Mr Anderson and Mr Benn – were involved in negotiations to build a large office complex in Port Moresby on land at Waigani owned by a company in which Sir Julius held 75% of the shares. Sir Julius held the shares in trust for his political party, the People's Progress Party.
- Sir Julius carried out his official duties without declaring his conflict of interests, creating an environment where corruption could easily occur.
- In the opinion of the Ombudsman Commission, Pato Lawyers were also in a conflict of interests. They failed to pass on vital information about the price at which The Conservatory had recently changed hands.
- Eighteen months after signing the contract to purchase The Conservatory, the POSFB entered into a "head lease" with the National government, whereby the State agreed to lease the entire building for ten years.
- This lease is a contrived arrangement. The State has agreed to pay the POSFB more than three times the market rental; there are no PNG governmental agencies occupying the building; and the building is still less than half tenanted. Even if the building is fully tenanted, the lease will continue to be a significant drain on the National Budget.

Principal recommendations

- The POSFB should immediately make a decision on the viability of commencing civil proceedings to recover money lost as a result of The Conservatory purchase.

- The head lease should be terminated.
- The Minister for Finance and Treasury should issue "show cause" notices to the members of the Board of the POSF responsible for the purchase of The Conservatory.
- Other public officials, including Ereman Ragi who is now the CEO of the Cocoa Board and senior officers of the POSFB, who failed to discharge their professional duties, should have their continuing public employment immediately reviewed; and , if necessary, terminated..
- Pato Lawyers should not be allowed to act for the State or any governmental body in any legal capacity for the next five years.
- The Independent State of Papua New Guinea should not conduct any further business with Mr Anderson or Mr Benn or any company wholly or partly owned by them, separately or together.

Conclusion

The \$11 million premium paid by the POSFB went straight into the hands of foreign property developers. The attempt to claw back some of this money from the State by way of exorbitant rentals under the head lease means that not only POSF contributors, but also the National Government and all the people of Papua New Guinea, continue to pay the price for gross administrative incompetence.

The vast majority of public officials whose job it was to assess, analyse, criticise and above all apply common sense to these kind of proposals, failed miserably.

The findings and recommendations of this report must be addressed and acted upon, to ensure the waste of public funds and the breach of public trust that occurred in this case are not repeated.



CHRONOLOGY

1994

- March Anderson and Benn visit POM to promote Waigani Redevelopment proposal. Meetings with Ragi and Violaris. Asking price approximately K360 million.
- April Benn visits POM. He and Violaris talk to Peruka, Chairman of OAC.
- 19.4.94 Ragi responds to proposal – POSFB interested “in principle”.
- 20.4.94 NEC decides to centralise PNG offices abroad.
- 22.4.94 Lemeki arrives in Cairns to take up appointment as PNG Consul.
- 18.7.94 Lemeki writes to Dusava regarding the purchase of a site for PNG Government building in Cairns.
- 8.8.94 Dusava flies to Cairns at Sir Julius Chan’s direction.
- 30.8.94 Change of government. New PM Chan appoints caretaker cabinet, including Sir Albert Kipalan.
- 1.9.94 Kipalan, as caretaker Minister, writes to Anderson, undertaking to lease the proposed Waigani offices.
- 6.9.94 Benn writes to Kipalan. Delighted to have received his support.
- 10.9.94 Kina floated. Currency quickly devalues.
- 13.9.94 Asia Securities enters option agreement with owner of The Conservatory, Cape Bouvard Investments Pty Ltd; paying \$100,000.00 for option to purchase at \$9.75 million.
- 26.9.94 POSFB receive the Roberts report which estimates The Conservatory is worth \$18.92 million.
- Early Oct Ragi flies to Cairns to inspect property for the first time.

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|-----------|---|
| Early Oct | POSFB business paper prepared by Cho and signed by Ragi and Wingia. |
| Early Oct | Ragi and Peruka put under pressure to hold Board meeting and expedite the purchase. |
| 6.10.94 | Anderson acquires a shelf company, Katingo Pty Ltd, to purchase and on-sell The Conservatory. |
| 7.10.94 | Iamo writes to Ragi with concerns over Conservatory purchase. |
| 7.10.94 | Peruka writes to Ragi, expressing same concerns. |
| 10.10.94 | Board meeting with Peruka as Acting Chairman, and Iamo present, makes decision to purchase The Conservatory. Chairman Aopi is overseas. |
| 10.10.94 | Asia Securities assigns its option to Katingo, for \$2 million; thus Katingo acquires right to purchase for \$9.75 million. |
| 11.10.94 | POSFB seeks approval for purchase from Prime Minister Chan. |
| 11.10.94 | Chan instructs Ragi to inform Acting Secretary for Finance to prepare recommendation. |
| 13.10.94 | Deadline for exercise of option by Katingo; further \$875,000.00 payable to Cape Bouvard. |
| 21.10.94 | Second Board meeting: second valuation ordered. |
| 25.10.94 | POSFB receive Crockford report, valuing The Conservatory at \$21 million. |
| 26.10.94 | Chan appoints himself Acting Minister for Finance, while Haiveta is overseas; issues statutory approval for purchase. |
| Early Nov | Ragi approaches Australian banks, seeking finance. Unsuccessful. |
| 14.11.94 | K500,000.00 deposit paid by POSFB. |
| 14.11.94 | Transfer instrument executed by Katingo. |
| 17.11.94 | The Conservatory transferred from Cape Bouvard to Katingo. |

Chronology

- 24.11.94 Contract of sale for The Conservatory signed; but no finance in place.
- 27.11.94 Due date for payment of \$8.775 million by Katingo to Cape Bouvard.
- Late Dec Ragi goes on recreation leave.
- 28.12.94 POSFB informed by Patos that it could still terminate the contract.
- 1995**
- 6.1.95 POSFB informed by Patos that it could still terminate the contract.
- 23.1.95 POSFB informed by Patos that it could still terminate the contract.
- 23.1.95 Board meeting: decision to re-finance The Conservatory.
- 23.1.95 Patos advised by Australian agents that Katingo had paid \$9.75 million for The Conservatory. Patos fail to pass this information on to POSFB.
- 18.5.95 Settlement of purchase.
- 3.11.95 The *Financial Review* and *Saturday Independent* break story.
- 3.11.95 Mulina briefs Minister.
- 3.11.95 Ombudsman Commission commences investigation.
- 30.11.95 Purchase of The Conservatory debated in Parliament.
- 1996**
- 30.5.96 Head lease between Moki No 10 and the State executed.
- 1997**
- Sept Ombudsman Commission releases preliminary report.
- Oct Indicative assessment is that The Conservatory is worth \$3 million.
- 10.11.97 Chan obtains injunction, preventing Ombudsman Commission from publishing final report.

25.11.97 Auditor-General's report tabled in Parliament.

1998

1.7.98 Omega Property Group replace Roberts as property manager.

1999

5.10.99 Court proceedings against Ombudsman Commission discontinued.

12.11.99 Less than half of The Conservatory occupied.



LIST OF ABBREVIATIONS

AUD	—	Australian dollar
CBD	—	Central Business District
CEO	—	Chief Executive Officer
DoF	—	Department of Finance
FIRB	—	Foreign Investment Review Board
IMB	—	International Monetary Brokers Ltd
IRR	—	internal rate of return
JLW	—	Jones Lang Wootton
MVIT	—	Motor Vehicles Insurance Trust
NEC	—	National Executive Council
NML	—	National Mutual Ltd
OAC	—	Office Allocation Committee
PGK	—	Papua New Guinea kina
PM	—	Prime Minister
PNG	—	Papua New Guinea
PNGLR	—	Papua New Guinea Law Reports
POSF	—	Public Officers Superannuation Fund
POSFB	—	Public Officers Superannuation Fund Board
PPP	—	People's Progress Party
psm	—	per square metre
ROI	—	return on investment
sqm	—	square metre

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1. JURISDICTION AND PURPOSE OF INVESTIGATION

[1.1] INTRODUCTION

This is the final report of an investigation into the purchase of a building in Cairns, Australia, by the Public Officers Superannuation Fund Board (the POSFB). The building is called "The Conservatory". The contract of sale was executed on 24 November 1994.

Intense public interest in the transaction was aroused in November 1995 when a series of reports appeared in *The Australian Financial Review* and *The Independent* newspapers. It was suggested that:

- The POSFB had paid \$18.72 million (K16.28 million) for the building.
- But the building was worth only \$9 million to \$10 million (K7.8 million to K8.7 million).

The Ombudsman Commission made the decision to investigate this matter on 3 November 1995. When we commenced investigating, it became evident there were two other projects which seemed to be interrelated with the purchase of The Conservatory. These were:

- The proposals and arrangements for the PNG Government to purchase and/or lease a building in Brisbane, Australia, known as Primac House. The name of the building was later changed to Malagan House.
- The proposal to construct, and then sell to the POSFB, a large office complex in Port Moresby. This is known as the "Waigani Redevelopment proposal".

In the initial stages, all three projects were investigated together. Our preliminary report covered all three projects. At that time we considered that the issues raised by our investigation of the purchase of The Conservatory were similar to those raised by our investigation into Malagan House.

Where the "preliminary report" is mentioned in this report, it refers to the preliminary report, issued in September 1997. The preliminary report was issued to individuals or groups affected by our report, to give them the opportunity to comment.

However, the Ombudsman Commission has since decided to produce two separate final reports: one for Malagan House, and one for the purchase of The Conservatory and the Waigani Redevelopment proposal. Although the two reports have some overlapping issues and themes, this report is the result of a separate and discrete investigation.

[1.2] THE DECISION TO INVESTIGATE

Unlike some ombudsman institutions in other jurisdictions, the Ombudsman Commission of Papua New Guinea has the constitutional power to conduct investigations on its own initiative. It exercised that power in this case.

In deciding to investigate this matter, we took note of the fact that the contract for the purchase of The Conservatory had already been executed. By the time the transaction came to the media's attention, the purchase had actually been settled.

Nevertheless, there was a huge, perhaps unprecedented, amount of public interest in the matter. As we stated in our 1996 report on the Port Moresby water project, when allegations of corruption arise, "sunlight is the best disinfectant". We considered it was very important to shed sunlight on the purchase of The Conservatory and associated transactions and arrangements.

The Commission decided to use its powers under the *Constitution* and the *Organic Law on the Ombudsman Commission* to investigate the transaction and the conduct of those persons and governmental bodies involved in it.

Under the *Constitution*, the Ombudsman Commission consists of three members: the Chief Ombudsman and two Ombudsmen. In this report, all references to "we" should be read as references to the Ombudsman Commission.

When the decision to investigate The Conservatory was made, and later, when the preliminary report of this investigation was released, the Ombudsman Commission consisted of: Chief Ombudsman Simon Pentanu, Ombudsman Joe Waugla and Ombudsman Ninchib Tetang. In December 1998, the six-year appointments of Ombudsmen Waugla and Tetang ended. Ombudsman Ila Geno and Ombudsman Raho

Hitolo were duly appointed to the vacant positions.

Although the membership of the Ombudsman Commission has changed, the decisions and actions taken by the Commission, as a constitutional institution, remain in place.

[1.3] JURISDICTION

The *Constitution* and the *Organic Law on the Ombudsman Commission* allow the Ombudsman Commission to investigate any conduct on the part of any "governmental body" or any of its officers. The Commission can thus investigate the conduct of any arm, department, agency or instrumentality of the National Government, including the POSFB.

[1.4] PURPOSE OF THE INVESTIGATION

General purpose

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

- To determine whether any of the conduct under investigation was *wrong*.
- To determine whether there were any *defects* in any law or administrative practice.

Specific terms of reference

To assist ourselves in determining whether any of the conduct was wrong, there were a number of specific matters which we thought should be addressed. These included:

- Who made the decision to purchase The Conservatory?
- How was the purchase price arrived at?
- Were any members of Parliament involved in the transaction?
- How was the deal put together?

- What was the market value of The Conservatory? Did the POSFB pay too much for it?
- If too much was paid, how can the deal be explained?
- Was there corruption involved in the decision to purchase The Conservatory?

Our findings on these and other matters are set out in the chapters which follow.

[1.5] THE AUTHORITY TO REPORT ON PRIVATE INDIVIDUALS AND COMPANIES

We have found it necessary, in this Report, to comment on the conduct of a number of private individuals and companies. When the Commission investigates government projects for the purchase and development of property, it is inevitable that findings of fact will have to be made concerning the conduct of the companies and individuals involved in those projects.

We received some submissions to the effect that the Commission was exceeding its authority by reporting on private individuals and companies. We have carefully considered those submissions, but rejected them.

The Ombudsman Commission would not be properly performing its constitutional functions if it declined to investigate and report on the conduct of particular individuals and companies, who had dealings with governmental bodies, simply because those individuals and companies form part of the "private" sector.

[1.6] OMBUDSMAN COMMISSION NOT CONFINED TO REPORTING ON LEGALITY OF ADMINISTRATIVE CONDUCT

When the Commission conducts an investigation of this nature, it is not confined to reporting on whether breaches of the law have occurred. The constitutional mandate is much broader than this. The Commission is authorised to report on what, *in its opinion*, is *wrong* conduct, irrespective of whether that conduct was in accordance with the law.

In forming our final opinion on such matters, we have closely examined and considered

all submissions made in response to the Commission's preliminary report of this investigation.

We have also been guided by a number of principles of good administration which the Ombudsman Commission has drawn attention to in its recent reports dealing with various public infrastructure projects, namely:

- The Poreporena Freeway Report (December 1992).
- The Report on the Disciplined Forces Institutional Housing Project (June 1994).
- The Report on the Upgrading of the Port Moresby Water Supply Project (October 1996).

[1.7] WHAT IS "WRONG" CONDUCT?

The *Constitution* gives some guidance to the Ombudsman Commission when it is deciding whether administrative conduct is "wrong".

Section 219(2) of the Constitution states:

Subject to Subsections (3), (4) and (5), and without otherwise limiting the generality of the expression, for the purposes of Subsection (1)(a) conduct is wrong if it is -

- (a) contrary to law; or
- (b) unreasonable, unjust, oppressive or improperly discriminatory, whether or not it is in accordance with law or practice; or
- (c) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations; or
- (d) based wholly or partly on a mistake of law or of fact; or
- (e) conduct for which reasons should be given but were not,

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

There is an important thing to note about the constitutional definition of "wrong" conduct. It is not exhaustive. Section 219(2) includes the words "and without otherwise

limiting the generality of the expression". This means that conduct which does not fit into any of the descriptions in paragraphs (a) to (e) can still be regarded as wrong. The descriptions used by the *Constitution* are examples only. So the Ombudsman Commission is entitled to regard conduct as wrong, even if the conduct does not fit into any of the examples given.

These are important observations to make in the context of the present investigation as we have decided to investigate, as one of our specific terms of reference, whether any of the conduct involved in or surrounding the purchase of The Conservatory in Cairns was "corrupt".

There is no definition of corruption in the *Constitution*. Corrupt conduct is not specifically included amongst the examples of wrong conduct in Section 219(2). But it is a word which is used a lot in Papua New Guinea today. Allegations of "corruption" are often raised. A certain person might be alleged to be "corrupt". Or a deal might be said to be "corrupt".

It is useful to address these issues because any conduct which is corrupt, we believe, should be regarded as wrong. So what do we mean by "corruption"?

[1.8] WHAT IS "CORRUPT" CONDUCT?

There are some obvious examples of corruption:

- If a person pays money "under the table" to a public official to get a decision made a certain way, that will amount to payment of a bribe. That conduct is clearly "corrupt".
- If public money is used to purchase private property at an artificially inflated price and part of the proceeds of the purchase are shared with the public official who authorised the purchase, that also amounts to payment of a bribe, or a "kickback". Clearly, that is "corruption".

But it needs to be appreciated that corruption extends beyond just straight-out bribes and kick-backs. This has been acknowledged in an increasing number of jurisdictions around the world. In New South Wales, for example, "corrupt conduct" is defined to include a large range of improper and unethical conduct for the purposes of the *Independent Commission Against Corruption Act 1988*.

DEFINITION OF "CORRUPT CONDUCT" UNDER THE INDEPENDENT COMMISSION
AGAINST CORRUPTION ACT OF NEW SOUTH WALES

Corrupt conduct is -

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or
 - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or
 - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or
 - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
-

We believe that the above definition is workable in Papua New Guinea. Corrupt conduct is any conduct which involves the "dishonest" or "partial" exercise of public power by a public official. It therefore includes all manner of improper and unethical behaviour on the part of public officials.

When corruption is understood in this light it makes us realise that in any society, especially PNG, the people who are part of that society can be expected to be judged by the ethics and customs of that society - not only by its written laws.

In our *Criminal Code* we have a number of provisions which deal with official corruption. But in determining whether certain administrative conduct is corrupt - and therefore wrong - we do not think we should be constrained by the way that the *Criminal Code* deals with these issues. The Ombudsman Commission is permitted, by the *Constitution*, to take account of much broader considerations.

Corruption has been described in the following terms by Professor Kempe Ronald Hope, Professor of Development Studies at the University of Botswana:

Bureaucratic corruption is, first and foremost, the utilisation of bureaucratic official positions or titles for personal or private gain, either on an individual or collective basis, at the expense of the public good, in violation of established rules and ethical considerations, and through the direct or indirect participation of one or more public officials whether they be politicians or bureaucrats. ...

The simple truth is that bureaucratic corruption can only occur with the participation of public officials. Whether or not that participation is direct or indirect is completely irrelevant to the completion of a corrupt act or a set of corrupt acts in which such officials are involved.

It is a tautology that 'bureaucratic corruption' takes place in transactions between private individuals or firms and public officials. Thus, as has been implied before, the issue is one of the misuse of public office and the abuse of public trust by public officials.

(*Bureaucratic Corruption and its Control in Africa*, from Collected Works of the Seventh International Anti-Corruption Conference, Beijing, P.R.C., October 1995, p 111.)

Corruption is closely tied to a lack of honesty and integrity. This point was made by Mr Pedro Estay Cerda of the Investigative Police of Chile:

Corruption is understood as a lack of honesty and integrity in the lives of people, that denotes non-compliance with duties that are inherent to assignments assumed before society. The corruption phenomenon may encompass the sphere of state agents who, in the practice of a public function, for the sake of personal profit accommodate actions or omissions that are under their legal authority, deliberately subordinating public interest to a personal one.

Corruption is an ethical category through which it is shown that an individual in the public sphere betrays the function the community has given him/her through a specific position.

(*The Corrupting Agent and His Effects on a Constitutional State*, from Collected Works of the Seventh International Anti-Corruption Conference, Beijing, P.R.C., October 1995, p 141.)

In his farewell message to the nation in 1985, the out-going Chief Ombudsman of Papua New Guinea, Sir Ignatius Kilage, emphasised that corruption often involves secrecy and a breach of trust:

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Corruption always involves more than one person. Secrecy is involved, except where the occurrence of such activity is so rampant that boldness is accepted, especially by the powerful.

Because more than one person is involved, there is an element of mutual obligation and benefits, which is usually camouflaged behind lawful justification. This deception of a public body or society at large is a betrayal of trust and violates the norm of duty and responsibility within the civic order.

Sir Ignatius also warned us of the dangers that corruption posed to Papua New Guinea:

Corruption can be compared to *Salvinia Weeds*. It can spread quickly and suffocate aquarium life as well as human beings whose livelihood is fishing.

If corruption is not checked, it will suffocate the fabric of our society, and our dreams of an idealic society will be in vain.

We have taken into account all of the above considerations when determining, for the purposes of our investigation into the purchase of The Conservatory, whether any of the conduct was wrong.

To summarise:

- Corrupt conduct is not confined to bribery and kickbacks.
- Corrupt conduct extends to all breaches of public trust.
- Corrupt conduct is wrong conduct.

[1.9] WHAT IS AN "ASSOCIATE"?

In this Report we use the term "associate". Most often this term arises when discussing a possible conflict of interest. As we state earlier, it is wrong for a public official to be influenced in a decision because of a possible benefit to an associate.

There is no definition of "associate" in the *Organic Law on the Ombudsman Commission*. Section 1 of the *Organic Law on the Duties and Responsibilities of Leadership* says that an associate includes (but is not limited to):

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A member of his family or a relative, or a person (including an unincorporated profit-seeking organization) associated with him or with a member of his family or a relative.

For the purpose of this Report the Ombudsman Commission considers that an "associate" is any of:

- a close personal friend;
- a political colleague;
- a family member or other dependant;
- a partner in a current business venture;
- a long-standing business colleague; or a
- person with some financial congruity of interest (e.g. a large common shareholding).

[1.10] METHOD OF INQUIRY

The Ombudsman Commission obtained documents and other evidence from a number of different sources and used its powers under Section 18 of the *Organic Law on the Ombudsman Commission* to require the production of documents and information. Section 18 states:

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- (1) Subject to the provisions of this section and Section 20, the Commission may from time to time require any person who in its opinion is able to give any information relating to any matter that is being investigated by the Commission to furnish to it that information and to produce any documents, papers or things that, in the opinion of the Commission, relate to any matter being investigated by it and that may be in the possession or control of that person.
- (2) Subsection (1) applies whether or not -
- (a) the person is an officer, employee or member of any State Service, provincial government body, local government body or statutory body; and
-

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-
- (b) the documents, papers or things referred to in that subsection are in the custody or under the control of any State Service, provincial government body, local government body or statutory body.
 - (3) The Commission may, by instrument in writing, summon any person who in its opinion is able to give any information relating to any matter that is being investigated by the Commission, to attend the Commission at a time and place specified in the summons for examination by it on oath or affirmation.
 - (4) The Commission may administer an oath or affirmation to a person appearing as a witness before the Commission whether the witness has been summoned or appears without being summoned, and may examine the witness on oath or affirmation.
 - (5) A witness attending before the Commission has the same privileges and is subject to the same penalties in relation to the giving of information, the answering of questions and the production of documents, papers and things as a witness before the National Court.
 - (6) Except on the trial of any person for perjury in respect of his sworn testimony, no statement made or answer given by that or any other person in the course of any inquiry by or any proceedings before the Commission is admissible in evidence against any person in any court or at any inquiry or any other proceedings, and no evidence in respect of proceedings before the Commission shall be given against any person.
 - (7) Where any person is required by the Commission to attend before it for the purposes of this section, the person is entitled to the same fees, allowances and expenses as if he were a witness in the National Court.
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**[1.11] THE OMBUDSMAN COMMISSION'S OBLIGATION TO
OBSERVE PROCEDURAL FAIRNESS**

Whenever the Ombudsman Commission prepares a report of this nature, it has a duty to observe procedural fairness. This duty is imposed by Section 17(4)(b) of the *Organic Law on the Ombudsman Commission*. Section 17(4)(b) states:

Nothing in this Law compels the Commission to hold any hearing and no person is entitled as of right to be heard by the Commission except that ... the Commission shall not make any comment in its report that is adverse to or derogatory of any person without -

- (i) providing him with reasonable opportunity of being heard; and
 - (ii) fairly setting out his defence in its report.
-

In order to discharge its duty of procedural fairness, the Ombudsman Commission distributed a preliminary report of this investigation in September-October 1997.

A preliminary report allows persons who may be affected by the investigation to respond to any adverse findings and correct any factual errors the Commission may have made.

The preliminary report was distributed only to persons who were the subject of adverse comment or who had some other special interest in the matter. The Commission also issued a direction under Section 21 of the *Organic Law on the Ombudsman Commission* that none of its contents could be published without the written consent of the Commission.

Some people were given a copy of the whole preliminary report to comment on, whereas others received only the parts which concerned them.

All persons who received the preliminary report (in whole or part) were given the opportunity to respond, orally and/or in writing, to the Commission's preliminary findings. Most persons responded during the course of October 1997. Though in some cases, extensions of time were granted. In a few cases, there was no response at all.

Some respondents expressed their disappointment at not having been interviewed by the Commission prior to the preparation of the preliminary report. But, while acknowledging that concern, the Commission considers that it satisfactorily discharged its duty of fairness by giving every person adversely commented on in the preliminary report a copy of the report (or relevant extracts) to respond to. It should also be emphasised that no restrictions were placed on the type of comments, suggestions or submissions that each respondent could make.

Some respondents sought undertakings from the Commission that their responses be

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reproduced in full. But the Commission has not given any such undertakings. It was neither practical nor desirable to do so.

As far as procedural fairness is concerned, the Commission's constitutional obligation is to "fairly" set out the "defence" of persons who are the subject of adverse or derogatory comment; and we have conscientiously set about discharging this obligation.

We consider we had a constitutional obligation to prepare a concise and readable report of our investigation, rather than simply a compendium of responses to the preliminary report.

A full list of people who were invited to respond to the preliminary report is contained in the following table.

TABLE 1.1
PERSONS INVITED TO RESPOND TO THE
PRELIMINARY REPORT

	NAME	STATUS
1	Mr Kila Ai	Responded in writing.
2	Mr Gereia Aopi	Responded in writing.
3	Mr Warren Anderson	Responded in writing.
4	Mr John Ban	Responded orally and in writing.
5	Mr Mark Basausau	Responded in writing.
6	Mr Brown Bai	Responded in writing.
7	Mr Solly Benn	Responded in writing.
8	Mr Anthony Boge	Acknowledged receipt of but offered no comment.
9	Sir Julius Chan	Extension of time granted to 31.10.97. Further extension granted to 10.11.97. Commenced Court proceedings on 06.11.97. Proceedings discontinued 05.10.99. Responded orally and in writing.
10	Mr Pe Cho	Responded in writing.
11	Mr David Coyle	<i>No response.</i>
12	Mr Ted Crockford	<i>No response.</i>
13	Mr Gabriel Dusava	Responded in writing.

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14	Mr Aloysius Eviassa	Responded in writing.
15	Mr Zacchary Gelu	Responded orally.
16	Hon Chris Haiveta, MP	Responded in writing.
17	Mr Vele Iamo	Responded in writing.
18	Mr Darby Kila	Responded in writing.
19	Sir Albert Kipalan	Responded orally and in writing.
20	Mr Bernard Knapp	Responded in writing.
21	Mr Jacob Lemeki	Responded in writing.
22	Mr Isaac Lupari	<i>No response.</i>
23	Mr Michael Malabag	Responded in writing.
24	Mr Ugwalubu Mowana	Responded in writing.
25	Mr Rupa Mulina	Responded in writing.
26	Pato Lawyers	Responded in writing.
27	Mr Tau Peruka	Responded in writing.
28	Mr Ereman Ragi	Extension granted to 31.10.97. Further extension granted to 10.11.97. Court action commenced on 14.11.97. <i>No response.</i>
29	Mr Tony Roberts	Responded orally and in writing.
30	Mr Dieter Seefeld	<i>No response.</i>
31	Mr Peter Tsiamalili	Responded orally and in writing.
32	Mr Nicos Violaris	Extension granted to 31.10.97. Further extension granted to 10.11.97. Responded in writing.
33	Mr Joseph Wingia	Responded in writing.

[1.12] LEGAL PROCEEDINGS

There were three persons who, rather than responding to the preliminary report, filed legal proceedings against the Commission. Sir Julius Chan, Mr Gabriel Dusava and Mr Ereman Ragi all claimed, amongst other things, that the Commission had acted in breach of Section 17(4)(b) of the *Organic Law on the Ombudsman Commission* by distributing its preliminary report without giving them a reasonable opportunity of being heard.

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Sir Julius's proceedings commenced in the National Court in November 1997, and continued until October 1999.

Those of Mr Dusava and Mr Ragi also commenced in November 1997, and in December 1997, each of those cases was adjourned to a date to be fixed. However, neither Mr Dusava nor Mr Ragi has pursued their cases against the Commission. As the National Court did not issue an injunction in either of these cases, the proceedings commenced by Mr Dusava and Mr Ragi have not had the effect of preventing the publication of this report.

On 10 November 1997, the National Court granted leave to Sir Julius to seek judicial review of the Commission's proceedings and ordered that the Commission be enjoined from proceeding further, pending the determination of the judicial review. Shortly afterwards the Commission applied to the National Court to have those orders set aside. The application was successful and on 10 December 1997, the Court set aside all orders previously made against the Commission, subject to the proviso that Sir Julius be granted a further four weeks to respond to the preliminary report.

However, Sir Julius still did not respond. Instead, in early January 1998, he appealed to the Supreme Court. The Commission then objected to the competence of the appeal, on the ground that the Rules of the Supreme Court had been breached. The Commission's objection was dismissed by the Supreme Court in March 1998.

On 5 June 1998, the Supreme Court allowed Sir Julius's appeal and set aside the orders of the National Court made in December 1997. The matter was then sent back to the National Court for hearing the actual issues. In July 1998 the National Court made some preliminary rulings about the way the case was to be run. Sir Julius applied for leave to appeal against those rulings. His application was heard by the Supreme Court in August and October 1998.

Unfortunately, the Supreme Court did not make a decision on Sir Julius's application until a further eight months had passed. On 25 June 1999, the Supreme Court denied Sir Julius leave to appeal and therefore sent the matter back, once again, to the National Court. In July 1999, the parties (i.e. the Ombudsman Commission and Sir Julius) appeared before the National Court and the matter was set down for trial on 5 October 1999. However, just prior to the hearing date, Sir Julius filed a notice of discontinuance. The Commission consented to this course of action as Sir Julius had, during August and September 1999, decided to respond to the preliminary report.

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When the proceedings were discontinued on 4 October 1999, the Court's injunction - which had effectively stopped the publication of this report for almost two years - was automatically lifted.



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2. RELEVANT LAWS

[2.1] OVERVIEW

There are three Acts of the Parliament which have a direct bearing on this investigation:

- The *Public Officers Superannuation Fund Act* 1990.
- The *Public Finances (Management) Act* 1986.
- The *Public Services (Management) Act* 1986.

Also relevant is the *Constitution*, particularly the provisions dealing with:

- Appointment of Ministers.
- Acting appointments of Ministers.
- Constraints on the power of Ministers.

[2.2] PUBLIC OFFICERS SUPERANNUATION FUND ACT

The *Public Officers Superannuation Fund Act* (the *POSF Act*) is intended, according to its long title, to "provide a scheme of superannuation rights" for citizen officers and employees of:

- The National Public Service.
- The Parliamentary Service.
- The National Judicial Staff Service.
- The Teaching Service.
- The Police Force.

- The Correctional Service.
- The approved authorities.

The POSF Act:

- Establishes the Public Officers Superannuation Fund Board (the POSFB) as a statutory corporation, which may acquire, hold and dispose of property and may sue and be sued in its corporate name.
- Provides for the composition of the Board and the appointment, tenure and termination of Board members.
- Prescribes the prime function of the Board and duties and responsibilities of Board members.
- Establishes the Public Officers Superannuation Fund, as distinct from the Board.
- Provides for administration of the Fund.
- Regulates the investment of the Fund by the Board.
- Provides for regular compulsory contributions to the Fund by officers and employees.
- Makes employer contributions compulsory upon the retirement, resignation, retrenchment, death or invalidity of an officer or employee.
- Gives contributors and their dependants rights to pensions or retirement benefits, in the event of retirement, resignation, retrenchment, death or invalidity of a contributor.
- Provides for advances being made from the Fund to contributors for the purpose of purchasing or building dwelling houses.

HISTORICAL NOTE ON THE POSF ACT

The POSFB and the Fund it administers were established by the State Services & Statutory Authorities Superannuation Fund Act No. 31 of 1990 (the SSSASF Act).

Their predecessors were the Public Officers Superannuation Fund Board and the Public Officers Superannuation Fund, established under the Public Officers Superannuation Act (Chapter No. 66 of the revised Laws; the POS Act).

On 1 January 1991, the SSSASF Act commenced operation. This Act repealed the POS Act and established the State Services & Statutory Authorities Superannuation Fund Board (the SSSASFB). The 1990 Act also transferred the Fund established by the POS Act to the Fund established by the SSSASFB Act.

In 1993, the SSSASF (Amendment) Act No. 8 of 1993 was enacted and commenced operation. This Act changed (back) the name of the SSSAS Fund to the POS Fund. Further, the name of the SSSASFB was changed (back) to the POSFB.

The title of the SSSASF Act was also changed to its present title, the POSF Act.

To the present day, the POSFB is required to administer the Fund in accordance with what is now known as the POSF Act 1990.

[2.3] COMPOSITION OF THE BOARD

Section 4(1) of the *POSF Act* provides that the Board consists of seven persons:

- (1) The Managing Director of the Fund (Section 4(1)(a)).
- (2) The Secretary for Finance or his nominee, who is the Chairman of the Board (Section 4(1)(b)(i)).
- (3) The Secretary for Personnel Management or his nominee (Section 4(1)(b)(ii)).
- (4) A person to "represent approved authorities" (Section 4(1)(b)(iii)).
- (5) A nominee of the Police Association (Section 4(1)(c)(i)).
- (6) A nominee of the Public Employees Association (Section 4(1)(c)(ii)).
- (7) A nominee of the Teachers Association (Section 4(1)(c)(iii)).

The persons holding office under (2), (3) and (4) are described as "representatives of the State". Those under (5), (6) and (7) are "representatives of the contributors".

At the time The Conservatory was purchased, in November 1994, the persons holding the above offices were:

- (1) Mr Ereman Ragi.
- (2) Mr Gereia Aopi.
- (3) Mr Tau Peruka.
- (4) *Vacant.*
- (5) Mr Aloysius Eviaisa.
- (6) Mr Michael Malabag.
- (7) Mr Ugwalubu Mowana.

[2.4] **APPOINTMENT, TENURE AND TERMINATION OF BOARD MEMBERS**

Appointment

The method of appointment depends on the particular office held:

- The Managing Director is appointed by the Minister for Finance on the recommendation of the Board (Section 12(1)(a)).
- The Secretary for Finance and the Secretary for Personnel Management or their nominees hold their offices ex officio. (Section 4(1)(b)(i) and (ii)).
- The remaining four Board members are appointed by the Minister for Finance; with no provision being made for a recommendation to the Minister (Section 4(2)).

Tenure

The term of office of a Board member also depends on the particular office held:

- The terms and conditions of employment of the Managing Director, including the period of his appointment, are fixed by the Minister for Finance (Section 12(5)).
- The Secretary for Finance and Secretary for Personnel Management or their nominees are not appointed for any specific term.
- The remaining four Board members are each appointed for three years (Section 4(2)).

Termination

The Minister has the power to terminate the appointment of any Board member, subject to the procedure set by Section 7 of the Act:

- The Minister must by written notice, advise the member that he intends to terminate his or her appointment on any of the following grounds:
 - > Inability.
 - > Inefficiency.
 - > Incapacity.
 - > Misbehaviour.
- The member then has fourteen days in which to reply in writing to the Minister.
- The Minister must consider the reply and, where appropriate, terminate the appointment.
- If the member does not reply in writing within the time specified, the appointment is revoked.

[2.5] ADMINISTRATION OF THE POSFB

The Staff of the POSFB is constituted by the following persons in accordance with Section 12 of the *POSF Act*:

- The *Managing Director*, who must be a "suitably qualified person" appointed by the Minister for Finance on the recommendation of the Board.
- The *Secretary* to the Board, who must be a "suitably qualified person" appointed by the Board.
- The *Actuary* to the Board, who must be a "suitably qualified person" appointed by the Board.
- Such *other staff* as the Board considers necessary to administer the Fund. Such staff are appointed by the Managing Director.

The terms and conditions of employment of the Managing Director are fixed by the Minister, subject to the *Salaries and Conditions Monitoring Committee Act* 1988.

The terms and conditions of the Secretary, the Actuary and other members of the Staff are set by the Board of the POSFB, subject to the *Salaries and Conditions Monitoring Committee Act*.

In addition, the Board is authorised by Section 12(6) "to appoint consultants to advise the Board in relation to the management of the Fund".

[2.6] FUNCTION OF THE POSFB AND DUTIES AND RESPONSIBILITIES OF BOARD MEMBERS

The prime function of the POSFB is prescribed by Section 13 of the *POSF Act*:

The Board is responsible for the administration of this Act in the best interests of the contributors.

In addition, the seven Board members have individual and collective responsibilities imposed by Section 5(4) of the Act:

The members of the Board are Trustees of the Fund and upon taking office each member of the Board shall -

- (a) sign a Trust Deed in a form determined by the Minister which shall make each member of the Board individually and jointly responsible for the proper management of the Fund; and
 - (b) a Declaration of Office in Form 1.
-

[2.7] RESTRICTIONS ON USE OF THE FUND

The POSFB is authorised to approve payments from the Fund for various purposes, including: contributor benefits; moneys appropriated for the management account (e.g. for staff salaries, expenses and other payments of the Board); insurance premiums; government charges; and "*investments*".

[2.8] NEED FOR INVESTMENT POLICY

In relation to investments, the POSFB is required by Section 18 of the *POSF Act* to formulate an "investment policy". The policy must be in accordance with:

- The "*advice*" of the Minister for Finance.
- Any "*investment guidelines*" issued by the Minister for Finance concerning investment of superannuation funds.

At the time the POSFB agreed to purchase The Conservatory, in October 1994, it had no investment policy in place. At the date of preparation of this report, there was still no investment policy in place.

In his response to the preliminary report, the POSFB's Executive Manager, Investments, Mr Joseph Wingia, stated that the lack of an investment policy was due to the "impossible statutory requirements" imposed by Section 18 of the *POSF Act*. He said that the problem had been discussed many times with the appropriate government departments and proposed amendments have been made but not yet passed. He said that at the moment it is not possible for the POSFB to formulate a policy that would comply with the Act.

We have considered the statutory requirements imposed by Section 18, which states:

The Board shall, in accordance with —

- (a) the advice of the Minister; and
- (b) any investment guidelines issued by the Minister concerning investment of superannuation funds,

formulate an investment policy whereby funds are invested to yield a satisfactory rate of interest, subject to maintaining the value of the contributors' moneys and crediting to each contributor's account a minimum rate of interest no less than that paid by the former Fund for the period of five years ending on 31 December 1990, and subject to meeting the liability of the Fund in respect of the payment of lump sum and pension benefits within the prescribed time limit.

Section 18 is designed to protect contributors to the Fund, including the recipients of pensions and lump sums. Section 18 requires that the investment policy of the Board invest funds so that the Fund:

- maintains the value of the contributors' moneys; and
- gives each contributor a minimum rate of interest which is at least that of the former Fund (6.75%); and
- enables the Fund to meet all lump sum and pension benefits.

In effect, Section 18 requires the Board to invest only where the return will cover inflation, give each contributor at least 6.75% interest, cover all potential lump sum and pensions, and cover the POSFB's operating costs.

In his response to our preliminary report, Mr Wingia stated:

Where there is high inflation in the country, such was the case in 1994/1995 of around 18 per cent, POSFB according to the Act must make a return that exceeds the inflation rate as well as to make sufficient return to meet the other requirements listed above. There can be no argument that it is an impossible statutory requirement and therefore not implementable.

The Ombudsman Commission has considered the Act and Mr Wingia's comments. However we do not consider that the requirement imposed by Section 18 is much greater than that imposed on a commercial fund - to maintain the value of contributions while offering a reasonable return and covering the ongoing pensions and potential

lump sum liabilities of the Fund.

In Chapter 15 of this report, we recommend that the POSFB should formulate and adopt an investment policy as a matter of priority.

[2.9] INVESTMENT GUIDELINES

Though the POSFB has no investment policy as such, it is significant to note that in July 1993 the then Minister for Finance, Sir Julius Chan, issued a set of "investment guidelines". These guidelines apply to the POSFB and a number of other statutory superannuation and investment authorities. The guidelines are relevant to this investigation as they were in operation when the decision was made to purchase The Conservatory.

The investment guidelines state:

APPROVAL OF INVESTMENT GUIDELINES FOR VARIOUS PROVIDENT, PENSION AND INSURANCE FUNDS

I, Julius Chan, Deputy Prime Minister and Minister for Finance and Planning, by virtue of the powers conferred by:-

- *Motor Vehicles (Third Party Insurance) Act* (Chapter 295);
- *Insurance Act* (Chapter 255)
- *National Provident Fund Act* (Chapter 377);
- *Defence Force Retirement Benefits Fund Act* (Chapter 76); and
- *Public Officers Superannuation Board* (1993) [sic]

hereby outline the new approved investment guidelines for each of the institutions covered by the above Acts, namely the Motor Vehicles Insurance Trust, the National Provident Fund, The Public Officers Superannuation Board, the Defence Force Retirement Benefits Fund and all licensed insurance companies in Papua New Guinea.

