PAPUA NEW GUINEA

[IN THE LEADERSHIP TRIBUNAL]

IN THE MATTER OF A REFERENCE BY THE PUBLIC PROSECUTOR PURSUANT TO SECTION 27 (2) (c) OF THE ORGANIC LAW ON DUTIES AND RESPONSIBILITIES OF LEADERSHIP

AND

IN THE MATTER OF HON SIR MOI AVEI MP MEMBER FOR KAIRUKU – HIRI OPEN & CENTRAL PROVINCIAL ASSEMBLY MEMBER

Hon. Justice Hinchliffe, CBE

Chairman

Magistrate Mark Pupaka

Member

Magistrate Steven Abisai, ISO

Member

Mr. C. Manek - Public Prosecutor with Mr. A. Kupmain

Mr. G. Sheppard with Mr. F. Griffin for the Leader

4th April 2007

TRIBUNAL: Pursuant to powers conferred upon him by Section 27 (7) (e) of the *Organic Law on Duties and Responsibilities of Leadership* (the OLDRL), the Chief Justice by an instrument dated 6th October 2006, appointed this Tribunal to hear, inquire into and determine allegations of misconduct in office by Hon. Sir Moi Avei MP (the Leader), member of the National Parliament representing the Kairuku-Hiri Open Electorate and Central Provincial Assembly member.

This Tribunal's appointment followed a request to the Chief Justice by the Public Prosecutor, whose request followed a referral by the Ombudsman Commission (the Commission), pursuant to Section 29 (1) of the *Constitution* and Sections 17 (d), 20 (4) and 27(1) of the OLDRL. The Commission's referral is dated the 12th of April 2006.

We accepted the allegations against the Leader on 31st October 2006. The Public Prosecutor presented nine (9) allegations, together with a Statement of Reasons. Consequently the Leader became suspended from office in accordance with Section 28 (2) of the OLDRL.

For convenience and space we append the 9 Allegations separately as "Schedule One" instead of setting them out in the body of this judgment.

SOURCES OF EVIDENCE

The evidence we have includes the annexures from the affidavits of the witnesses who testified before us, and of course the oral evidence from those witnesses. We also have before us the evidence provided by the Leader himself. Some documents, either referred to in the witnesses' oral evidence or clearer copies of documents already in evidence, are also before us. The Statement of Reasons – all three volumes – is part of the transcript and records of this Tribunal. However as to which documents in the Statement of Reasons became evidence in this inquiry, and indeed any documents contained in the Statement of Reasons which are not part of the evidence, maybe deduced by a perusal of the affidavits of the witnesses that have testified before us. Each affidavit identifies and exhibits documents from the Statement of Reasons that originated from

the source that each of the deponents of the affidavits represented. In that way the documents that originated from the organisation each of the deponents represent, were able to be tendered into evidence before us. We state that the contents of the Statement of Reasons did not become evidence for the purposes of this Tribunal's proceedings as a matter of course. Only the exhibited documents, identified in the respective affidavits, are in evidence before us. These documents became evidence through the respective affidavits as annexures.

PRELIMINARY RULINGS

We state for the record that we have published and provided reasons for rulings in relation to seven (7) preliminary applications. The nature of those applications and our reasons for each ruling are now matters of record and we see no need to repeat them.

PURPOSE OF THE LEADERSHIP CODE

We think it is important that we state an overview of the purposes of the Constitution, the OLDRL and the Organic Law on the Ombudsman Commission (OLOC) provisions which comprise the Leadership Code. In our view the fundamental aim of these provisions in the legislation is the protection of the integrity of leadership and the integrity of the processes associated with public office (elected or otherwise). In this regard the Commission's duty, we think, is twofold.