From the date this notice is published in the Gazette the approved investment guidelines will be as follows:-

(a) Allocation of Investment Portfolios

The Investments of particular institutions will be composed as follows:-

**APPROVED INVESTMENT GUIDELINES
PERCENTAGE OF INVESTMENT PORTFOLIO HOLDINGS,
AT MARKET PRICES**

	MVIT	PRIVATE INSURERS	PENSION AND PROVIDENT FUNDS
Government Securities	15% - 25%	15% - 25%	30% - 40%
Term Deposits	20% - 30%	55% - 65%	10% - 20%
Commercial Equities	25% - 35%	15% - 25%	20% - 35%
Property	20% - 30%	0% - 15%	20% - 30%
Long Term Development Loans/Debentures (1)	10% - 20%	5% - 15%	10% - 25%

(1) Includes: (i) Private corporate bonds, debentures and long term loans.

(ii) Investments in CSAs and other semi Government bodies.

(iii) Loans and advances to members for housing.

(b) *Government Economic Priorities must be taken into account*

In selecting investments institutions should give full consideration to the government's economic policies and priorities which stress economic and employment growth in non mining sectors of the economy. The Government's priorities outlined and updated annually in the presentation of the National Budget. The most recent statements indicate priority for generating increased private sector investment (especially by Papua New Guineans) sectors of the economy other than mining, with particular emphasis on agriculture, fisheries, forestry, manufacturing and housing.

(c) *Approved Institutions for Term Deposits*

Funds may be held in term deposits within Papua New Guinea without reference to the Minister providing:-

- (a) They are lodged with a licensed commercial bank; and/or
- (b) A quarterly report on all investment decisions undertaken by institutions must be submitted to the Minister; and

(c) They are lodged with any of the following properly licensed financial institutions as approved from time to time:-

- AGC Pacific Ltd;
- Credit Corporation (PNG) Ltd;

-
- Indoniu Finance Company Ltd;
 - Resources and Investment Finance Ltd;
 - MBF Finance (PNG) Ltd; and
 - Nambawan Finance Ltd.

The above list does not reflect any guarantee on the part of Government. Institutions must make their own credit assessments and take their own risks.

(d) *Investment Plans and Reports*

All public institutions established by legislation are required to submit to the Minister by 28th February in any year:-

- (a) A detailed investment report outlining, investment performance and returns over the previous 12 months to 31st December. This report should contain an itemised schedule of all individual investments held at any time during the year;
- (b) A rolling five year investment plan (updated annually) which provides five year forecast of investment flows and returns and the investment policies, strategies and administrative systems which are to be pursued.

(e) *Approval Delegations*

Public bodies are required under the Public Finances (Management) Act (1986) to seek Ministerial approval for the acquisition and disposal of investments exceeding K100,000. Upon approval by the National Executive Council and parliament of an amendment to the Public Finances (Management) Act, 1986, more liberal investment approval powers will be delegated as follows:-

- The affected public institutions will be confined to National Provident Fund, Motor Vehicles Insurance Trust, Public Officers Superannuation Board and the Defence Retirement Benefits Fund.
 - Future delegation will depend entirely on:-
 - The annual investment report and rolling five year plan having been submitted to the Minister by 28th February in any year;
 - The Minister having reviewed investment performance and planning as having been satisfactory and as a result formally agreeing by Gazettal Notice to a further 12 months delegation of approvals.
-

Subject to the above including finalisation of legislative amendments the only individual investment acquisitions or disposal which will require Ministerial approval will be:-

- Those exceeding 3 percent of the total assets of the particular institution; and
- Those that will lead to equity holdings in any one company exceeding 10% of the issued shares.

(f) *Investments Abroad*

Each of the institutions are now allowed to invest up to a maximum of K1.0 million abroad at any one time.

The abovementioned newly approved investment guidelines are to remain in force until amended by further notice in the National Gazette.

Dated this 27th day of July, 1993.

J. CHAN,
Deputy Prime Minister
and Minister for
Finance and Planning.

[National Gazette
No. G87, 21.10.93, pages 4-5]

These are several noteworthy features of the investment guidelines:

- Restrictions have been imposed on the POSFB in relation to the *types* of investment which may be undertaken.
- The sole criterion is *not* whether the investment will yield a profit.
- In selecting any particular investment, full consideration is to be given to the government's *economic policies and priorities*.
- Emphasis is to be given to investing in the *non-mining* sector of the PNG economy. In particular: agriculture; fisheries; forestry; manufacturing; and housing.

- The POSFB was subject to a *limit of K1 million* on its *off-shore* investment portfolio.

[2.10] PUBLIC FINANCES (MANAGEMENT) ACT

HISTORICAL NOTE ON THE PUBLIC FINANCES (MANAGEMENT) ACT

At the time the contract for The Conservatory was executed (November 1994), the Public Finances (Management) Act 1986 was still in operation. The 1986 Act has since been repealed and replaced by the Public Finances (Management) Act 1995. The 1995 Act commenced operation on 16 August 1995.

The 1995 Act is in similar terms to the 1986 Act. However, there are some differences, which are noted below.

In general terms, the *Public Finances (Management) Act*:

- Obliges the Managing Director of the POSFB, to submit *performance and management plans* to the Secretary of the Department responsible for financial management as and when required (1986 Act, Section 49; 1995 Act, Section 50).
- Requires the POSFB to obtain the *approval of the Minister for Finance to enter into contracts* involving payments above a prescribed amount (1986 Act, Section 60; 1995 Act, Section 61).
- Obliges the POSFB to prepare and furnish to the Minister for Finance a *report on its operations* for each financial year, before 30 June of the following year (1986 Act, Section 62(2)).
- Under the 1995 Act, the reporting requirements have been strengthened. The POSFB is required to furnish to the Minister, before 30 June of each year, a performance and management report of its operations for the year ending the preceding 31 December. In addition, the POSFB must furnish a quarterly report on all its *investment* decisions and an annual *investment report* by 28 February in each year. The Board must also furnish a five year *investment plan* (updated each year) setting out investment policies, strategies and administrative systems to be pursued (1995 Act, Section 63).
- Subjects the POSFB to the jurisdiction of the *Auditor-General*, to whom it

must submit its financial statements before their submission to the Minister. The Auditor-General is obliged to inspect and audit the accounts and records of financial transactions and the records relating to assets in the custody of the POSFB and any of its subsidiary corporations (1986 Act, Sections 61(4), 63; 1995 Act, Section 63(4)).

- Subjects the POSFB to the jurisdiction of the *Minister*, who may, where he has reason to believe the Board has failed to submit its management plan or failed to comply with the Act, authorise the Secretary for Finance to *investigate or inspect the records of the Board* (1996 Act, Section 64; 1995 Act, Section 64).

[2.11] PUBLIC SERVICES (MANAGEMENT) ACT

The *Public Services (Management) Act* is relevant to this investigation as it is the legislation under which the Office Allocation Committee, also known as the Office Allocation Authority, operates.

The Office Allocation Committee had an important role to play in some of the matters covered by this report, particularly the leasing arrangements for The Conservatory, after it was purchased on behalf of the POSFB.

Statutory basis

The *Public Services (Management) Act* allows the Secretary of the Department of Personnel Management to give directions to officers of the National Public Service. These directions, known as General Orders, can be made in relation to any matter that is necessary or desirable for the efficient management and control of the Public Service.

General Orders 16.7 to 16.10 give various directions regarding "Office Allocation".

Role of Secretary for Personnel Management

Order 16.7 states:

All office allocation requests must be submitted to the Secretary, Department of Personnel Management, for consideration and approval.

Order 16.9 states:

The Secretary, Department of Personnel Management, or his nominee is responsible for giving advice on:

- (a) allocation of office space in State owned office buildings;
 - (b) leasing of office space from other agents;
 - (c) administration of lease payments and office layout; and
 - (d) determining office standards.
-

Composition of Committee

The composition of the Office Allocation Committee is determined by General Order 16.8, which states:

The Secretary, Department of Personnel Management, or his nominee shall consider all requests for acquisition of office space. The Secretary or his nominee, in considering requests, shall consult the following departments.

- . Finance and Planning
 - . Works
 - . Justice (State Solicitor), and
 - . Lands and Physical Planning.
-

Functions of Office Allocation Committee

The functions of the Committee are prescribed by Order 16.10:

The terms of reference for the Office Allocation Authority are:

- (a) to review and examine all current leased and Government owned accommodation with a view to reducing the Government payment for leased accommodation;
 - (b) to examine and approve all future leases;
 - (c) to authorise the movement of Departments in the best interest of efficient Government office utilisation;
 - (d) to examine and approve the purchase of private properties for all Government Offices within the limit of available funds; and
-

-
- (e) to co-ordinate and examine all submissions for Minor New Works regarding the upgrading and air-conditioning of existing office accommodation.
-

Status and jurisdiction of Office Allocation Committee

Other noteworthy features of the Committee are:

- The Committee is not a legal entity. It is only an administrative authority. It has no power to enter into contracts, to hold property, to sue or be sued.
- The Committee's jurisdiction is confined to National Government departments. It has no jurisdiction over statutory authorities, such as the POSFB, the National Airline Commission and the Investment Promotion Authority.
- Approval from the Committee is required for all arrangements to accommodate government offices.
- The General Orders do not restrict the jurisdiction of the Committee to only government offices inside Papua New Guinea.
- The Office Allocation Committee exists as part of a screening process, to ensure that public money allocated to office accommodation of National Government departments is spent wisely.

HISTORICAL NOTE ON THE PUBLIC SERVICES (MANAGEMENT) ACT

At the time the contract for The Conservatory was executed (November 1994), the Public Services (Management) Act 1986 was still in operation. The 1986 Act has since been repealed and replaced by the Public Services (Management) Act 1995. The 1995 Act commenced operation on 7 December 1995. It is in similar terms to the 1986 Act.

[2.12] APPOINTMENT OF MINISTERS

In Papua New Guinea, Ministers are appointed by the Governor-General, acting on the advice of the Prime Minister, under Section 144(2) of the *Constitution*. All Ministers are members of the National Executive Council which, together with the Governor-

General acting as Head of State, forms Papua New Guinea's "National Executive".

[2.13] **APPOINTMENT OF ACTING MINISTERS**

When we were conducting this investigation it became apparent that a number of important decisions regarding The Conservatory had been made by an "Acting Minister for Finance". We therefore considered it important to clarify the law surrounding the appointment of acting ministers. For this purpose, we consulted the First Legislative Counsel, Mr James Fraser, who advised as follows:

"The term "acting minister" although widely used is not strictly correct. It would only apply if there were to be appointed as an acting Minister a person who is not otherwise a Minister, but this has never been done..."

Under Section 144 of the *Constitution* the Head of State, acting on the advice of the Prime Minister, appoints Ministers. Under Section 148 of the *Constitution* the Prime Minister determines the titles, functions and responsibilities of Ministers. When a Minister is overseas or otherwise unable to perform his duties the practice is that the Prime Minister makes a determination under Section 148 that another Minister shall have the temporary responsibility for his portfolio during his absence."

We agree with the First Legislative Counsel's analysis of the law.

We also consulted Mr Fraser to clarify the administrative practices which apply when a Minister is overseas or otherwise unable to perform his or her duties, and a change is made in the allocation of ministerial responsibilities.

Mr Fraser advised:

- There is no legal requirement for so-called "acting" ministerial appointments (i.e. alterations to determinations by the Prime Minister under Section 148 of the *Constitution*) to be published in the National Gazette.
- There is no legal requirement for acting appointments to be tabled in the Parliament.
- Nevertheless, it is normal practice for acting appointments to be gazetted. This is done by publishing a temporary amendment to the determinations by the Prime Minister under Section 148 of the *Constitution*.

[2.14] LIMITS ON MINISTERIAL POWERS IMPOSED BY THE CONSTITUTION

The powers and functions of Ministers are prescribed by Section 148 of the *Constitution*. This important provision states:

-
- 148. Functions, etc., of Ministers**
- (1) Ministers (including the Prime Minister) have such titles, portfolios and responsibilities as are determined from time to time by the Prime Minister.
 - (2) Except as provided by a Constitutional Law or an Act of the Parliament, all departments, sections, branches and functions of government must be the political responsibility of a Minister, and the Prime Minister is politically responsible for any of them that are not specifically allocated under this section.
 - (3) Subsection (2) does not confer on a Minister any power of direction or control.
-

The principles expressed in Section 148 are critical to the efficient and orderly governing of our country.

These principles can be summarised as follows:

- The Prime Minister has the power to determine what title a Minister is to hold and what his or her portfolios and political responsibilities will be.
- Each department, section, branch and function of government must be the political responsibility of a Minister.
- The duty to be politically responsible does not by itself carry any power of direction or control.

[2.15] WHAT DOES POLITICAL RESPONSIBILITY MEAN?

The concept of "political responsibility" was carefully explained by the Supreme Court in *Supreme Court Reference No. 1 of 1982; Re Bouraga* [1982] PNGLR 178.

This case arose following a confrontation in 1981 between the Minister for Police, Mr Warren Dutton, and Mr Phillip Bouraga, who occupied the positions of Commissioner

of Police and Secretary of the Department of Police. Mr Bouraga had refused to supply certain information regarding police operations to the Minister, which led to disciplinary charges being brought against him. One of the many important issues raised was the nature of the powers of Ministers, in particular the concept of political responsibility.

The Supreme Court indicated that political responsibility for a department or other governmental body encompassed the following powers and duties:

- Ensuring that the organisation had sufficient funds to carry out its functions.
- Defending it, if appropriate, when it was being criticised, particularly in the Parliament.
- Informing or answering questions in the Parliament or the public through the media as to its operations.
- Assisting the National Executive Council in the formation of policy and the making of executive decisions concerning its operations.
- The right to be fully informed of all aspects of its operations by the permanent head of the organisation.

(See [1982] PNGLR 178, per Kidu CJ at pages 186-188; Kapi J at page 196 and Pratt J at pages 205-206.)

[2.16] WHAT DOES POLITICAL RESPONSIBILITY NOT INCLUDE?

Section 148(3) of the *Constitution* imposes strict limitations on the powers of Ministers.

It is very clear that political responsibility does *not*, by itself, confer any power of direction or control. As Mr Justice Pratt explained in the *Bouraga* case:

What the framers of the *Constitution* have emphasised however is that in giving to the Minister political responsibility for a department under s.148(2), they have not at the same time granted as a part of that responsibility any power to direct or control the department - be it the head of the department or any other individual within it. The giving of this political responsibility does not of itself confer any power. To put it another way, if there is to be any power of direction or control, it will not come

from the area of political responsibility given to the Minister but from some other source altogether.

([1982] PNGLR 178 at page 206.)

[2.17] HOW DOES THE CONSTITUTION ALLOW MINISTERS TO GIVE DIRECTIONS?

The *Constitution* allows Ministers to exercise control over the departments and other governmental bodies for which they are responsible, in two ways.

The first is through the setting of clear policies. A Minister must give clear policy directions and ensure that sufficient funds are available to allow the policies to work.

The second way Ministers can exercise direction and control is if they have been authorised to do so by an Act of the Parliament. The Supreme Court emphasised in *Bouraga's* case that the *Constitution* had always contemplated that Parliament would be able to authorise Ministers to exercise powers of direction and control in particular cases.

[2.18] WHAT POWERS DOES THE MINISTER HAVE OVER THE POSFB?

In addition to political responsibility, the Minister for Finance responsible for the POSFB has a number of statutory duties and responsibilities, which give the Minister some degree of control over its activities. For example:

- The Minister is responsible for supervision of the finances of the POSFB (*Public Finances (Management) Act* 1986 Section 3(1)(b); 1995 Act, Section 3(1)(b)).
- The Minister must *approve contracts* entered into by the POSFB above the amount prescribed. At the time The Conservatory contract was executed (November 1994), the prescribed amount was K100,000.00 (*Public Finances (Management) Act* 1986, Section 60).

- The Minister may give *advice* and issue *investment guidelines* to the POSFB for the purposes of formulation of an investment policy (*POSF Act*, Section 18).
- The Minister must be furnished with a report by the POSFB on its operations for each financial year (*Public Finances (Management) Act* 1986, Section 62(2); 1995 Act, Section 63).
- The Minister may, where he has reason to believe that the Board may have failed to submit its management plan or comply with the *Public Finances (Management) Act*, authorise the Secretary for Finance to investigate or inspect the records of the Board (*Public Finances (Management) Act* 1986, Section 64; 1995 Act, Section 64).

It is important to note that except as permitted by the above or other specific statutory provisions, the Minister has no power of direction or control over the POSFB. Thus the Minister cannot generally direct the Board or the Managing Director in regard to the actual day-to-day running of the organisation.



3. THE WAIGANI REDEVELOPMENT PROPOSAL

[3.1] OVERVIEW

The "Waigani Redevelopment proposal" refers to a proposal, put to the National Government and the POSFB in 1994, to build a new government office complex in Port Moresby. The proposal was initiated by Tipperary Developments Pty Ltd, a company incorporated in Western Australia. Its Managing Director was Mr Warren Anderson, who was largely instrumental in the sale to the POSFB of The Conservatory, Cairns.

Eight buildings were to be constructed at Somare Circuit Waigani at a cost of K360 million. The proposal has not yet come to fruition. But it is relevant to the investigation of The Conservatory because of links between the two projects provided by the individuals, companies, public officials and organisations involved; and because both projects were being put forward around the same time.

[3.2] INITIAL DISCUSSIONS: MARCH 1994

Initial discussions regarding the Waigani Redevelopment proposal took place in March 1994. Mr Warren Anderson and Mr Solly Benn of Tipperary Developments Pty Ltd visited Port Moresby from their base in Perth, Western Australia. They held discussions with the Managing Director of the POSFB, Mr Ragi.

Mr Ragi did not keep any record of these discussions.

In his response to our preliminary report, Mr Anderson advised that Tipperary Developments Pty Ltd had been working on this project for some years:

We have been working on this project since 1986 - 11 years. It was the only site in the Waigani area of its size that was available and suitable in location.

[3.3] ROLE OF MR NICOS VIOLARIS

While in Port Moresby, Messrs Anderson and Benn met with Mr Nicos Violaris. Mr Violaris was also involved in attempting to source finance for the proposed purchase of Malagan House, Brisbane.

Mr Violaris was examined under oath as to his involvement in the Waigani Redevelopment proposal. His evidence was that he had no direct dealings with Mr Ragi. But he may have been involved in organising a meeting. He said he did not have a remuneration arrangement with Messrs Anderson and Benn, but charged them for office, telephone and fax expenses. He was operating through one of his companies, Zorba Mining and Exploration Support.

Mr Violaris said the type of role he had in the Waigani Redevelopment proposal was similar to what he had had in a number of other projects. He had assisted potential investors in meeting the right people. He had been in business in PNG for a long time and could help people get from point A to point B a lot quicker than if they were left on their own. Invariably this meant he could get a small consultancy or even an offer of a directorship if projects went ahead. If something ever goes through on the Waigani Redevelopment proposal, Mr Violaris said, he may "get something out of it".

Mr Violaris testified to the Ombudsman Commission that he was a close friend of Sir Julius Chan. He said "everyone knows" this. Sir Julius was the Minister for Foreign Affairs, and later the Prime Minister, when the Waigani Redevelopment proposal was being advanced.

Mr Violaris denied having any financial associations or dealings with the People's Progress Party.

Mr Violaris clarified his involvement further in his response to our preliminary report:

I met Mr Warren Anderson and his employee Mr Sol Benn in connection with this development proposal. My role was to arrange for a meeting for them with relevant authorities. My only interest in this project was the hope that if the project went ahead the Violaris Construction Company might win some subcontract work put to public tender.

When we questioned Mr Ragi about Mr Violaris's role in the Waigani Redevelopment proposal and his involvement with Sir Julius Chan and the People's Progress Party, his version of the situation was somewhat different. Mr Ragi indicated he had the

impression Mr Violaris was quite involved with the People's Progress Party.

Mr Ragi said that he met Mr Violaris in 1992 or 1993 at the office of Sir Julius, who was then the Deputy Prime Minister and Minister for Finance and Planning. Mr Violaris then came to Mr Ragi's office in 1993. Mr Ragi had the impression that Mr Violaris was involved with the People's Progress Party. Mr Ragi commented on this meeting in his oral testimony.

RAGI : He [Mr Violaris] came and saw me and when he saw me, there was this proposal already and that's when I knew that maybe there was some discussion between him and Lemeki and Solly Benn about this proposal and that they would be interested in being invited, apart from these other banks, to fund the K13.5m loan that we were talking about.

It became apparent during this investigation that Mr Violaris does have an association with the PPP. Sir Julius Chan, the then parliamentary leader of the PPP, transferred his shares in Kalang Pty Ltd, the business arm of the PPP, to Mr Violaris on 15 November 1996. (This was 12 months after Mr Violaris was interviewed in connection with this investigation.) On 14 January 1997 Mr Violaris was appointed a director of Kalang Pty Ltd. Mr Violaris holds those shares in trust for the PPP.

In light of the above, the opinion of the Ombudsman Commission is that Mr Violaris had a vested interest in seeing that the Waigani Redevelopment proposal went ahead. This interest arose as a result of the possibility of obtaining construction or financial brokering work. The interest also arose by virtue of Mr Violaris's association with Mr Warren Anderson, the proponent of the project; the personal association with Sir Julius Chan, who was the legal owner of the land on which the project was to take place; and the political association with the PPP, the apparent beneficial owner of the land.

[3.4] THE LAND PROPOSED FOR DEVELOPMENT

The site of the Waigani Redevelopment project was two parcels of land, totalling approximately 6.5 hectares, near the Rural Development Bank building in Somare Circuit, Waigani. The parcels of land are officially known as:

- Section 135, Allotment 11 (proposed Allotments 14, 15, 16 and 18), Hohola.
- Section 135, Allotment 17, Hohola.



At all material times these parcels of land have been the subject of State Leases in favour of Kalang Pty Ltd, a company incorporated in Papua New Guinea. Our search of the Register of Companies shows that during 1994 Sir Julius Chan was the legal owner of three quarters of the shares. Further details of the company are recorded later in this chapter.

Two years before the Waigani Redevelopment proposal was advanced, the following decisions had been made at Land Board Meeting No. 1876, on 28 September 1992, concerning these parcels of land:

- Section 135, Allotment 11 (proposed Allotments 14, 15, 16 and 18) - Kalang Pty Ltd was granted a renewal of a Town Subdivision Lease.
- Section 135, Allotment 17 - Kalang Pty Ltd was granted relaxation of the leasehold improvement covenant.

At the time these applications were granted the Minister for Lands and Physical Planning was Sir Timothy Ward. The Minister for Finance at the time, with political responsibility for the POSFB, was Sir Julius Chan.

[3.5] NATURE OF THE PROPOSAL

On 13 April 1994, Mr Warren Anderson of Tipperary Developments Pty Ltd (Tipperary) wrote to Mr Ragi. He thanked him for sparing the time to meet and discuss his company's proposal.

Mr Anderson advised that Tipperary had "completed an overall developed sketch design concept together with a model" and was "now at a stage where we are proceeding with the site boundaries establishment and subdivision documentation".

Mr Anderson submitted the following financial offer and program for the POSFB's consideration:

1. Prime Minister's Building

The construction of a Prime Minister's Building of 15,000 m² net lettable area, including basement car-parking and associated facilities. This would include F F & E and represent a completed building.

Cost K55.5 Million

Chapter 3 Waigani Redevelopment Proposal

2. Department Minister's Buildings (7 in number)

The construction of seven (7) Department Minister's Building each of 12,000 m2 net lettable area, including basement car-parking and associated facilities. This would include F F & E and represent a completed building.

Cost K43.5 Million each

Thus, Mr Anderson was proposing that the POSFB agree to a construction project worth the following amount:

1	x	Prime Minister's building worth K55.5 million	=	K55.5 million
7	x	Minister's buildings at K43.5 million each	=	K304.5 million
Total =				K360 million.

These prices were on a non-turnkey basis. This meant that the POSFB would arrange its own finance, and Mr Anderson would construct the buildings at the agreed price.

If the POSFB required the buildings on a turnkey basis, interest and finance costs would have to be added. Under the turnkey method, both the construction and finance aspects would be performed by Mr Anderson (or Mr Anderson in association with other companies). The turnkey method is simpler for the buyer but can be more expensive.

Mr Anderson proposed a building program commencing in August 1994, with the construction of all buildings completed by 1999.

Also in April 1994, Tipperary presented the POSFB with a "Report and Design Development Analysis". This set out Mr Anderson's proposal in more detail.

[3.6] RESPONSE TO THE PROPOSAL BY MR RAGI: APRIL 1994

On 19 April 1994, Mr Ragi responded to Mr Anderson's proposal. The POSFB was interested "in-principle". He had started talking to the Chairman of the Office Allocation Committee to interest him in the proposal and made an appointment to see him again the following week.

However, Mr Ragi was concerned about the estimated cost of each building. He suggested that Mr Anderson "start looking at the concepts again to see where costs could be reduced". He recommended that the recently completed Vulupindi Haus (which cost approximately K14 million) be used as a reference.

When he was examined on oath by the Ombudsman Commission, Mr Ragi repeated his concern about the cost of the project. He said he "nearly had lost breath" when he heard the price being asked.

On 27 April 1994, Mr Anderson responded to Mr Ragi's 19 April letter. He said "a rigid comparison [with Vulupindi Haus] is not strictly realistic because of the nature of the buildings, i.e. low rise, low-tech building compared with high rise, high-tech building". The buildings he was proposing would have the advantages of a high-tech 21st century building with a life span of 25 to 30 years. Vulupindi Haus, he said, was built for a specific purpose and "while it might initially show a higher yield it would only have a life span of 10 to 15 years: this demonstrates that the two buildings are basically a different investment concept".

[3.7] DISCUSSIONS WITH MR PERUKA

In late April 1994, Mr Solly Benn of Tipperary Developments Pty Ltd again visited Port Moresby. He and Mr Nicos Violaris had a meeting with the then Secretary for Personnel Management and Chairman of the Office Allocation Committee, Mr Tau Peruka.

The Ombudsman Commission examined Mr Peruka under oath as to the nature of the meeting. Mr Peruka said its purpose was for the developers to show him what they were proposing. His response was that anything to do with office complexes for the government would have to be presented formally to the Office Allocation Committee and that normal public tendering procedures would apply. Mr Rodney Tomuriesa of the Office Allocation Committee secretariat was also present at this meeting.

Mr Peruka said it was evident that "political pressure" was being applied, through the representatives of Tipperary Developments. No names were mentioned, Mr Peruka said, but Messrs Benn and Violaris told him they had "political support". Any delay in getting the project off the ground would be blamed on him, Mr Peruka said.

Mr Peruka was initially rather vague when asked to clarify what he meant by "political pressure". But when pressed, he indicated one of the politicians putting "pressure" on the Office Allocation Committee was Sir Albert Kipalan, who at the time was Deputy

Leader of the People's Progress Party.

An extract of Mr Peruka's testimony is reproduced below:

PERUKA : Through talking to [Mr Sol Benn and Mr Nicos Violaris] I had an impression that they had connections with people higher up ... Eventually that's what they said but they did not name any names... They were very anxious to get that project off the ground. They were really not happy with my position. As I said, I originally realised that they had some connection with the top level. And I knew that whatever it is, I would be blamed for delaying, for not following through the proposal with the representatives. There were political pressures for us to go ahead with this particular proposal.

When asked who was applying this political pressure, Mr Peruka initially replied:

In fact I can't recall but they were political pressures.

A short time later, the following exchange occurred:

OC : What sort of pressures were they?

PERUKA : For us to go ahead with the proposal ... without tendering.

OC : When you say political pressure was applied, how was it applied? Orally or in writing?

PERUKA : They were applied through the representatives of Tipperary Developments ... They were telling me: We have political support and the slowness of this thing, in getting this thing off the ground, will be blamed on you.

OC : You say that this was coming from people like Violaris and Benn but not directly from the politicians?

PERUKA : It could have been politicians who could have called me ... If I can recall one would have been Sir Kipalan.

OC : Did you have any discussions with Sir Julius in his various capacities as Foreign Minister, Deputy Prime Minister and Prime Minister about this Redevelopment?

PERUKA : No. But Violaris, I eventually realised, he was very close to Sir J. When we would see Sir J off at the airport he would be one of the first people to go up to the PM. I got the impression they were very close.

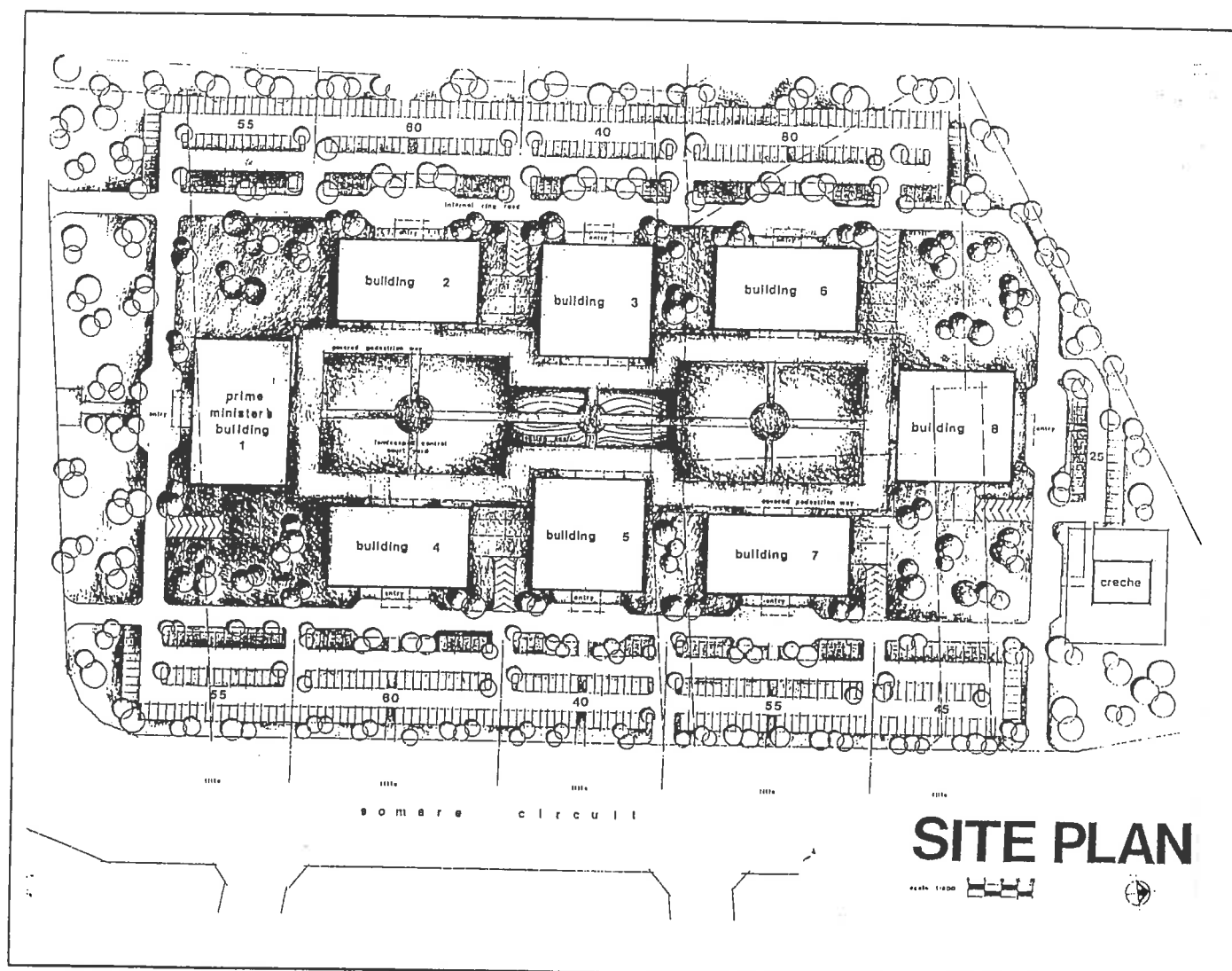
In light of Mr Peruka's evidence, it appears that, like Mr Ragi, he was subject to political pressure in relation to the Waigani Redevelopment proposal.

[3.8] **PROPOSAL PUT TO OFFICE ALLOCATION COMMITTEE:
MAY 1994**

In May 1994, Tipperary prepared an "Executive Summary" document specifically for the Office Allocation Committee. This document further developed the proposal previously put to the POSFB. There would be eight buildings located around a large central court-yard, the dominant building being the Prime Minister's administration centre with the remaining seven structures being "governmental ministerial buildings".

The buildings would be of a "high-tech" nature. They would have raised computer floors; high performance tinted vision glaze curtain walls; ULB light fittings; security/access control systems; a security guard system; video conferencing facilities; closed circuit television systems; emergency warning and communication systems; alpha-numeric paging systems; master antenna television systems; telephone block cabling systems; building automation systems and uninterrupted power supplies.

A site plan of the building complex, included in the document prepared for the Office Allocation Committee, is reproduced below.



WAIGANI REDEVELOPMENT PROPOSAL - SITE PLAN

Chapter 3 Waigani Redevelopment Proposal

Late in May 1994, the Tipperary proposal was formally considered by the Office Allocation Committee at Meeting No. 2/94. The Department of Works representative at this meeting, Mr A Kalnins, advised that his Department wanted to have its views on the proposal put on the record.

The Department of Works' views were:

- It was against proposals such as this.
- Their estimated cost of the eight buildings was K183.2 million - significantly below Tipperary's price of K360 million.
- The design efficiency of 82% claimed by Tipperary was excessive. It was only 70%.
- The Tipperary proposal was unrealistic. (It was later described by a Department of Works representative as "fantasyland".)

[3.9] UNDERTAKING GIVEN BY MINISTER OREA: AUGUST 1994

On 22 August 1994, the Minister for Public Service, Mr John Orea, became involved, when he wrote to Mr Ragi on the subject of office accommodation for national government departments. He advised that the Department of Personnel Management wanted to relocate all government agencies and establishments to the Waigani City centre. This "would have many financial and non-financial advantages". For this reason, a planning consultant, Unitech Development and Consultancy Pty Ltd, had been engaged to study various aspects of office accommodation.

Mr Orea said the study had been completed. The results were as follows:

Current Waigani office space	70,400 square metres
Space currently occupied outside Waigani	30,400 square metres
Further space required by year 2000	<u>20,000 square metres</u>
Total requirements by 2000	120,800 square metres

Mr Orea said that, of the 70,400 square metres currently occupied at Waigani, 25,000 square metres was in the Central Government Offices building which was "condemned".

Accordingly, total new space required by 2000 was:

Replacement space for Central Government Offices	25,000 square metres
Space currently occupied outside Waigani	30,400 square metres
Further space required by year 2000	<u>20,000 square metres</u>
Total	75,400 square metres

Mr Orea advised Mr Ragi that the National Government was "encouraging private developers" to build office complexes at Waigani in order to relocate all departments there. He added:

We understand that your organisation will purchase the buildings when completed. This letter gives an undertaking that all the Government Departments will rent and occupy the new office space when completed.

Mr Orea said one of the recommendations of the consultants was that a "more positive approach" be taken in negotiating rental agreements:

It is however, safe to suggest that the rentals will be at the rate of K250.00 to K350.00 per square metre.

Mr Orea did not mention Tipperary Developments Pty Ltd in his letter.

A noteworthy feature of the letter is the breadth of the undertaking given by Mr Orea. He was suggesting that 75,400 square metres of new office space was required at Waigani by the year 2000 and that *all* of this space would be leased by the National Government.

[3.10] CHANGE OF GOVERNMENT: 30 AUGUST 1994

On 25 August 1994, the Supreme Court handed down its decision in the case of *Haiveta v Wingti* ([1994] PNGLR 197). That was a challenge to the constitutionality of the then Prime Minister Mr Paias Wingti's resignation and re-election on 23 September 1993. The Court's decision, adverse to Mr Wingti, precipitated the following events:

- On 30 August 1994, Sir Julius Chan was appointed Prime Minister in accordance with a decision of the Parliament made the same day.
- On 31 August 1994, a caretaker cabinet was appointed.
- Sir Albert Kipalan, a member of the caretaker cabinet, thereupon became Minister for Lands and Physical Planning, Public Service and Communications.
- On 7 September 1994, Sir Albert was substantively appointed Minister for Lands and Physical Planning.

**[3.11] UNDERTAKING GIVEN BY SIR ALBERT KIPALAN:
SEPTEMBER 1994**

On 1 September 1994, Sir Albert wrote in his capacity as Minister for Lands and Physical Planning, Public Service and Communications to Mr Warren Anderson on the subject of "proposed government offices". Sir Albert noted that the National Executive Council had recently approved the centralising of government departments to the Waigani precincts. He enclosed a site plan from one of the documents previously supplied by Tipperary Developments to the POSFB. Sir Albert stated in that letter:

The buildings which you intend to build as detailed in the attachment to this letter are suitable for our requirements and conform to the N.E.C. directive. Accordingly, we are prepared to commit to lease Buildings 1, 2, and 3 at this stage.

We would be prepared to lease the space at K350.00 (1996 Kina) per square metre per year of net lettable floor area plus all outgoings such as rates and taxes. Rent reviews will be biannual based on C.P.I. The initial lease period would be 10 years with a 10 year option. The lease will commence within one month of the buildings' completion.

In his response to our preliminary report, Sir Albert said that this letter was drafted for him by Mr Solly Benn. Sir Albert said he changed the tone of the letter from a definite commitment to a more general undertaking.

Sir Albert denied that his actions in writing this letter were improper, or a breach of established procedure. He also maintained that the letter was only intended to be a general statement of intention, and not a binding commitment by the State.

On the question of Waigani Redevelopment Proposal, I as a Minister responsible for official allocation did write to Mr. Anderson that the State would lease those properties from POSFB. It was and still is the responsibility of Minister for Public Service, and while I was a Minister for Public Service, I did write to Mr Anderson and it was indeed my responsibility at the time. I see no misproper in the writing to Mr Anderson.

We make the following observations about Sir Albert's undertaking to Mr Anderson:

- The undertaking was given just one day after Sir Albert was appointed to Sir Julius Chan's caretaker cabinet.
- Sir Albert had no opportunity to be briefed on this matter by any Department or the Office Allocation Committee.
- Despite his assertions that the letter was only a statement of intention, Sir Albert did not qualify his acceptance of Mr Anderson's proposal by making it contingent on, for example, public tender procedures being followed.
- The financial commitment was very large. The three buildings referred to by Sir Albert had a combined net lettable floor area of 39,000 square metres. If the State leased all of the space, the annual outlay would be K13.65 million, which Sir Albert proposed would continue for at least ten years.
- Purchase of the three buildings would involve a capital outlay by the POSFB of K142.5 million.

**[3.12] TIPPERARY ADVANCE THEIR PROPOSAL FOLLOWING
SIR ALBERT'S UNDERTAKING**

In September 1994, Tipperary advanced their proposal on the strength of Sir Albert Kipalan's undertaking of 1 September 1994.

On 6 September 1994, their projects executive Mr Solly Benn faxed a letter to Sir Albert, saying that Tipperary was "delighted to have received your letter, dated 1 September 1994, accepting our offer to lease the proposed Waigani Government Office Buildings. We will now proceed accordingly with our program".

On 7 September 1994, Mr Benn wrote to Mr Ragi, enclosing a copy of Sir Albert's "letter of intent" of 1 September 1994. Mr Benn said he would be in Port Moresby later that month and requested a meeting with Mr Ragi "to continue our discussions on the sale in more detail".

During the weekend of 10-11 September 1994, the National Government announced the floating of the kina and the currency quickly devalued. On 13 September 1994, Mr Benn wrote to Mr Ragi in response to the devaluation. He said the price of the buildings would be increased as follows:

- Building No. 1
(i.e. the Prime Minister's building) ⇒ increased from K55.5 million to K60.5 million
- Building Nos. 2 and 3
(the Ministers' buildings) ⇒ increased from K43.5 million each to K47.5 million each

This meant that the total price of the three buildings had increased from K142.5 million to K155.5 million.

Mr Benn also suggested that Mr Ragi adjust the proposed rentals to take into account the devaluation. He concluded:

We thank you for allow us to submit this "letter of offer" and look forward to receiving your Board's approval to proceed.

On 21 and 22 September 1994, Mr Benn sent a draft "heads of agreement" to Mr Ragi, and also to Pato Lawyers of Port Moresby, who were the POSFB's lawyers. This draft envisaged an agreement being executed between Tipperary Developments Pty Ltd, an associated company, Owston Nominees No. 2 Pty Ltd, and the POSFB. It was assumed that companies owned by Tipperary would "own" the land (identified as Section 153, Allotments 17 and 18, Somare Circuit Waigani).

The agreement proposed a rather complex series of transactions whereby different companies associated with Tipperary would construct each building and the POSFB would agree to purchase from Tipperary, the shares in the Australian companies which "own" the companies which "own" the land in Port Moresby.

[3.13] OVERVIEW OF TRANSACTIONS INVOLVED IN WAIGANI REDEVELOPMENT

The transactions that would have been involved in the Waigani Redevelopment proposal can be summarised as follows:

Kalang Pty Ltd (Sir Julius Chan/PPP) would sell the land to Tipperary Developments Pty Ltd (Mr Warren Anderson) or companies owned by Tipperary.



Mr Anderson's companies would construct each building - initially three - according to Sir Albert Kipalan's undertaking.



POSFB would purchase the shares in Mr Anderson's companies; thereby purchasing the buildings for a minimum of K155.5 million.



POSFB would then lease the buildings to the State.

It is evident from these arrangements that Sir Julius Chan had an interest in seeing that the Waigani Redevelopment proposal went ahead.

[3.14] THE POSFB RESPONSE: SEPTEMBER - OCTOBER 1994

On 21 September 1994, Mr Ragi wrote to the Chairman of the Office Allocation Committee, Mr Peruka. He enclosed copies of Sir Albert Kipalan's letter of intent and Mr Benn's fax confirming Tipperary's acceptance. Mr Ragi said the POSFB had been approached formally by Tipperary to purchase three buildings. He asked Mr Peruka to advise his "written endorsement and final approval of the lease conditions".

Also in September 1994, Mr Ragi instructed Pato Lawyers to draft a paper for submission to the POSFB. This task was completed by Pato Lawyers on 26 September 1994.

On 5 October 1994, Mr Ragi wrote again to Mr Peruka, referring to his letter of 21 September 1994. He noted that in Sir Albert's letter of intent, a rental of K350.00 per square metre and a 10 year lease period was proposed. Mr Ragi said that upon reflection it had "become necessary to revise those parameters in order to maintain viability". The following changes were advised:

- Rental on the Prime Minister's building
 - Increased from K350.00 to K400.00 per square metre.
- Rental on the two Ministers' buildings
 - Still K350.00 per square metre.
- The lease period
 - Extended from 10 years to 15 years with a 10 year option.

This had the effect of increasing the annual proposed lease payments on the three buildings from K13.65 million to K14.4 million.

Mr Ragi said he looked forward to receiving the Office Allocation Committee's approval.

**[3.15] OFFICE ALLOCATION COMMITTEE RESPONSE:
OCTOBER 1994**

On 5 October 1994, Tipperary's proposal and Sir Albert Kipalan's letter of intent of 1 September 1994 were referred by the Office Allocation Committee to the Department

of Finance. In an internal memorandum dated 5 October 1994, a Department of Finance officer, Mr J Mangor, noted that the rates agreed to by Sir Albert were "rather excessive". He added:

Despite Chairman Peruka's request that a firm commitment should be made to lease, it is my belief that this request was made due to mounting pressure from Minister Kipalan. It is advisable that whatever decision the Chairman takes must have the backing of both Commercial Investments Division and the Department of Works.

On 29 November 1994, Tipperary's proposal was formally considered by the Office Allocation Committee at Meeting No. 4/94.

The Committee's deliberations on the proposal were recorded as follows:

The Committee agreed that:

- a) The request be acknowledged
 - b) In line with Minute 1.13, Tipperary Development P/L will be asked to re-submit a proposal with all information required by the State.
 - c) Materials proposed by the developer are considered too superior for the State to afford, as reflected in the rentals.
 - d) In this regard Works believed the Tipperary Development proposal to be generally unrealistic, i.e., "Fantasyland".
-

[3.16] EVENTS DURING 1995 AND 1996

There has been little progress on Tipperary's Waigani Redevelopment proposal following the negative response by the Office Allocation Committee in November 1994.

However the general policy of centralising all government offices in Waigani was still current in April 1996. In Decision No. 53/96 on 17 April 1996, the National Executive Council:

-
- 1. acknowledged that there is insufficient office space to accommodate all government departments in the Waigani City Centre;
-

-
2. directed the Ministers for Finance, Public Service, National Planning, Housing, Lands and Justice to formulate and develop a master plan for government office requirements with the Waigani City Centre over a period of five to ten years to accommodate all government departments. The NCDC be co-opted as a member of the Team for purposes of planning the government's office requirements;
 3. directed that various options be looked at to fast-track the construction of Government Offices at Waigani; and
 4. directed the Department of Finance to implement without delay its Decision No. 5/96 of 27th January, 1996.
-

The decision was signed by Sir Julius Chan in his capacity as Chairman of the National Executive Council. But it appears that Sir Julius did not declare his interest in the matter before it was deliberated on by the NEC.

In his response to our preliminary report, Sir Julius stated that he was absent from the NEC meeting above, although he had returned in time to sign the decision. Sir Julius points out that the NEC decision is extremely general in its terms and does not identify any particular land for development.

[3.17] SIR JULIUS'S INTEREST IN KALANG PTY LTD

In our preliminary report, we stated that Sir Julius had a significant vested interest in any redevelopment of Waigani, owing to his majority shareholding in Kalang Pty Ltd. Kalang Pty Ltd holds State Leases over two allotments which would be a prime target for redevelopment, and which were the subject of Mr Warren Anderson's proposal. Sir Julius therefore stood to make a substantial profit from the sale of the land.

In his response to our preliminary report, Sir Julius stated that he only held the shares in Kalang Pty Ltd in trust for the People's Progress Party. As a trustee, Sir Julius would not make any personal profit, or obtain any personal benefit, from the sale of the land. Any benefit would be for the PPP.

Sir Julius has provided us with copies of a trust deed, signed by him in 1989, stating that he holds these shares in trust for PPP. Although this deed was not presented to the Commission of Inquiry into Transparency in Government Dealings and Accountability of Public Office Holders (the "Second Sandline Inquiry"), the Commission of Inquiry accepted Sir Julius's statement that he held these shares in trust.

Sir Julius emphasises this in his response to our preliminary report:

I was never the beneficial owner of the Waigani Land proposed for development. This land was owned by Kalang Pty Limited. I held three shares in Kalang upon trust for the People's Progress Party.

The Report itself describes Kalang as a company linked to the People's Progress Party. I would have received no personal benefit if the Kalang land had been sold to Tipperary.

In light of the above we find that Sir Julius held the shares in Kalang Pty Ltd in trust for the PPP. However, the Ombudsman Commission remains of the opinion that Sir Julius had a vested interest in the sale of the land.

Even accepting Sir Julius's statement that he would derive no direct personal benefit from the Waigani Redevelopment proposal, the Ombudsman Commission considers that Sir Julius had an interest in the sale through his associated political party. Sir Julius held his public office of Prime Minister through his leadership of the People's Progress Party.

The PPP stood to gain significantly from the Waigani Redevelopment proposal. It was inevitable that the PPP's financial windfall would also benefit Sir Julius.

[3.18] KEY COMPANIES AND INDIVIDUALS

There are a number of companies and individuals involved in the Waigani Redevelopment proposal whose roles and associations require comment.

Tipperary Developments Pty Ltd

This is the company under whose name the Waigani Redevelopment proposal was put forward. The principals of the company are Mr Warren Anderson and Mr Solly Benn. They are the same individuals who played key roles in negotiations for the sale of The Conservatory, Cairns, to the POSFB during 1994.

Mr Warren Anderson

He is the Managing Director of Tipperary Developments Pty Ltd. Mr Anderson is an associate of Mr Nicos Violaris, who is a personal friend of Sir Julius Chan.

Mr Solly Benn

He was a director of Tipperary Developments Pty Ltd and was described in various correspondence as Projects Executive. Mr Benn is a business associate of Mr Violaris, having worked together on the Redevelopment proposal.

In his response to our preliminary report, Mr Benn denies an association with Sir Julius Chan:

At all times I understood that Kalang Pty Ltd was a company controlled by the People's Progress Party and not as indicated in the diagram [at page 136 of the preliminary report]. I am not a business associate of Sir Julius Chan or any of the companies mentioned in the report.

Mr Nicos Violaris

Mr Violaris assisted Messrs Anderson and Benn during negotiations with the POSFB and the Office Allocation Committee on the Waigani Redevelopment proposal. Mr Violaris provided office accommodation and services for Messrs Anderson and Benn when they were in Port Moresby on business trips.

Mr Violaris had a vested interest in seeing that the Waigani proposal went ahead. He is a personal friend of Sir Julius Chan.

Kalang Pty Ltd

This company was incorporated in PNG in 1984. During 1994, its directors were: Glaimi Warena, Glenn Kundin and Hudson Arek, all of whom were linked with the People's Progress Party. Sir Julius Chan is a former director, having resigned on 1 June 1989. The company secretary was Mr John Boo, an accountant of Boroko.

In 1994, the company had an issued capital of K4.00 comprising four shares at K1.00 per share. Three of the shares (75%) were held by Sir Julius Chan. One share (25%) was held by Samuel Piniau, who was also linked with the People's Progress Party.

On 15 November 1996, Sir Julius transferred his three shares to Mr Violaris. On the same day Mr Violaris signed a deed of trust, declaring he held these shares in trust for the PPP.

At the date of the company's last annual return, made up to 17 June 1999, Mr Violaris holds three shares, and Sam Piniau the remaining one. The directors of the company are Hudson Arek and John Boo.

Sir Julius Chan

During 1994, when the Waigani Redevelopment proposal was mooted, Sir Julius Chan had legal ownership of 75% of the shares in Kalang Pty Ltd, which he held in trust for the People's Progress Party.

Sir Albert Kipalan

At the time of the proposal, Sir Albert Kipalan was a member of the Parliament, Minister for Lands and Physical Planning and member of the People's Progress Party.

Sir Albert gave a very broad undertaking to Tipperary for the government to lease three buildings in the Waigani Redevelopment proposal.

[3.19] APPARENT ASSOCIATIONS BETWEEN COMPANIES AND INDIVIDUALS

Links exist between the following companies and individuals:

- Tipperary Developments Pty Ltd.
- Mr Warren Anderson.
- Mr Solly Benn.
- Mr Nicos Violaris.
- Kalang Pty Ltd.
- Sir Julius Chan.

Tipperary Developments was the corporate vehicle for the proposal put forward by Messrs Anderson and Benn. There was nothing improper or unusual about the manner in which Tipperary was used in this way. What is significant, however, is the key role played by Mr Violaris in advancement of the proposals.

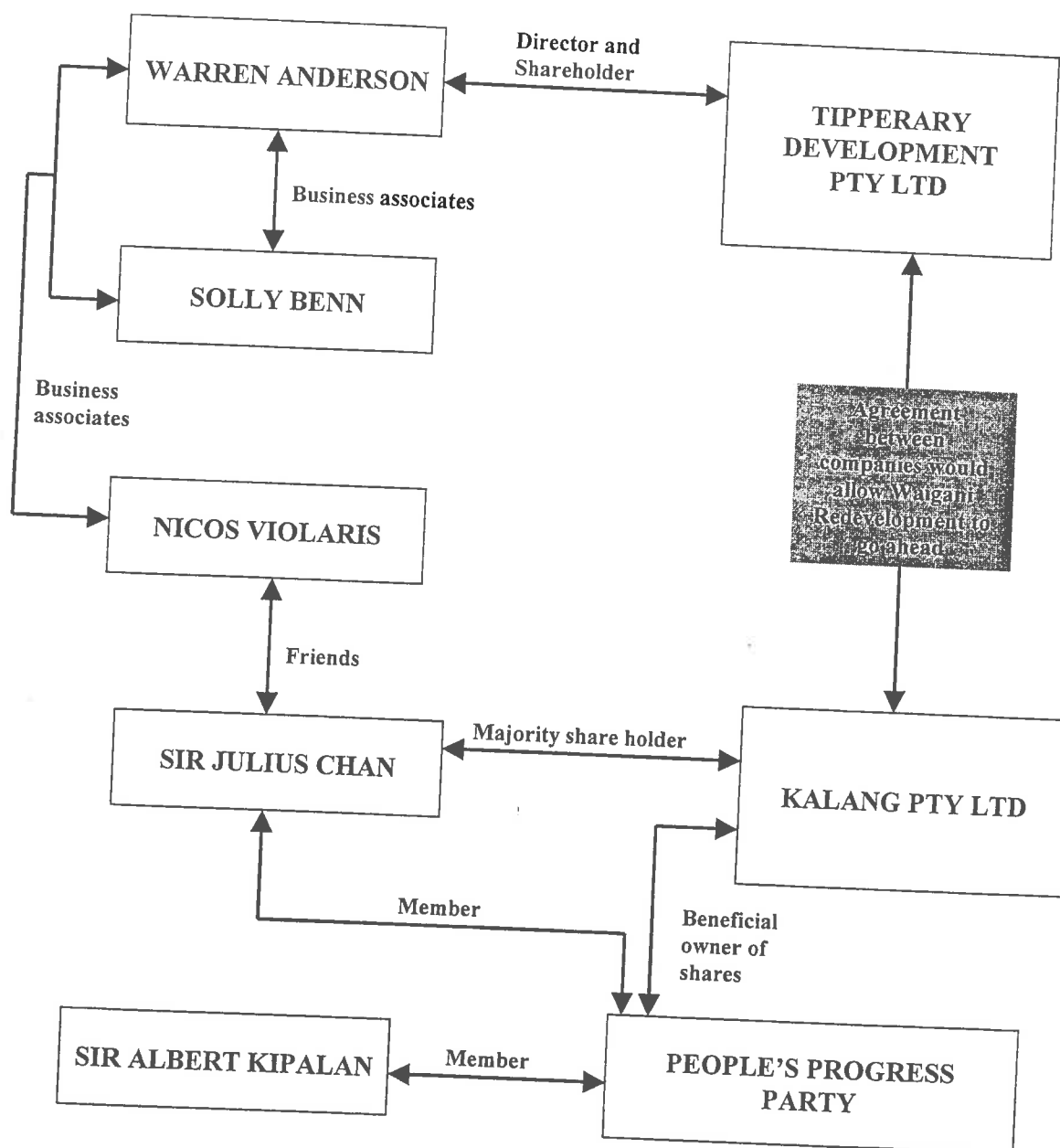
Mr Violaris was a business associate of Messrs Anderson and Benn. He was the person arranging meetings with the Office Allocation Committee and POSFB in order to advance the proposal. The Chairman of the Office Allocation Committee, Mr Peruka, has testified that during the course of a meeting, Mr Violaris gave clear indications that there was political involvement in the decision. When pressed on this, he identified Sir Albert Kipalan as the politician involved.

If we accept Mr Peruka's evidence at face value, that in itself would probably not warrant any finding of impropriety on the part of Sir Albert. However, when that evidence is considered in the context of the facts about the company whose land was proposed as the site for the Waigani Redevelopment proposal, a different picture emerges.

At all relevant times, the land has been the subject of a State Lease in favour of Kalang Pty Ltd. As indicated above, Sir Julius Chan is the majority shareholder in that company. What existed therefore in 1994 was the following situation:

- Sir Julius Chan had legal ownership of 75% of a company which, in effect, owned land in Waigani earmarked for development by Tipperary Developments Pty Ltd.
- Tipperary Developments Pty Ltd was owned and controlled by Messrs Anderson and Benn.
- Messrs Anderson and Benn were business associates of Mr Nicos Violaris, who was instrumental in arranging meetings with the POSFB and the Office Allocation Committee to advance the proposal.
- Mr Violaris is a personal friend of Sir Julius Chan.

These relationships are summarised in the diagram below.



[3.20] **A MATTER OF SPECIAL CONCERN: SIR JULIUS CHAN'S
INTEREST IN THE WAIGANI REDEVELOPMENT PROPOSAL**

Sir Julius Chan had an interest in the Waigani Redevelopment proposal. If it went ahead, Sir Julius's political party, PPP, stood to gain substantially, as the land proposed for development is the subject of a State Lease in favour of Kalang Pty Ltd. Sir Julius had 75% of the shares in Kalang Pty Ltd in trust for the PPP. The interests of Sir Julius's associates conflicted with the interests of his public office.

One thing which emerges from Mr Anderson's proposal is the confidence with which it was assumed that the land in Somare Circuit held by Kalang Pty Ltd would be available for development. For example, in a letter to Pato Lawyers dated 22 September 1994, Tipperary Developments' project executive, Mr Solly Benn, enclosed extracts of a "fourth draft heads of agreement" relating to the Waigani Redevelopment proposal. The preamble to the draft stated, amongst other things:

Tipperary owns certain companies which own companies which have purchased the land in Port Moresby shown on the marked Plan A attached hereto and described in the first schedule hereto. (Emphasis added.)

The first schedule stated:

The proposed buildings will be constructed on a resubdivision of Section 135 Lot Numbers 17 and 18 Hohola, Waigani.

From this, it is apparent that an integral part of the Waigani Redevelopment proposal was the sale to Tipperary Developments Pty Ltd of the land owned by Kalang Pty Ltd.

In these circumstances, we form the view that Sir Julius was actively involved in the negotiations and had given the go-ahead to Messrs Anderson and Benn for the development to proceed on PPP land.

The natural inference to draw from the manner in which the Waigani Redevelopment proposal was advanced is that an obligation of some sort was created. The PPP and therefore Sir Julius Chan stood to benefit substantially from the Waigani proposal; thereby creating an obligation in favour of the person proposing to confer the benefit: Mr Warren Anderson.

In order to bring the required degree of transparency to all of the negotiations and transactions which took place, it was imperative that Sir Julius disclose his own interest in this matter to the Parliament, the National Executive Council and the Ombudsman Commission. The scale of the project, the amount of money that was involved and the interest of his associates in the transaction required him to make these disclosures. However, he did not make such disclosures.

Our concern about Sir Julius's involvement in the Waigani Redevelopment proposal is exacerbated by the manner in which Sir Julius's political associate, Sir Albert Kipalan, attempted to expedite the proposal, just two days after Sir Julius's appointment as Prime Minister.

Sir Albert was also a member of the People's Progress Party, and therefore also stood to gain an indirect benefit if the Waigani Redevelopment proposal went ahead. This benefit was through the PPP's beneficial ownership of Kalang Pty Ltd, the company which owned the Waigani land.

When politicians are involved in spending hundreds of millions of kina of State money, it is imperative that any interest is declared openly. Not only must there be no bias or vested interests in these decisions, there must also be no public perception of vested interests.

[3.21] CONDUCT OF SIR ALBERT KIPALAN

One of the major irregularities surrounding the proposed Waigani Redevelopment was the preparedness of Sir Albert Kipalan to commit to the project without a tender.

Several months after the proposal was put forward, Sir Albert Kipalan gave a written undertaking to Mr Warren Anderson to go ahead with the first phase of the project. He did this just the day after being appointed as a caretaker minister in Sir Julius Chan's new government in August - September 1994.

The undertaking would have involved outlays by the POSFB of at least K142.5 million. He did this without consultation with either the POSFB or the Office Allocation Committee. He was giving the go-ahead to a foreign company to build a large office complex in Waigani without any apparent regard to whether the price being proposed was reasonable or competitive and without regard to the public tender requirements of the *Public Finances (Management) Act*.

Sir Albert's conduct was contrary to established procedures, of an extraordinary nature

and wrong.

[3.22] CONDUCT OF SIR JULIUS CHAN

The second major irregularity surrounding the proposed Waigani Redevelopment was the conduct of Sir Julius Chan.

We have already outlined our concerns in detail. Sir Julius, through his political party, was in a position to gain substantially in the event the proposal went ahead. His friends and associates were also involved in the matter.

Sir Julius did not disclose the interests of himself or his friends and associates. Before dealing in any way with this proposal, he should have disclosed these interests to the Ombudsman Commission, the National Executive Council and the Parliament. By not disclosing these interests, Sir Julius created an environment where corruption could easily occur.

Sir Julius's conduct was not transparent and it was wrong.

[3.23] SUMMARY OF THE WAIGANI REDEVELOPMENT PROPOSAL

The proposal put forward to develop land at Somare Circuit, Waigani has not yet gone ahead. However, there was considerable progress made during 1994 and it is significant that these events took place at around the same time that proposals were being put forward for the purchase of The Conservatory, Cairns.

Our investigation suggests that Sir Julius Chan, and his political and personal associates, stood to gain substantially in the event the proposal went ahead. His political associate Sir Albert Kipalan was also involved and at one stage gave an extraordinary undertaking to Mr Warren Anderson to go ahead with part of the proposal.



4. DECISION TO PURCHASE THE CONSERVATORY: JUNE - OCTOBER 1994

[4.1] OVERVIEW

The POSFB made an in-principle decision to purchase The Conservatory at a special meeting on 10 October 1994. In this chapter, we trace the events leading up to and including that decision.

[4.2] NATIONAL EXECUTIVE COUNCIL POLICY DECISION

Six months before the decision was made to purchase The Conservatory, the National Executive Council made a policy decision to centralise overseas PNG government offices. This decision (No. 60/94) came to be known as the "one-stop-shop" policy. It was recorded as follows:

ACCOMMODATION OF PAPUA NEW GUINEA PUBLIC OFFICES OVERSEAS

On 20th April, 1994, Council:-

1. endorsed the proposal for all PNG State Offices established abroad to be rationalised and, where they are located in the same country, or cities, they be physically centralised, in those offices buildings [sic] accommodating our Foreign Missions; and
 2. directed the Foreign Affairs and Trade Ministry to implement this Decision.
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[4.3] PROMOTION OF THE IDEA OF PURCHASING THE CONSERVATORY BY CONSUL JACOB LEMEKI: JULY 1994

The person formally responsible for promoting the idea of purchasing The Conservatory was Mr Jacob Lemeki, PNG's first Consul in Cairns.

In order to put the purchase of The Conservatory in context, the following facts need to be noted:

- In February 1994, Mr Lemeki was appointed Consul on the recommendation of the then Minister for Foreign Affairs, Sir Julius Chan.
- Prior to his appointment, Mr Lemeki had been a member of Parliament for three consecutive terms from 1977 to 1992. He represented the Samarai-Murua electorate as a member of Sir Julius Chan's People's Progress Party. At one stage, he was the deputy parliamentary leader of the party. He held ministerial office in various portfolios, including Labour and Employment (twice), Minerals and Energy and Public Service (twice).
- In late March - early April 1994, Messrs Anderson and Benn had visited Port Moresby to promote their Waigani Redevelopment proposal. As we reported in Chapter 3, Sir Julius Chan had a vested interest in that proposal.
- On 22 April 1994, Mr Lemeki arrived in Cairns to take up his appointment as Consul.
- By that time, the Consulate had already been established, with its offices in the National Mutual Building, Lake Street, directly opposite The Conservatory.
- Three months later, on 18 July 1994, Mr Lemeki wrote to the Secretary of the Department of Foreign Affairs, Mr Dusava, on the subject of "purchase of site for Government building in Cairns". He said he had been requested by both Prime Minister Wingti and the Minister for Foreign Affairs and Trade, Sir Julius Chan, "to find a vacant land within or in the heart of the city and refer the matter to their attention".
- In this letter Mr Lemeki emphasised the need for positive action:

As you know Cairns is a fast growing city as compared to other cities in Australia. There will not be any land available for us in the future unless the Government is prepared to spend three to five times the present prices offered for vacant land only. One must remember that upon the completion of the Casino the cost of everything in the Cairns area will be trebled.

- Though Mr Lemeki did not mention The Conservatory in this letter, it appears that he had already identified it as a target for purchase.

In his oral response to our preliminary report, Mr Lemeki denied that he was the initiator of the purchase of The Conservatory. He stated that the first time the idea came to his notice was when he met the then Prime Minister, Mr Paias Wingti, at

Cairns Airport. Mr Wingti mentioned to him that he should look for land in Cairns to purchase. This was part of the government "one-stop shop" policy.

Mr Lemeki was initially looking for land to purchase, and then build a suitable building for the Papua New Guinea government agencies. He stated that his first proposal was a vacant block of land next to Hydes Hotel, in the centre of Cairns.

In light of the above, our view is that the idea of purchasing property in Cairns originated with the Prime Minister, Paias Wingti, and Sir Julius Chan, who was at the time the Minister for Foreign Affairs and Trade. The purchase of The Conservatory was, initially, promoted by Mr Lemeki. This happened at the same time the Waigani Redevelopment proposal was being advanced by Messrs Warren Anderson and Solly Benn, a project in which Sir Julius had a vested interest.

Mr Lemeki's initial contact with Mr Anderson and Mr Benn

As part of implementing the policy to centralise government agencies in overseas cities, Mr Lemeki was carrying out instructions to locate land or buildings to purchase. In doing so Mr Lemeki came into contact with Warren Anderson and Solly Benn.

In his oral response to our preliminary report, Mr Lemeki made various statements as to the circumstances in which he met Mr Anderson and Mr Benn. He stated that he attended a briefing seminar for new Heads of Mission at the Airways Hotel in Port Moresby in early 1994. Mr Lemeki says that at that function, Sir Julius Chan mentioned to him that he should look out for Mr Anderson and Mr Benn while he was in Cairns, and that these two men may contact him relating to the purchase of a property.

Mr Anderson, in his response to our preliminary report, said that Mr Lemeki originally contacted him to find a building suitable for the Consulate and government agencies.

Our mandate from Consul Jacob Lemeki was:

Find or build a building suitable for their consulate and associated PNG government businesses.

A One Stop Shop building for the PNG Government and must be available for immediate occupancy up to 3500m².

Therefore the building must be untenanted. Repeat empty - vacant possession.

Mr Benn also stated that Mr Lemeki gave a "mandate" to himself and Mr Anderson to purchase a prime Cairns CBD property, which was part retail and part business, and essentially vacant.

Initial contact was therefore made with Mr Benn and Mr Anderson by Mr Lemeki, who had known about these two men from Sir Julius Chan.

**[4.4] INITIAL DISCUSSIONS INVOLVING MESSRS BENN,
DUSAVA, LEMEKI, PERUKA AND RAGI:
JULY - AUGUST 1994**

POSFB involvement

When Mr Ragi gave evidence before the Ombudsman Commission, he testified that in early to mid-July 1994, Mr Lemeki had telephoned him from Cairns and asked whether the POSFB would be interested in purchasing a property between Lake and Abbott Streets, Cairns. Mr Lemeki said the property was ideally situated and it would be a good idea to relocate the Consulate there. Mr Lemeki said that Mr Solly Benn was acting for the vendor and that Mr Benn would be calling Mr Ragi later to discuss the matter.

Mr Lemeki also said that Mr Dusava was aware of the property and suggested that Mr Ragi follow up the matter with him.

Mr Ragi contacted Mr Dusava as suggested and discussed the matter. Mr Ragi said Mr Dusava showed just as much interest in the proposal as Mr Lemeki.

After his discussion with Mr Dusava, Mr Ragi briefed the Chairman of the Office Allocation Committee, Mr Tau Peruka. Mr Ragi expressed his interest in-principle to Mr Peruka, provided there was a long term commitment from the Government to lease the entire property.

Mr Ragi's attitude then was that he did not want the POSFB to go to Cairns and try and look for tenants.

Mr Ragi stated:

I then briefed Secretary Tau Peruka because the OAC [Office Allocation Committee] is the authority really who normally organise office space for government departments. I talked to them and then re-expressed my interest in principle in the property, provided there is a long term commitment with the government to lease the entire property. I didn't want us to go there and try to look for tenants. At that time I did not want to get into the business of having to run around and chase tenants ... So I said: fine if that's government policy I will investigate the concept of the Board buying it on condition that the government rents on a long term commercial basis. That's what I told Tau Peruka and Gabriel Dusava.

Mr Ragi said that after his discussions with Messrs Dusava and Peruka, he was "very excited" about the proposal. For some time he had been anxious for the POSFB to diversify its portfolio out of exclusively PNG properties. He was hearing for the first time that he had very strong political support for this idea, particularly from Sir Julius Chan. He was encouraged by this.

Mr Ragi's evidence was as follows:

So I was really interested to move out of PNG property. I hear for the first time I have very strong political support, particularly from the Minister for Foreign Affairs at that time, Sir Julius Chan. But that was not the basis upon which I proceeded. I was encouraged. Here we are for the first time ever presented with an opportunity. There is political support for me. That's what I get from these two gentlemen [Messrs Dusava and Lemeki] ... So I said I am going to have a look at it and see it.

After these initial discussions, Mr Ragi received - as arranged by Mr Lemeki - a telephone call from Mr Solly Benn, of Tipperary Developments. As we reported earlier, Mr Ragi had already met Mr Benn in Port Moresby regarding the Waigani Redevelopment proposal. Mr Ragi described Mr Benn as "Mr Anderson's right hand man".

Mr Ragi told Mr Benn he had expressed in-principle interest to Mr Dusava and Mr Lemeki. Mr Ragi said he gained the impression that Mr Benn had already discussed the matter in detail with Mr Lemeki. But at this stage, there was no mention of the price of the building.

Mr Ragi said he regarded Mr Benn as the vendor's representative. He was not aware, he said, that Tipperary Developments did not own the property.

[4.5] OFFER TO CONSUL LEMEKI: 9 AUGUST 1994

On 9 August 1994, Mr Benn wrote to Mr Lemeki, saying he was pleased to advise that "we have an investment property through our joint venture partner, that meets

your requirements". He identified the property as The Conservatory, which he said was "in the very heart of the Cairns Tourist precinct". Mr Benn continued:

This outstanding property can be secured for the sum of K13 million. The net lettable area is approximately 3,000 m² and when fully occupied will generate an income of in excess of K1.3 million, calculated on an average annual rent of K450 per m².

Mr Benn said that the property makes an ideal "blue chip" investment for the PNG superannuation funds and financial institutions.

Mr Benn then outlined what he described as the "numerous advantages" of the property:

-
- The site's prime position is an essential prerequisite and should never be underestimated; the site is surrounded by existing and proposed 5 star hotels, the new Reef Casino, the new Cairns Convention Centre and the NML Tower where you currently occupy space.
 - "The Conservatory" is within easy walking distance of the General Post Office, the Kuranda Rail Terminal, the Bus and Coach Terminal, the Cruise Hire Terminal, and the Main Ferry Terminal that service excursions to the Great Barrier Reef.
 - In addition to the convention centre contract another contract has been awarded for the redevelopment of the Cairns Railway Station and yards into a major retail centre and tourist complex.
 - It is apparent that the site is located in the most appropriate part of Cairns, and is the hub of the thriving Japanese, Asian and International tourist business.
 - The existing centre has some ideal space that could readily accommodate Air Niugini, PNG Bank, Tourism Offices, Permanent Trade Centre incorporating primary production and mining displays. In addition, a PNG Artefacts Shop stocking a wide range of indigenous/national arts and crafts imported from the provincial areas of PNG.
 - The consulate itself could occupy a portion of the building with totally separate and secure tenure.

Rentals/Promotional Fund/Outgoings

- The existing tenancies will help offset government outgoings and overall will represent a strong investment for the Superannuation Board. In addition, the existing tenancies contribute to a "promotional fund". Monies from this fund are utilised in the promotion of the Centre.
-

-
- Each tenant contributes a prescribed percentage towards the outgoings of the Centre.

Occupancy

- This proposal allows for approximately 70% of the total area being made available for PNG occupancy. Purchase of the building will allow the staged occupancy and orderly relocation coinciding with the expiry of existing leases, e.g. NML Tower and Air Niugini. Should immediate occupancy be required then the vendor will be prepared to take over the PNG Government's liability for rent for the balance of the term of the lease in the NML Tower.
- We have attached to this offer, a proposed development concept schematic which details suggested locations for Air Niugini, PNG Bank, Consulate and Tourist and Trade Centre.

Future Development

- In the long term, the site has development potential of 4:1 plot ratio allowing for greater total development or even vertical expansion of the current development. This alone will escalate the value of the property in the years to come.

Summary

- We believe that this proposal has an important role to promote PNG to the world, creating a lively presence in the heart of the most successful tourist zone in Australia.
-

A copy of this letter was sent to Mr Ragi.

A significant aspect of Mr Benn's letter is that he did not identify who the "joint venture partner" of Tipperary Developments actually was. As we report later, Tipperary Developments did not have any interest in the property at that time.

During his evidence to the Ombudsman Commission concerning the preliminary negotiations to purchase The Conservatory, Mr Ragi said:

[Mr Benn] wrote giving us a rundown of the position very much what Lemeki had earlier stated about the property, its ideal position and what's happening there ... He finally wrote and initially offered K13 million for the property plus the stamp duty and other legal costs.

In his conversation with Mr Ragi, Mr Benn did not say where the figure of K13 million came from. It did not appear to be based on any valuation.

Mr Ragi was asked by the Ombudsman Commission what he thought of Mr Benn's

offer. He replied:

I couldn't say one way or the other because I haven't got the valuations yet and I haven't been down to look at the property as yet.

[4.6] SUPPORT OF PROPOSAL BY MR DUSAVA: AUGUST 1994

During the week commencing 8 August 1994, Mr Dusava visited Cairns to inspect The Conservatory. He did so following a direction by the then Minister for Foreign Affairs and Trade, Sir Julius Chan, to inspect and report on overseas properties.

In his response to our preliminary report, Sir Julius further explains his direction:

... He [Mr Dusava] was to look for other properties as well but the author of the Report leaves that out. I am aware of this because a Cairns activity report from the Consulate reported that a number of properties had been looked at. The Report deliberately omits Mr Lemeki's report on his inquiries into a number of other properties. Mr Dusava thought The Conservatory was the most suitable building.

The Ombudsman Commission did not deliberately omit Mr Lemeki's report on his inquiries. We do not have any evidence that any properties other than The Conservatory were seriously considered at any stage.

On 15 August 1994, Mr Dusava presented Sir Julius with a brief on the Government's properties in various overseas locations, including Sydney, Brisbane, Honiara, Suva and Cairns.

In relation to Cairns, Mr Dusava reported that the Chancery was located on the 12th floor of a 16-storey building in the heart of Cairns city - the National Mutual Building. It was being rented for \$9,950.39 per month. He said that, given PNG's long-term interest in Cairns and North Queensland and the projected increase in economic activities with enormous spin-off benefits to PNG, "it would be most appropriate and wise to purchase or build the Chancery in Cairns city".

Mr Dusava said he had visited and investigated two sites in Cairns the previous week under Sir Julius's direction. He then proceeded to describe The Conservatory and relate the terms of the offer conveyed the previous week by Mr Benn.

Though Mr Dusava said he investigated two sites, his brief to Sir Julius mentioned only one - The Conservatory.

It will be observed that Sir Julius Chan was, at this early stage, playing an important role in the proposal to purchase The Conservatory.

Mr Dusava stated:

"The Conservatory's" location is in the very heart of the Cairns Tourist precinct. This outstanding property can be secured for the sum of K13 million. The net lettable area is approximately 3,000m² and when fully occupied will generate an income of in excess of K1.3 million, calculated on an average annual rental of K450/M.

Based on long term Papua New Guinea Government Rental Agreement, the property makes an ideal "blue chip" investment for the PNG Superannuation Funds/Financial Institutions. The property can be purchased by one, or more, or a joint venture between the various Superannuation Funds.

Mr Dusava concluded:

Obviously, Sir, this proposal has an important role to promote Papua New Guinea to the world, creating a lively presence in the heart of the most successful tourist zone in Australia.

A significant feature of Mr Dusava's brief regarding The Conservatory is that it was taken almost word-for-word from Mr Benn's letter of offer to Mr Lemeki.

Mr Dusava made the following statements:

- The property was "in the very heart of the Cairns Tourist precinct".
- The property was "outstanding".
- It could generate an income "in excess of K1.3 million";
- It would "make an ideal blue chip investment".
- The advantages of the property are "numerous". These were listed exactly as they were in Mr Benn's letter.
- The proposal "has an important role to promote Papua New Guinea to the world, creating a lively presence into the heart of the most successful tourist zone in Australia".

All of the above statements were copied verbatim from Mr Benn's letter of 9 August

1994 to Mr Ragi.

**[4.7] ENGAGEMENT OF REAL ESTATE AGENT TO SUPPLY
 MARKET APPRAISAL: AUGUST 1994**

Mr Ragi testified that during his discussions with Mr Dusava in July-August 1994, Mr Ragi told him that "before we could actually progress this idea further we will insist on the valuation of the property and that's what we normally do. Ask for a market valuation and see if it is a suitable price".

The person appointed to carry out this task was a Cairns-based real estate agent, Mr Tony Roberts. The "market appraisal", which he prepared in the following months has become a critical document for the purposes of this investigation. It is therefore important to report the circumstances in which Mr Roberts was appointed.

Our findings are:

- When the question of valuing The Conservatory was raised, Mr Ragi said he didn't want the POSFB to pay for it. So Mr Dusava offered to arrange a valuation through Mr Lemeki.
- Mr Lemeki then asked Mr Solly Benn to find someone to value the property.
- Mr Benn chose Mr Roberts, who was the property manager of The Conservatory.
- Mr Benn advised Mr Lemeki to write to Mr Roberts. Mr Benn drafted a letter for Mr Lemeki to sign.
- On 16 August 1994, Mr Lemeki sent this letter to Mr Roberts to formally request a "market appraisal".
- Mr Lemeki's request was made on the basis that it would not cost the PNG Government anything. Instead, Mr Roberts would be given an exclusive management rights agreement and an annual management fee of 3% - if the PNG Government succeeded in purchasing the property.
- On 18 August 1994, this offer was accepted by Mr Roberts.

In his response to our preliminary report, Mr Anderson emphasised that Tony Roberts was not instructed by Tipperary Development, but by Mr Lemeki. However Tipperary had to "pay these people because POSFB and the Government

would not pay for the reports after they were produced”.

Mr Benn also denied employing Mr Roberts. He stated that “Mr Roberts was never contracted by Mr W Anderson or Mr S Benn, his services were arranged for by Mr Lemeki”.

Mr Lemeki said that he never questioned Mr Roberts’ qualifications. Mr Lemeki assumed that when Mr Benn told him to write to Mr Roberts, Mr Benn was doing so on the authority of Sir Julius Chan. Mr Lemeki also assumed that further screening would be done on the “market appraisal” by POSFB.

In his response to our preliminary report, Mr Roberts gives a slightly different version of his engagement:

I cannot confirm that Mr Benn chose me. I was approached by Greg Peters who was employed by me as a commercial consultant and who had previously worked as a commercial consultant in real estate agencies in Cairns and Melbourne. Greg Peters asked me whether I would be interested in providing a market appraisal of the Conservatory for the PNG government in consideration of payment by way of property management rights of the building at 3% of the annual rental on the basis that the building would be fully occupied by existing tenants and PNG government agencies...

I do not know Mr Warren Anderson. In fact, I have never met Mr Anderson and have spoken to him only once on the telephone when I was collecting rents for Katingo Pty Ltd concerning a lock-out of a tenant, in late 1994 or early 1995.

I had never met Mr Solly Benn nor spoken to him when approached by Greg Peters in relation to the market appraisal. I met him for the first time approximately 2 weeks later on a social level. His dealings were with Greg Peters.

[4.8] PREPARATION OF THE MARKET APPRAISAL

Mr Roberts was the principal of an agency, then trading as:

**TONY ROBERTS REAL ESTATE CAIRNS
REAL ESTATE CONSULTANT,
REGISTERED AGENTS, AUCTIONEERS, COMMERCIAL
AGENTS AND PROPERTY MANAGERS**

Mr Roberts is not a registered valuer.

It is significant to note that he was engaged to provide a "market appraisal" - not a valuation of the property. He did not hold himself out as being a valuer.

In his response to our preliminary report, Mr Roberts made the following points in relation to his preparation of the market appraisal:

1. I was not offered nor did I ever receive any fee of any kind from Mr Benn or Mr Anderson or any of their companies in respect of the provision of my property report nor was any consideration offered or expected.
2. I was not given nor did I seek any suggestions from any party whatsoever as to the dollar outcome of the market appraisal.
3. Most of the work in compiling the property report was conducted by Greg Peters.
4. I was informed by Greg Peters and believed that significant designated areas of the building would be taken up by PNG agencies at a rent level which was provided to Mr Peters by Mr Lemeki.

Mr Greg Peters was the link between Mr Roberts and Tipperary Developments. Mr Peters was working for Mr Roberts as a commercial real estate consultant. Mr Roberts states that Mr Peters first mooted the idea of providing a market appraisal for The Conservatory.

Mr Lemeki assumed that Mr Peters was an employee or associate of Tipperary Developments. Mr Lemeki had the impression that Mr Peters' role was to source out information for Tipperary.

[4.9] CHANGE IN GOVERNMENT AND MINISTERIAL RESPONSIBILITIES: EARLY SEPTEMBER 1994

As we reported earlier, the period in late August - early September 1994 was significant in terms of the changes in ministerial responsibilities which occurred following the Supreme Court's decision in the case of *Haiveta v Wingti* and the subsequent change of government from Wingti-Chan to Chan-Haiveta.