In our view the first duty of the Commission is to prevent breach of the Leadership Code by giving directions to those to whom the Leadership Code applies. It seems to us that the Commission is empowered under Section 27 (4) of the Constitution to direct leaders to either refrain from certain actions or conduct or direct them to comply with the requirements of a public office. Section 27 (4) of the Constitution provides:

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(4) The Ombudsman Commission or other authority prescribed for the purpose under Section 28 (further provisions) may, subject to this Division and to any Organic Law made for the purposes of this division, give directions, either generally or in a particular case, to ensure the attainment of the objectives of this section."

This power is restated, albeit in the context of a specific situation, in Section 4 of the OLDRL and that provision provides:

"4. Statement of income, et

- (4) The Ombudsman Commission or other authority may, by notice in writing to a person to whom this Law applies, require him to explain or give details or further details of any matters relating to the statement including
 - (a) sundries and minor items shown in accordance with Subsection (3); and
 - (b) omissions or apparent omissions; and
 - (c) discrepancies in the statement or between it and other statements or other information available to the Ombudsman Commission or other authority."

It seems to us that by issuing directions the Commission must endeavour to advise leaders of their obligations concerning the integrity of public office or, in cases where possible breaches of the Leadership Code is detected or suspected, direct leaders to rectify or correct their conduct. This aspect of the Commission's powers is what we may call pre-emptive or preventative function.

Indeed we think the requirement of the whole set up of the Leadership Code is preventative of misconduct in public office. Therefore if, in any given case, the protection of integrity of public office and restoration of trust and confidence in its processes can be achieved without a referral or prosecution then the purpose of the Leadership Code is adequately served. There would, therefore, be no need for the Commission to refer for prosecution if there is substantial compliance in the terms of any direction. This, we think, is also keeping in line with the essential requirements of the Principles of Natural Justice.

Any failure to comply with a Commission directive is also misconduct. The failure itself would become a prosecutable misconduct under Section 27 (5) (b) of the Constitution. In such instances the original breach, whatever the suspected misconduct that prompted the Commission to issue the direction was, and the subsequent failure to comply, would both be referred for prosecution because further advice or direction may not possibly restore confidence and integrity in public office.

The second duty of the Commission, we think, is to gather evidence of misconduct and refer the misconduct for prosecution, or in certain instances, prosecute misconduct cases [Section 29 (2) of Constitution, Section 27 (3) of the OLDRL]. Referral for prosecution or prosecution, as

the case may be, would happen when the Commission, in the exercise of its discretion, considers that a warning or direction cannot restore the people's respect and confidence in a public office and it is imperative that the misconduct is prosecuted.

The Supreme and National Courts have, in various instances, addressed the purpose of the Leadership Code. However we see no need to discuss the purpose of the Leadership Code in detail. We only make these brief comments to put in perspective our view that the Commission's enforcement of the Leadership Code is both by a system of advice or directions as well as referrals for prosecution. We think penalizing or removing unworthy leaders from public office is principally to instil integrity and confidence in public offices. In the context and perspective of the point we make here, the fact that unworthy leaders are "punished" is only consequential and not the primary intended outcome.

The Supreme Court in the case of SC Reference No. 2 of 1992 [1992] PNGLR came close to saying what we are stating here:

"Firstly, it was contended for the referrer that the proposition that the entire thrust and the primary purpose of the Code is the removal of unworthy leaders should be rejected. It was submitted that the primary purpose of the Code is not the removal or dismissal of unworthy leaders, but rather, as was stated by the Supreme Court in SCR No 1 of 1978; Re Leo Robert Morgan [1978] PNGLR 460 at 464: "to preserve the people of Papua New Guinea from misconduct by its leaders.""

A fuller version of what the Supreme Court said in the Leo Morgan case (supra), which is stated at 464, is that:

"A leader has a duty not to place himself in a position in which he could have a conflict of interests or might be compromised when discharging his duties, not to demean his office or position, not to allow his public official or personal integrity to be called into question, not to endanger or diminish respect for and confidence in the integrity of government and not to use his office for personal gain. And in this connection we consider that the Constitution, insofar as it seeks to preserve the people of Papua New Guinea from misconduct by its leaders, should not be considered a "penal" statute. In requiring a higher standard of behaviour from its leaders than from ordinary citizens, it should not be considered as "penalising" or "punishing" a leader; but as ensuring in the interests of the safety of the people that only persons who are prepared to accept added restrictions on their personal behaviour should become leaders. No citizen need become a "leader"...In interpreting s. 26(1) (f) of the Constitution one must have regard to the intention and spirit of the Leadership Code and the mischief that is aimed at."