The changes affected various ministers involved in the purchase of The Conservatory:

- On 30 August 1994, Sir Julius Chan was appointed Prime Minister in accordance with a decision of the Parliament made the same day.
- On 31 August 1994, a caretaker cabinet was appointed, comprising Sir Julius and six other ministers.

- Sir Albert Kipalan, a member of the caretaker cabinet, thereupon became Minister for Lands and Physical Planning, Public Service and Communications.
- On 31 August 1994, Mr Chris Haiveta was appointed Deputy Prime Minister and Minister for Finance.
- On 7 September, Sir Albert was "substantively" appointed Minister for Lands and Physical Planning.

[4.10] PURCHASE PRICE INCREASED: 12 SEPTEMBER 1994

During the weekend of 10-11 September 1994, the National Government announced the floating of the kina. Immediately afterwards, the currency devalued.

On Monday 12 September 1994, Mr Benn wrote identical letters to Mr Ragi and Mr Lemeki to inform them that Tipperary Developments had adjusted the purchase price of The Conservatory, previously K13 million, as a result of the devaluation:

The revised price is now K14,800,000.00 (Fourteen Million, Eight Hundred Thousand Kina).

The price quoted does not include any allowance for interest/bank charges, etc., associated with term payments. State Duties and Government charges and any movements in the PNG Kina have not been allowed for. The above charges and possible cost increases, if applicable, will be to the Client's account.

This price will remain firm for a period of 60 days from today's date and will then be subject to review.

Curiously, though Mr Benn said he was giving the revised price on account of the Kina's devaluation, he also said that "movements in the PNG Kina have not been allowed for".

Mr Benn seemed to be saying that though the devaluation had increased the price of The Conservatory by 14% (from K13 million to K14.8 million), it could still increase further.

[4.11] FURTHER PROMOTION OF THE PROPOSAL BY MR RAGI AND MR DUSAVA: SEPTEMBER 1994

The idea of purchasing The Conservatory continued to be advanced during September 1994 by both Mr Ragi and Mr Dusava.

On 21 September 1994, Mr Ragi wrote to Mr Dusava (cc to Mr Peruka) to officially advise him that the POSFB had received the offer from Tipperary Developments.

Mr Ragi said his understanding was that the Government was keen to establish a PNG trade and commerce centre in Cairns. The POSFB had reviewed Tipperary's submission and "would like to proceed with purchasing the property". However, before doing so, a "letter of intent" to lease the premises was required. The lease would be on the following conditions:

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- Lease Period of ten (10) years with two (2) options of ten (10) years.
 - Total lease area of 3018 square metres with a commencement base rental of \$980/square metres.
 - Annual Rental Reviews based on a ten percent (10%) increase or CPI whichever is the greater.
 - All Government and State Charges including rates, taxes, etc., to be paid by the tenant.
 - The Department of Foreign Affairs enters into a Standard POSFB lease agreement.
-

Mr Ragi advised Mr Dusava that of the total lettable area of 3,018 square metres, 1,327 were currently on lease, generating an annual income of \$430,000.00. The leases for those tenancies would progressively be terminated to suit the Government's requirements.

Mr Ragi concluded:

We look forward to receiving an early written acceptance of this proposal, on the above terms, together with a letter of endorsement from the Chairman of the Office Allocation Committee. Upon receipt of these letters we will then seek Board approval.

Mr Ragi's letter to Mr Dusava indicated that the POSFB had reviewed Tipperary's submission regarding The Conservatory. However, we can find no evidence in the files and documents we obtained that, at that stage, any officer of the POSFB other than Mr Ragi was involved in consideration of the proposal. We also find it unusual that Mr Ragi was seeking Mr Dusava's approval of the proposal *before* raising it with the Board of the POSFB or the Minister for Finance, who would eventually have to give statutory approval of the purchase.

On 24 September 1994, Mr Dusava advanced Mr Ragi's proposal by writing to the Chairman of the Office Allocation Committee, Mr Peruka. Mr Dusava said the

Department of Foreign Affairs and Trade was in a position to confirm through a letter of intent that the Cairns property would be leased on the terms set out in Mr Ragi's letter of 21 September 1994. He asked that the matter be given a high priority and sought Mr Peruka's urgent endorsement of it.

We note that, in approving Mr Ragi's proposal, Mr Dusava made no attempt to negotiate the conditions. This was unusual because Mr Dusava had, just five weeks earlier, on 15 August 1994, advised Sir Julius Chan that The Conservatory could be leased at an average annual rental of K450.00 per square metre. He was now arguing that the property should be leased by the National Government at approximately double that amount, \$980.00 per square metre.

Mr Dusava gave his approval without obtaining any independent advice on whether the asking price represented value for money.

[4.12] MARKET APPRAISAL RECEIVED: 26 SEPTEMBER 1994

On 26 September 1994, the POSFB received the market appraisal prepared by Tony Roberts, hereafter referred to as "the Roberts report". In this part of our report, we will describe the contents of the document.

As we reported earlier, Mr Roberts had been identified by the vendor's representative, Mr Solly Benn, to prepare this document. It was described as a "Property Report". It was 23 pages in length.

The disclaimer

The Roberts report began with an extensive disclaimer. It stated that the contents of the publication were believed to be accurate. However, because information given in respect of the property "could possibly be inaccurate or incomplete", it was noted that:

-
- No assurance is given by the Vendors or the Agent that any Information is accurate, complete or balanced.
 - You should not rely on the Information. You should satisfy yourself as to its accuracy and completeness through inspections, surveys, inquiries, searches etc. by your own independent consultants.
 - If you make an offer, or sign a contract for the property which is the subject of this publication, you will be taken to be not relying on any Information (unless otherwise agreed in a written contract with the Vendor).
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- No person is authorised to give information other than the Information in this publication or in another official brochure.
 - Any Information given will not form part of the contract (unless specifically included in the contract).
 - This disclaimer does not exclude any statutory rights you may have which cannot be excluded.
-

In his response to our preliminary report, Mr Roberts claimed that this disclaimer was "my stock standard disclaimer which I was advised some years previously to use on any property market appraisal."

Executive summary

The second part of the report was described as an executive summary. It stated that the property consisted of a retail sector of thirty-three shops on the ground floor and eighteen offices on the first floor; and that the building is located "in the heart of the Cairns Central Business District".

The remaining part of the executive summary consisted of an analysis of the "major transformation" the city of Cairns would undergo over the next five years. Some of the plans for new hotels and major tourist facilities which "will change visible characteristics of the city and provide valuable business" were summarised.

Photographs

Parts 3 and 4 were devoted to aerial photographs of Cairns city and location and site plans of the building.

Property details

Part 4 was entitled "property details". This gave another brief description of the property; identified the property in terms its registration details; described the land area as being 3,185 square metres; identified the local authority as the Cairns City Council; identified the zoning of the property as "main business and shopping"; identified the current fire service levy as \$1,261.22 per annum; and identified the current half yearly council rates as \$29,605.00.

Improvements

Part 6 was entitled "description of improvements". It again described the building in general terms. It also contained a half-page schedule of materials and finishes. There were four pages of photographs.

Development potential

Part 7 stated that The Conservatory was on a "prime site, which in the future, could accommodate almost three times the current floor area ... this building has both prime location and ideal future development potential".

Market appraisal

Part 8, entitled "Market Appraisal", occupied one page. This later proved to be a very contentious part of the report, so we quote it in full:

8.01 CURRENT CAIRNS RENTALS

Esplanade Markets 1995	\$1850/M ²
Orchid Plaza.....	\$1173/M ²
Abbott Street.....	\$980/M ²
Lake Street.....	\$805/M ²

8.02 TENANCY REVENUE

Proposed Tenancy Schedule	Rate/M ² Revenue		
Existing Tenants	1327M ²	Various	\$ 430,000
PNG Tenancy	1691M ²	\$ 865	\$1,462,700
Total Revenue	3018M ²	(Av \$ 624)	\$1,892,700

8.03 CAIRNS CAPITALISATION RATES: SEPTEMBER 1994

Based on an average annual revenue of \$1,892,700, "The Conservatory" would have a 1994 market price of \$18.927 Million capitalised at 10%. The figure of 10% is conservative in Cairns where CBD properties are currently being sold at a capitalisation rate of 8.5% for new buildings with quality tenants. Older buildings with not so strong tenants are being capitalised at 9.5%.

The estimated price of this building in 1996 would be approximately \$23,000,000.

8.04 GROWTH

Capital growth over the next two years until the end of 1996 should increase the value of the property by as much as \$ 3 Million to \$ 4 Million.

We believe the property is well positioned directly opposite the Casino and adjacent to the proposed new retail and tourist accommodation development. Rents should rise substantially from their current rate, and given freehold property in Cairns, a 10% per annum growth is reasonable.

Tourism

Part 9 was entitled "Far North Queensland Tourism Overview". As with the executive summary, it was devoted to explaining the tourism potential of the North Queensland region and some of the major developments expected to proceed soon e.g. the Reef Casino and the Cairns Convention Centre. There was a one-page explanation of growth in the air transportation sector, particularly the large increase in passenger movements at the Cairns international and domestic terminals. Half a page was devoted to the importance of Cairns as a service centre for mining companies. It concluded with the assertion that "Cairns is undoubtedly the international supply gateway to the region".

Confidentiality

Part 10 was headed "Proprietary/Confidentiality Information". It consisted of the following statement:

This document contains proprietary and confidential information, and has been prepared for our client, and cannot be passed on to third persons without our prior written approval.

However, the report did not indicate who Tony Roberts' client actually was.

Mr Roberts strongly denies that Tipperary Developments was his client.

I repeat that my clients were not Tipperary Developments or Messrs Anderson or Benn but PNG government through Mr Lemeki. If Mr Benn recommended us to Mr Lemeki, that is a matter for them. If Mr Lemeki arranged the appointment of Mr Roberts as suggested, it was arranged at the instance of Mr Lemeki as evidenced by his subsequent letter. Certainly I received no instructions from Mr Benn to act for Mr Benn or any person on his behalf.

The confidentiality statement ... is again our standard provision in property reports included on the long standing advice of our lawyers.

Ostensibly, Mr Roberts' client was the PNG Government - as the report had been officially requested by Mr Lemeki. But Mr Roberts had been selected by Tipperary. Mr Benn had told Mr Lemeki to write to Mr Roberts, and had drafted the letter of engagement. Mr Roberts obtained his information from Tipperary. Mr Roberts stood to benefit by obtaining the management of the property if the purchase went ahead.

The engagement of Mr Roberts highlights one of our major concerns with The Conservatory purchase - that even though the main party was ostensibly the Papua

New Guinea government, the wheeling and dealing was done behind the scenes by third parties.

**[4.13] INSPECTION OF PROPERTY BY MR RAGI:
EARLY OCTOBER 1994**

In early October 1994, Mr Ragi travelled to Cairns to inspect The Conservatory. Prior to this he had not inspected it. We find it surprising that neither Mr Ragi nor any other officer of the POSFB had inspected the property before this; as it was just one week later that the POSFB decided to purchase it.

Mr Ragi gave an account of his trip. He testified that he met with Mr Lemeki and also Mr Solly Benn. When he inspected the building he was accompanied by them. Mr Ragi was asked what his first impression of the building was. He said he noticed it wasn't fully tenanted. There were some vacant offices:

There were vacancies but to me if the Government was going to be leasing it, it doesn't matter. It's irrelevant to me. If the Government was going to be leasing on a full owner basis, and I was insisting on that, so it didn't matter to me whether it was full or not full.

Mr Ragi said that after inspecting the building, he, Consul Lemeki and Mr Benn went to the PNG Consulate. It was located in the NML Building just across the road from The Conservatory. Mr Ragi viewed The Conservatory from the Consulate. Consul Lemeki and Mr Benn then pointed out a block of land not far from where the Consulate was, similar in size to The Conservatory block. They told him the vacant block alone would cost A\$12 million.

Mr Ragi was asked whether he accepted this information in good faith. He replied:

Yes, I have no reason to believe otherwise. I have never had any dealings in Cairns before.

Mr Ragi also stated:

The other thing that Lemeki and Sol Benn did advise, and repeatedly said, was that there were other people in the queue that wanted to buy the property. So that's the situation. Take it or leave it and I took it.

Mr Ragi had dinner with Mr Lemeki and Mr Benn that evening. The following day he flew back to Port Moresby. He was not accompanied by any officers of the

POSFB on this trip. He did not make a report on the trip, nor did he keep any file-notes of the discussions he had.

**[4.14] PRESSURE TO HOLD BOARD MEETING:
LATE SEPTEMBER - EARLY OCTOBER 1994**

The Roberts report was received by the POSFB on Monday 26 September 1994. Two weeks later, the POSFB had a board meeting and decided to purchase The Conservatory.

In the intervening two week period, Mr Ragi was put under considerable pressure to hold the Board meeting and expedite the purchase.

Evidence of this pressure comes from two sources. First, a letter Mr Ragi wrote to the Minister for Finance, Mr Haiveta, shortly after the Board's decision. Secondly, from evidence given by Mr Ragi and Mr Peruka before the Ombudsman Commission.

Letter to Minister for Finance

The letter to the Minister was dated 14 October 1994. It was a brief on the status of the proposed purchase. Mr Ragi advised that he and the Secretary for Foreign Affairs were excited about the proposal. They "considered it to be highly viable if implemented properly". They also agreed that an in-depth valuation of the property be undertaken at the vendor's cost.

In the letter Mr Ragi then made the following statement about the circumstances in which the Board meeting of 10 October 1994 had been called:

Upon receipt of the valuation, a lot of pressure (some political) was exerted on me to organize a Board Meeting as soon as possible so that the Board would consider the proposal.

The Chairman [the Secretary for Finance, Mr Gereia Aopi] was approached on 27 September 1994 to call a special meeting of the Board. The Chairman advised that the proposal would be considered upon his return from Europe. This was conveyed to the vendors. Thereon, pressure on me intensified to great heights. I learnt later that the Secretary for DPM was also being pressured as Chairman of the Office Allocation Committee. At a meeting on Wednesday 5 October 1994, Secretary Tau Peruka and I resolved to call for a Special Board Meeting on 10 October 1994 to consider the proposal.

Oral evidence

When he was examined by the Ombudsman Commission, Mr Ragi was asked what he meant by "political pressure" and how it was applied. He replied that the pressure was coming through Mr Solly Benn.

Mr Ragi stated:

We are suddenly getting through Sol Benn, he was repeatedly quoting and saying that Sir Albert Kipalan wanted us to have this thing done very quickly, the meeting should be proceeded with for a decision. The PM and Sir Kipalan...

Mr Ragi went on to say that he thought that Mr Benn and Mr Anderson were quite close to the Prime Minister. When we asked him what gave him that impression, he replied:

RAGI : Particularly when Lemeki was actually dealing with them already. They know each other already. I mean I was introduced to Solly Benn by Lemeki. I don't know if there was any communication between Lemeki and Sir Julius and Sir Albert, I don't know.

OC : But the impression created this?

RAGI : Yeah.

Mr Ragi also further explained his letter of 14 October 1994 to the Deputy Prime Minister. Mr Ragi said that Sir Albert Kipalan had placed increasing pressure on Mr Ragi and Mr Peruka to hold a special POSFB meeting. Mr Ragi elaborated on the pressure:

OC : What type of pressure?

RAGI : They were saying that you've got to have this Board meeting. We have talked with Gereā before his departure and he agreed that you will call a special meeting in his absence. That's where Sir Albert came in.

OC : That's where you got the approval.

RAGI : Yes.

OC : And as you said in your letter to the Deputy PM you appeared to be a bit concerned about this?

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- RAGI : I was concerned, yes.
- OC : Can you just amplify what your thoughts were at this point in time and in terms of the pressure what the nature of your concern was?
- RAGI : I wanted the Secretary for Finance to be involved. Gereza as the Chairman has got to be involved. So I didn't want to rush into it. I know all important financial projects with big finance being implicated I always wanted to see Gereza present at the Board meetings.
-

Mr Ragi's evidence on this matter was corroborated by Mr Peruka.

Sir Albert Kipalan's response

In his response to our preliminary report, Sir Albert Kipalan strongly denied exerting any pressure on Mr Peruka to hold the Board meeting.

I would like to say here that I was not in anyway party to the deal in Cairns building. It is indeed a separate transaction. When I was asked by Mr Solly Benn to ask my Secretary whether they had attended to propose a meeting of POSFB, on the date in question, I simply conveyed that message to my Secretary (Mr Tau Peruka) and nothing else.

In his oral response Sir Albert also stated he only *requested* Mr Peruka to hold the Board meeting, and did not attempt to press or influence him. Sir Albert stated that Mr Benn had told him if the meeting did not go ahead the country would lose a great deal of money.

Having carefully considered the differing statements above, we still consider that Sir Albert applied pressure to ensure the Board meeting was called.

Sir Julius Chan's response

Sir Julius also denied applying any form of pressure.

It is said that the evidence of this pressure comes from two sources. First a letter Mr Ragi wrote to the Minister for Finance, Mr Haiveta. The letter was a brief on the status of the proposed purchase, the contents of the letter is paraphrased: There is nothing in it at all that relates to the pressure emanating from anybody to do anything. The Report then proceeds to examine some "oral evidence" being a statement obtained from Ereman Ragi. The statement is

quoted at page 163. A reference to the "PM" (answer No. 2) has no meaning as Ragi was cut off by the investigator ... It is clear that the conclusion reached of pressure being exerted by me is baseless.

At no time did I exert any legal pressure on Mr Ragi or anyone else. I supported his idea but that was all.

Conclusion as to calling of the meeting

We have carefully considered Sir Julius's comments. However, we do not consider that Mr Ragi's evidence, that he felt there was pressure coming from the Prime Minister, can be so easily discounted.

In light of the above, we draw the following conclusions:

- Mr Ragi reluctantly called the special meeting of 10 October 1994, after pressure was applied on him through Mr Solly Benn, of Tipperary Developments.
- Mr Ragi initially insisted that the Board Chairman, Mr Aopi, be present, but relented due to the pressure being applied.
- The pressure to hold the meeting urgently emanated from Sir Julius Chan and Sir Albert Kipalan.

[4.15] PATO LAWYERS TO BE PAID BY TIPPERARY: OCTOBER 1994

On 8 October 1994, Mr Ragi gave written instructions to Pato Lawyers of Port Moresby to act for the POSFB in relation to purchase of The Conservatory. Mr Ragi stated:

The Board will not be responsible for the payment of your fees - this aspect is a condition of the proposal to purchase and those fees will therefore be to the account of the vendors, except after completion, when it may become necessary to further act for the Board.

This was an unusual arrangement. In the opinion of the Ombudsman Commission, it was really quite absurd for Mr Ragi to expect the POSFB's lawyers to be paid by the vendor of the property, as such a situation would put the lawyers in a conflict of interests. However, it was consistent with the general approach being taken by Mr Ragi to the proposed purchase. He seemed to want the vendor of the property to undertake tasks which would normally be performed by or on behalf of the

purchaser. This was evidenced by Mr Ragi letting the vendor arrange and pay for a market appraisal.

It is noteworthy that the day before Pato Lawyers' received written instructions from Mr Ragi, they had in fact given a quotation to Tipperary Developments, to perform the same work.

On 7 October 1994, Pato Lawyers wrote to Tipperary, stating:

We confirm that our fees for provision of legal services on behalf of the POSFB is the sum of K10,000.00 excluding disbursements. Our services shall include provision of all legal advice on all aspects of the transaction as may be required by the POSFB from time to time, including provision of any agency or liaison work with the Australian solicitors.

Later that day, Pato Lawyers wrote again, qualifying their earlier letter. They said their quotation may in fact be adjusted upwards to reflect the complexity of "work not ordinarily required in the standard conveyance in Queensland".

Thus, from early October 1994, Pato Lawyers were acting for the POSFB and being paid by Tipperary Developments in relation to The Conservatory. This put Pato Lawyers in a serious conflict of interests.

In their response to our preliminary report, Pato Lawyers advised that they did not act for the vendor, but for the purchaser, POSFB. They also contended that "there is in principle no objection to lawyers acting for both sides of no-contentions commercial business".

In the Commission's opinion, there is something very wrong in the purchaser of a multi-million kina commercial building being denied independent legal advice. We consider Pato Lawyers showed poor judgment in agreeing to be paid by the vendors in this transaction.

**[4.16] OFFICE ALLOCATION COMMITTEE'S POSITION:
OCTOBER 1994**

The Office Allocation Committee had an important role to play in the POSFB's decision to purchase The Conservatory. It was Mr Ragi's stated intention that the purchase would not proceed unless and until a guarantee could be given by the National Government, through the Office Allocation Committee, that the State would lease the building once it was purchased. It was for this reason that Mr Ragi had written on 21 September 1994 to the Secretary for Foreign Affairs, Mr Dusava, and also to the Chairman of the Office Allocation Committee, Mr Puka.

On 5 October 1994, Mr Ragi wrote a follow-up letter to Secretary Peruka. He reminded him that the Office Allocation Committee's "endorsement ... is necessary before I seek the Board's consideration of the proposal".

Two days later, on 7 October 1994, Mr Peruka replied to Mr Ragi's letter. He had in the meantime referred the matter to the Department of Finance for its views.

Mr Peruka noted that in fact there were two separate proposals being made by Mr Ragi. These were:

- The POSFB to purchase The Conservatory for K14.8 million.
- The State to lease the whole or part of the building.

Far from endorsing these proposals, Mr Peruka raised a number of serious queries and concerns.

Mr Peruka's concerns about purchasing the building

- Serious concerns were raised about the ownership of the building and the actual role of Tipperary Developments. Mr Peruka stated:

Documents provided by the valuer, Tony Roberts Real Estate (Cairns), indicate that the Certificate of Title on the building is in the name of Joseph Pease (Cairns) Pty Ltd. The question arises whether Joseph Pease (Cairns) Pty Ltd are still the registered owners of "the Conservatory" and whether there are any encumbrances, liens, mortgages and interest on the building. As well, is there documentary evidence available to POSFB that would suggest that owners of the building are prepared to sell the building and on what terms and conditions.

Clarification is also sought on the role of Tipperary Developments Pty Ltd and what commissions and/or fees are applicable or payable to Tipperary Developments Pty Ltd by either the registered owners and/or purchaser of the building.

- Mr Peruka also pointed out that the purchase price of K14.8 million was based on anticipated annual revenue of \$1,892,700.00 capitalised at a rate of 10%; with the average rental being \$865.00 per square metre. But why were existing tenants able to secure much cheaper rates of \$324.00 per square metre? Why was it proposed that PNG tenants would pay much more?
- A reduction in rates for PNG tenants would directly reduce the purchase price of the building. Mr Peruka made an important observation, relating to

the income capitalisation method of property valuation:

Conversely, any move to artificially increase the tenancy rate to PNG tenants will result in an increase in the cost to POSFB to purchase the building.

Mr Peruka's concern about leasing the building

Mr Peruka also said:

- If the State were to consider a long term lease of 10 years, it would be preferable for a lease-purchase agreement to be entered into.
- The proposed lease area of 3,018 square metres was too extensive.
- Though a tenancy rate of \$865.00 per square metre was being used to value the building, the POSFB was seeking an even higher rate of \$980.00 per square metre. This would make PNG tenancy rates at least three times that of existing tenants.

Mr Peruka concluded:

Your early response on the above comments and queries will be appreciated.

The above letter was received by the POSFB on Friday 7 October 1994. This was just three days before the meeting at which approval was given to purchase The Conservatory.

[4.17] CONCERNS OF DEPARTMENT OF FINANCE: OCTOBER 1994

The twin proposals to (a) purchase The Conservatory and (b) lease the entire building to the State, were referred to the Department of Finance in late September 1994. On 4 October 1994, a brief was presented to the Acting Secretary for Finance, Mr Kila Ai. It was signed by First Assistant Secretary Commercial Investments, Mr Vele Iamo, and First Assistant Secretary Top Management and Support Services, Mr Eddy Galele.

This brief recorded a number of serious concerns about the viability of purchasing The Conservatory and the proposed lease agreement between the State and the POSFB. These concerns were relayed to Mr Peruka and formed the basis of his letter of 7 October 1994 to Mr Ragi.

The brief concluded:

A number of issues needs to be addressed with respect to the purchase price of the building. In particular, why the State's tenancy rate is set at a much higher rate than those paid by existing tenants.

A number of concerns that need to be addressed with respect to the proposed Lease Agreement between the State and POSFB and this will need to be progressed on an "arms-length" basis, with the decision to purchase the building being kept separate and distinct from any decision by the State to lease the building.

In his response to our preliminary report, Mr Ai contended that this brief did not question the viability of purchasing the Conservatory. This is important, as Mr Ai later acts in direct contradiction to this advice from senior officers in the Department. Mr Ai said:

The brief does not question the value of the building; it notes the fundamental, and so very general, relation that the value of a building that is to be rented is a function of the stream of rents anticipated. The brief does not question the viability of the purchase; it explicitly notes that this is a question for the POSF Board. Hence your statement on p169 - "*the Department of Finance had serious concerns about the viability of the purchase by the POSFB*" - is not supported by this brief. I ask you to note that the brief makes no recommendation about purchase.

We have closely examined the brief of 4 October 1994. It does indeed say that the onus of establishing the commercial viability of the proposal is on the POSFB. However it is the Department of Finance's role to advise the Minister for Finance, whose approval was required for the proposed purchase.

As we outline above, the brief noted those areas where the proposal was seriously deficient. The brief is very critical of the proposal and states that there are a number of issues which need to be addressed. We do not agree with Mr Ai that because the brief did not "recommend" against the purchase, the problems highlighted by the brief can be put aside.

Letter to Mr Ragi

On 7 October 1994, Mr Iamo signed a letter to Mr Ragi, raising the same concerns expressed in the departmental brief. This letter was in identical terms to that sent by Mr Peruka.

[4.18] POSITION AS AT 7 OCTOBER 1994

The situation which had developed by Friday 7 October 1994 was therefore:

- The Department of Finance had signalled serious concerns about the viability of the purchase by the POSFB; and the terms of the proposed lease of the building to the State.
- The Chairman of the Office Allocation Committee shared the concerns of the Department of Finance.
- The views of both the Department of Finance and the Office Allocation Committee were conveyed formally to the POSFB.

[4.19] MR RAGI'S RESPONSE TO DEPARTMENTAL CONCERNS: 10 OCTOBER 1994

On 10 October 1994 - the day of the special meeting - Mr Ragi responded in writing to the queries raised by Mr Peruka in his letter of 7 October 1994.

Mr Ragi said it was crucial to reiterate that the proposal to purchase The Conservatory had come about as a result of the Government's approach to the POSFB to purchase a property in Cairns and lease it to the Government on a long term basis.

Mr Ragi stated:

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1. We are advised that the properties will be registered in the name of the subsidiary of Tipperary Developments Pty Ltd today or tomorrow after completion of formalities.
 2. We don't know whether there are any encumbrances, liens, mortgages or interests on the building. In any case, however, it is the Board's requirement that if there are any, these must be settled before settlement.
 3. As advised above, I am assured that after today or tomorrow the building would be owned by a wholly-owned subsidiary of Tipperary Developments Pty Ltd after certain formalities have been completed. When that happens, the question of commission or fees to Tipperary does not apply. It is extremely difficult to find properties in the area where "The Conservatory" is located as there are so many developments going up in the area and everybody is trying to remain close to the action.
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4. The existing average tenancy rate of \$324/m² is for tenants who have patronised the property for many many years. This is clearly well below the current rentals of \$980/m² for Abbott Street and \$805/m² for Lake Street within which the property is located. Should POSF purchase the property, current tenants must pay the going rent. Clearly the current rent of \$324/m² is not commercially viable unless the purchase price is substantially reduced.
 5. We are prepared to negotiate a "Lease-Purchase" arrangement on satisfactory terms.
 6. We will be prepared to consider crediting against the purchase price lease payments made by the State.
 7. As the Fund is purchasing the property at the request of the Government, we consider it fair to offer the entire property to the Government. Furthermore, we want the Government to be in total control of the property so that it would determine the future use of the building.
 8. We are reliably informed that the decision whether Air Niugini will lease space at "The Conservatory" will be made at the political level.
 9. It was only a suggestion that a PNG Bank may be established in Cairns if it became commercially viable.
 10. The proposed rent of \$980/m² is the going rent in the Abbott Street. The rent must compare to what is prevailing in the market. The current indications are that the rent will definitely rise in view of the activities that are taking place in the area. I am sure you will agree that the rate used in the valuation would not necessarily be the rent that should be charged.
 11. The Government is certainly at liberty to shop around for tenancy rates, but at the end the Fund will only settle for a tenancy rate that is commercially viable in the circumstances.
 12. The Board will be prepared to pay for the repairs and maintenance which is due to normal wear and tear. All other costs such as legal costs must be borne by the Government.
 13. The Board will furnish a standard Public Officers Superannuation Fund Board (POSFB) Lease Agreement as soon as we have received a "Letter of Commitment" from the Committee. ...
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Mr Ragi's letter, in our view, brushed aside the serious concerns raised by Mr Peruka and Mr Iamo in their letters of 7 October 1994:

- On the question of ownership of the property and the suggestion that the POSFB was dealing with a middleman, Mr Ragi simply said he had been advised that the property would be registered in the name of a subsidiary of Tipperary "today or tomorrow". He therefore avoided the issue of why the POSFB was not dealing directly with the owner of the property.

- As for the concerns about the rentals being proposed and the effect this would have on the purchase price, Mr Ragi continued to rely on the unchallenged assertions in the Roberts report that the going-rate for rent in Abbott Street was \$980.00 per square metre. No attempt was made to check whether this was correct.
- This was an extremely dangerous assumption on which to base an investment decision. The Roberts report was prepared by someone who was neither independent nor qualified to give a valuation. The extensive terms of the disclaimer at the beginning of his report made it clear that it could not even be regarded as "balanced". Mr Ragi should have known all this.

**[4.20] BUSINESS PAPER PREPARED FOR BOARD'S
CONSIDERATION: OCTOBER 1994**

In early October 1994, a business paper was prepared for consideration by the Board of the POSFB. It was presented by Mr Ragi and the Executive Manager (Investments), Mr Joseph Wingia.

In his response to our preliminary report, Mr Wingia downplayed his involvement in the preparation of this paper:

As far as I recall, the Board Submission was prepared by my Investment Manager, Mr Pe Cho on instruction from the Managing Director. I signed the Submission based on the practice at POSFB, where all Board papers are normally signed by the Managing Director and the Executive Manager responsible for the Department that generates the business paper. I assumed that the facts and figures as presented were discussed and verified.

The purpose of the submission was to get the Board to approve purchase of The Conservatory "from Tipperary Developments Pty Ltd or its nominee which owns the property".

Description of property

This included the following statement:

The site is located in the heart of the Cairns Central Business District (CBD) and this prime property occupies a very prominent position in the main tourist precinct.

Cost

The estimated cost of The Conservatory was said to be:

Purchase price	14,800,000.00
Other related costs	<u>200,000.00</u>
Total Cost	<u>K15,000,000.00</u>

Investment analysis

Under the heading "Return on Investment" the following analysis was presented:

The current asking rentals in the Cairns CBD precinct are as follows:

Lake Street.....	K 647 per square metre
Abbott Street.....	K 788
Orchid Plaza.....	K 943
Esplanade market 1995	K 1,488 - 1,568

At a rental rate of K788 per square metre, the property will generate a gross income of K2,378,184 per year.

With an investment of approximately K15 million, the property is expected to achieve an average undiscounted pre-tax return on Investment (ROI) of 13.2% per annum.

Our cash-flow analysis using *Discounted Cash Flow* method indicates an Internal Rate of Return (IRR) of 16.4 percent. Therefore, the proposed investment will be worthwhile since the funds to be borrowed is expected to cost about 7% to 10% only.

The Pay back Period (i.e., the time to recover the cash investment) would be 8.4 years.

The Cash Flow Analysis is undertaken on the following assumptions:

Inflation factor:	4% per annum
Rental income:	K788 per square metre per annum; Increased by the assumed inflation rate from year 2.
Operating expenses:	5% of gross rental.
Residual value:	computed at 20% capitalisation rate.

The net lettable area can be increased by removing the existing escalator system and enclosing the area. Following this approach, an additional area of approximately 420 square metres can be achieved. Revenue from the additional area leased at, say K880, would be K369,600 and this would have a positive impact upon the return on investment.

... Government support for the proposed *Papua New Guinea Centre* is crucial and the Board will require a commitment from the Office Allocation Committee to take up space in the building for the Government's consular and other offices.

Funding

The submission recommended "the injection of funds not exceeding K4.5 million" to a subsidiary company, which would then be authorised to borrow up to K13.5 million to settle the purchase.

Thus, it was envisaged that K4.5 million would be withdrawn from the Public Officers Superannuation Fund to finance the purchase. The rest of the money would come from a commercial loan. (In fact, as we report later, it turned out that *all* of the money was withdrawn from the Fund).

Source of information

Mr Ragi said in evidence before the Ombudsman Commission that the information used to prepare the submission was provided by Mr Solly Benn of Tipperary Developments. The cash flow calculations were prepared by the POSFB's Manager of Investments, Mr Pe Cho. Mr Ragi had given Mr Cho the materials provided and Mr Cho then did his own calculations.

In his response to our preliminary report, Mr Cho clarified the circumstances in which he prepared the submission:

I was instructed by the Managing Director to prepare a Board Paper on a proposal to purchase a commercial property in Cairns. The Managing Director provided me with the information/material for the board paper.

... I give advice upon instructions. I undertake investment evaluations upon instructions. In the case of the acquisition of *The Conservatory*, I was not instructed to undertake an evaluation or to provide advice. I cannot force my advice upon my superiors.

... I was simply instructed to prepare a Board Paper based on facts and figures contained in the material supplied, which I did to the best of my knowledge and ability, using techniques and formulas commonly employed in the industry.

**[4.21] BOARD MEETING TO APPROVE PURCHASE:
10 OCTOBER 1994**

On Monday 10 October 1994, the POSFB held a special Board meeting to consider the submission to purchase The Conservatory.

Composition of Board

The Board Chairman, Mr Gereia Aopi, was absent overseas. It was unanimously resolved that Mr Peruka would be the Acting Chairman. Others present were: Mr Michael Malabag; Mr Ugwalubu Mowana; Mr Aloysius Eviaisa; Mr Vele Iamo; Mr Ragi; and the Board Secretary, Mr Darby Kila.

Matters noted

The minutes record the following matters as being noted:

This matter was raised by the Secretary for Foreign Affairs as the consequence of an NEC decision on investment portfolios. The property however is located at 9 Abbott Street in Cairns, Australia and has an area of 3185 m2 with a two storey building on the site. The property is in the heart of Cairns Central Business District (CBD) and is regarded as a prime property.

The estimated cost of the property is:

Purchase Price	K14,800,000
Related Costs	K700,000

Total Estimate	K15,500,000

Upon devaluation of the Kina, the purchase price was increased to K14,800,000 from K13,000,000 initially. The related cost involve a stamp duty and legal fees. The Board also noted the political support behind this proposal as it was seen to be a viable and beneficial proposal in the long term for the Government of PNG. However, it was noted that a firm long term commitment from the Government is tantamount to the long term viability of the proposal. It was imperative therefore that such a commitment is given before proceeding with acquisition.

It was expressed further that because this is the first of its kind by the Board, the Directors supported the proposal due to the commercial potential of the investment.

Decision

Upon noting the submission and comments by Mr Ragi, it was moved by Mr Eviaisa, seconded by Mr Mowana and unanimously resolved, subject to the Minister for Finance's approval, as follows:

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- (a) The establishment of the Australian subsidiary company which will purchase the property from Tipperary Developments Pty Ltd or its nominee which owns the property...
 - (b) The establishment of a PNG subsidiary which will fully own the Australian subsidiary company
 - (c) The injection of funds not exceeding K4.5 million (if necessary) to the PNG subsidiary company for the purpose of purchasing all the shares in Tipperary Development Pty Ltd or its nominee.
 - (d) The shares in both the subsidiary companies to be held by E. Ragi and J. Wingia in trust ...
 - (e) The appointment of Messrs Tau Peruka, Michael Malabag, Ereman Ragi, Joseph Wingia and Pe M. Cho as directors of subsidiary companies with Managing Director as Chairman.
 - (f) Authorize the PNG subsidiary company to borrow up to K13.5 million.

It was further resolved that an officer of the Department of Finance and Planning will be co-opted during negotiation of the bank loan.

Comments on the minutes

The following matters require comment:

- The total estimated cost of the property shown in the minutes (K15.5 million) increased K500,000.00 from the estimate (K15 million) in the business paper. No concern was expressed about this; nor was the matter noted.
 - No record was made in the minutes of any of the serious concerns and queries raised just three days before by Mr Peruka and the Department of Finance.
 - No query was raised whether there had been a valuation of the property or what the results of the valuation were. When he gave evidence to the Ombudsman Commission, Mr Ragi indicated that the Board insisted that there be a valuation before the proposal went to the Minister. However, there is no indication in the minutes of any such qualification to the Board's decision.
-
- Nobody raised the fact that the purchase of The Conservatory was above the K1 million limit on overseas investments set out in the investment guidelines.

- Nobody questioned the figures at all.
- Two of the members of the Board who voted in favour of the submission (the Acting Chairman, Mr Peruka and the Secretary for Finance's nominee, Mr Iamo) had only three days before, written to Mr Ragi to raise serious concerns and queries as to the viability of both the purchase of The Conservatory and the proposed lease of the building to the State. The minutes suggest that Mr Peruka and Mr Iamo remained silent and did not raise any of their concerns at the meeting. This seemed unusual to say the least. We cannot reconcile the conduct of Messrs Peruka and Iamo with any rational standard of administrative practice.

Responses to our preliminary report

Several of the Board members who voted on this issue responded to the preliminary report, explaining why they agreed to this purchase.

Mr Eviaisa said:

Mr Ragi did mention to the Board that the Chairman Office Allocation Committee had approved to lease all the office spaces in Conservatory so Board will get all its money back by rental from PNG government. The Board has nothing to lose.

PNG Government will pick up head lease therefore is responsible for all rental dues to POSF and as such the Board will get all its money back and make a long term benefit from the Conservatory investments. It is a good investment.

Mr Malabag said:

I can only state that when the proposal was first presented to the board by management, Union directors were apprehensive about the whole thing and we did voice our views which were not indicated in the minutes as only decisions are recorded. This can be confirmed by the former Board Secretary, Mr Darby Kila. It was only after much convincing from the Management including strong support from the relevant Government Agencies i.e. Foreign Affairs, Prime Minister, Personnel Management and Finance that the decision to buy the Conservatory was reached.

Mr Mowana said:

Firstly, I confirm that I was present in the meeting on the 10th October, 1994 and supported the purchase of the Conservatory. I was on the board as the teachers representative. My support of the proposal was in the interest of the contributors as the board was provided with information presented by the management which favours good rate of returns to the fund.

Secondly, as to my support to purchase the property, I was convinced by the Commercial potential of the proposed investment, the rate of return was 16.4% and this rate is intended to yield about K2 million per year to the fund.

Mr Iamo also responded to our comments:

On occasions I was required to attend at meetings of the Board of The Public Officers Superannuation Fund ("POSF"). On these occasions I abstained from voting because of the concerns that I had expressed to the Department of Finance in relation to the proposed purchase. For your information I wish to advise that these concerns were:

- (a) that the purchase of The Conservatory and the lease by the State should be treated as separate issues and not as a combined issue;
- (b) that the rent of AU\$900.00 per square metre was excessive; and
- (c) the valuation of the property to be purchased.

Mr Iamo considered that his concerns were later addressed by the POSFB.

Ombudsman Commission's opinion

After having considered the above responses, the Ombudsman Commission is of the opinion that all the members of the Board failed in their duty to the contributors. They had a duty to check the proposal and objectively assess the risk. In this case, they should have put up a stop sign.

[4.22] WHY DID MR PERUKA CHANGE HIS MIND?

On 7 October 1994, the Chairman of the Office Allocation Committee, Mr Peruka, had despatched a list of concerns to Mr Ragi about the proposal to purchase The Conservatory and lease it to the Government.

Three days later, in his capacity as Acting Chairman of the Board, Mr Peruka participated in the unanimous decision to purchase the building. No apparent consideration was given to the concerns he had earlier raised.

within the space of three days. Why did he do a "U" turn?

Mr Peruka answered:

There was pressure at that time on the Board and there was some emergency with the vendors [Mr Anderson/Tipperary] and Ereman was adamant that this thing must be approved. There was a reason. He said he was under considerable pressure to get the Board to approve this proposal.

When asked what kind of pressure he was referring to, Mr Peruka answered:

Political pressure.

When asked who was applying the pressure, he said:

It was just political pressure. I could have mentioned the source of that but I can't recall.

In seeking to further explain his decision, Mr Peruka said:

I think we have a combination of factors. First, political pressure. Second, in fact we did not have all the information that we would have required in order to help us.

I think he [Mr Ragi] was more or less interested in making sure that this thing gets through as quickly as possible because of the pressure... There was an urgency about having this thing sorted out as Ereman was pushing for an urgent meeting to take place ... He said he was under pressure.

In his response to our preliminary report, Mr Peruka commented further:

The meeting was called by Mr Ragi. This followed pressure from politicians (especially Sir J. Chan) on Mr Ragi. As Acting Chairman, I had to chair the meeting in Mr Aopi's absence.

At the meeting, I can recall that part of the discussion was for a definite decision to be made by the Board to purchase the building as that was what the Prime Minister wanted, according to Mr Ragi. Pressure was mounting on me from Sir Albert Kipalan as well and that was the main reason why I changed my mind.

Sir Albert Kipalan denied putting pressure on Mr Ragi or Mr Peruka:

That contrary to what is stated and/or implied in the Report, I did not exert any pressure whatsoever on any of the officials of either the POSB or officials of Government Departments including both then the Secretary of the Department of Personnel Management (Mr Tau Peruka) and the Managing Director of the POSB (Mr Ereman Ragi) and for that matter, any other Government officials or private individuals that may have been involved in the Cairns property deal and/or related dealings as suggested/implicated in the preliminary Report of the Ombudsman Commission.

We have carefully considered all the above comments. We conclude that the reason Mr Peruka changed his mind was that the Board was under "political pressure" to approve the purchase at the meeting on 10 October 1994.

[4.23] WERE OTHER PROPERTIES CONSIDERED?

Once the decision was made that the POSFB would purchase a property in Cairns, no property other than The Conservatory was ever seriously considered.

When giving evidence before the Ombudsman Commission, Mr Ragi said he asked Mr Lemeki early in their discussions whether there were any other properties worth looking at. Mr Lemeki's reply was there were none available. The Conservatory was the most ideally situated for the Consulate and Air Niugini, he said.

When Mr Dusava gave his brief to Sir Julius Chan in July 1994, he said he had inspected two properties on his visit to Cairns. But the only property he referred to in his memo was The Conservatory.

The POSFB did not at any stage engage a consultant with expertise in the Cairns market to advise it on what properties may be available and at what price.

[4.24] WAS ANY OTHER PROPERTY REPORT OR VALUATION OBTAINED?

As reported above, the property report by Tony Roberts Real Estate was received by the POSFB on 26 September 1994. No other property report was obtained prior to the Board's decision of 10 October 1994; and no valuation of the property was obtained.

We questioned Mr Ragi on this point. He said he was reluctant for the POSFB to obtain its own valuation because of the cost involved. He stated:

I know from experience it's normally expensive those kind of valuations and I didn't want the Fund to pay.

For this reason, he said, Mr Dusava had offered to get a valuation done through Mr Lemeki; and this was how the Tony Roberts property report was obtained.

Mr Ragi stated that he had no reason to disbelieve the figures in the Roberts report, nor did he consider the possibility that the market appraisal of the property may give an inflated value.

Mr Ragi said that, though a valuation was not obtained prior to the Board's decision of 10 October 1994, the understanding of the Board was that the decision was subject to a valuation. He agreed, however, that the Board's decision did not reflect that understanding.

The purchase price was approved by the Board without a valuation being obtained.

**[4.25] THE INCOME CAPITALISATION METHOD OF
PROPERTY VALUATION**

For the purposes of this investigation, the Ombudsman Commission engaged an independent and registered valuer to provide advice on the market value of The Conservatory at the time it was sold to the POSFB, late November 1994. The valuer we engaged was Jones Lang Wootton ('JLW'), one of the largest in Australia, and one we consider as reputable. JLW have since changed their name to Jones Lang LaSalle, however we refer to them in this report as JLW, the name at the time of the valuation.

As we report in Chapter 11, JLW estimated the market value of The Conservatory to be \$5.75 million to \$6.5 million. Another valuation, obtained from the Australian Valuation Office by the Auditor-General, put its value at \$8 million. These values were far below the figure provided by Mr Tony Roberts in his September 1994 report.

We therefore decided to subject the Roberts report to critical analysis. To do this, it was necessary to examine the income capitalisation method of property valuation.

In general terms, the income capitalisation method entails estimating the amount of net income a property will generate each year and then "capitalising" that amount at a rate determined by looking at similar market transactions. All the costs in securing full occupancy of a property are then deducted, to arrive at the estimated market value.

To be more specific, we have identified five steps a valuer takes when using the income capitalisation method:

- (1) Calculate "estimated total gross income (fully leased)". This is done by adding the property's current lease income to "potential additional income" and recoverable outgoings (if any).
- (2) Calculate "deducted estimated annual net income (fully leased)". This is done by deducting from the "estimated total gross income (fully leased)" a vacancy provision and estimated annual outgoings.

(The technical term "vacancy provision" is a percentage of estimated annual income to reflect the potential difficulties of sustaining full occupancy in perpetuity. A fair figure for "vacancy provision" would be 5% of estimated annual income.)

- (3) Capitalise "deducted estimated annual net income (fully leased)" at a rate determined from comparable market transactions (usually at a rate of 10% - 11%).
- (4) Deduct from the capitalised "deducted estimated annual net income (fully leased)" all necessary costs likely in securing full occupancy. These include leasing fees; letting up allowances during the interim period when rental is not being received but outgoings must still be met; items of capital costs; and other appropriate expenses.
- (5) This result is the estimated market value of the property.

**[4.26] OMBUDSMAN COMMISSION'S COMMENTS ON THE
TONY ROBERTS PROPERTY REPORT**

The Roberts report purported to use the income capitalisation method to arrive at the market value of The Conservatory. However, when we examined the calculations used in the report, we discovered a number of large discrepancies between the figures being used and those contained in the report prepared by JLW.

The Roberts report used higher figures for current lease income and vastly more optimistic amounts for the potential future rental income.

The JLW valuation was based on:

- Capitalisation rates of 10% and 11%.

- Current lease income of \$254,647.00.
- Potential additional income of \$825,753.00. This was based on estimated average market rentals ranging from \$250.00 (gross) for the first floor, to \$380.00 (net) for the ground floor, totalling \$695,190.00; plus recoverable outgoings totalling \$130,563.00.

By contrast, the Roberts report was based on:

- Capitalisation rate of 10%.
- Current lease income of \$430,000.00.
- Potential additional income based solely on "PNG Tenancy" of \$1,462,700.00

These differences had the following consequences:

- JLW's estimate of "estimated total gross income (fully leased)", including recoverable outgoings of \$130,000.00, totalled \$1,080,400.00. Whereas, the equivalent figure in the Roberts report was \$1,892,700.00.
- JLW capitalised "deducted estimated annual net income (fully leased)", of \$751,380.00; whereas, the Roberts report capitalised "estimated total gross income (fully leased) of \$1,892,700.00.
- JLW based its analysis of comparative market rentals on the rental rates applicable to other properties in the vicinity of The Conservatory (Village Lane; the ground floor of the National Mutual building and Palm Court). These allowed for average estimated market rentals for The Conservatory ranging from \$250.00 (gross) for the first floor, to \$380.00 (net) for the ground floor.
- By contrast, the Roberts report used market rentals on completely different properties (Esplanade markets; Orchid Plaza; Abbott Street, Lake Street Market). These all had significantly higher rental rates: \$1,850.00, \$1,173.00, \$980.00 and \$805.00 per square metre, respectively.

Other apparent flaws in the Roberts report were:

- The report contained no valuation rationale; no definition of market value; no supply/demand analysis (if deemed applicable); and no demographic

survey (if deemed applicable).

- The analysis of comparative rental data and sales indicators in the Cairns CBD area as set out in paragraph 8.01 of the report was vague and inadequate.
- The calculations failed to deduct a vacancy provision and estimated annual outgoings from "total revenue" (i.e. estimated annual income (fully leased)).
- The report failed to calculate "deducted estimated annual net income (fully leased)". This meant that no provision was made for deductions from estimated annual net income (fully leased) of capitalisation rates; estimated letting expenses (leasing fees, promotion, letting-up allowances (assuming progressive leasing); and/or capital costs; or any other appropriate expenses.
- The Roberts report claimed that The Conservatory was "in the heart of the Cairns Central Business District". But in fact, the correct description of the property's location is, as stated in the JLW report, that it is on "the periphery of the CBD".
- The Roberts report was made subject to a disclaimer which was so extensive, we consider that no reasonable person reading it could have any assurance that any of the information in the report was accurate. By contrast, the JLW report simply stated:

... this report is confidential to the party to whom it is addressed or their professional advisers for the specific purpose to which it refers. No responsibility is accepted to any third party ...

Thus the JLW report contained no disclaimer at all. This, we believe is an accurate indication of the difference in quality of the documents. On the one hand, the JLW was a standard, independent, professional valuation prepared by a registered valuer. On the other hand, the Roberts report was full of concocted figures, prepared by someone who was neither independent nor qualified.

The unreliable nature of the Roberts report was established by the breadth of the introductory disclaimer, which appears to have been included in the document to reduce the risk of the author being sued or charged with criminal fraud.

Mr Roberts's response

In his response to our preliminary report, Mr Roberts strongly objected to our suggestion that his market appraisal was concocted or contrived. He emphasised that the value of the building in his market appraisal was based on the information he was given about the proposed Papua New Guinea government tenancy:

We query whether either of those valuations [by JLW or the Australian Valuation Office] were based on the same premise on which we were instructed to prepare the market appraisal, that is that 1691 sqm of property would be occupied at \$865 per sqm and that all of the existing tenants would remain. As you are aware, most of the tenancies were by nominees of Sarich Pty Ltd and all of them closed on 28 November 1994, on settlement of the sale of the property to Katingo Pty Ltd.

Mr Roberts also pointed out that his appraisal was based on the advice that all outgoing were recovered and recoverable, and that the building would be fully leased by Papua New Guinea tenancies. On the basis of the latter instruction Mr Roberts did not include a vacancy provision.

Mr Roberts objected to our suggestion that he was linked with Mr Anderson. In our preliminary report we had mooted the possibility that Mr Roberts was part of a conspiracy to defraud the POSFB by providing "independent" support for Mr Anderson's proposed purchase price. Mr Roberts replied:

The suggestion made as to a "role" by myself and the words "emerging conspiracy to defraud" are strenuously denied. The report itself may have been used to play a role. I admit that the report was robust and even optimistic in relation to the property but was based on information provided to me and accepted by me in good faith and if the report had a part to play in wider events, I was not aware of it and certainly not a party to it.

Mr Anderson's response

Mr Anderson disagreed with the JLW valuation of the building.

The price of building was arrived at by Replacement Value and not rental income (there was to be no rental income from tenants). This property could not be valued (as by JLW) on the rental income method. The Replacement Value of the building was in excess of \$16.0 M. This was confirmed by our Quantity Surveyors, Valuers and myself.

The Ombudsman Commission's opinions on the Roberts report

We have carefully considered the submissions of Mr Roberts and Mr Anderson in drawing the following conclusions:

- The Roberts report contained an inaccurate and over-optimistic appraisal of the market value of the building. It appears to have been published to confirm Mr Anderson's purchase price, so that the POSFB could be convinced to acquire The Conservatory at the price being asked.
- The Roberts report was hinged on a "PNG tenancy factor" which was artificial and unrealistic. Mr Roberts was given this information and did not assess or question it in any way.
- Mr Roberts was engaged to prepare the "valuation" because if a reputable licensed valuer had been engaged, Mr Anderson's purchase price could not have been sustained.
- Mr Roberts' fee for preparing the appraisal was to be the property management rights, at 3% of the annual rentals, if the sale went ahead. Mr Roberts therefore had a vested interest in supporting Mr Anderson's assessment of the purchase price.
- The Roberts report was not independent.
- The role played by Mr Roberts in the purchase cannot be underestimated. Without his contribution, Mr Anderson's purchase price could not be confirmed and the sale would have fallen through.
- JLW's professional services were just as available to Mr Benn, Mr Lemeki and Mr Ragi as they were to the Ombudsman Commission. We engaged JLW to prepare two valuations (The Conservatory and Malagan House) for a total cost of \$15,000.00. So an independent valuation could have been obtained for approximately \$7,500.00. This expense was insignificant compared to the purchase price of The Conservatory.
- If the Board of the POSFB had been provided with a valuation similar to the JLW report, the Board would have immediately realised it was being persuaded into purchasing The Conservatory by Mr Anderson and his associates for a purchase price significantly above its actual market value.
- Mr Ragi's reason for not securing an independent valuation of The Conservatory - "I know how expensive these things can be" - was feeble.

This would cause any reasonable person to think he may have been covering up his own complicity in a manifestly unfair deal - a rip-off.

It is difficult to understand how any reasonable person could regard the Roberts report as being objective or independent or in any acceptable sense a valuation of The Conservatory.

At best, it must be said that it was quite astonishing for any person to rely on this document as giving a representation of the value of The Conservatory. But perhaps a more appropriate description of those who acted on the basis of this document is that they were incompetent. We also point out that any public official, who shows such incompetence, inevitably causes suspicion in the public mind that he or she must have done so deliberately for a corrupt motive.

[4.27] FLAWS IN THE BUSINESS PAPER

The Ombudsman Commission has examined the POSFB Business Paper which recommended the purchase of The Conservatory. This Business Paper was prepared by Mr Pe Cho on the basis of information supplied by Mr Ragi, and signed by Mr Ragi and Mr Wingia.

The Ombudsman Commission considers the Business Paper contains a number of serious flaws and erroneous assumptions:

- It was accepted that Tipperary Developments Pty Ltd or its nominee owned The Conservatory. This was not the case. At the time the submission was prepared, Tipperary Developments Pty Ltd did *not* own The Conservatory. If this critical fact had been disclosed, it should have led the POSFB to question *why* it should be dealing with a company which did not own the property; and disclosed that the POSFB was dealing with a "middleman"; and led to the conclusion that it should be dealing with the actual owner of the property.
- It was assumed that the property would generate rental income of K788.00 per square metre, resulting in a gross income of K2.3 million per year. On any objective basis this was an optimistic and unrealistic assumption; especially given the fact that during 1994, The Conservatory was said to be generating gross income of only \$430,000.00 per annum.
- No indication was given of the basis on which the K788.00 per square metre figure had been based.
- No indication was given that there had been a valuation of the property.

- At the time the submission was prepared, there was no commitment by the Office Allocation Committee to take up any space in the building. Yet Mr Ragi had earlier stated that he would not put the proposal to the Board until the Committee had endorsed it.
- The serious concerns raised by both the Chairman of the Office Allocation Committee and the Department of Finance as to the viability of the purchase and the reluctance of the State to lease the building were not addressed.
- All the costs and estimates, including projected rental income and cash flows, were expressed in Kina. This was a misleading and dangerous assumption. A few weeks before the submission was prepared, the Kina was floated and then devalued significantly. No mention was made of this, nor the obvious financial risks it created. It seemed to be assumed that the purchase price of The Conservatory would be set in Kina. This turned out not to be the case. The purchase price was in Australian dollars.
- The inflated rentals appeared to be based on Mr Roberts' property report.

In light of the above, it is fair to say that the business paper was seriously flawed. If it had been prepared with a reasonable degree of skill and diligence, it would have prevented the purchase from going ahead.

The business paper was prepared essentially by the POSFB's Manager of Investments, Mr Cho.

In his response to our preliminary report, Mr Cho denied that he had in any way failed to fulfil his duties. He said that many of the flaws we pointed out in the Business Paper were outside his responsibility and authority. Mr Cho disclaims all responsibility for the lack of valuation, the lack of Office Allocation Committee approval, and the failure to address the Department of Finance concerns.

I had no involvement in the policy decisions regarding The Conservatory purchase. I was given the necessary information by my employer to provide for the Board a business paper concerning the purchase. I simply attended to that diligently and professionally within the scope of my instructions.

To suggest otherwise that I had extra investigatory functions to determine the propriety of the deal before complying with my instructions is absurd.

Regarding the acceptance in the Business Paper that Tipperary Developments owned the property, Mr Cho stated:

Mr Ragi has given evidence that he gave me the information for the business paper that I prepared. I was never involved in the negotiation process.

I never ever met or spoke to the vendors of the property or to their agents or lawyers.

While noting Mr Cho's disclaimers of responsibility, the Ombudsman Commission maintains the view that Mr Cho, as Manager of Investments, should have critically assessed the information given to him. Mr Cho failed to exercise his professional responsibility towards the POSFB, his employer.

However, it is clear that the flaws in the business paper should not rest solely with Mr Cho. The business paper was based on information provided by Mr Ragi, and signed by Messrs Ragi and Wingia. Both should also be held to account for their actions, which we consider to have been well below the standard of competence and care required.

Auditor-General's analysis

The Auditor-General, in his November 1997 report on the purchase of The Conservatory, subjected the POSFB proposal to a financial analysis. The Auditor-General considered that the assumptions contained in the POSFB analysis led to serious deficiencies in the business paper.

It is my view that the commercial viability of the investment is totally dependent upon the amount of expected rental income which can be generated only by renting the property. During the course of investigation, I obtained two independent valuation reports of the property and by using the assumptions of rental income and cash outflows as given in the Australian Valuation Office report, a Discounted Cash Flow analysis done by my Office, reveals that the investment is not commercially viable because calculations of Net Present Value yield a negative amount and an internal rate of return of only 00.43% which is far below the required rate of return of 10% (before tax) used by the Board as its investment criteria.

In the financial appraisal of the investment, the Board should have at least tried to conduct sensitivity tests by calculating rental revenue at the then prevailing market prices in its cash flow analysis rather than totally relying on the rental value of A\$700.00 per square metre per annum.

The optimistic assumptions on which the financial analysis was carried out by the POSFB, naturally showed a very healthy picture. However, it is my belief that those assumptions are highly unrealistic and very difficult to achieve, in a real world situation.

[Report of the Auditor-General on the purchase of The Conservatory Building in Cairns by the Public Officers Superannuation Fund Board
November 1997
Page 28, paragraph 7.3]

[4.28] THE PRUDENT PURCHASER

In contrast to the POSFB's approach, we ask: What steps would a prudent purchaser take before purchasing a building such as The Conservatory?

- Obtain a lawyer to examine ownership and title details. The lawyer would also examine all the existing leases.
- Obtain an engineer to assess the quality of services to the building, including air conditioning, escalators and electricity.
- Obtain a surveyor who would undertake a survey to see if any encroachments on the title were evident.
- An extremely cautious investor, for example one who was investing moneys held on trust for other people, may also obtain reports on whether there are any environmental flaws with the building, for example soil contamination.
- Put together a package of information, from a variety of sources, establishing potential and current rentals levels; as well as a summary of existing leases and management contracts relating to the building.
- Obtain an independent valuation to verify the asking price.
- Once the above due diligence exercise has been completed, the purchaser can finalise negotiations with the vendor.

We acknowledge that this type of comprehensive due diligence exercise might appear time consuming and expensive. However, it is much more sensible, and in the end cheaper, to obtain advice and go into negotiations in a strong position, or even to walk away from a deal, than to buy property at the vendor's first asking price.

**[4.29] IRREGULAR ASPECTS OF THE DECISION TO
PURCHASE THE CONSERVATORY**

Having investigated the events which led to the decision to purchase The Conservatory, we have formed the view that the decision was seriously flawed in a number of respects.

1. No attempt to go into the open market

No serious consideration was given to the purchase of any property other than The Conservatory. No professional advice was sought regarding the property market in Cairns. No consideration was given to alternatives. Everything Mr Solly Benn said about the property was accepted by Mr Ragi at face value.

Mr Ragi had never had any dealings in Cairns before, but continued to place faith in Mr Benn's advice.

2. No negotiation of the price

The POSFB demonstrated no willingness to negotiate the purchase price. During the four week period leading to the decision to purchase the property, there was a *K1.8 million increase* in the purchase price, said to relate to the September 1994 devaluation. The justifiability of this increase was never questioned.

The various purchase prices quoted to the POSFB gave the impression of being plucked out of the air.

3. No record of negotiations

Mr Ragi kept no file-notes of the various discussions and negotiations he had regarding the purchase of The Conservatory.

This was quite extraordinary.

4. No valuation of the property

The POSFB made its decision to purchase The Conservatory at an "all up" cost of K15.5 million without obtaining an independent valuation.

This was inexcusable.

5. Reliance on the Roberts report

The Tony Roberts property report, received by the POSFB on 24 September 1994, was not a valuation in the accepted sense.

We believe even the most casual observer should have realised that it was not a valuation and that it was dangerous to rely on it. It contained wildly inaccurate assumptions about the rents which the property would generate. No attempt was made by the POSFB to ascertain the credentials of Mr Roberts or his qualifications or background. Mr Ragi created a situation where the vendor's representative, Mr Benn, was able to select Mr Roberts; and then advise Mr Lemeki to instruct Mr Roberts.

Mr Roberts also had a vested interest in inflating the "market value" of the property, as the fee he was to receive for the appraisal was contingent on him obtaining the management of The Conservatory after the building had been purchased by the POSFB.

The whole arrangement was grossly improper.

6. No commitment by the Office Allocation Committee

Mr Ragi had stated that he would not go ahead with the purchase, without getting the Office Allocation Committee's approval. But at the time the POSFB made its decision to purchase The Conservatory, no commitment had been made by the Office Allocation Committee to lease the building or any part of it.

Mr Ragi had therefore set the POSFB on a very dangerous path.

7. Quality of submission to the POSFB

The submission which went to the POSFB, prepared by Mr Cho and signed and presented by Messrs Ragi and Wingia, was defective in a number of significant areas. The cashflow figures relied on representations made in the Roberts report, which any reasonable person would have realised were unrealistic and misleading.

On any objective view, the submission was unprofessional and lacking in substance.

8. Negligence of Board members

In the opinion of the Ombudsman Commission, the members of the Board of the POSF failed, individually and collectively, to subject the proposal to purchase The Conservatory to proper assessment. We consider that they each had the duty to stop

the proposal going forward.

They failed to discharge that duty.

9. Political involvement in the decision

It is apparent from the evidence provided by Mr Ragi and Mr Peruka that they were under considerable political pressure to expedite the purchase of The Conservatory despite their being an abundance of reasons, clearly obvious to any prudent administrator, why further detailed consideration and negotiation was necessary.

Mr Ragi and Mr Peruka succumbed to this pressure; as did the Department of Finance's Mr Iamo. This pressure came from Sir Albert Kipalan and Sir Julius Chan.

If this pressure had not been applied, it is most unlikely the deal would have taken place.



5. SIGNING OF CONTRACT OF SALE: OCTOBER - NOVEMBER 1994

[5.1] OVERVIEW

The POSFB decided at its meeting on Monday, 10 October 1994, to purchase The Conservatory. Six weeks later, the contract of sale was signed. In this chapter we examine what happened in the intervening period. We also summarise the contract of sale. We begin by focussing on the events of 11 October 1994. These included:

- Mr Warren Anderson being advised by Mr Ragi of the Board's approval of the purchase.
- The acquisition of a shelf company to facilitate the purchase.
- A briefing to the Prime Minister by the Acting Secretary for Finance.
- A formal submission for Prime Ministerial approval by the POSFB.
- A luncheon meeting between the Prime Minister and Mr Ragi.
- An instruction by the Prime Minister that the matter be expedited.

[5.2] MR RAGI ADVISES MR ANDERSON THAT PRIME MINISTERIAL APPROVAL IS IMMINENT: 11 OCTOBER 1994

On the morning of 11 October 1994, Mr Ragi sent a fax to the Managing Director of Tipperary Developments, Mr Warren Anderson:

Dear Warren,

I am pleased to advise you that my Board has now approved this transaction as proposed. The Board's decision has been submitted to the Prime Minister for his consideration and approval. The Prime Minister's decision is expected today.

As soon as I am in receipt of the Prime Minister's approval, I will arrange the deposit of K500,000.00 (Five Hundred Thousand Kina) into the Trust Account of our Solicitors Pato Lawyers as an indication of our intention to proceed. Subject to all legal requirements being met by the parties, we do not expect any difficulty with completion of the transaction.

A curious aspect of Mr Ragi's letter is his advice that the Board's decision had already been submitted to *the Prime Minister* and that his decision was expected *that day*. As we pointed out in Chapter 2, the question of approval of the contract of sale was always one that under the *Public Finances (Management) Act* should have been referred to the Minister for Finance - not the Prime Minister.

Mr Ragi's confidence that the Prime Minister's approval would be given *that day* is also surprising - unless of course Mr Ragi had already discussed the matter with the Prime Minister and been given an indication that approval would be forthcoming. In view of the events which transpired later that day, we consider it likely that that is in fact what had already happened.

**[5.3] ACQUISITION OF SHELF COMPANY BY POSFB:
11 OCTOBER 1994**

On 11 October 1994, the POSFB instructed Pato Lawyers to prepare a shelf company for acquisition. The plan was that the shelf company would purchase The Conservatory. Shares in the company would be held by officers of the POSFB in trust for the POSFB.

On 14 October 1994, the plan was put into effect with the acquisition of a company called Moki N° 10 Pty Ltd.

Ownership

The shareholders of Moki N° 10 Pty Ltd became:

- Mr Ereman Ragi, holding one share in trust for the POSFB.
- Mr Joseph Wingia, also holding one share in trust for the POSFB.

Control

The directors of Moki N° 10 Pty Ltd became:

- Mr Pe Cho.
- Mr Michael Malabag.
- Mr Tau Peruka.
- Mr Ereman Ragi, Chairman.
- Mr Joseph Wingia.

Mr Darby Kila, the Secretary to the POSFB, was appointed company secretary and public officer. In his response to our preliminary report Mr Kila advised that he had no dealings with the company other than maintaining the company records.

Deed of indemnity

On 14 October 1994, each of the five directors executed deeds of indemnity with the POSFB.

Under these deeds, the POSFB agreed to indemnify (i.e. protect) each director against liabilities which may be incurred as a result of his actions as a director. The key part of each indemnity is set out below.

POSF covenants with the officer that it will to the full extent that the same is from time to time by law permissible at all times hereafter indemnify the Officer and keep him indemnified from and against all claims and payments of any nature whatsoever for which the Officer may directly or indirectly become liable and against all actions, suits, proceedings, fines, penalties, claims, demands, costs, and expenses whatsoever which may be taken, made, imposed, or levied against the Officer or incurred or become payable by him in or in relation to or arising by virtue of his capacity as such or in the course of or in connection with:

- (a) the Officer performing the duties imposed upon him in relation to the Office by the Companies Act Chapter 146 of the Revised Laws of Papua New Guinea and/or any similar or analogous legislation, provision or arrangement.
 - (b) failing neglecting or omitting to perform any such duties, unless such failure is wilful or results from the gross negligence of the Officer.
-

It is significant to note that the directors are not entitled to the indemnity in cases of "gross negligence".

**[5.4] SUBMISSION FOR PRIME MINISTER'S APPROVAL OF
PURCHASE: 11 OCTOBER 1994**

On 11 October 1994, a formal submission to Prime Minister Sir Julius Chan was prepared by the POSFB. Its purpose was to seek his approval to enable the purchase of The Conservatory to proceed.

A curious aspect of this document is that it was addressed directly to the Prime Minister, rather than the Minister for Finance - even though the Prime Minister had no power under the *Public Finances (Management) Act* to approve the purchase. We raised this issue with Mr Ragi in the course of our investigation. He said his recollection was that Sir Julius was the Acting Minister for Finance at that time. However, as we note below in 5.17, there is no documentation to show that Sir Julius had the portfolio responsibility for Finance at this time.

We can identify no legitimate reason for Sir Julius's approval being sought on 11 October 1994.

In his response to our preliminary report, Sir Julius said:

... reference is made to the fact that POSFB sent me a submission for my approval of the purchase of the Conservatory. At that time I was Prime Minister. I did not solicit the submission, indeed I do not know why it was sent to me, I had no control over that. No approval was given by me.

**[5.5] ACTING SECRETARY FOR FINANCE GIVES BRIEFING TO
PRIME MINISTER: 11 OCTOBER 1994**

On 11 October 1994, Sir Julius Chan was briefed on The Conservatory by the Acting Secretary for Finance, Mr Kila Ai. It appears that at that briefing, Sir Julius asked for a copy of the draft "heads of agreement" between the State and POSFB. This was provided to Sir Julius two days later, on 13 October 1994.

It is worth noting that Sir Julius, who, as we have said, had no formal part to play in approving the purchase, was so interested in the matter that he asked to be provided with this information.

In his response to our preliminary report, Mr Ai stated that at that briefing he gave Sir Julius the POSFB submission, dated 11 October 1994, and a letter from himself as Acting Secretary, dated 10 October 1994. He states that his letter was for Sir Julius's

information, rather than making a concrete recommendation:

My October 10th letter to Sir Julius, as Prime Minister, passed on faithfully the views of senior officers of my Department. As is usual, substantial parts of my letter to Sir Julius are from the brief that I received. The letter - as does the brief - summarises the POSF proposal and draws attention to the issues about tenancy rates and area to be occupied by the State.

While the letter ends with the heading "conclusions and recommendations" there are no recommendations. Rather, the letter is for *reference and comment* - it could equally have been "for your information".

Mr Ai also did not consider Sir Julius's interest in this project unusual:

You may not be aware that Sir Julius was a very active Prime Minister. He took particular interest in all of the major projects that were on-going when he came into government and that were initiated by his government. (Later, this involvement was formalised through a committee and a *Blue Book* of projects). I found nothing unusual on briefing him on a major project - whether as Prime Minister or as acting Minister of Finance. I briefed him on many projects.

**[5.6] MEETING BETWEEN PRIME MINISTER AND MR RAGI:
11 OCTOBER 1994**

On 11 October 1994, Mr Ragi met Sir Julius over lunch. Also present was the then Secretary for the Department of Prime Minister and National Executive Council, Mr Brown Bai.

In his evidence before the Ombudsman Commission, Mr Ragi said he was the one who set up this meeting. He described the Prime Minister's interest in the matter as follows:

He just wanted to catch up on what has happened, the progress of the matter.

Mr Ragi kept no notes of the meeting.

**[5.7] PRIME MINISTER INSTRUCTS THAT RECOMMENDATION
BE PREPARED: 11 OCTOBER 1994**

One of the outcomes of the luncheon meeting of 11 October 1994 between the Prime Minister and Mr Ragi was that Sir Julius requested the Acting Secretary for Finance to

prepare a recommendation regarding The Conservatory. He issued this request by passing a message through Mr Ragi.

After lunching with Sir Julius, Mr Ragi left a hand-written note with Mr Ai:

PM spoke to me about this project over lunch and asked me to advise you to prepare a Recommendation to him by close of business today for his consideration. Unfortunately I had to go so I'll leave it to you.

Cheers.

E. K. Ragi
212382

Mr Ai then put his own notation on the note:

Jim Bantegul

pls handle asap.

Neither Mr Ragi nor Mr Ai questioned the nature or extent of the Prime Minister's involvement in the matter. Neither objected to Sir Julius's control of the project.

In his response to our preliminary report, Sir Julius denied issuing the instruction to Mr Ai.

... there is an assertion that I issued an instruction to Department of Finance via Ragi to prepare a recommendation concerning the Conservatory. The paper from POSFB seeking approval to borrow funds dated 11 October 1994 was sighted by me and on 12 October 1994 I endorsed the paper, at the provision Approved/Not Approved, "subject to Sec Finance - Project Good Concept". It was not until the 26th of October 1994 that I issued an approval, which I have said elsewhere was effectively Mr Haiveta's approval. If I had wished to give instructions to the Secretary for Finance I would have issued them direct to the secretary.

However in our opinion, Sir Julius's denial conflicts with the clear impression Mr Ragi evidently received from their meeting. Mr Ragi's note, written very shortly after the meeting took place, shows his understanding that Sir Julius asked for a recommendation by the close of business that day; and that the recommendation would be in favour of purchasing The Conservatory.

Chapter 5

Signing of Contract

[5.8] **DEPARTMENT OF FINANCE CRITICAL OF THE PURCHASE
PROPOSAL: OCTOBER 1994**

The Prime Minister's instruction, conveyed to the Acting Secretary for Finance through Mr Ragi on 11 October 1994, put the Department of Finance in a difficult situation.

It was evident that the Prime Minister wanted the purchase of The Conservatory to go ahead; and wanted a recommendation to that effect given to him for his immediate approval.

But at the same time, senior officers of the Department of Finance had already formed the view that there were serious flaws in the POSFB's proposal to purchase The Conservatory. An analysis was prepared entitled "Comments on POSB Base Case Submission". It was quite critical of the POSFB submission which had gone to the Prime Minister on 11 October 1994.

The Department of Finance analysis, dated 15 October 1994, stated:

1. **Comments on Assumptions**

a) **Inflation rate** - whilst the submission refers to an annual increase in rental rate of 4%, correspondence received refer to an inflation rate of CPI or 10%, whichever is higher:

- In order to be conservative in the analysis, the 10% factor should be used for so long as agreement is reached with POSFB that rental payments made by the State is to be credited towards the purchase price;
- It is in POSFB's interest to use 10% in that failure on the part of the State to exercise its option to purchase at the end of ten (10) years will result in benefits to POSFB.

b) **Debt to Equity Ratio** - whilst it is stated that the submission is based on a debt to equity ratio of 80:20, the following are noted:

- POSFB has indicated that it is prepared to provide up to K4.5 Million from internal resources. This represents close to 30% of the investment and will therefore result in a debt to equity ratio of 70:30 and not 80:20;
 - notwithstanding the above, the proceeds of the loan and debt repayment has not been factored into the analysis;
-

-
- with all due respects to POSFB, it is erroneous to simply factor "interest" in the calculation in that POSFB's obligations relate to both principal and interest repayments;
 - conversely, if it is POSFB's intention not to reflect the proceeds of the loan and loan repayment, then interest charges should also be excluded from the calculations. This is to ensure one is comparing "apples with apples" and not "apples with oranges";
- c) Loan interest rate of 10% - POSFB assumes a loan interest rate of 10% in the analysis. This equates to a margin of 2.5% over the bank indicator lending rate of 7.5%:
- the interest rate of 10% is considered to be too high in that the State regularly secures commercial loans at nil margin;
 - however, given the commercial nature of the project, a margin of 1.0% is assumed in the analysis.
- d) Operating Cost of 5% of gross revenue - no adjustment is made on this assumption in that this represents the best judgement of POSFB to operate the building.
- e) Capitalisation rate of 20% - It is not clear on what basis POSFB is using a capitalisation rate of 20%:
- the valuation done by the valuer assumes a capitalisation rate of no more than 10%;
 - In any case, the capitalisation rate is irrelevant in that the model should assume a residual value;
 - the proposed residual value of K16,925,000 is considered to be far too onerous;
- f) Total payments to POSFB. Under POSFB's model, the State will be paying POSFB K24,208,258 in rental over 10 years plus K16,925,000 or a total of K41,133,258 for a K15,500,700 building (In today's prices). This is considered to be far too onerous to the State and provides for a much higher internal rate of return that POSFB originally estimated.
2. Results of Analysis of POSFB
- a) with all due respects to POSFB representative, the manner in which the cash flow analysis was shown is simply erroneous in that it did not take into account the loan proceeds and loan repayment obligations of POSFB i.e., the principal as well as the interest;
- b) taking the above factors into account, POSFB's assumptions will actually result in an internal rate of return of 19.5% and not the 14.5% shown in the analysis;
-

-
- c) DFP has shown all the calculations that make up the model and crossed checked both the loan repayment and the IRR calculations. DFP will have no objections to the calculations being independently evaluated by a qualified accounting firm.
-

So, at the same time Prime Minister Sir Julius Chan was, by his conduct on 11 October 1994, making it clear that the Acting Secretary for Finance should recommend in favour of the purchase, other senior officers of the Department of Finance had very different views on the matter.

Mr Ai, in responding to the preliminary report, denied that Sir Julius was asking him to recommend in favour of the purchase. He also denied that the Department of Finance analysis recommended against the purchase.

I object strongly to the insinuations in this paragraph. (I note below my reasons for not finding Sir Julius's interest in major projects unusual.) He did pass a message to me, through Mr Ragi, to prepare a recommendation on its purchase - as you note on p199 the note did not say: "prepare in favour". You may believe that Sir Julius was making it clear that I (as Acting Secretary) should recommend in favour. I do not know what basis you have for this belief. It is logically fallacious to argue that because on the October 26th I recommended Ministerial approval, this was my view earlier in October. It is purely insinuation to imply that my decisions were influenced by Sir Julius's views.

Your use of other in other senior officers of the Department of Finance had very different views necessarily excludes me from being of one view with these officers. Again, you have no basis for your opinion. On the contrary, my letter of October 10th shows I shared the views of senior DoF officers and that I reflected these fully in the letter they prepared for my signature.

The Ombudsman Commission has carefully considered Mr Ai's comments. However, Mr Ragi's evidence makes it clear that Sir Julius was strongly in favour of the proposed purchase. Mr Ai ignored the valid concerns of his own Departmental officers to recommend in favour of the purchase. The Ombudsman Commission maintains the view that Mr Ai failed to provide independent and objective advice.

**[5.9] DRAFT AGREEMENT SENT TO PRIME MINISTER:
13 OCTOBER 1994**

On 13 October 1994, the Acting Secretary for Finance, Mr Ai, as requested, sent a draft "heads of agreement" to Sir Julius Chan for his "reference and approval". This document assumed that the State would agree to enter into a lease-purchase agreement

covering the entire building for ten years.

Again, there was no legitimate reason why a document of this nature should have been given to the Prime Minister.

Mr Ai responded to our preliminary opinion, that Sir Julius should not have been so closely involved in this matter, as follows:

I did not ask Sir Julius to approve anything which he had no power to approve. My letter of October 11th passes on information for *reference and comment*. My letter of October 13th attaches POSF's draft heads of agreement for Sir Julius's *reference and approval*. This is poor drafting - but even were it not, it is not unreasonable to let the chair of the final arbiter of any contract with POSF (NEC) have a say on the negotiating stance that the State should take.

It is also significant that the draft heads of agreement assumed a ten year lease of the *entire* building by the State. This assumption was contrary to the advice which other officers of the Department of Finance were consistently giving: that the issues of purchasing of the property and its lease to the State were separate and distinct issues; and that the purchase price was being inflated because of the rents proposed to be charged to the State.

In responding to the preliminary report Mr Ai denied that it was significant that the draft heads of agreement assumed a lease of the entire building by the State. Mr Ai argued that the draft agreement was prepared by the POSFB as lessor, and therefore assumed terms which would be extremely favourable to the POSFB. As Mr Ai had already pointed out to Sir Julius that this was an issue which needed to be resolved, he saw no harm in forwarding the draft heads of agreement to Sir Julius without further comment.

**[5.10] REQUEST FOR MINISTER FOR FINANCE'S APPROVAL:
17 OCTOBER 1994**

On 17 October 1994, the POSFB presented a submission to the Minister for Finance, Mr Haiveta, seeking approval for purchase of The Conservatory. This was the first occasion on which he had been formally approached by the POSFB.

This submission was almost identical to that which had a few days earlier been forwarded to the Prime Minister. However, the cash flow figures had been changed. The internal rate of return was now shown as 10.2%; rather than the previous 16.4%.

The pay-back period was estimated as 9.9 years; rather than 8.4 years. The rental income was based on a projected figure of K647.00 per m²; rather than the previous K788.00 per m². This translated to a reduction from \$900.00 per m² to \$700.00 per m². These changes came about following a meeting between Mr Ragi and officers of the Department of Finance on Saturday 15 October 1994.

However, all the cash flow projections were still based on the figures which Mr Ragi had presented to the POSFB in late September 1994, i.e. Tony Roberts' figures. In the three weeks which had elapsed since then, no attempt had been made to verify these figures. As we indicated previously, the Roberts figures were extremely optimistic and misleading.

The submission presented to the Minister for Finance on 17 October 1994 was still based on wildly inaccurate financial data.

[5.11] SECOND VALUATION ORDERED: 21 OCTOBER 1994

On Friday 21 October 1994, a board meeting of the POSFB was held. Present were: the Chairman Mr Aopi; Mr Malabag; Mr Mowana; Mr Eviaisa; Mr Ragi; and the Board Secretary, Mr Kila. The Secretary for Personnel Management, Mr Peruka, was absent.

Two important decisions were made regarding The Conservatory:

- The rental to be asked from the Government for lease of the building was reduced from K900.00 to K700.00 per m².
- There would be a further valuation of the property.

The latter decision was recorded in the following terms:

It was further suggested that one or two more valuation of the property is required. This is so that proper procedures as according to the Public Finances (Management) Act is satisfied.