We may discuss more on the purpose of the Leadership Code later if we need to. However it would suffice for the moment to say that the sincerity and motives of the Commission maybe questioned and the integrity of its own processes may become an issue, when a suspected case of misconduct by a leader, which could otherwise be corrected by an appropriate directive, is referred for prosecution.

DSG, JDPBPC & MPs DISCRETION

Some important aspects we would also like to discuss as preliminary points are the matters of the Joint District Planning and Budget Priorities

Committee (JDPBPC) and the role played in it by the local Member of Parliament (MP) in utilizing the District Support Grant (DSG).

By law each open MP is entitled to a minimum of K500, 000.00 per year to fund projects and activities in his or her electorate. These funds are called DSG. We are also aware that the DSG is sometimes referred to as Constitution grant. It seems to us that this characterization (Constitutional grant) is because of its origin. The DSG funding is an imperative of Section 95A of the OLPGLLG, which of course is a Constitutional law. Section 95A is not a short section but we must set it out here in full as we will be referring to it throughout the course of this judgment:

"95A. District Support Grants.

- (1) For each year the National Government shall out of monies lawfully available for the purpose, make a District Support Grant in respect of each open electorate
 - (a) one half of which shall be made to the Joint District Planning and Budget Priorities Committee in the open electorate, for the purpose of funding –
 - (i) the rural action programme; and
 - (ii) the urban rehabilitation programme; and
 - (b) one half of which shall be made to the Member representing the open electorate to be used in accordance with District Support Grant Guidelines issued under Subsection (7).
- (2) The minimum amount of District Support Grant shall not be less than K300,00.00 per Open Electorate and shall be determined by the National Economic and Fiscal Commission in consultation with the Departmental Head of the Department responsible for finance matters and the Departmental Head of the Department responsible for planning matters.

- (3) In determining the amount to which Subsection (1) and (2) refer, the National Economic and Fiscal Commission shall take into consideration the details of other grants made available to the Provincial Governments and Local-level Governments.
- (4) The minimum amount of the District Support Grant for each year for each-open-electorate shall be determined by the National Executive Council but shall be not less than
 - (a) K300,000.00 for the fiscal year commencing 1 January 1998; and
 - (b) K500,000.00 for each succeeding fiscal year, for each open electorate.
- (5) The National Government shall, within the first month of each quarter of each fiscal year, make a payment of all monies due for the purposes of the District Support Grant for that quarter to the Joint District Planning and Budget Priorities Committee and to the Member representing the open electorate respectively.
- (6) The monies referred to in Subsection (4) shall be -
 - (a) paid through the District Treasury; and
 - (b) in the case of -
 - (i) the Joint District Planning and Budget Priorities Committee, paid directly to that Committee by the District Treasury; and
 - (ii) the Member representing the open electorate, paid on his behalf in accordance with the District Support Grant Guidelines issued under Subsection (7).
- (7) The National Executive Council shall, from time to time, issue District Support Grant Guidelines relating to the District Support Grant specifying
 - (a) the purposes for which the portion of it payable under Subsection (3) (b) may be used; and
 - (b) the manner in which it shall be disbursed and accounted for; and
 - (c) other administrative arrangements pertaining to it."

The DSG is split into two parts or components [Subsection (1)]. The first half is the 'discretionary component.' It is to be disbursed towards projects and activities at the discretion of the MP. The other half is the 'nondiscretionary component' which is to be utilized to fund projects and activities that are collectively decided upon by the JDPBPC.

We note that by law open members of Parliament have close to total discretion and control on how the entire DSG is spent. It appears to us that in practical terms there is no real difference between the so called discretionary and non discretionary components of the DSG.