**[5.12] ENGAGEMENT OF ANOTHER REAL ESTATE AGENT -
TED CROCKFORD: OCTOBER 1994**

After the POSFB made the decision to obtain "one or two more valuations", another Cairns-based real estate agent, Mr Ted Crockford, was engaged.

In his oral evidence before the Commission Mr Ragi said that he requested the vendors to arrange the valuations.

RAGI	:	At my request because I wanted to avoid paying for those costs.
OC	:	So the valuation was left solely to the vendors?
RAGI	:	Yeah, simply because I don't want to pay the costs.

Mr Ragi conceded that no independent valuation was obtained.

It is apparent from the above that, just as with the Roberts report, the task of obtaining another "valuation" of the property was left to the vendors, through their projects executive, Mr Solly Benn.

Further details of the circumstances surrounding Mr Crockford's engagement are outlined below.

[5.13] WHO IS TED CROCKFORD?

Mr Ted Crockford is the principal of an agency which was, in 1994, trading as:

**CROCKFORD PROPERTY CONSULTANTS PTY LTD
COMMERCIAL REAL ESTATE AGENTS
AUCTIONEERS
PROJECT AND BROKERAGE LEASING
PROPERTY MANAGEMENT SERVICES
CNR McLEOD AND MINNIE STREETS CAIRNS**

It is significant to note that, as was the case with Mr Roberts:

- Mr Crockford was not a valuer.
- He was not registered to practise property valuation.
- He did not hold himself out as a valuer.

[5.14] CROCKFORD REPORT RECEIVED: 25 OCTOBER 1994

On 25 October 1994, the POSFB received the document prepared by Crockford Property Consultants. It was described as an "Investment Report". It was 35 pages in

length.

Introduction

The report began with a brief description of the property:

The site is located in what is now considered Prime CBD area and it has located in the immediate surrounds the best office space available, existing and proposed 5 star hotels, the new casino directly opposite, the new convention centre and the proposed development of trinity wharf.

This property is strategically located in the prime zone of the central business district and represents an ideal investment opportunity.

Real property details

Part 2 gave a formal description of the property and its zoning. It was noted that the property had a freehold tenure in the name of "Sarich Corporation Pty Ltd - [now under option]".

Situation and location

This part of the report gave another description of the land and surrounding developments. It also included site plans, a title diagram and architectural plans.

Description of improvements

Part 4 gave another brief description of the building, accompanied by some photographs and a schedule of materials and finishes.

Market appraisal

Part 5 occupied a little over one page. As in the case of the Roberts report, this was the critical section of the report. It was set out in almost identical fashion to the Roberts report; the only major difference being that all the figures were increased.

The key figure was the "estimated market value" of \$21 million which was calculated as follows:

5.01 TENANCY INCOMES

(existing)	ground floor 600m ²	rate/m ² \$328 Av.	=	\$ 196,950 pa
(existing)	first floor 721m ²	rate/m ² \$328 Av.	=	\$ 234,325 pa
		total income	=	\$ 431,275 pa
New Tenancies				
	ground floor 1069m ²	rate/m ² \$900	=	\$ 962,100 pa
	first floor 622m ²	rate/m ² \$500	=	\$ 311,000 pa
		sub total	=	\$1,273,100 pa
	total annual income generated		=	\$1,704,375 pa

However, when existing leases with low rents expire, they will be replaced with tenants at prevailing market rental.

In summary, the final rental situation will be as per the following figures:

ground floor 1675m ² @ \$900/m ²	=	\$1,507,500 pa
first floor 1343m ² @ \$500/m ²	=	<u>\$ 671,500 pa</u>
total annual rental	=	<u>\$2,179,000 pa</u>

5.02 CURRENT RENTALS (Cairns CBD general)

Abbott Street	\$1,000/m ²
Lake Street	\$850/m ²
Spence Street	\$800/m ²
Shields Street	\$800 - \$1,000/m ²

Recently achieved rentals (Cairns CBD general)

*	Cominos Centre	\$1,000/m ² July 1994
*	Brewster Food Court Market	\$1,500 - \$1,200/m ² Sept. 1994
*	Esplanade Shops/Market	\$1,800/m ² Nov. 1994
*	Orchid Plaza (Abbott Street)	\$1,200/m ² Jul. 1994

5.03 CAIRNS CAPITALISATION RATES

Based on historical evidence since 1989, building capitalisation rates in the CBD have fluctuated between 7.5% to 9.00%. However, a 9.5% to 10% capitalisation rate on a fully leased building with quality tenants would be considered conservative and reasonable based on the above.

At 10% "The Conservatory" would have an estimated market value of K21,000,000.

North Queensland status report

Part 6 gave a general description of Cairns, the infrastructure it provided and its commercial and industrial features. This was all of a general nature.

Confidentiality

Part 7 contained a confidentiality clause:

The information contained in this Investment Report is proprietary and confidential and cannot be passed on to third persons without our prior approval in writing.

As in the case of the Roberts report, the Crockford report did not indicate who had given instructions to prepare it.

Disclaimer

The report contained an extensive disclaimer:

Crockford Property Consultants Pty Ltd give notice that:-

1. The particulars are set out as a general guide-line only, for the guidance of purchasers and do not constitute any offer or contract.
 2. All descriptions, dimensions, references to conditions and necessary permission for use and occupation and other details are given in good faith and are believed to be correct but any intending purchaser should not rely on them as statements or representations of fact but must satisfy themselves by inspection or otherwise as to the correctness of each of them.
 3. No person in the employ of Crockford Property Consultants Pty Ltd has any authority to make or give any representation or warranty whatsoever in relation to this property.
-

Summary

The most important part of the Crockford report was that it gave an estimated market value for The Conservatory of *\$21 million*.

[5.15] **CIRCUMSTANCES IN WHICH THE CROCKFORD REPORT
WAS PREPARED: OCTOBER 1994**

Interview

During the course of this investigation, Mr Ted Crockford was interviewed in Cairns by officers of the Ombudsman Commission. Because he was outside PNG, he could not be required to give evidence under oath or affirmation.

Mr Crockford's reputation had been affected by a series of rather damaging newspaper articles in the *Australian Financial Review* in November 1995. He appeared anxious to clear his name, even though he said he had been advised both by his lawyer and Mr Solly Benn not to talk to the Ombudsman Commission about the matter.

We note here that Mr Roberts has strongly refuted many of the statements we made in the preliminary report, which were based on Mr Crockford's evidence. We also note that Mr Crockford, who was personally served with a copy of the preliminary report, elected to make no response.

Discussions with Tony Roberts

Mr Crockford said he first became involved with The Conservatory late in October 1994 when Mr Tony Roberts, a former colleague, approached him and told him The Conservatory looked like being sold to persons in PNG. At that stage, Mr Crockford said, he did not know who the proposed purchaser was. He said he was surprised Mr Roberts was involved in the sale because he was only a suburban real estate agent with minimal CBD experience.

Mr Crockford said that Mr Roberts asked him if he could prepare a valuation of The Conservatory for a percentage of the commission which would be earned if the sale went through. Mr Crockford was told the valuation was required by Mr Warren Anderson and his company Tipperary Developments. They would be Mr Crockford's clients. Mr Crockford said he agreed to do the valuation, after confirming that Tipperary Developments was a client of Mr Roberts.

Mr Crockford said he did not conduct his own survey of comparable rentals. He based his market appraisals on the rental data given to him by Mr Roberts. Also involved was Tipperary Developments' architect, Mr Bert Gianotti.

Mr Crockford said that before finalising his market appraisal, he discussed the matter

with Mr Roberts. Mr Roberts asked him if he would be prepared to go as high as \$21 million. The basis would be that the property would be fully leased at \$900.00 per square metre for the ground floor and \$500.00 per square metre for the top floor.

In his response to the preliminary report, Mr Roberts denied many of Mr Crockford's statements. Mr Roberts gave the following description of events:

I called Mr Crockford and asked him if he was interested in preparing a market appraisal for the Conservatory. Our staff had previously spoken to him when preparing the Roberts report in relation to provision of rental levels for businesses he managed. To my knowledge he had commercial real estate experience and in fact had worked for Colliers Jardine at one stage and managed a number of shopping centres in the CBD. He said he was interested and I told Greg Peters (and/or Solly Benn) that Mr Crockford was interested. I did not discuss with Mr Crockford a figure which the property might be worth nor did I provide him with a copy of my report. I certainly did not suggest to him that he would receive a percentage of the commission which would be earned if the sale went through. I did not tell him the valuation was required by Mr Warren Anderson and his company Tipperary Developments. At that stage I was not even aware of the existence of Tipperary Development much less advise him that Tipperary Developments was a client of mine. It was not. If Mr Crockford based any part of his appraisal on my market appraisal, he obtained the copy without my knowledge or consent. I spoke to him only on the one occasion as described above.

Tipperary a client of Crockford

Mr Crockford said that, even before he completed his report, he was approached by Mr Gianotti of Tipperary Developments who asked him if he could fax the page which set out his figures to Port Moresby, as the information was urgently required. He said he agreed to this and faxed a copy of the relevant page to a fax number in Port Moresby which Mr Gianotti gave him.

After completing his report, Mr Crockford handed a copy to Mr Gianotti and to Mr Greg Peters, an employee of Tony Roberts. Mr Roberts states that he does not have a copy of this report.

Mr Crockford said he received a cheque in the mail in February 1995, after which he telephoned Mr Solly Benn to find out what had happened to The Conservatory. Mr Benn told him that The Conservatory had been sold to the POSFB and the cheque was payment for his report.

Report not a valuation

Mr Crockford stated that his investment report was never intended to be a valuation:

My appraisal was definitely not a valuation, nor was it ever intended to be. All I prepared was a market appraisal which the newspapers and everybody else has made out was a valuation. People are ringing me up from all over Australia and asking me: "Since when were you a valuer?" Let me make it clear, I am not a valuer and never have been. My client asked me for a market opinion and that's all I gave him.

Ombudsman Commission's assessment

In view of these conflicting versions of events, the Ombudsman Commission notes the following points:

- Mr Crockford did not prepare his own assessment of the market rentals for the Conservatory, but based his market appraisal on the Roberts report. It is not clear whether or not he obtained that report with Mr Roberts' knowledge.
- Mr Crockford is not a qualified valuer.
- Mr Crockford's opinions were not independent, as his services were paid for by Mr Warren Anderson.

[5.16] OMBUDSMAN COMMISSION'S COMMENTS ON THE CROCKFORD REPORT

For the purposes of this investigation, the Ombudsman Commission subjected the Crockford report to critical examination.

According to Mr Crockford, The Conservatory was worth \$21 million as at October 1994.

It was apparent from our examination of his report, however, that Mr Crockford based his calculations almost entirely on the Roberts report; using the same method of valuation and the same inflated rental data. The only real difference was that Mr Crockford had somehow managed to exceed Mr Roberts' appraisal by \$2.1 million.

As in the case of the Roberts report, Mr Crockford capitalised "estimated gross total income" rather than "deducted estimated annual net income (fully leased)". This meant

that The Conservatory would have an inflated value. The Crockford report also calculated estimated future income on "new tenancies" which he (incredibly) assumed would result in the building being leased at a rate of \$900.00 per square metre for the ground floor and \$500.00 per square metre for the first floor.

Although "new tenancies" were not identified, it is evident that Mr Crockford was referring to the same "PNG tenancy factor" Mr Roberts had used in his report to artificially inflate The Conservatory's value.

Mr Crockford's market appraisal was further inflated by the failure to make relevant deductions either from income or the capitalised value of the property.

There was no indication given in the Crockford report as to the source of the rental data. However, it has become apparent that all of Mr Crockford's figures were based on the Roberts report. In other words, Mr Crockford was valuing The Conservatory on the basis of Mr Roberts' figures, rather than his own independent market research.

Such a scenario was, in our view, a recipe for disaster.

**[5.17] SIR JULIUS CHAN GIVES APPROVAL TO PURCHASE THE
CONSERVATORY AS ACTING MINISTER FOR FINANCE:
26 OCTOBER 1994**

Minister for Finance out of the country

On the afternoon of Wednesday, 26 October 1994, the Minister for Finance, Mr Haiveta, departed Port Moresby for Singapore. It appears as though Sir Julius then immediately re-allocated responsibility for the Finance portfolio to himself.

We can find no documentation that shows Sir Julius made a determination under Section 148 of the *Constitution* to re-allocate the Finance portfolio. As we note in Chapter 2, there is no requirement for a determination under Section 148 to be published in the Gazette. But this is the common practice. Certainly, there should at least have been a written determination made. However there was none on this occasion.

Sir Julius's response

Sir Julius raised this issue in his oral response to the preliminary report.

The question of Constitution now - that I appointed Acting Ministers. It is my understanding that if Ministers went away for short periods, I automatically act. Chief Ombudsman, all those Ministers don't tell me where they go. They go to Australia for the weekend or something, they don't, they just sneak off - but when something came up, they are bothered. But I'm told the Prime Minister automatically acts.

Ombudsman Commission's opinion

Under the *Constitution* the Prime Minister does not automatically act. A Section 148 determination is needed. We consider it is poor administrative conduct to make such an important determination without paperwork. It raises the possibility that in this case the determination was not validly made, i.e. that Sir Julius was not, as a matter of law, the Acting Minister for Finance on the day that he approved the purchase of The Conservatory.

We also consider that the law is defective in not requiring such an important determination to be notified to the public in the National Gazette. We consider that the defect in the law has allowed poor administrative practices to develop.

Advice of Department of Finance

On 26 October 1994, Sir Julius received a letter from the Acting Secretary for Finance, Mr Ai, regarding The Conservatory. Mr Ai referred to the 17 October 1994 submission for ministerial approval from the POSFB. He also referred to the Crockford Report, which was described as a "valuation".

Mr Ai re-stated part of the previous advice of the Department of Finance. The question of leasing The Conservatory to the State was a separate issue. It required negotiation with the Office Allocation Committee and Cabinet approval. As to the issue of purchasing The Conservatory, however, he recommended that approval be given as follows:

-
- approval for POSFB to invest up to K15.5 Million in "The Conservatory Shopping Village" in Cairns, Australia;
 - exemption from the application of the Investment Guidelines for POSFB to invest in excess of the maximum K1.0 Million in the "investment abroad" category;
-

lodging of a deposit of K500,000 (Kina equivalent) on the understanding that said deposit (and interest accruing thereon) will be returned in the event that the proposed investment does not proceed.

In recommending to Sir Julius that approval be given to purchase The Conservatory, Mr Ai was acting directly contrary to the advice of senior officers of his Department. The concerns raised earlier about the viability of the purchase had still not been properly addressed.

Mr Ai's response

In his response to our preliminary report Mr Ai denied that in signing the letter requesting approval he was acting against the advice of Department officers:

The officers in DoF directly involved in dealing with POSF prepared the letter without direction from me. (I returned to being Acting Secretary only on this day - as the Secretary accompanied Mr Haiveta to Singapore, the reason why Sir Julius was Acting Finance Minister). The letter goes over ground by then familiar: the need for a good faith deposit was noted in my letter of October 13th; the issue of State leases remained to be settled by the Office Allocation Committee. There is nothing in the letter drafted for my signature to suggest anything unusual, nothing in the letter to raise doubts about recommending approval.

Ombudsman Commission's opinion

The Commission has carefully considered Mr Ai's response. However, we note Mr Ai was aware of the problems which had been raised regarding the POSF's earlier submission. He had noted his Departmental officers' concerns in their briefing to him of 4 October 1994.

We are of the opinion that on this occasion he did not fairly represent the Department of Finance's position on the issue. He failed to bring the problems with the proposal to the attention of the Prime Minister.

In our preliminary report we stated that it appeared that Sir Julius had compromised Mr Ai's independence. Mr Ai strongly objected to this statement, disputing entirely "the interpretation you place on what I did in the course of discharging my duties as Acting Secretary of the Department". Mr Ai believed our comment called into question the Commission's objectivity.

After consideration of Mr Ai's comments, we maintain our original view that Mr Ai's independence was compromised by pressure from Sir Julius. We see no other explanation for the letter of 26 October 1994 recommending approval for this seriously flawed proposal.

Terms of approval

Later the same day, 26 October 1994, Sir Julius signed a letter, as Acting Minister for Finance, addressed to Mr Ragi. It was in accordance with the above recommendations. Sir Julius stated he was giving approval in accordance with the *Public Finances (Management) Act* for the POSFB: to invest K15 million in The Conservatory; to be exempted from the investment guidelines regarding the maximum K1 million in the investment abroad category; and to lodge a deposit of K500,000.00 towards purchase of the building.

There is a handwritten notation on a copy of this letter, dated "30/10", by Sir Julius which stated:

Fin Minister to okay my letter as this is a big project and he should be fully informed.

In his response to our preliminary report, Sir Julius further clarified the circumstances surrounding his approval.

The Report rightly records that there is a reference in that letter to the "valuation undertaken by Crockford" which was enclosed and which supported the application and had obviously been considered by the Department of Finance and approved. I then spoke to the Minister for Finance, the Hon. Chris Haiveta who was overseas and obtained his approval. If there had been some misgiving in the Finance Department at a senior level, then I was not aware of it. If I had thought that there was something wrong with the proposal, I would not have approved it.

The fact remains that there was something seriously wrong with the proposal. As Acting Minister for Finance and the person who gave the final approval, Sir Julius must take some responsibility for the purchase.

[5.18] **WAS SIR JULIUS'S APPROVAL IN ACCORDANCE WITH
THE PUBLIC FINANCES (MANAGEMENT) ACT?**

Sir Julius Chan stated that he was giving approval for the POSFB to invest in The Conservatory and that this was being done in accordance with the *Public Finances (Management) Act*.

Sir Julius did not specify which provision of the Act he was using to give approval; and this calls into question whether proper approval was in fact given.

At the relevant time - October 1994 - Section 60(2) of the *Public Finances (Management) Act* stated:

A public body shall not, except with the approval of the Minister, enter into a contract involving the payment or receipt of an amount ... exceeding K100,000.00.

In our preliminary report, we suggested that the Act required the Minister to approve a *contract*. We further stated that this requirement appeared not to have been met because at the time Sir Julius purported to give approval, there was no contract in existence. Also, details, such as the parties to the contract and the purchase price of the property, were not available.

Sir Julius disagreed with this preliminary view:

My legal advice is to the contrary. My own comment is this, how can any contract be prepared unless there is a prior approval of the expenditure? My advice is that the approval of the expenditure would allow a public body to enter into a subsequent contract, which reflected and was in accordance with the terms of any approval.

After considering Sir Julius's submission, we agree with his interpretation of the Act. There does not need to be an actual contract in place before the approval is given. Sir Julius's approval was therefore not in breach of the *Public Finances (Management) Act*.

[5.19] **ACCEPTANCE OF THE CROCKFORD REPORT**

When Mr Ai recommended to Sir Julius Chan that he give approval for purchase of The Conservatory, he enclosed a copy of the "valuation" undertaken by Crockford Property Consultants.

Mr Ai did not subject this document to any assessment prior to handing it on to Sir Julius. It was assumed to be an authentic and independent valuation. The \$21 million figure in the report was regarded as valid and the Crockford report was accepted at face value.

Mr Ai responded to this issue as follows:

As my only previous involvement with the proposed purchase was as a result of my letter to the Acting Minister for Finance, dated 10 October 1994, I was not aware that the purported "valuation" undertaken by Crockford property Consultants Pty Ltd was simply a property appraisal and not a valuation undertaken by a valuer registered and qualified to undertake valuations in Queensland. I was aware that it was provided to the Department of Finance by the POSFB and as such I believe that I was entitled to accept that the management of the POSFB had obtained a valuation from a registered valuer. It is the management of the POSFB that is responsible for the day to day operations of the POSFB and is therefore, responsible to ensure that all of the necessary steps are followed when it is proposed to enter into a transaction which involves the expenditure of any funds of the POSFB.

We agree with Mr Ai that POSFB should have made it very clear to the Department of Finance that the "valuation" was only a property appraisal. However the minute of 4 October 1994 from officers of the Department to Mr Ai had pointed out that the purchase price of the building was based on proposed rentals that were well above the market rate. At that stage the purchase price being proposed was K14.8 million.

We consider that Mr Ai had notice of the possibility that the purchase price for the building was too high. But he accepted the valuation in the Crockford report without comment. This was a fatal error of judgment on the part of Mr Ai.

Mr Iamo's advice

One of the authors of the minute of 4 October 1994 was Mr Vele Iamo, the First Assistant Secretary, Commercial Investments. In this minute Mr Iamo raised some serious questions about the POSFB proposal. However he later dropped these objections.

In our preliminary report we expressed concern at this apparent about-face by Mr Iamo, and suggested he may have bowed to pressure and provided the advice his superiors wished to hear.

Mr Iamo strongly refuted this suggestion:

Chapter 5 Signing of Contract

On occasions I was required to attend at meetings of the Board of The Public Officers Superannuation Fund ("POSF"). On these occasions I abstained from voting because of the concerns that I had expressed to the Department of Finance in relation to the proposed purchase.

For your information I wish to advise that these concerns were:

- (a) that the purchase of The Conservatory and the lease by the State should be treated as separate issues and not as a combined issue;
- (b) that the rent of AU\$900.00 per square metre was excessive; and
- (c) the valuation of the property to be purchased.

Mr Iamo considered that these concerns were sufficiently addressed by the POSFB as follows:

- (a) the POSFB agreed that the lease be separate, rather than the purchase be conditional on the lease as originally proposed;
- (b) the rent was reduced to \$AU700.00 per square metre; and
- (c) the POSFB provided the Crockford Report, valuing the property at \$21 million. Mr Iamo considers the POSFB misled the Department and himself into believing the Crockford Report to be an independent valuation.

Ombudsman Commission's opinion

We have carefully considered Mr Iamo's comments. There is no independent confirmation of Mr Iamo abstaining from voting, as records of the meeting of 10 October 1994, which Mr Iamo attended, state that the matter was "unanimously resolved".

We still consider that Mr Iamo did not sufficiently pursue his early concerns. In his earlier minute, Mr Iamo noted that the current average rentals in The Conservatory were \$324 per square metre. He was aware that the purchase price was based on obtaining rents of \$864 per square metre from the Papua New Guinea government.

In light of this knowledge, Mr Iamo should not have been satisfied with a rent reduction that still resulted in a figure that was more than double the average current rentals. He also should not have accepted as genuine a "valuation" that placed the value of the property at \$21 million, when he knew that the earlier figure of K14.8 million was

based on inflated rentals.

**[5.20] CONTINUING DISAGREEMENT ABOUT LEASE TO THE
STATE: OCTOBER - NOVEMBER 1994**

History

During September 1994, Mr Ragi stated on a number of occasions that he would not put the proposal to purchase The Conservatory before the POSFB until there was a commitment from the State to lease the building. He had held various discussions on this subject with Messrs Dusava and Peruka. But by early October 1994, no commitment by the State had been given.

Notwithstanding this, Mr Ragi proceeded to put the proposal to the Board, and had it approved on 10 October 1994.

On 11 October 1994, Mr Ragi advised Mr Warren Anderson of the Board's decision and submitted it to the Prime Minister for his approval. At the time he did this, however, Mr Ragi still had no commitment that the State would lease The Conservatory, or any part of it.

Meeting of 15 October 1994

It was in this environment that on Saturday 15 October 1994, a meeting was convened between Mr Ragi and representatives of the Department of Finance to try and resolve the dispute over the proposed lease. No notes or records to this meeting appear to have been kept. Mr Ragi does however refer to this meeting in subsequent correspondence. For example, in a letter to Mr Peruka on 17 October 1994, he said it had been agreed by the Department of Finance representatives at that meeting that the State would lease the entire building for five years at a rate of \$700.00 per square metre. There is, however, no evidence available to corroborate this claim.

Mr Ragi approaches Department of Finance

On 26 October 1994, when Mr Ai recommended to Sir Julius Chan that approval be given for purchase of The Conservatory, the question of the lease to the State was left open. Mr Ai copied his letter to Mr Ragi and Mr Ragi responded immediately.

On 27 October 1994, he reiterated the importance of the lease to the whole project:

It is paramount that a long term commitment from the Government to lease the whole property is provided as soon as possible. The Board's decision to purchase the property is conditional upon a long term commitment from the Government. Accordingly, unless that commitment is forthcoming the transaction cannot be finalised.

The next day, 28 October 1994, a response was made by the Department of Finance's First Assistant Secretary, Commercial Investments, Mr Vele Iamo. He stated that it had been "made quite clear" to Mr Ragi in the past that the question of purchasing the property and the question of leasing it to the State were "separate and distinct issues":

... it has been emphasised that Lease agreements entered into by the State require the support and approval of both the Office Allocation Committee and Cabinet. The Department is not in a position to pre-empt the decision of the National Executive Council.

Clearly, Mr Iamo had a different view to Mr Ragi about the understanding reached at the meeting of 15 October 1994.

Approach to Minister for Finance

Four days later, on 1 November 1994, Mr Ragi again raised the issue of the lease, this time by writing directly to the Minister for Finance, Mr Haiveta. He said the same thing to the Minister he had said to the Department of Finance a few days before:

... a long term commitment from the Government to lease the entire property is paramount. The Board's decision to purchase the property was conditional upon such a long term commitment.

Mr Ragi advised the Minister that the vendors were "under a lot of pressure to settle" (whatever this meant) and that any prolonged delay would jeopardise the POSFB's investment in the property.

Approach to Office Allocation Committee

The following day, 2 November 1994, Mr Ragi wrote to the Chairman of the Office Allocation Committee, Mr Peruka, to advise him formally that approval for the purchase had been granted by the Prime Minister, as acting Minister for Finance. He also raised the issue of the lease:

Now that the approval has been granted, the only thing outstanding on the part of the Government is a long term commitment to lease the entire property. That commitment is to come from the Office Allocation Committee with NEC's endorsement. As you are fully aware, a long term commitment from the Government to lease the entire building is a fundamental requirement before the purchase is finalised. It is, therefore, crucial that the Committee makes the decision to lease the entire property without further delay.

In order to facilitate an agreement with the Committee the Board has reduced the rent to \$700 m² which is well below the current rent for the area. This is provided the period is five years or more with option to renew.

Another approach to Department of Finance

The next day, 3 November 1994, Mr Ragi wrote to Mr Iamo responding to his letter of 28 October 1994. He said he agreed with the Department of Finance's position that the purchase and the lease to the State were separate and distinct issues. But he once again stressed that a long term commitment to lease the property was "fundamental and part and parcel of the whole deal":

Let me repeat once again that now that approval has been granted, all parties concerned must move swiftly in finalising the terms of a long term lease by the Government. We stand ready to co-operate fully in order to finalise the terms expeditiously.

Mr Ragi had therefore become quite persistent with his request that the question of the lease - which he continued to maintain should be of the whole building - should be resolved urgently. In the space of three days, he had written to the Minister for Finance and the Chairman of the Office Allocation Committee and the Department of Finance to register his concern about the urgency of the matter.

Commitment by Mr Peruka

Mr Ragi's persistence seemed to pay dividends when, on 10 November 1994, the Chairman of the Office Allocation Committee, Mr Peruka, wrote to advise:

- The State would lease office space within The Conservatory "for the Department of Foreign Affairs and Trade and other Government departments that require office space ... for official Government purposes".

- The lease would be for five years with an option to renew.
- The rate would be \$700.00 per square metre.
- But there would be no commitment to lease on behalf of statutory organisations such as Air Niugini because the Committee's responsibilities extended only to government departments.

Mr Peruka did not indicate what proportion of the building the State would agree to lease. So he fell short of meeting Mr Ragi's request for a commitment to lease the whole building.

Mr Ragi still not satisfied

One week later, on 17 November 1994, Mr Ragi responded to Mr Peruka. He thanked him for the commitment. But he was unhappy it did not extend to the whole building. He referred to the negotiations of 15 October 1994. He said it had been agreed by the Department of Finance that the State would lease the entire building. Mr Ragi said he had discussed the matter with the Secretary for Finance, Mr Aopi, who had agreed that Mr Peruka's letter of 10 November 1994 be amended to reflect the Department of Finances' agreement.

We have been unable to find any record of any discussions between Mr Ragi and Mr Aopi on this subject.

Still no commitment

Mr Ragi's letter of 17 November 1994 was written just one week before the contract of sale for The Conservatory was signed on 24 November 1994. There was no correspondence from Mr Peruka, the Minister for Finance or the Department of Finance in that intervening period.

On 29 November 1994, five days after the contract of sale was signed, the Office Allocation Committee dealt formally with the question of the lease over The Conservatory. The minutes of that meeting show that, even at that stage, there was no commitment to lease the whole building. The minutes state:

Agreed that the Office Allocation Committee will lease only office space for Government departments as the Committee's terms of reference in the General Order do not allow it to cater for office space requirements for Statutory bodies.

Position when the contract was signed

- When the contract was signed, the POSFB did not have a commitment in writing from any person or authority that the State would lease the entire building.
- Despite Mr Ragi's continued assertions that such a commitment was fundamental to the purchase proceeding, he disregarded his own stipulation in this regard.
- The only positive indication by the State was Mr Peruka's commitment that a limited amount of office space would be leased for five years for the Department of Foreign Affairs and Trade any other government department which required it.

[5.21] UNSUCCESSFUL ATTEMPTS TO ARRANGE FINANCE: OCTOBER - NOVEMBER 1994

History

When ministerial approval was given for purchase of The Conservatory on 26 October 1994, Sir Julius Chan indicated he had no objection to the POSFB's funding proposal, which was:

- Injection by the POSFB of K4.5 million into a subsidiary company, which would purchase the building.
- A commercial loan of up to K13.5 million by that company.

However, Sir Julius added:

You are advised to firm up the terms and conditions of the commercial borrowing and secure my prior approval of final funding arrangements as soon as this is at hand.

Approaches to financial institutions

Mr Ragi subsequently made approaches in writing to the following financial institutions:

- National Australia Bank (4.11.94).
- Macquarie Bank (4.11.94).
- Schroders Australia (4.11.94).
- Westpac Banking Corporation (4.11.94).
- ANZ Bank (4.11.94).
- Hambros Equities (7.11.94).
- Macquarie Bank, again (7.11.94).
- Schroders Australia, again (7.11.94).
- International Monetary Brokers Pty Ltd, i.e. Mr Nicos Violaris (11.11.94).
- St. George Bank (11.11.94).

Mr Ragi approached these institutions by way of standard letters which indicated:

- The POSFB would provide only 10% equity for the purchase. (This was despite the fact that he had advised both the Prime Minister and the Minister for Finance that the POSFB's equity contribution would be approximately 30%.)
- There would be no guarantee by the POSFB or the Government.
- There would be a head lease of the entire property for at least five years to the PNG Government. (This was despite the fact there was no commitment to this effect at the time he made this statement.)

In some of the letters, Mr Ragi (again relying on the Roberts and Crockford reports) said that the rental income would be at least \$2.1 million per annum.

Responses

There were varying responses. Some of the institutions (e.g. National Australia Bank and Westpac) expressed no interest at all. Others expressed interest, but sought further

information. Hambros Equities, Schroders and ANZ indicated that the proposed equity contribution of 10% was too low. At least 30% would be required. Schroders and ANZ requested a detailed tenancy schedule, identifying what area would be covered by the PNG Government lease.

ANZ specifically stated that a formal valuation would be sought from a bank panel valuer, at the POSFB's expense.

Release of Crockford report

At around the time the above correspondence was being exchanged, the POSFB's Manager of Investments, Mr Pe Cho, contacted Mr Ted Crockford to seek permission to release a copy of his report to prospective financiers.

On 10 November 1994, Mr Cho faxed a letter to Mr Crockford, in which he made the following statement:

As mentioned during our conversation in the morning, we will make it clear to our financiers that your Report is not a valuation as such but it is an agent's market opinion.

Mr Crockford's immediate response was to request a list of the financiers to whom Mr Cho wish to submit his report. The following day, 11 November 1994, Mr Cho replied that the prospective financiers were: ANZ; Macquarie; Schroders; St George; and Hambros Equities.

Three days later, on 14 November 1994, Mr Crockford gave written approval for the release of his report to those financiers.

Recognition that Crockford report was not a valuation

It is unclear from the files of the POSFB whether all of the listed financial institutions were in fact furnished a copy of the Crockford report. The only one we can confirm as having received a copy is Macquarie Bank. A copy was faxed on 14 November 1994, together with the following, rather significant, covering message from Mr Cho:

Faxed herewith is a copy of an Investment Report for "The Conservatory" prepared by CROCKFORD Property Consultants Pty Limited, Cairns.

Though it is not, strictly speaking, a Valuation, we have relied upon the agent's market appraisal and opinion.

Regards!

When Mr Ragi gave evidence before the Ombudsman Commission, we asked him if he had been briefed by Mr Cho about sending the Crockford Report to Macquarie Bank. Mr Ragi said that Mr Cho had not mentioned this matter to him. It therefore appears Mr Cho did not inform Mr Ragi that he was stating to a bank that the Crockford Report was not a proper valuation.

Why were the banks not interested?

We also asked Mr Ragi why, in his view, the banks were not interested in lending money for this project. The following exchange occurred:

OC	:	It appears that the banks simply refused to get involved.
RAGI	:	Well, as far as I know, I don't know where I got it from but, at that time, there was this adverse publicity about PNG and they didn't want to do anything with PNG. Particularly if it's going to be leased on a long term basis for PNG and we were going to be relying entirely on the Government as the sole source of income for the property. So as far as I am concerned it is still a PNG lease.
OC	:	So what happened then?
RAGI	:	Nothing further.

Summary of attempts to arrange finance

Mr Cho's fax of 14 November 1994 to the Macquarie Bank is the last record we have been able to find of discussions with financial institutions prior to the signing of the contract of sale.

Thus on 24 November 1994, when the contract was signed:

- The POSFB had not been able to arrange any finance.
-

- No understanding had been reached that finance would be forthcoming.

[5.22] PAYMENT OF K500,000.00 DEPOSIT: NOVEMBER 1994

On 3 November 1994, Mr Ragi sent a fax to Mr Anderson in Perth. He stated:

Dear Mr Anderson

I am pleased to confirm officially that approval has been granted for the Public Officers Superannuation Fund to purchase "The Conservatory Shopping Village" in Cairns. Payment of a K500,000 deposit to Pato Lawyers is in final stages. ...

On 14 November 1994, a cheque for K500,000.00 was drawn in favour of "Pato Lawyers Trust Account" and delivered to Pato Lawyers. This was intended to demonstrate the genuineness of the POSFB's intention to go ahead with the purchase.

[5.23] CONTRACT NEGOTIATIONS: OCTOBER - NOVEMBER 1994

History

In early October 1994, Pato Lawyers had received instructions from the POSFB regarding the purchase of The Conservatory. As we reported earlier, the arrangement had been made that Pato Lawyers would be paid by Mr Warren Anderson and Tipperary Developments.

On the day the POSFB made its decision to purchase The Conservatory, Pato Lawyers appointed a Brisbane law firm, Barker Gosling, to be their Queensland agents. Tipperary Developments had already appointed another Brisbane firm, McNamara & Smith, to act on their behalf. Negotiations to finalise the contract of sale extended for six weeks.

Events during October 1994

There were some unusual aspects of the negotiations which should be noted. For example, on 10 October 1994, McNamara & Smith contacted Pato Lawyers and enclosed a "final draft of the contract" for their consideration. The fax containing this "final draft" was sent at 8.56 am - some hours *before* the POSFB made the decision to go ahead with the purchase.

On 11 October 1994, Barker Gosling conducted a title search on The Conservatory. They discovered that the nominated vendor, Mr Anderson's shelf company, Katingo Pty Ltd, did not own the property. At that stage the registered proprietor was still Mr Ralph Sarich's company, Cape Bouvard Investments Pty Ltd.

This was obviously a matter of concern. So the following day, 12 October 1994, Barker Gosling brought it to the attention of Pato Lawyers. Amongst many matters raised, Barker Gosling advised that a search of records of the Australian Securities Commission showed that Katingo had only recently been incorporated and that it was a shelf company.

Furthermore, in the draft contract there was no mention of a prior conveyance in favour of the vendor. Accordingly it was suggested a special term should be included in the contract, stating that "the Vendor is the registered owner of the land."

Barker Gosling's advice was despatched, through Pato Lawyers, to Mr Ragi on the same day it was received, 12 October 1994. He then made a notation on the covering letter:

The comments by Barker Gosling are accepted. However, put on hold until Min's approval has been received.

Pato Lawyers also advised Mr Ragi that the "vendor's solicitors are ringing Barker Gosling constantly asking whether the contract has been signed".

McNamara & Smith did not agree to the proposed amendment, so Barker Gosling suggested an alternative, which was eventually incorporated in the contract:

The vendor is entitled to become the registered owner of the Land (according to the title expressed or implied in this Contract) in pursuance of a contract made between the vendor and Cape Bouvard Investments Pty Ltd and dated 11 October, 1994.

Confusion as to final form of the contract

By the third week of November 1994, negotiations were at an advanced stage.

On 18 November 1994, Barker Gosling despatched a final contract to Pato Lawyers ready for execution. But there was confusion as to who was actually drafting it. Three days later, on 21 November 1994, Pato Lawyers received another contract ready for execution. This draft came from McNamara & Smith. The confusion continued for the

next two days at least, evidently leading to some acrimony between the lawyers involved.

[5.24] EXCHANGE OF CONTRACTS: 24 NOVEMBER 1994

On the day the contract was executed, 24 November 1994, Barker Gosling was still not happy with information provided by McNamara & Smith about current leases on The Conservatory. Amendments to the contract were still being proposed.

On 25 November 1994, Barker Gosling despatched a draft power of attorney to Pato Lawyers, which Pato Lawyers then transmitted to Mr Ragi; the idea being that one of Barker Gosling's lawyers would be authorised to sign the contract on Mr Ragi's behalf.

Unknown to both Barker Gosling and Pato Lawyers, however, Mr Ragi and Mr Wingia had actually signed the contract the previous day. Thus, the contract was executed by Mr Ragi without him seeking final advice from the lawyers who were representing the POSFB.

[5.25] DETAILS OF THE CONTRACT OF SALE

The contract of sale for The Conservatory was signed on 24 November 1994. The parties to the contract and its key terms are set out below.

<i>Vendor</i>	Katingo Pty Ltd
<i>Purchaser</i>	Moki N° 10 Pty Ltd
<i>Purchase price</i>	A\$18,720,000.00
<i>Particulars of land sold</i>	Conservatory Shopping Village Abbott Street Cairns Lot 32 on registered plan No. 747595 Title Reference No. 21376224

Deposit

A 10% deposit (\$1,872,000.00) was payable by the POSFB forthwith upon formation of the contract. The deposit was to be paid to the "stakeholder": the vendor's solicitor, McNamara & Smith.

Encumbrances

The property was sold subject to the existing leases of various shops and offices in the building. These were set out in a schedule to the contract, which showed that 10 of the shops or offices were vacant; and that the rent under the leases ranged from \$625 per square metre for a shop on the ground floor to \$210 for an office on the first floor, to \$112 per square metre for storage space on the first floor.

The vendor was required to deliver copies of all the leases to the purchaser within 7 days of the contract being signed. If this were not done, the purchaser could give notice to the vendor to do so. If the vendor failed to comply with the notice, or if the purchaser were not satisfied with the terms and conditions of any lease, the contract could be terminated by written notice within 28 days.

However, there was an apparently last - minute, handwritten addition to the contract which stated that if the purchaser gave such a notice, the vendor had the right to rectify the dissatisfaction within 28 days. It is unclear whether this extra special condition was inserted with the knowledge of the POSFB's lawyers.

Date for completion

The date for completion of the contract (i.e. settlement) was linked to the purchaser's application to the Australian Foreign Investment Review Board (FIRB) for approval to purchase the property. The purchaser was required to make the application within two days of execution of the contract. If the FIRB gave unconditional approval, the date for completion would be seven days after the purchaser received notification of the approval.

Default interest

If any money payable under the contract was not paid on the due date, interest would accrue at the rate of 9% simple interest per annum, until the date of payment.

Warranties

The vendor gave various warranties regarding itself and the property, e.g. that there was no current litigation by any person claiming an interest in the property; and the vendor was not in liquidation.

The most important warranty was that inserted at the insistence of Barker Gosling:

The vendor is entitled to become the registered owner of the land (according to the title express or implied in this contract) in pursuance of a contract between the vendor and Cape Bouvard Investments Pty Ltd and dated 11th October, 1994.

If any of the above statements were not accurate, the purchaser could terminate the contract by notice in writing; in which case the deposit and other money paid under the contract would be refunded. The purchaser also had the right to request the vendor to produce all unregistered documents relating to the property and full particulars of all unregistered dealings that so related, within 14 days of such a request.

Purchaser's acknowledgments

The purchaser acknowledged that, in entering into the contract, it had not relied on any statement, representation or warranty made by or on behalf of the vendor as to: the condition of the property; the neighbourhood or environment; rights and privileges relating to the property; or any other matter relating to the property. The purchaser also acknowledged that the vendor afforded it an opportunity to inspect the property and conduct its own inquiries concerning the property.

[5.26] RELEASE OF INFORMATION BY MR RAGI TO MR BENN

When Mr Ragi wrote to Mr Anderson on 3 November 1994 to advise that the POSFB had been granted approval to purchase The Conservatory, he also raised the question of the POSFB's application with the Australian Foreign Investment Review Board:

I understand that before the Fund can purchase the property, prior approval of the Foreign Investment Review Board is required. If so, I seek your assistance in obtaining FIRB's approval in addition to the efforts of our Lawyers in Australia.

We will send the copy of the application to you as soon as we receive a copy at our end.

This later became a cause of concern for Pato Lawyers, who advised Mr Ragi that he should not be releasing such sensitive confidential internal data to the vendor.

However, on 22 November 1994, Mr Solly Benn contacted Pato Lawyers and asked for a copy of the FIRB application, which he was then given.

[5.27] **IRREGULARITIES SURROUNDING EXECUTION OF THE
CONTRACT OF SALE**

As we reported in the previous chapter, there were many irregularities surrounding the decision of the POSFB to agree in-principle to purchase The Conservatory. That decision was made on 10 October 1994. In the period between then and the date of execution of the contract, 24 November 1994, further serious irregularities are apparent.

1. Disregard of the fact that the vendor did not own the property

The POSFB, and Mr Ragi in particular, paid little or no attention to the fact that the company it was buying the property off, did not own it. This basic fact should have put the POSFB on notice that it was necessary to make further inquiries into the ownership of the property and the price being paid for it.

None of this was done.

In his response to our preliminary report, Sir Julius Chan downplayed the importance of this issue.

It is said [In the Report] that the POSFB should have been put on notice that it was necessary to make further inquiries into the ownership of the property. There is no reason to think that the purchaser's Australian solicitors are not competent. The purchaser's concern should be that the vendor can give title at completion, which they presumably did.

From a purely legal standpoint, Sir Julius's contention is valid. However our concern is not with any potential defects in the POSFB's title to The Conservatory. Our general concern is with the commercial viability of the purchase, and in particular the failure to appreciate the fact that Katingo Pty Ltd did not own the building. The POSFB should have made further, simple, inquiries into the ownership of the building before approving the purchase.

2. No proper valuation

The POSFB failed, again, to obtain a proper valuation of the property. The error Mr Ragi made in September 1994, when he left the question of valuation for the vendor to arrange, resulting in the Tony Roberts property report being received, was repeated the following month, when the Crockford report was received. This was, at best,

commercially naive.

However, as we indicated earlier, the failure to obtain a legitimate valuation was conduct which was so grossly irregular, we must question the motives of those responsible for it, in particular Mr Ragi.

3. Failure to secure agreement for lease of the property to the State

At the time the contract was executed, the POSFB had been unable to obtain a commitment that the State would lease the property. Mr Ragi had stated all along this was one of the pre-conditions for the purchase going ahead.

He disregarded his own edict on this matter.

4. Mystery surrounding contract price

It is unclear how the final price stipulated in the contract - \$18.72 million - was set. The last official correspondence from Tipperary Developments or Katingo regarding the purchase price was in September 1994 when the price was K14.8 million. There are no recorded discussions or negotiations concerning the price.

The process by which it was agreed on remains a mystery.

In his response to our preliminary report, Mr Joseph Wingia disclaimed responsibility for negotiating the purchase price:

I have no idea whatsoever on how the sale price was agreed upon. All I knew at that time was that the sale price inclusive of associated transaction cost was K15.5 million. This was the price the Government probably agreed to pay and requested POSFB to finance. As I saw it, my job was to negotiate a rental rate and the terms and conditions of the lease agreement with the State that would generate a satisfactory return to the POSFB.

As Executive Manager, Investments, of the POSFB, Mr Wingia should have had serious concerns about the purchase of The Conservatory. As a senior officer with specific responsibility for investments, Mr Wingia should have subjected the purchase to a critical assessment.

5. Failure to read the banks' signal

The POSFB's attempts to obtain finance in October - November 1994 can really only be described as half-hearted. The lukewarm response of the banks and financial institutions - and their insistence on an independent valuation of The Conservatory - should have been a sufficient signal to Mr Ragi that it was very dangerous to proceed.

Mr Ragi failed to read the signal being provided by the Australian banks. Such negligent behaviour is also wrong in that it raises the possibility in the public mind that Mr Ragi acted deliberately for another motive.

6. No finance in place

When the contract for The Conservatory was signed, Mr Ragi had not been able to arrange finance for the purchase. All that he could count on at that stage was a direct grant of K4.5 million from the Public Officers Superannuation Fund. As the contract was not made "subject to finance", the POSFB was immediately placed in a dangerous situation, running the risk that when the time came for settlement it would not be able to pay the vendor and may have to forfeit its deposit or pay late payment penalties. The only person who could benefit from this arrangement was the vendor, Mr Warren Anderson.

This, again, raises suspicion about Mr Ragi's conduct.

7. Execution of the contract

Irregularities continued right up to execution of the contract by Mr Ragi and Mr Wingia on 24 November 1994. The contract was signed without being sanctioned or approved by the POSFB's lawyers. Neither of the lawyers acting for the POSFB even knew that the contract was being signed on that day. The Board of the POSFB did not approve the contract. Nor, it seems, was there any involvement by any other senior officers in the execution of the contract.

In his response to our preliminary report, Mr Wingia again disclaimed any responsibility for negotiating the terms and conditions of the contract.

I played no part in negotiating terms and conditions of the Contract of Sale and Purchase. I was asked by Mr Ragi to witness for him as he held the Power of Attorney from the Board to sign such documents. As a matter of fact, I had never seen any draft of the contract prior to signing.

The Commission has considered Mr Wingia's comments. Our opinion is that Mr Wingia must take some responsibility for the execution of the contract. He signed the contract on behalf of the POSFB. Mr Wingia, as the POSFB's Executive Manager, Investments, should have been offering objective and professional advice at every stage of the purchase process.

We find his comments - that he had not seen a draft of the contract before signing, had played no part in negotiating its terms, and had no idea how the price was agreed - horrifying.

8. Deposit not in place

On the date the contract was executed, the POSFB did not have the required deposit of \$1.872 million. All that had been paid was the K500,000.00 given to Pato Lawyers on 14 November 1994. So, immediately the contract was signed, the POSFB was in breach of it, incurring interest of 9% per annum on the amount unpaid.

If Mr Ragi had sought clearance from the POSFB's lawyers prior to executing the contract, we consider it is most unlikely they would have given the go-ahead for signing the contract in these circumstances.

[5.28] SIR JULIUS CHAN'S INVOLVEMENT

Prime Minister Sir Julius Chan was heavily involved, both directly and indirectly, in expediting the signing of the contract of sale.

The day after the POSFB made its in-principle decision, a submission for approval of the purchase of The Conservatory was made to Sir Julius. There was no legitimate reason why he should have been involved. The question of approval of the contract fell squarely within the jurisdiction of the Minister for Finance under the *Public Finances (Management) Act*.

There was also a luncheon meeting between the Prime Minister and Mr Ragi on that day, 11 October 1994. Sir Julius instructed that a recommendation be prepared for his approval, even though the Department of Finance at that stage was seriously querying the viability of the purchase and the proposed lease of the property to the State.

Sir Julius then approved the purchase under the *Public Finances (Management) Act* as Acting Minister for Finance. The Minister for Finance was only out of the country for a

few days. Sir Julius denied there was anything wrong with the length of time he was Acting Minister.

It does not matter if the substantive Minister is away for 3 days or 3 weeks, there has to be a Minister in place.

We agree with Sir Julius that the length of time he was acting as Minister for Finance is not in itself wrong.

In his response to our preliminary report, Sir Julius also clarified the nature of his approval.

The Commission ignores the fact, and the fact of which it is well aware, that I obtained the approval of Mr Haiveta before I made the authorisation. Effectively it was Mr Haiveta's approval.

The Ombudsman Commission does not consider that the approval was effectively that of Mr Haiveta. We have no evidence that Sir Julius obtained the consent of Mr Haiveta before approving the contract. If Sir Julius had wished Mr Haiveta to approve the contract, the approval should have been done when Mr Haiveta returned to the country. The fact that Sir Julius gave the approval means he must take responsibility for it.

The questionable nature of Sir Julius's conduct is exacerbated by the fact that, at the same time he was involving himself in the decision to purchase The Conservatory, the same people who were selling the property to the POSFB - Warren Anderson and Solly Benn - were involved in negotiations to build a large scale office complex in Port Moresby on land owned by a company in which Sir Julius had a controlling interest.

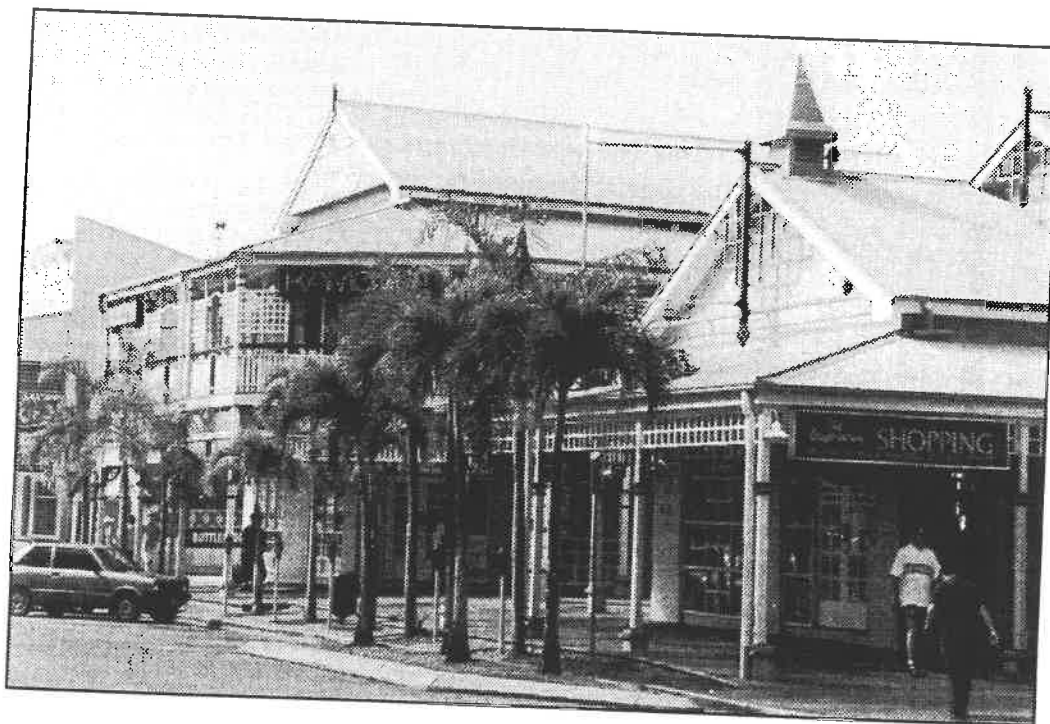
In his response to our preliminary report, Sir Julius strongly denied a connection with Warren Anderson and Solly Benn.

I was not involving myself in the decision to purchase The Conservatory as is suggested. The land at Waigani that Anderson wanted to develop was owned by Kalang. My shareholding in Kalang was as a trustee as the Second Sandline Commission of Inquiry found as a matter of fact. I had no beneficial interest in the assets of Kalang. Thus, the whole scurrilous assertion that I had something to gain in the Waigani redevelopment is knocked away. The fact that Anderson figured in both the abortive Waigani proposal and the purchase of the Cairns property is irrelevant because I had no business relationship with Anderson.

The fact remains that Kalang Pty Ltd was an associate company of Sir Julius, both by virtue of his shareholding and the beneficial ownership of the company by Sir Julius's political party. Kalang, and therefore the People's Progress Party and Sir Julius himself, stood to benefit greatly by the Waigani proposal.

The Ombudsman Commission continues to be of the opinion that Sir Julius and his associates had an interest in both proposals going forward.

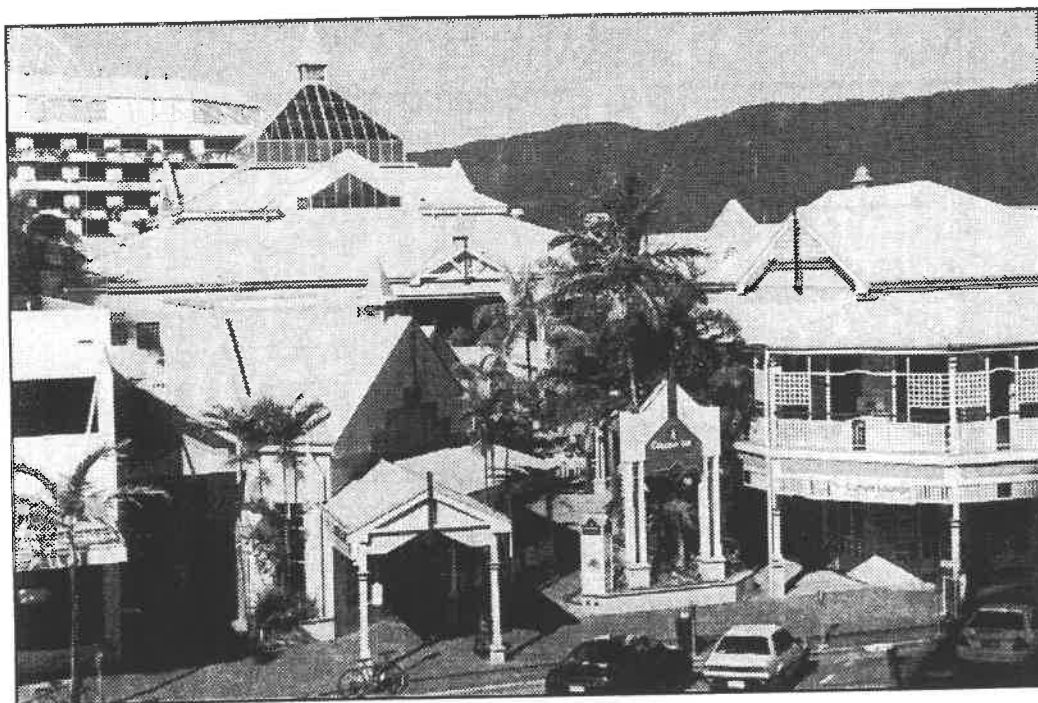




The Abbott Street frontage.



The arcade through the middle of The Conservatory, with landscaped walkways and outside eating areas.



Lake Street elevation from the National Mutual Building.



As of November 1999, less than 50% of the Conservatory is occupied.

6. SETTLEMENT OF THE CONTRACT: NOVEMBER 1994 - MAY 1995

[6.1] OVERVIEW

The contract of sale for The Conservatory was signed on 24 November 1994. It took six months after that for settlement to be completed. In this chapter we report on events during that "settlement period" and examine what the total cost of The Conservatory actually was.

[6.2] BALANCE OF DEPOSIT PAID: 6 DECEMBER 1994

On 14 November 1994 - ten days before the contract of sale for The Conservatory was signed - the POSFB made an initial payment of K500,000.00 to Katingo Pty Ltd, i.e. to Mr Warren Anderson.

On 6 December 1994, a further K1,204,545.45 was paid. This represented the balance of the 10% deposit (\$1,872,000.00) required under the contract of sale.

[6.3] AIR NIUGINI ENCOURAGED TO MOVE TO THE CONSERVATORY: DECEMBER 1994 - FEBRUARY 1995

In early December 1994, considerable pressure was brought to bear on Air Niugini to relocate its offices in Shields Street, Cairns to The Conservatory.

The Ombudsman Commission summoned the then General Manager, Mr Dieter Seefeld, to give evidence on this aspect of the investigation. Mr Seefeld said that in April 1994 the NEC made a policy decision for all PNG offices abroad to be rationalised and physically centralised. Steps were subsequently taken to implement this one-stop-shop policy, particularly in relation to Brisbane and Cairns.

Mr Seefeld said that in principle this was a good idea. However, the commercial consequences of the policy had not been properly considered.

On 12 December 1994, Prime Minister Chan called Mr Seefeld to his office. Present were the Prime Minister; Mr Seefeld; the Commercial Director of Air Niugini, Mr

Simon Foo; the Secretary of the Department of Prime Minister, Mr Brown Bai; the Secretary of the Department of Foreign Affairs, Mr Gabriel Dusava; and a representative of the Tourism Promotion Authority.

This meeting had been called at short notice. Mr Seefeld was only advised verbally to go to the meeting. He thought it had been called to discuss the Traffic Rights and Air Services Agreement, which was under intensive discussion at that time. He was therefore surprised that the question of the Air Niugini offices in Cairns and Brisbane was raised at this meeting. Usually Mr Seefeld does not have direct communication with the Prime Minister on such issues.

Mr Seefeld told the Prime Minister that Air Niugini would have to look at the location and the commercial viability of changing the location of its offices. The Prime Minister's reaction, he said, was "very friendly".

However, on 15 December 1994, Mr Seefeld received a letter from Mr Bai advising him that the Prime Minister had *directed* that Air Niugini must relocate. So, on 19 December 1994, Mr Seefeld asked for a study to be done of the proposed relocation, which was completed in February 1995.

In his response to our preliminary report, Mr Bai denies applying pressure on Mr Seefeld:

The letter that I, as Secretary of the Department of Prime Minister sent on the 15th December 1994 was really a follow up to the Prime Minister's meeting.

There was no pressure imposed by me nor my office for Agencies to comply with the movement of organisations into the conservatory building.

In early 1995, Mr Seefeld received various reminders to implement the NEC decision regarding the "one-stop-shop" policy, mainly from Mr Dusava. The reminders were both in writing and on the telephone. There were at least two telephone calls. Mr Seefeld also ran into Mr Dusava at a couple of social occasions (one of them a book launch). On these occasions Mr Dusava took Mr Seefeld aside and asked him what progress was being made on implementation of the policy.

On 16 February 1995, the National Airline Commission formally considered a study which had been carried out on the proposed moves of the Cairns and Brisbane offices.

The study concluded that in relation to Cairns:

- There would be a one-off cost to Air Niugini of \$100,000.00.
- The increase in annual rental costs would be \$73,202.00.
- There was also the unquantified potential loss of business due to the constraints of The Conservatory's location, which was considered to be not as good as the present location.

In relation to Brisbane, there was a one-off cost of \$350,000.00 plus increases in annual rental of \$61,722.00.

The study concluded that moving Air Niugini's offices could not be justified on commercial grounds.

The National Airline Commission nevertheless decided that it would comply with the NEC decision, on condition that the landlord would agree to make up the increased costs incurred as a result of the two moves. However, until these arrangements were finalised, the current offices would be retained.

On 17 February 1995, Mr Seefeld advised Mr Dusava of the decision. Mr Seefeld said that these issues were on the agenda for a number of National Airline Commission meetings. The Commission meets every six to eight weeks.

Negotiations were being conducted with Mr Mark Basausau of the Department of Finance and Planning. The POSFB had advised Air Niugini that he should be regarded as the co-ordinator of the move. Everything had been done through him.

Air Niugini had been offered rent free accommodation for the first two years of the proposed five year lease on The Conservatory. It was proposed that the rental for years 3, 4 and 5 would be K900,000.00. Mr Seefeld, however, regarded this as out of the question. So there was nothing finalised on the move.

At the date of this report, Air Niugini continues to occupy a shopfront and offices at Shop 2, Tropical Arcade, 4 - 6 Shield Street, Cairns.

**[6.4] CONTINUING NEGOTIATIONS WITH OFFICE
ALLOCATION COMMITTEE: JANUARY - MAY 1995**

Prior to February 1995, the Office Allocation Committee's position regarding The Conservatory was as follows:

**Chapter 6
Settlement of Contract**

- In early October 1994, it took the view that *no commitment* could be given to lease any part of the building for government departments because of concern about the high rent proposed by the POSFB.
- In early November 1994, the Committee changed its mind. Its Chairman, Mr Peruka, advised Mr Ragi that the State would lease office space within The Conservatory for a period of *five years*. But he did not indicate what amount of space would be leased. And he restricted his commitment to government departments only, thus excluding statutory authorities such as Air Niugini and the Tourism Promotion Authority.

Correspondence with Mr Peruka

In early 1995, negotiations continued. Mr Ragi was still not happy with the commitment given by Mr Peruka.

On 24 January 1995, Mr Ragi wrote to Mr Peruka:

As the transaction is drawing to a close, I appeal for understanding in the whole thing. I, accordingly, kindly seek variation to your Committee's decision to the effect that the Government will lease the entire building for five years or more for \$700 [per] square metre.

On 22 February 1995, Mr Peruka replied, advising that the State would indeed lease the *entire building* for a period of five years at \$700.00 per square metre.

Mr Peruka's advice represented another significant turn-around in his approach to The Conservatory issue. It appears that there was no meeting of the Office Allocation Committee authorising Mr Peruka to adopt this change of approach.

Correspondence with Mr Basausau

On 14 March 1995, there was another significant development. A senior officer of the Department of Finance, and member of the Office Allocation Committee, Mr Mark Basausau, advised the POSFB in writing:

In view of our latest discussions regarding the lease of this property, I now confirm that the State will lease the entire building for a period of seven (7) years at the same terms and conditions previously agreed to.

In his response to our preliminary report, Mr Basausau said that this letter was the result of a meeting held between himself, Mr Peruka, Mr Aopi and Mr Ragi. At that meeting Mr Basausau was briefed on the proposed purchase of the Conservatory. He was told of the NEC decision to accommodate the Papua New Guinea Consulate office and other agencies such as Air Niugini in one building.

Mr Basausau stated that he had some concerns about the proposal:

I can recall clearly that I voiced my opinion on the Aust.\$700.00 per square meter. At that time I thought it was too high.

I was also concerned and voiced my opinion in relation to the Office Allocation renting the whole building (about 2,000 square meter). This would mean the Department of Finance and Planning or Office Allocation Secretariat had to collect rent from other tenants. My concern was that this would create a lot of administrative paper work, legal paper work on lease documents, and setting up financial and administrative procedures for the rent revenue transaction.

Despite his concerns Mr Basausau confirmed the intention to lease the entire building in his letter of 14 March 1995. This letter also increased the lease term from five to seven years. Mr Basausau stated that he had been advised in his meeting with Mr Peruka, Mr Aopi and Mr Ragi, that the seven year lease term was more appropriate.

Mr Basausau signed this letter as "Deputy Secretary Financial Operations for: Tau Peruka Chairman Office Allocation Committee". There is no evidence that he had Mr Peruka's authority to write this letter. Nor there is any evidence that the Committee itself had authorised it.

In his response to our preliminary report, Mr Basausau gives his authority for making that commitment in his letter as General Order 16.8.

The General Orders 16.8 refer to the Secretary for Department of Personnel Management nominee in considering all requests for acquisition of office space. I believe this would be the Secretary for Finance and Planning because he is responsible for the administration of function for the Office Allocation Secretariat. Such responsibility was delegated to Deputy Secretary Financial Operation. I was the incumbent.

General Order 16.8 states that the Secretary of the Department of Personnel Management, or his nominee, is to consider all requests for office space. At that time the Office Allocation Secretariat was under the administration of the Department of Finance. Mr Basausau interprets this to mean that the nominee of the Secretary for Personnel Management was the Secretary for Finance. The Secretary for Finance had then delegated this function to Mr Basausau.

The Commission has considered Mr Basausau's explanation but notes that General Service Order 16.8 only gives the Secretary the power to *consider* all office requests. Only the Office Allocation Committee itself can authorise the lease and allocation of office space. Therefore no commitment should have been made without the authority of the Committee.

The Commission also considers that part of the difficulty with Mr Basausau's role lay in the imprecise status of the Office Allocation Committee. It is not clear who has the ultimate responsibility for office allocation - is it the Chairman of the Committee, the Secretary for the Department of Finance, or the Secretary for the Department of Personnel Management?

Lease negotiations inconclusive

Despite the undertakings given by Mr Peruka and Mr Basausau, by the time that settlement of The Conservatory took place in May 1995, there was still no lease in place between the POSFB and the State.

[6.5] POSFB ADVISED THAT IT COULD STILL TERMINATE THE CONTRACT: 28 DECEMBER 1994

On 21 December 1994, Pato Lawyers' Queensland agents, the law firm of Barker Gosling, sent a fax to Pato Lawyers, advising that they had received summaries of each of the leases over The Conservatory from Katingo's lawyers.

They advised that though the leases were generally acceptable there was one important

defect: the leases did not contain a provision specifying the terms which the parties agreed were "essential terms". Barker Gosling said that this was a significant omission in view of a recent decision of the High Court of Australia. They pointed out that under special condition 4.7 of the contract of sale, the purchaser could terminate the contract if it were not satisfied with the terms of the leases. But this right had to be exercised on or before 30 December 1994.

On 28 December 1994, this advice was conveyed by Pato Lawyers to the POSFB:

Under the provisions of special condition of 4.7 of the contract, the purchaser may attempt to terminate the contract if it is not satisfied with the terms of any of the leases. Please note that you have until Friday, 30 December 1994 to take this step, and your immediate instructions would be appreciated.

Pato Lawyers also advised in this letter that approval from the Foreign Investment Review Board was expected as soon as Wednesday 28 December 1994, and that settlement was due to take place within seven days after receiving notification of the approval.

**[6.6] MR RAGI ON RECREATION LEAVE BUT NO
INSTRUCTIONS LEFT: DECEMBER 1994 - JANUARY 1995**

The next day, 29 December 1994, the POSFB's Executive Manager - Investments, Mr Joseph Wingia, referred the issues raised by Pato Lawyers to the Acting Managing Director, Mr John Ban. Mr Ragi had just prior to this gone on recreation leave, and Mr Ban was appointed to act in his position.

Mr Wingia stated:

I refer to the above transaction and attach letter and documents received today from Pato Lawyers advising the status of the proposed investment.

I advise that as I have not been advised on any action to be taken or to even conclude the investment by the Managing Director, I am unable to progress this transaction. As you will note from the advice, we are required to settle the investment within seven (7) days upon receiving the approval from FIRB of Australia.

As I am aware, 70% of the funding for this investment is to be sourced off-shore for which the Managing Director has had initial discussions with potential lenders in Australia. However, none of the potential lenders have responded formally on the proposal. On this basis, funding is not available.

I therefore seek your direction on the matter.

Mr Ban's response to Mr Wingia on the same day, 29 December 1994, was as follows:

I am unable to give you any direction on the above proposal as I have not seen the project submission stating the terms and cost of the investment. I suggest you hold this until more information is furnished on the proposal.

The next day, 30 December 1994, Mr Ban wrote to Pato Lawyers. This was the day by which the POSFB had to exercise its right to terminate the contract on the ground of dissatisfaction with the leases.

Mr Ban stated:

We refer to your letter of advice dated 28 December, 1994 and telephone discussion (Wingia/Koiri) today.

We advise that we have no instruction on the matter from our Managing Director who is presently on recreation leave. In the absence of the Managing Director, we are unable to give any commitment or instructions on the matter. If possible, we seek your assistance in contacting the vendor's lawyers to defer the matter until further advice from this Board. Our Managing Director is due back in Mid-January, 1995 at which time we will revert to you with appropriate instructions. Please convey our most sincere apologies to the vendor's lawyers and let us know in due course their response.

Mr Wingia supported his and Mr Ban's actions, in his response to our preliminary report:

I confirm to the correctness of those actions involving Mr John Ban and myself. The fact of the matter is that we did not have any instructions as to what to do in the absence of Mr Eremen Ragi. The action we took was appropriate as we did not have any authority whatsoever to terminate the contract.

We did not consider it an opportunity where we could terminate the contract as this would be an illegal act on our part. Since the investment was approved already, it was not up to us to terminate.

It is apparent from the above that Mr Ragi had left for recreation leave in December 1994, either not realising or not caring about the significance and urgency of the obligations about to be brought into existence under the contract of sale.

Mr Ragi had left the matter in abeyance, without arranging finance to settle the purchase and without giving any instructions to any person in authority. When Pato Lawyers advised the POSFB on 29 December 1994 that it had until the next day to terminate the contract, there was no-one within the organisation who was willing to take the matter further. If neither Mr Wingia nor Mr Ban had the authority to terminate the contract at this time, the matter should have been put before an urgent Board meeting.

The result of this was that the 30 December 1994 deadline passed and the POSFB lost the opportunity to terminate the contract on the ground of dissatisfaction with the leases.

[6.7] GRANTING OF FOREIGN INVESTMENT APPROVAL BY AUSTRALIAN AUTHORITIES: 6 JANUARY 1995

On 6 January 1995, Barker Gosling received notification that the Australian Foreign Investment Review Board (the FIRB) had granted approval for Moki N° 10 Pty Ltd to acquire The Conservatory, subject to one condition, viz that it "does not make any claim of sovereign immunity in relation to any Australian taxes that may arise from the investment".

The FIRB approval was a very significant event because under the contract of sale, it triggered the date for settlement:

- If the FIRB gave unconditional approval, the date for settlement would be seven days after the purchaser received notification.
- If the FIRB gave conditional approval, the purchaser would then have seven business days within which to notify the vendor -
 - (a) that the conditions imposed by the FIRB were not acceptable and that the contract is terminated; or

- (b) that the conditions were acceptable, in which case the contract would no longer be conditional upon FIRB approval and the date for settlement would be seven days after the purchaser was required to notify the vendor of its response to the condition.

On 6 January 1995, Barker Gosling brought the above matters to the attention of Pato Lawyers. On the same day, Pato Lawyers sent a fax to the POSFB. Pato Lawyers said the notification from the FIRB should be regarded as conditional approval. Hence the POSFB still had seven days to notify the vendor:

- That the condition imposed was not acceptable - in which case the contract would be terminated.
- Or that the condition was acceptable - in which case settlement would be due to take place within seven days after the purchaser was required to notify the vendor of its response to the condition.

Pato Lawyers suggested that, due to the difficulty in remitting funds to Australia, an attempt to delay settlement for a period of seven days should be made before the vendor's lawyers were notified of acceptance of the conditions attached to the FIRB approval. They advised that if this approach were adopted, the date for completion of the contract would become 24 January 1995.

This date was calculated as follows:

- Friday 6 January 1995 - the date on which FIRB conditional approval was notified to the purchaser.
- Tuesday 17 January 1995 - the date seven business days after FIRB notification. This became a critical date, because the POSFB could have still, on or before then, notified Katingo of its intention to terminate the contract.
- Tuesday 24 January 1995 - the date seven days (including non-business days) after the date by which acceptance of the conditions attached to FIRB approval had to be notified to the vendor.

**[6.8] POSFB FAILS TO PREPARE FOR SETTLEMENT:
18 JANUARY 1995**

The above matters were brought to the attention of the POSFB by Pato Lawyers' fax of

16 January 1995, sent at 11.39 am. It was also stressed that the following day, Tuesday 17 January 1995, was a public holiday owing to the visit to the country by Pope John Paul II:

Since it is a public holiday on that date due to the Pope's visit, we suggest that it would be proper to give our agents instructions today.

Pato Lawyers' suggestion was not followed. At that stage, Mr Ragi was still on recreation leave. The critical date identified by Pato Lawyers - 17 January 1995 - passed without any instructions being received. There was no response until Wednesday 18 January 1995, when Mr Ban wrote:

Please notify the vendors or their lawyers that we have received FIRB approval for purchase of "The Conservatory" in Cairns, and that the condition regarding claim of sovereign immunity in relation to Australian taxes is acceptable to us.

We will be willing to proceed with the purchase subject to:

- (a) The finalisation of funding arrangements; and
 - (b) Ministerial approval of the full capital outlay of A\$18.72 million.
-

It appears from Mr Ban's letter that he did not appreciate the significance of the dates advised to him by Pato Lawyers. He did not appreciate that the POSFB had the opportunity - until the previous day - to terminate the contract. He also did not appreciate the significance of the settlement date of 24 January 1995, which had been triggered by the granting of FIRB approval and the POSFB's acceptance of the condition to which it was subject.

Mr Ban's advice to Pato Lawyers that the POSFB would be "willing to proceed with the purchase subject to ... finalisation of funding arrangements and ... ministerial approval" indicated that he and other senior officers of the POSFB failed to appreciate that within six days time, the POSFB had to locate and remit to the vendor the full balance of the purchase price, i.e. \$16,848,000.00.

In his response to our preliminary report, Mr Ban emphasised that he did not have the knowledge or the authority to terminate the contract at this time. His actions were solely to stall for time once the vendors started putting pressure on the POSFB. He stated:

I had no prior knowledge of this investment until 29.12.94 when Executive Manager - Investments, Mr Joseph Wingia sought my directive on the transaction.

I have then declined to provide any directive on the transaction because the Managing Director, Mr Ereman Ragi had not briefed me on the transaction nor left any instruction with me prior to him taking his recreation leave...

Both the POSF Board of director's resolution and the ministerial approval was for the acquisition of the Cairns Conservatory to proceed.

I therefore had no authority to stop this investment nor the authority to terminate the contract. The position I was in was merely to carry out the decision of the Board which had ministerial approval.

**[6.9] FURTHER OPPORTUNITY TO TERMINATE THE
CONTRACT: 23 JANUARY 1995**

On Monday 23 January 1995, the POSFB was presented with another last minute opportunity to terminate the contract, or at least delay the time for completion. A fax was received from Pato Lawyers, advising of a recent development with one of the existing tenants in The Conservatory. The proprietor of a hair dressing salon claimed he was being evicted.

This was significant because there was a term in the contract of sale under which the vendor warranted it had not agreed to the surrender of any of the leases; and there was a further term which provided that if that statement were not accurate, the purchaser could give notice to the vendor postponing the date for completion for fourteen days and requiring the vendor to take such action as may be necessary to remedy the situation, failure to do so giving rise to a right in the purchaser to terminate the contract.

However, the POSFB did not respond to Pato Lawyers' advice and gave no instructions regarding termination or postponement of the date for completion. Thus a third opportunity to terminate the contract had been lost.

In his response to our preliminary report, Mr Ban defended his conduct in not terminating the contract on any of these three occasions:

I did not have the authority to terminate the contract yet the view advanced by the Ombudsman report is that I had the opportunity to terminate the contract. This is not correct. With the situation I faced I simply acted in good faith to stall the settlement by providing reasons of the requirement of ministerial approval of the capital outlay and delays on the funding arrangement. This was to buy time in order for the Managing Director, Mr Ereman Ragi to resume work on 24/01/97 in order to handle the matter himself.

[6.10] PATO LAWYERS PUT ON NOTICE OF RECENT SALE PRICE OF THE CONSERVATORY: 23 JANUARY 1995

On 23 January 1995, Barker Gosling sent a fax to Pato Lawyers, advising they had obtained documents from the Queensland Land Registry which would be required to transfer title to The Conservatory from Katingo to Moki N° 10. These documents showed that the most recent transfer of the property had been just two months ago in November 1994, when it was transferred from Cape Bouvard Investments Pty Ltd to Katingo Pty Ltd for a consideration of \$9,750,000.00. That is, Katingo had agreed to pay \$9.75 million for The Conservatory.

Barker Gosling enclosed the documents with their fax and stated:

The purchase price paid by Katingo Pty Ltd for the property may be of interest to your client.

The above fax was sent to Pato Lawyers at 6.14 pm on 23 January 1995.

The following day, 24 January 1995, at 9.05 am, Pato Lawyers' principal lawyer, Mr Rimbink Pato, sent a fax to Mr Ragi (who had just returned from leave) intending, it seems, to convey the information received the previous evening from Barker Gosling.

Mr Pato stated:

Our agents are preparing certain amendments to the sale of share agreement. In the meantime, copies of the transfer and caveat in respect of the property but which remain presently unregistered follow. The transfer instrument is the document under which terms Katingo Pty Limited will become the registered proprietor of the property. The caveat appears to have been lodged by Katingo Pty Limited's financier.

The purchase price (consideration) paid by Katingo for the land appears on the transfer documents.

Could you contact me this morning to confirm instructions on a number of matters including partial settlement and completion by instalment payments and preparation of financial statements for Moki No 10 Pty Limited. [Emphasis added.]

The above fax refers to the documents transmitted the previous day by Barker Gosling. But, in fact, those important documents were *not* faxed to Mr Ragi. We have examined the files of both the POSFB and Pato Lawyers. The cover sheet to the fax (which contained Mr Pato's message) indicated that the fax consisted of three pages including the cover page. But only the cover sheet was sent.

Consequently, we draw the conclusion that Pato Lawyers did *not* bring to the attention of the POSFB the information it had received about the purchase price paid by Katingo for the property. We can find no evidence that this information was conveyed either on 24 January 1995 or at any other time.

Mr Eviaisa's response

In his response to this point in our preliminary report, Mr Eviaisa, POSF Board Member, bluntly states:

Pato is responsible.

Pato Lawyers' response

Pato Lawyers assert that they had no knowledge of the value of the real estate and would not have expressed an opinion:

With the benefit of your analysis of the position, we can see that serious mistakes appear to have been made by the POSFB but, with respect, it is erroneous to somehow make the lawyers their client's keeper on commercial and management decisions which are outside both our brief and our responsibility.

Specifically, we had no idea what the Calms conservatory property was worth. It was not our job and it would have been both reckless and improper for us to express opinions on the value of real estate - especially real estate in another country.

We repeat, we had no knowledge of the true value of the property, we had no reason to know and this was way outside our field.

The fact that a vendor is onselling before completion is neither unusual nor in any way improper. It was certainly not a reason for us to intrude into the POSFB's internal decision making processes or to take on responsibility in areas where we have no expertise or authority.

The notion that the POSFB might have failed to obtain competent advice in making its decision never occurred to us, and it was only after the event that the matter found its way into the public arena, raising an inference that all might not have been as it should be.

In summary, we are not policeman, nor are we valuers or auditors.

With respect, sections of your report seem to impose duties on us which are both inappropriate and unrealistic.

Ombudsman Commission's opinion

The Ombudsman Commission's considered view, however, is that Pato Lawyers blundered badly when they failed to ensure that the information contained in the Land Registry documents was conveyed to POSFB. The information was clearly suggesting that the POSFB was agreeing to pay an amount (\$18.72 million) which was almost twice the price (\$9.75 million) at which the property had only recently changed hands.

[6.11] CHANGE IN THE FINANCING PACKAGE: 23 JANUARY 1995

By Monday 23 January 1995, Mr Ragi had returned from recreation leave. He had been absent for several weeks. In that period a number of important things had happened:

- The POSFB had lost three opportunities to terminate the contract, or at least put back the completion date of the contract.
- The date for settlement had been triggered by the granting of FIRB approval.

In fact, the date for settlement was the following day, 24 January 1995. On that day the POSFB had to find \$16.848 million to pay Katingo Pty Ltd. The immediate problem facing Mr Ragi was that the money was not available. The POSFB only had ministerial approval to inject K4.5 million into the purchase. It was expected that the corporate vehicle being used for the purchase, Moki N° 10 Pty Ltd, would obtain a commercial loan for the balance of the purchase price. However, as we reported previously, the POSFB's attempts to find a loan had come to nought.

Chapter 6 Settlement of Contract

It was in this environment that, on Monday 23 January 1995, Mr Ragi convened a special meeting of the Board of the POSF to consider a submission for refinancing of the purchase.

Board members in attendance were: the Acting Secretary for Finance, Mr Ai (Chairman); Mr Mowana; Mr Malabag; and Mr Ragi. The Board's Secretary, Mr Kila, took minutes. Apologies were received from Mr Puka and Mr Eviaisa.

Mr Ragi presented a business paper dated 23 January 1995, signed by himself and Mr Wingia. Its purpose was to seek the Board's approval to finance the purchase of The Conservatory from the POSFB's own financial resources. The material parts of the paper stated:

SUBJECT: PROPOSED PNG CENTRE, CAIRNS, AUSTRALIA

PURPOSE:

The purpose of this Submission is to seek approval of the Board of Directors to review the financial arrangements for the acquisition of the proposed PNG Centre in Cairns, Australia.

FACTS & CONSIDERATIONS:

On 10 October 1994, the Board approved the establishment of an Australian subsidiary company which would purchase "The Conservatory Shopping Village".

The Board also approved the injection of K4.5 million as equity and authorised the subsidiary to borrow up to K13.5 million to finance the debt component of the acquisition cost.