Section 33A (1) of the (OLPGLLG) provides for the establishment of JDPBPCs in each District. We consider it necessary to set out in full this provision. It provides:

"33A Joint District Planning and Budget Priorities Committee

- (1) There shall be established, in each district, a Joint District Planning and Budget Priorities Committee.
- (2) The Committee shall consist of -
 - (a) the Member of the Parliament representing the open electorate who shall be the Chairman of the Committee; and
 - (b) [Repealed].
 - (c) the heads of Local-level Governments in the district or their nominees; and
 - (d) any other members not exceeding three in number appointed by the Member of the Parliament representing the open electorate in consultation with the heads of the Local-level Governments in the district.
- (2A) The Member of the Parliament representing the open electorate shall appoint one of the other members of the Committee to act as

Chairman of the Committee in the event of the absence of the Member representing the open electorate from a meeting of the Committee.

- (3) The Joint District Planning and Budget Priorities Committee shall have the following functions:—
 - (a) to oversee, co-ordinate and make recommendations as to the overall district planning, including budget priorities, for consideration by the Provincial Government and the National Government;
 - (b) to determine and control the budget allocation priorities for the Local-level Governments in the district;
 - (c) to approve the Local-level Government budgets for presentation to the Local-level Government and make recommendations concerning them;
 - (d) to draw up a rolling five-year development plan and annual estimates for the district;
 - (e) to conduct annual reviews of the rolling five-year development plan.
- (4) The District Administrator shall be the Chief Executive Officer of the Committee.
- (5) [Repealed].
- (6) [Repealed].
- (7) An Act of the Parliament shall make provision for other functions and powers of, and the administrative arrangements for the Committee.

Subsection (2) (a) thereof makes the MP Chairman of the JDPBPC. Subsection (2) (c) says the head of the local level government (LLG) or his or her nominee is a member of the JDPBPC. Subsection (2) (d) says that up to three people are to be appointed to the JDPBPC by the MP in consultation with the LLG head. Subsection (3) sets out the functions of the JDPBPC, which includes overseeing, coordinating, making district planning recommendations including budget priorities for respective provincial governments and National Government, to rolling five-year

development plans. Subsection (4) makes the District Administrator chief executive officer of the JDPBPC.

So it seems to us that the law [OLPGLLG] favours the MP in the management and expenditure of the entire DSG. There is opportunity for the MP to appoint supporters or 'team players' to the JDPBPC. The MP can, in his or her absence, appoint any member of the JDPBPC of his or her choice to act as chairperson [Section 33A (2A)]. Given this scenario the MP could potentially exert total influence on how the entire DSG, both the discretionary and non discretionary components, are utilized.

DSG GUIDELINES

The DSG Guidelines are issued by the National Executive Council (NEC) pursuant to Section 95A (7) of the OLPGLLG and administered by the Office of Rural Development (ORD).

We note that the DSG Guidelines, first issued in 1998, are still current. We further note that these Guidelines apply to both discretionary and non discretionary components of the DSG. It also applies to and regulates utilization of the Provincial Support Grants (PSG). For the purposes of this matter now before us though, we are only concerned with how the Guidelines regulate the expenditure of DSG and not PSG.

The guidelines define the objectives of the DSG and set out the way in which it is to be spent. It particularly postulates who may apply for project funding, how project proposals are to be prepared and submitted including what other requirements are to be met at that stage, the project

selection and approval criterion, how funds are to be managed and dispersed, and the reporting and inspection and acquittal requirements.