On 26 October 1994, in his capacity as Acting Minister for Finance and Planning, the Prime Minister granted his approval for POSF to purchase "The Conservatory Shopping Village" for a total amount of K15.5 million.

Soon after the Prime Minister's approval, negotiations were held with several Australian banks regarding the debt component of the acquisition cost. Due to the adverse publicity on PNG by the Australian Media, all the banks were not as receptive as originally envisaged. Up to now, none of those banks have reverted to Management.

Recently, the Foreign Investment Review Board (FIRB) of Australia gave its unconditional approval for POSF to buy the property. The Contract of Sale stipulates that settlement must occur seven (7) days after FIRB's approval. That seven day period ends tomorrow (24/01/95). Unless we settle tomorrow the deposit of K1.4 million will be forfeited to the vendors.

In light of lack of progress with the Banks, it has become necessary to amend the proposed financing plan for the acquisition. The original plan was 1/3 equity and 2/3 bank finance. The proposal before the Board is that POSF provide 1/3 equity and 2/3 loan funds that was originally planned to be borrowed from an Australian bank. Only by doing that can forfeiture of the deposit be avoided. It is further proposed that Management continue discussion with the banks with a view to refinancing the POSF loan.

Discussions with the principals of the vendors have taken place and they have offered that K5.0 million be paid tomorrow and the balance will be paid as and when term deposits mature and/or the Government pays up the K12.0 million that it owes the Fund.

RECOMMENDATIONS:

It is recommended that the Board approve the following:

1. POSF to provide a loan of K13.5 million to Moki N°10 Pty Ltd for the debt component of the acquisition cost of "The Conservatory Shopping Centre" for an interest of 10% per annum;
2. The term of the loan shall be a maximum of 5 years or whenever re-financing is secured, whichever is earlier;
3. The loan shall be secured by way of first mortgage on the property to be purchased;
4. Equity of K4.5 million in Moki N°10 Pty Ltd;
5. Payment of K5.0 million to the vendors tomorrow and the balance as and when term deposits mature and/or when the Government pays the Fund the amount it owed the Fund.

It will be observed that the explanation given by Messrs Ragi and Wingia for the lack of interest shown by the Australian banks in financing the purchase was "adverse publicity" about PNG in the media.

In our preliminary report, we suggested that this claim was without basis, and that the real reason the banks were not interested was that Mr Ragi would not agree to an independent valuation of The Conservatory.

Mr Wingia refuted our suggestion:

The loan negotiations with the Australian Banks and Financial Institutions were conducted during the ongoing crisis in Bougainville. At the same time, there was in fact adverse publicity in the Australian media. I was involved in the negotiations and therefore know of the sentiments expressed. The Ombudsman Commission is not in a position to either confirm or deny this fact. We advised the Board of POSF the facts as we knew it from our discussions.

Mr Ai also made a general statement that he found, during his duties with the Department of Finance, adverse publicity about Papua New Guinea often made borrowing difficult.

While a general perception about Papua New Guinea may have been a factor in the banks' decision, we are not satisfied that publicity about PNG was any more adverse in late 1994 than it was at any other time. In the correspondence the banks expressed a range of queries and concerns about the proposal; including the proposed POSFB equity contribution being too low, inadequate lease details, and the need for a proper valuation.

The Ombudsman Commission considers that the reason given in the Business Paper for the failure to secure bank finance was shallow. It glossed over some serious concerns about the purchase. It placed the blame for the banks' refusal to finance the proposal on "the Australian media", rather than on the proposal itself.

Nevertheless, these recommendations made in the Business Paper by Messrs Ragi and Wingia were accepted. The minutes stated:

NOTED:

The members noted the explanations and progress of the proposal as presented by the Managing Director and Executive Manager (Investments). Of note, the Board was advised that due to the recent adverse publicity about PNG by the Australian media, the Australian banks have not been that enthusiastic about providing funds for the debt component. Unless payment is made by close of business tomorrow, the deposit of \$1.8 million would be forfeited to the vendors.

RESOLVED:

Moved Director Malabag, seconded Director Mowana, it was unanimously resolved that the following recommendations be approved subject to Ministerial approval:

- i) POSF to provide a loan of K13.5 million to Moki N° 10 Pty Ltd for the debt component of the acquisition cost of "The Conservatory Shopping Centre" for an interest of 10% per annum;

-
- ii) The term of the loan shall be a minimum of 1 year or whenever re-financing is secured, whichever is earlier;
 - iii) The loan shall be secured by way of first mortgage on the property to be purchased;
 - iv) Equity of K4.5 million in Moki N° 10 Pty Ltd.
 - v) Payment of K5.0 million to the vendors tomorrow and the balance as and when term deposits mature and/or when the Government pays the Fund the amount it owed the Fund.
-

**[6.12] MINISTERIAL APPROVAL OF REFINANCING PACKAGE:
24 JANUARY 1995**

Immediately after the POSFB Board meeting of Monday 23 January 1995, Mr Ragi wrote to the Minister for Finance, Mr Haiveta, to seek approval of the refinancing package.

Mr Ragi stated:

At a Special Meeting of the POSF Board held today, it was resolved that we seek your approval for the Board to amend the proposed financing plan for the proposed acquisition of "The Conservatory Shopping Centre" in Cairns.

The Board regrets to advise that due to the recent adverse publicity about PNG by the Australian media, the Australian banks have not been receptive to the proposal to provide loan funding of K13.5 million for the acquisition. Under the terms of the Sale Contract, settlement must occur seven days after the approval of the Foreign Investment Review Board. The FIRB's approval has been granted without any conditions, and the seven days period ends tomorrow.

Due to lack of bank loan, to date, it has become necessary to amend the financing plan for the acquisition. Instead of a bank loan, it is proposed that POSF provide a loan of K13.5 million to Moki N° 10 Pty Ltd. This is the only surest way of avoiding forfeiture of deposit of \$1.8 million that has been paid. It is envisaged that the loan will be re-financed as soon as bank loan is arranged.

As there are insufficient funds available at the moment, the vendors have agreed to a staged payment of K5.0 million tomorrow and the balance as and when funds become available.

Accordingly, it is recommended that you approve the following:

-
1. POSF to provide a loan of K13.5 million to Moki N° 10 Pty Ltd for the debt component of the acquisition cost of "The Conservatory Shopping Centre" for an interest of 10% per annum;
 2. The term of the loan shall be a minimum of 5 years or whenever refinancing is secured, whichever is earlier;
 3. The loan shall be secured by way of first mortgage on the property to be purchased;
 4. Equity of K4.5 million in Moki N°10 Pty Ltd;
 5. Payment of K5.0 million to the vendors tomorrow and the balance as and when term deposits mature and/or when the Government pays the Fund the amount it owed the Fund.
-

The following day, Tuesday 24 January 1995, Mr Haiveta wrote to Mr Ragi, giving his approval of the refinancing package under Section 60 of the *Public Finances (Management) Act*:

-
- a) POSB to provide equity financing of K4.5 Million in the project through a subsidiary company, Moki N° 10 Pty Ltd; and
 - b) POSB to provide a loan to Moki N° 10 Pty Ltd under the following terms and conditions:
 - loan amount of K13.5 Million;
 - interest rate of 10% per annum;
 - 5 year term or whenever refinancing is secured by POSFB, whichever is earlier;
 - first mortgage on the property to be purchased.
-

There is no evidence that when Mr Haiveta gave the above approval, he had before him any advice from the Department of Finance. He appears to have acted exclusively on the advice of Mr Ragi.

Mr Haiveta, responding to our preliminary report through his lawyers, Allens Arthur Robinson, contended that giving this approval was not wrong:

Mr Haiveta was given very little time to make a decision as settlement had to take place the day after the Approval was sought. If the Approval had not been granted the POSF was liable to forfeit \$A1.8 million being the deposit paid on the Property.

At the time the approval for the loan was given Mr Haiveta was a Minister for Finance. He had the Ministerial responsibility for the Department of Finance. For the Report to suggest that any advice received from the Minister's own department would be *independent* is patently absurd. Alternatively, should the Report be suggesting that the Minister was bound to seek advice other than from the POSF on the proposal to purchase the Property then our client denies he was bound to follow such a procedure. Surely the Minister could rely on the board of POSF to properly advise him.

The Ombudsman Commission finds this submission by Mr Haiveta quite worrying. Mr Haiveta appears to be suggesting that advice obtained from his "own" department could not be independent. But one of the functions of a government Department is to provide frank and objective advice to a Minister.

We remain of the view that Mr Haiveta should have received advice from his Department before deciding whether to give approval.

[6.13] LOAN AGREEMENT EXECUTED: 25 JANUARY 1995

On 25 January 1995, the loan agreement between the POSFB (the lender) and Moki N° 10 Pty Ltd (the borrower) was executed. Mr Ragi signed the agreement for the POSFB; Mr Wingia signed for Moki N° 10.

The terms of the agreement were:

- Amount borrowed - K13.5 million.
- Interest rate - 10% p.a.
- Term of the loan - 12 months
- Date for repayment - 25 January 1996.

[6.14] VARIATION OF CONTRACT OF SALE: 25 JANUARY 1995

On the date of settlement under the contract, 24 January 1995, the POSFB was unable to settle. Some arrangement immediately had to be made with the vendor, to avoid the vendor electing to walk away from the contract with the deposit.

Around this time, both Mr Warren Anderson and Mr Solly Benn arrived in Port Moresby. Negotiations were conducted through Pato Lawyers and a deed of variation of the contract of sale was executed on 25 January 1995.

The effect of this deed was that the balance of the purchase price became payable as follows:

- 24 January 1995 - \$7,472,215.00.
- 14 February 1995 - \$5,623,892.50.
- 28 February 1995 - \$5,623,892.50.

**[6.15] PURCHASE PRICE PAID IN INSTALMENTS:
JANUARY - FEBRUARY 1995**

During January and February 1995, the following payments were processed by the POSFB on behalf of Moki N° Pty Ltd, by transferring funds into Pato Lawyers' trust account:

- 24.01.95 - K5 million
- 03.02.95 - K2 million
- 08.02.95 - K2 million
- 13.02.95 - K2 million
- 22.02.95 - K2 million
- 28.02.95 - K2 million

K15 million

These payments were in addition to the deposit of K1,704,545.45 which had been paid in November 1994.

This meant that by 28 February 1995 the POSFB had paid a total of K16,704,545.45 for the purchase of The Conservatory.

Amazingly, some of the money was paid early. Amounts totalling K8 million (on 3 & 8 February 1995) were paid ahead of the dates prescribed by the deed of variation. The POSFB could have continued to invest this money on a short-term basis - and earned interest on it - rather than giving it to Mr Anderson in the form of a windfall gain.

The money was remitted by Pato Lawyers to an account in the name of Tipperary Developments Pty Ltd at the ANZ Bank, 77 St George's Terrace, Perth, Western Australia, in various amounts. By way of example, we have been able to identify from the records of the Bank of South Pacific, through which the funds were remitted, that the following transactions occurred from 27 January 1995 to 16 February 1995:

TABLE 6.1

PAYMENTS MADE TO TIPPERARY BY THE POSFB

Date Foreign Currency Purchased	Exchange Rate	Value Date	Kina Amount	AUD Amount
27.01.95	1.1244	31.01.95	4,550,000.00	5,116,020.00
30.01.95	1.1268	01.02.95	2,111,545.00	2,379,288.90
03.02.95	1.1278	07.02.95	886,682.03	1,000,000.00
06.02.95	1.1280	07.02.95	354,609.93	400,000.00
06.02.95	1.1258	07.02.95	558,708.94	628,547.56
07.02.95	1.1258	07.02.95	199,999.10	225,158.99
07.02.95	1.1258	09.02.95	500,000.00	562,900.00
08.02.95	1.1218	09.02.95	500,000.00	560,900.00
08.02.95	1.1209	09.02.95	300,000.00	336,270.00
08.02.95	1.1260	09.02.95	700,000.00	788,200.00
10.02.95	1.1297	14.02.95	500,000.00	564,850.00
10.02.95	1.1281	14.02.95	500,000.00	564,050.00
13.02.95	1.1356	14.02.95	1,000,000.00	1,135,600.00
16.02.95	1.1331	21.02.95	250,000.00	283,275.00
16.02.95	1.1337	21.02.95	250,000.00	283,425.00
16.02.95	1.1306	21.02.95	750,000.00	847,950.00

16.02.95	1.1317	21.02.95	250,000.00	282,925.00
16.02.95	1.1324	21.02.95	250,000.00	283,100.00
16.02.95	1.1331	21.02.95	250,000.00	283,275.00

When it is considered that all of these remittances were made when the kina was under heavy pressure, the concerns about the POSFB's purchase of The Conservatory are even more pronounced.

[6.16] DELAYS IN SETTLEMENT: JANUARY - MAY 1995

On 28 February 1995, the POSFB paid what it thought was the last instalment on The Conservatory, when K2 million was transferred into Pato Lawyers' trust account. It was expected that settlement of the contract and transfer of title would take place immediately thereafter. But this did not happen. Settlement did not take place until almost three months later. There were a number of reasons for this:

- Confusion over a proposal to rescind the contract of sale and instead purchase all the shares in Katingo Pty Ltd.
- Delay in payment of stamp duty.
- Confusion over the amount of interest (i.e. late payment penalty) payable to Mr Anderson.
- Confusion over an "exchange rate adjustment" claim by Mr Anderson.
- A claim by Mr Anderson for additional settlement money.

[6.17] PROPOSAL TO RESCIND CONTRACT: MARCH 1995

For several months after the contract of sale was signed on 24 November 1994, there was a proposal that the contract be rescinded. In its place an agreement would be entered into whereby the POSFB would acquire all the shares in Katingo Pty Ltd. This proposal seemed to be advanced most vigorously by Mr Benn, though at various times it also had the support of Mr Ragi.

We have not been able to ascertain the real motive for this proposal which, on the face of it, seemed quite dangerous.

Both Barker Gosling and Pato Lawyers consistently advised Mr Ragi against the idea of purchasing Katingo as one of the consequences would have been a double exposure to stamp duty. There was also the risk that the POSFB would acquire all the liabilities of Katingo, as well as its assets.

There was considerable confusion as to whether the proposal would actually go ahead. The degree of confusion is vividly portrayed by two sets of instructions given to Pato Lawyers on 24 March 1995, one from Mr Ragi and the other from Mr Wingia.

On the one hand, Mr Ragi stated:

You are hereby instructed:

1. Moki No 10 Pty Ltd ("the Company") wishes to rescind the contract made between the Company and Katingo Pty Ltd for the purchase by the Company of the property known as "The Conservatory Shopping Village";
 2. the Company wishes to enter into a contract with the shareholders of Katingo Pty Ltd for the purchase of the whole of the shares in Katingo Pty Ltd;
 3. the Company requires you to investigate means by which the above rescission and contract may be implemented while reducing the liability of all documentation in relation to these matters for stamp duty and, if you think necessary, to instruct Queen's Counsel to provide an opinion in relation to these matters.
-

On the other hand, Mr Wingia stated:

I write to express my strong concern on the matter as there seems some misunderstanding over the whole transaction. I must make it very clear that this Board has not issued any other instructions to yourselves to enter into any discussions to rescind the land contract and enter into a share sale agreement. As far as this Board is concerned, all such means have already been ruled out based on your advises, and as a result we are only proceeding to purchase the property from Katingo Pty Limited. Therefore the settlement must proceed as it is without any further discussions.

The matter was put to rest shortly after this, when the proposal to rescind the contract of sale was abandoned. There was, however, no record of this decision; nor was any file-note made.

In his response to our preliminary report, Mr Wingia explained his concerns about

buying the company.

As I saw it, the lawyers were giving us conflicting advices on the concept of purchasing the property against purchasing the company owning the company [sic]. In my view, it was dangerous to purchase the company because of unknown liability associated with Katingo Pty Ltd. This was the basis of my advice to Pato Lawyers.

[6.18] DELAY IN PAYMENT OF STAMP DUTY: MARCH 1995

The confusion about the proposal to purchase the shares in Katingo Pty Ltd also led to confusion about payment of stamp duty, which was due to be made by 22 March 1995.

Eventually, the duty of \$699,225.00 was paid, several days late, to the Queensland Commissioner of Stamp Duties. Late payment penalty was avoided because of approaches made to the Commissioner by Barker Gosling on behalf of Moki N° 10 Pty Ltd.

[6.19] CONFUSION OVER INTEREST: MARCH - APRIL 1995

Under the original contract of sale, Moki N° 10 Pty Ltd was liable to pay interest at the rate of 9% per annum on any amounts unpaid. The deed of variation, executed on 25 January 1995, also addressed the question of interest. It stated:

The Purchaser will pay interest to the Vendor on the Purchase Price from the 10th day of JANUARY 1995 to the date when the final instalment is paid at the rate of 9%. The interest accrued will be paid on the date of payment of the last instalment.

This clause led to some confusion. Mr Benn argued it made Moki N° 10 liable to interest on the full amount of the purchase price until the date the final instalment was paid - irrespective of any instalments received in the meantime. Pato Lawyers argued that interest was only payable on the reducing amount of the purchase price outstanding. The effect of the different interpretations was quite substantial. If Katingo's interpretation were accepted it would result in an interest bill of \$240,026.40; being interest on the full purchase price until 3 March 1995, when Katingo received its last instalment. If the reducing balance method of calculation were used, the interest bill would only be \$97,044.18.

Eventually, it was agreed that the latter method would be used, the result being that the POSFB accepted liability for late payment penalty of \$97,044.18, which converted to

K87,074.18.

**[6.20] DISPUTE OVER EXCHANGE RATE ADJUSTMENTS:
MARCH - APRIL 1995**

By 3 March 1995, the POSFB had paid all of the purchase price of \$18.72 million. But, soon afterwards, Messrs Anderson and Benn claimed there was an agreement in place to use an arbitrary exchange rate of \$1.00 = K1.1145. Their claim was that the actual purchase price had been changed to K16,796,769.85 ($\$18,720,000.00 \div 1.1145$).

It transpired that in the period between the date of the contract of sale (24 November 1994) and the time when the final instalment was paid (3 March 1995) there was an increase in the value of the kina. So Katingo claimed there had been an "under-payment" of \$102,783.65 (or K92,224.00).

Katingo's claim was put to Pato Lawyers in mid March 1995. It resulted in the following filenote by one of the lawyers handling the matter for Pato Lawyers, Mr David Coyle:

This agreement on exchange rates was never documented or formalised. Furthermore, the parties ignored the arrangements for both payment by three instalments and for payment in kina. Instead the purchaser made seven instalments in advance of its obligations (all paid in AUD), to save interest, believing that interest was only payable on the reducing balance. The vendor acquiesced in this altered arrangement.

Regrettably, the amending deed is capable of the interpretation that interest is payable on the full purchase price, not on the reducing balance. Clearly this was never intended. The vendor now says;

- a. The purchaser should "do the right thing" and revert to the 1.1145 exchange rate, although it was never documented or implemented.
- b. However, there is no need for the vendor to do the right thing! Even though the proposition that the purchaser should abandon its rights under the contract, and pay interest on purchase money it has already paid, the vendor will make no concessions "because that is what the contract says".

The vendor cannot have it both ways. If he wants to strictly enforce the words of the amending agreement then he cannot escape from those same words when it comes to exchange rate. He has accepted payments in AUD and it is too late to put the toothpaste back in the tube.

Despite there being no evidence of any agreement about a fixed exchange rate, Pato

Lawyers subsequently advised the POSFB that they were obliged to pay the K92,224.00 claimed by Messrs Anderson and Benn. In early April 1995, Pato Lawyers told the POSFB that it still had to pay K179,298.18 to settle the matter. This was calculated as follows:

- Interest (i.e. late payment penalty) K 87,074.18
 - Exchange rate adjustment K 92,224.00
- K179,298.18

Pato Lawyers' advice caused some consternation in the POSFB, at least on the part of Mr Wingia, who on 3 April 1995 wrote to Pato Lawyers querying it.

The following day, 4 April 1995, Pato Lawyers replied with a written explanation. But it was not immediately accepted. The POSFB's Financial Controller, Mr Ranjit Kanagasabai, also queried the amount and further pointed out that the purchase price of K16.79 million now being quoted for The Conservatory exceeded the ceiling on ministerial approval, which was K15.5 million.

On 12 April 1995, Mr Wingia again wrote to Pato Lawyers seeking clarification of the matter.

On 18 April 1995, Pato Lawyers replied, confirming that K179,298.18 was still payable; that only K51,087.61 was held in trust; and that the POSFB still needed to pay K128,210.57 into their trust account. Pato Lawyers stated:

The discrepancies ... came from the fact that an *Amending Deed* was signed. In that amending deed, the purchase price was recalculated and exchange rate impact resulted in a purchase price of K16,796,769. Total payments by POSFB to the Vendor to date is K16,705,545.

Also provided in the amending deed is a 9% interest on purchase price up to the date of last payment amounting to K87,074.18.

Pato Lawyers' advice that the purchase price was recalculated in the amending deed was incorrect. As Mr Coyle had remarked in his file note of 17 March 1995, there was no proof of any agreement about an exchange rate adjustment. It is unusual therefore that Pato Lawyers was on 18 April 1995 advising that the purchase price had been recalculated in the deed.

By 25 April 1995, however, the dispute about the outstanding interest payment and the exchange rate adjustment appeared to be resolved. Mr Ragi and Mr Wingia, on behalf of the POSFB, accepted the advice that K179,298.18 was still outstanding and arrangements were made to transfer funds into Pato Lawyers trust account.

**[6.21] CLAIM BY MR ANDERSON FOR ADDITIONAL
SETTLEMENT MONEY: MAY 1995**

However, the money was not immediately made available. More than a week passed and nothing happened, evidently leading to some concern on the part of Messrs Anderson and Benn.

On 3 May 1995, Mr Benn sent a fax to Mr Ragi. He said that, in addition to the K179,298.18 previously agreed, Katingo now needed a further \$47,885.88. This was for financial losses of \$12,323.97 incurred by Katingo due to the delay in receiving the final payment of K179,298.18. The other \$35,476.91 was in respect of increased "legal fees".

The Ombudsman Commission is not aware of any undertaking given by the POSFB to pay Katingo's legal fees, so the claim in respect of this item seems particularly unusual. Nevertheless, Mr Ragi made a written notation on the fax saying that he was "inclined to accept their proposal".

There was no official reply to Mr Benn's fax, however.

The next attempt at resolving the issue was on 8 May 1995, when Mr Benn sent a fax to Mr Rimbink Pato. Mr Benn referred to a telephone conversation Mr Pato had earlier that day with Mr Anderson. He said he was transmitting Katingo's "final settlement statement". This claimed that the POSFB now owed Katingo \$447,503.02 - substantially more than the amount previously agreed. Interestingly, it included an amount of \$97,420.13 for legal fees; whereas in the fax sent to Mr Ragi five days earlier, the amount claimed was only \$35,476.91.

The following day, 9 May 1995, Mr Benn sent another fax to Mr Pato, reiterating the previous day's claim:

Dear Rim

As promised, in response to our telephone conversation earlier today, I have spoken to Warren regarding the above matter.

At the time Warren only agreed to the compromise to assist yourself and as a fair and equitable solution. This was providing the balance outstanding was promptly paid. We were led to believe this was just a matter of days not months.

As mentioned previously, we have incurred considerable losses caused by the late settlement etc.

We maintain that we are entitled to the full amount as detailed in yesterday's transmittal.

Please inform POSFB accordingly.

Regards

SOL BENN

The next day, 10 May 1995, Pato Lawyers sent a fax to the POSFB, advising that the vendor had withdrawn from the "compromise arrangement" which would have resulted in a final settlement figure of K179,298.18. They added:

In fairness, Katingo showed considerable patience before taking this step.

During the course of that day, Mr David Coyle of Pato Lawyers held discussions with Mr Ragi. In the evening, he sent Mr Ragi a fax confirming the discussions and advising that "interest and exchange loss compensation must be paid in addition to the amount of K179,298.18". He recommended that Pato Lawyers be authorised to offer as much as K200,000.00 on account of these other claims.

The next day, 11 May 1995, Mr Ragi apparently accepted Mr Coyle's advice. There is no file-note which evidences its acceptance or the giving of instructions. But there is a fax on file from Mr Coyle to Mr Benn, dated that day, which states:

Dear Solly

I tried to ring you this morning, to tell you that I have an absolute assurance that funds sufficient to cover balance purchase money, interest and exchange rate losses will be in our Trust Account tomorrow Friday 12 May without fail.

I am confident that this will happen. We need to talk about settling the matter tomorrow.

Regards
DAVID-COYLE

The next day, 12 May 1995, Mr Benn sent a fax to Pato Lawyers, advising that the "total amount outstanding" was as follows:

	Kina	AUD\$
Final Payment	179,298.18	199,827.82
Currency Fluctuation	15,884.30	----
Interest	3,399.49	3,480.40
Additional Costs	<u>34,652.19</u>	<u>35,476.91</u>
	<u>K233,234.16</u>	<u>AUD\$238,785.13</u>

[6.22] **FINAL SETTLEMENT AND DISBURSEMENT OF PROCEEDS:
18 MAY 1995**

On Monday 15 May 1995, Pato Lawyers sent a fax to Katingo, advising that funds from the POSFB were now in their trust account. Settlement would take place in Brisbane, after which payment of the money would be made into a nominated account in Port Moresby. The final settlement figure was said to be K247,386.62.

This amount was K14,152.46 more than what had been advised on 12 May 1995 by Katingo. The amount of K14,152.46 represented legal fees owed by Katingo to Pato Lawyers under a memorandum of costs and disbursements dated 15 May 1995. Thus, Katingo's legal fees were *added* to the settlement figure being paid by the POSFB into Pato Lawyers trust account. This seemed a very unusual arrangement.

On 18 May 1995, the settlement finally took place in Brisbane. Immediately thereafter, a cheque for K247,386.62 was drawn against Pato Lawyers trust account, payable to Tipperary Developments Pty Ltd. It was deposited into Tipperary's account at the Bank of South Pacific, Boroko.

Later that day, 18 May 1995, Mr Benn sent a fax to the Bank of South Pacific authorising the deposited funds to be disbursed as follows:

- K36,569.62 to Pato Lawyers trust account.
- K210,817.00 to be remitted by telegraphic transfer to an account in the name of Tipperary Developments Pty Ltd at the ANZ Bank, 77 St George's Terrace, Perth, Western Australia.

[6.23] **ANALYSIS OF THE FINAL SETTLEMENT FIGURE OF
K247,386.62**

This figure was calculated as follows:

(a)	Interest	K 87,074.18
(b)	Exchange rate adjustment to 02.03.95	<u>92,224.00</u>
(c)	= Compromise reached as at 25.04.95	179,298.18
(d)	Loss due to currency fluctuation	15,884.30
(e)	Loss of interest	3,399.49
(f)	Additional legal costs	<u>34,652.19</u>
(g)	= Amount claimed by Katingo on 15.05.95	233,234.16
(h)	Katingo's fees payable to Pato Lawyers	<u>14,152.46</u>
(i)	Final settlement figure	<u><u>247,386.62</u></u>

We make the following comments on the components of this figure.

(a) Interest

This was, in effect, a late payment penalty calculated at the rate of 9% per annum. It was payable because on the date set for completion of the contract - 24 January 1995 - the POSFB had no finance in place. This led to the deed of variation of 25 January 1995 under which the balance of the purchase price became payable in instalments.

At one stage, Mr Benn was claiming that interest was payable on the full amount of the purchase price, irrespective of reductions in the outstanding balance. Pato Lawyers negotiated successfully with him on this point. It was eventually agreed that the reducing balance method of calculation would be used.

The amount of interest therefore seems to be in accordance with the contract of sale and the deed of variation.

(b) Exchange rate balance on purchase price

This payment came about following a claim by Mr Benn in mid-March 1995 that the parties had agreed to fix the purchase price of \$18.72 million according to an exchange rate of \$1.00 = K1.1145. The purchase price was said to be:

$$\text{\$18.72 million} \div 1.1145 = \text{K16,796,769.85.}$$

It was claimed that what was actually remitted to Tipperary - though it totalled \$18.72 million - equalled only K16,704,545.00. On this reasoning there had been an under-payment of K92,224.00.

Pato Lawyers originally considered this to be an unreasonable claim, as there was no evidence to support it. Neither the contract of sale nor the deed of variation mentioned pegging the purchase price to any exchange rate. Both documents fixed the purchase price and instalments in Australian dollars. Despite this, Pato Lawyers later advised the POSFB that it should pay the purported under-payment of K92,224.00. Pato Lawyers even went so far as to say in writing, in a fax dated 18 April 1995 to Mr Wingia, that the purchase price was recalculated in the amending deed. This advice was, as we pointed out earlier, wrong.

If there were in fact an arrangement for an exchange rate adjustment (but we can find no evidence of it in either the files of the POSFB or Pato Lawyers) it appears to have come about from some sort of "gentlemen's agreement" entered into by Mr Ragi without legal advice.

Our finding is that the amount of K92,24.00 should not have been paid to Tipperary Developments Pty Ltd.

(c) The compromise amount

On 21 March 1995, Mr Benn phoned Mr Coyle of Pato Lawyers to confirm that he would accept the "compromise amount" of K179,298.18. This agreement was confirmed by a fax from Pato Lawyers to Mr Benn the following day, 22 March 1995. On that day, Pato Lawyers also sent a fax to Mr Wingia advising him that the matter was ready for settlement and that it should be done as a "matter of urgency".

On 3 April 1995, a fax was sent by Pato Lawyers to Mr Wingia again requesting a cheque for the compromise amount. Mr Wingia replied the same day, querying the figure and advising that the POSFB was not in a position to pay it without "proper justification". This led to another fax from Pato Lawyers on 4 April 1995, again setting out the basis of calculation of the figure of K179,298.18.

On 12 April 1995, Mr Wingia wrote to Pato Lawyers, advising that the POSFB still did not have a "complete picture of the transaction".

On 18 April 1995, a further fax was sent by Pato Lawyers to Mr Wingia, again setting out the basis of the calculation. Eventually, on 25 April 1995, there was a meeting

between Mr Coyle of Pato Lawyers and Messrs Ragi and Wingia, who agreed that the POSFB would pay the compromise amount of K179,298.18.

(d) Loss due to currency fluctuation

The figure of K15,884.30 was derived from a claim made by Mr Benn to Pato Lawyers on 12 May 1995. On that date, the exchange rate was \$1.00 = K1.0238. Mr Benn claimed that Katingo was entitled to be compensated for the devaluation of the kina which had occurred. He submitted the following claim:

K179,298.18 at agreed rate of 1.1145	=	AUD\$199,827.82
Less: K179,298.18		
at today's rate of 1.0238	=	<u>AUD\$183,565.47</u>
Loss due to exchange fluctuation		AUD\$ 16,262.35
		(K 15,884.30)

We find it very difficult to comprehend the basis of this claim.

The POSFB acted wrongly by agreeing to pay this amount.

(e) Loss of interest

This claim was made by Mr Benn in his fax of 12 May 1995 to Pato Lawyers, as follows:

Loss of interest calculated at 9% on AUD\$199,827.82 for 70 days (period 3 March 1995 to 12 May 1995).		
<u>Calculation:</u>	AUD\$49.72/day for 70 days	=
		AUD\$3,480.40
		(K3,399.49)

As with the amount in (d), we find it difficult to comprehend the basis of this claim. It should not have been paid by the POSFB.

(f) Additional legal costs

Mr Benn had raised the question of legal costs in a fax to Mr Ragi on 3 May 1995:

As discussed the total legal fees received to date amount to the sum of AUD\$97,420.13, this amount exceeds the original quotes submitted by the legal people, by AUD\$35,476.91.

When Mr Benn submitted his final claim on 12 May 1995, this figure was converted to K34,652.19.

As we indicated earlier, we could find no evidence during our investigation of any understanding by the POSFB to pay Katingo's legal costs. Such an arrangement, even if it was made, was not properly documented; and, in our opinion, was most irregular.

This amount should not have been paid.

(g) Amount claimed

On 12 May 1995 the figure of K233,234.16 was said by Mr Benn to be the "total amount outstanding".

(h) Katingo's fees payable to Pato Lawyers

On 15 May 1995, Pato Lawyers presented Katingo with a bill for K14,152.46. This was *added* to the amount said by Mr Benn to be outstanding.

As we indicated above, there is no evidence that the POSFB had agreed to pay Katingo's legal costs. In fact, we could find no evidence that the POSFB even knew that Pato Lawyers were acting for Katingo.

This payment was grossly irregular.

(i) Settlement figure

This was the sum of the amount claimed by Katingo on 12 May 1995 and the amount of Katingo's legal fees under the memorandum of costs and disbursements dated 15 May 1995.

The amount of K247,386.62 was transferred from Pato Lawyers trust account, to Tipperary's account at BSP Boroko on 18 May 1995.

Summary

For the reasons stated above, the Ombudsman Commission finds that the only legitimate component of the final settlement of K247,386.62 paid to Katingo, was the amount of K87,074.18 for interest.

The other amounts, totalling K160,312.44, were improperly paid. These costs were needlessly incurred.

[6.24] ROLE OF PATO LAWYERS

We make the following findings regarding the role of Pato Lawyers in settlement of the contract of sale for The Conservatory.

- In October 1994, Pato Lawyers accepted payment from the vendor, Katingo Pty Ltd, for acting for the purchaser, POSFB.
- The POSFB agreed to this arrangement. However in the final settlement POSFB ended up paying Pato Lawyers for work performed for *both* POSFB and Katingo Pty Ltd.
- Pato Lawyers charged the POSFB legal fees of at least K16,635.23. Memorandums of costs and disbursements were issued as follows:

28.12.94	6,306.00
29.12.94	2,003.63
19.09.94	<u>8,325.60</u>
	K16,635.23

- Barker Gosling charged Pato Lawyers at least \$85,484.85. Memorandums of costs and disbursements were issued as follows:

26.01.95	32,100.00
05.04.95	10,776.85
15.05.95	41,323.00
04.10.95	<u>1,285.00</u>
	\$85,484.85

Presumably, these bills were also paid by the POSFB.

- Pato Lawyers charged Katingo Pty Ltd at least K59,569.67. Memorandums of

costs and disbursements were issued as follows:

26.01.95	23,000.00
20.04.95	22,417.21
15.05.95	<u>14,152.46*</u>
	K59,569.67

* This is the amount included in the final settlement figure of K247,386.62.

- In January and February 1995, when the POSFB was paying the purchase price of The Conservatory in instalments, almost all payments were made into Pato Lawyers' trust account at the Bank of South Pacific Boroko. This was despite the fact that under the contract of sale the nominated stakeholder was Katingo's lawyers, McNamara & Smith of Brisbane.
- Pato Lawyers received instructions from Katingo to remit to Australia, through the Bank of South Pacific Boroko, the funds which had been deposited in their trust account. However, Pato Lawyers did not remit the funds to Katingo Pty Ltd. Instead, they were remitted to an account of Tipperary Developments Pty Ltd, at the ANZ Bank, 77 St George Terrace, Perth, Western Australia. Tipperary Developments was one of the shareholders of Katingo Pty Ltd. However, Tipperary had no formal role in the sale of The Conservatory.
- On many occasions, Pato Lawyers gave advice that was of a professional and objective nature, concerning the rights of the POSFB (or Moki N° 10 Pty Ltd) to terminate the contract on various grounds.
- However, when information was brought to Pato Lawyers' attention that the purchase price paid by Katingo of \$18.72 million was almost twice the price at which The Conservatory had changed hands very recently, they *failed* to pass this information on to the POSFB. It is difficult to say whether this omission was deliberate.
- When Pato Lawyers advised the POSFB in April/May 1995 that there were still amounts outstanding to Katingo, they gave advice that was in a number of respects wrong or at least misleading. In the opinion of the Ombudsman Commission, the POSFB paid K160,312.44 over and above the amount it was legally obliged to pay.
- Of particular concern are the components of the final settlement referable to

Katingo's legal costs. These amounts were K34,652.19 (apparently payable to Katingo's Australian lawyers, McNamara & Smith) and K14,152.46 (payable by Katingo to Pato Lawyers). Thus Pato Lawyers advised the POSFB to pay Katingo's legal fees totalling K48,804.65. The POSFB was under no obligation to pay this amount.

As set out earlier in the report, Pato Lawyers deny that they acted for both parties. However, the Ombudsman Commission considers that Pato Lawyers did receive instructions and take actions on behalf of the vendor. In our opinion, it was enough to place Pato Lawyers in a serious conflict of interests.

Pato Lawyers also deny having any knowledge as to the value of The Conservatory, and state that such knowledge is outside their field of expertise.

In their response to our preliminary report, Pato Lawyers explained the additional sums payable by POSFB:

As to the adjustments on settlement, you will be aware of the constant problem we had getting instructions and getting our message across regarding the POSFB's contractual commitments - particularly when many decisions were made and commitments given without reference to us.

...However, to the extent that this matter represented difficulties in managing the transactions, our position was that the matter was, as we understood it, being handled by senior management under the supervision of the Board and the transaction had been approved by the Minister for Finance. Who were we to say that the commercial and management side of client's business might have been handled more effectively.

The Ombudsman Commission has carefully considered Pato Lawyers' comments. We note that they originally responded in brief and advised that they would prepare a more detailed response later. They have not done so.

The Ombudsman Commission considers that Pato Lawyers was in a serious conflict of interests that was not known to the POSFB, and that Pato Lawyers did not ensure on all occasions that the advice it gave to the POSFB was objective and in the interests of the POSFB. In our recommendations set out in full at the end of report, we recommend that Pato Lawyers do not act for the State or any governmental body in the future.

Chapter 6

Settlement of Contract

[6.25] **CALCULATION OF THE FINAL COST OF THE CONSERVATORY**

The following table gives a summary of the cost of acquisition of The Conservatory up to and including May 1995.

TABLE 6.2: SUMMARY OF FINAL COST

COST OF THE CONSERVATORY AS AT MAY 1995		
	\$	K
(a) Purchase price in contract	18,720,000.00	16,704,545.00
(b) Interest (late payment)	100,524.18	90,473.48
(c) Exchange rate adjustments	102,783.64	108,108.30
(d) Katingo's legal costs	50,034.13	48,804.65
(e) POSFB's legal costs & disbursements	102,493.88	100,484.20
(f) Stamp duty	699,225.00	614,783.71
TOTAL	\$19,775,060.83	K17,667,199.34

Notes on calculation of costs

- (a) The purchase price in the contract of sale was \$18.72 million. To pay this, K16,704,545.00 was transferred to Pato Lawyers, which was then remitted in Australian dollars to Tipperary Developments Pty Ltd in Perth, Western Australia.
- (b) This is the late payment penalty incurred at the rate of 9% per annum. The amount of \$100,524.18 represents the part of the "compromise amount" referable to interest (\$97,044.18) plus the additional interest claimed by Katingo on 12 May 1995 (\$3,480.40). The sum of K90,473.69 corresponds to the same components (K87,074.18 + K3,399.49).
- (c) This is the extra amount claimed by Katingo pursuant to the purported agreement that the contract of sale was subject to a fixed exchange rate of \$1.00 = K1.1145. The amount represents the part of the "compromise amount" of K179,298.18 referable to the exchange rate adjustment

(K92,224.00) plus the additional amount (K15,884.30) claimed by Katingo on 12 May 1995.

- (d) This is the total of the additional legal costs claimed by Katingo on 12 May 1995 (\$35,476.91; K34,652.19) plus the legal costs owed by Katingo to Pato Lawyers pursuant to Pato Lawyers' memorandum of 15 May 1995 (\$14,557.22; K14,152.46).
- (e) The amount of \$102,493.88 is comprised of \$16,967.93 (the A\$ equivalent, at the rate of \$1.00 = K1.02, of the sum of K16,635.23 in costs and disbursements due under Pato Lawyers' memoranda issued to the POSFB) plus \$85,525.95 (the total of costs and disbursements under Barker Gosling's memoranda issued to Pato Lawyers). The sum of K100,484.20 corresponds to the same components (K16,635.23 + K83,848.20).
- (f) Stamp duty of \$699,225.00 was paid on 22 March 1995. The POSFB drew a cheque for K614,783.71 to make this payment.

[6.26] WHAT WAS THE FINAL COST OF THE CONSERVATORY?

The purchase price set under the contract of sale was \$18.72 million. However, in identifying the final cost to the POSFB of acquisition of The Conservatory, a number of additional costs have to be taken into account. Some were anticipated, e.g. payment of stamp duty. Others were unexpected, e.g. interest on late payment of the purchase price. Some seem to have been wrongly incurred, e.g. exchange rate adjustments, payment of Mr Anderson's legal fees.

It is estimated that the final cost of The Conservatory to the POSFB was:

- **\$19.78 million, or**
- **K17.67 million.**