There are five specifically prohibited areas. Whilst the Guidelines state that "in principle, there are no restrictions on the type of projects that can be funded under the RAP so long as the funds are channelled into areas of social, economic and infrastructure", it also leaves matters in no doubt that the DSG is to be invested in infrastructure and in projects that would benefit the District or villages in the District. That is because the guidelines also state, among others, the following:

"Project proposals maybe initiated by any member of the JDP&BPC, Churches, Community Groups, Youth and Gender Groups and NGOs. Any group seeking DSG or PSG project funding must be registered or be a recognised institution or a group recognised by the member. Project proposals must address the needs of the village, be implemented within twelve months and be located in the member's electorate. All project proposals must be submitted using the standard format PROJECT PROPOSAL FORM. Project Proposals for funding under DSG must fill DSG-1 FORM and those for funding under PSG should fill PSG-2 FORM and have them submitted to the JDP&BPC and JPP&BPC respectively. All project proposals must be submitted no later than the end of March."

An individual person's ineligibility for project funding assistance, on his or her own behalf and benefit, is conspicuous in the lack of mention or reference to it. It seems to us the DSG is intended to be utilized only toward projects that would start or capacitate or sustain economic activity

at the district and village level. It seems to us that the DSG is especially to be utilized toward the collective benefit of every one in the district.

The various requirements in the guidelines, particularly the system of project funding qualifications, the stringent project proposals-preparation-formats including requirements for supporting information, project selection and approval criterion, how funds are to be managed and disbursed, and the reporting and inspection and acquittal requirements, all point toward strict management and control of taxpayer funds. It seems to us that the use of the words "discretionary" and "non discretionary" do not mean that the funds are to be utilized in any manner outside the express requirements of the DSG Guidelines.

Before we leave this aspect we must mention that it seems to us the use of the words "discretionary" and "nondiscretionary" in the Guidelines is confusing, and we might add, quite needlessly so. These descriptive words are only contained in the Guidelines and not stated or defined in Section 95A of the OLPGLLG. The words "discretionary" and "nondiscretionary" seem to have been introduced in the Guidelines to distinguish the two DSG components, the expenditure of which is separately controlled by the MP and JDP&BPC respectively. The insertion of these words is an NEC creation and not the work of Parliament. The NEC is empowered under Section 95A (7) of the OLPGLLG to issue the DSG Guidelines.

However, in our view, the reference to "discretionary component" connotes nothing more than a restatement of the legislative (OLPGLLG) intent, which is that the MP has unfettered discretion to singularly select or decide or nominate the projects into which 'his' or 'her' share of the

DSG would be invested. As for the other half – nondiscretionary component – selection or nomination of projects is a collective decision of the JDP&BPC. We think the discretion on the MP does not extend to expending DSG funds outside the scope and limitations of the Guidelines.

We particularly do not accept that the discretion vested in the MP authorises him or her to go outside the scope of the infrastructural and development purposes to which the funds are to be utilized upon.

Section 95A (1) (b) of the OLPGLLG specifically says that the MP's half of the DSG is to be disbursed in accordance with the Guidelines. We think we have said enough to make our point but we may refer to this aspect again at a later time if necessary.

ALLEGATIONS

Having stated all of that we now propose to discuss the 9 allegations and the evidence before us in relation to each one of them. We then propose to identify the most probable conclusions open on the evidence. We will decide whether or not each allegation is sustained on the evidence. We will then consider each accusation in the allegations.

A. <u>ALLEGATIONS 1-4</u>

We wish to deal with Allegations 1 to 4 together as they can be easily dealt with that way. They are related allegations and the charges contained in them are the same or similar.

The first four allegations raise issues of impropriety by the Leader in the application of K250, 000.00, which is the discretionary component of the Kairuku – Hiri Open Electorate 2002 DSG in the period between January and October 2002. The specific charges are that the Leader (a) placed himself in a position in which he had a conflict of interests and (b) demeaned his office or position as member of Parliament for Kairuku-Hiri Open and member of the Central Provincial Assembly and (c) allowed his public or official integrity and his personal integrity to be called into question and (d) endangered and diminished respect for and confidence in the integrity of government in Papua New Guinea. These are failures under Section 27 (1) and (2) of the Constitution which renders the Leader guilty under Section 27 (5) (b) of the Constitution [Allegation 1] Sections 5 (1) & (2) of the OLDRL [Allegation 2] Section 13 (a) of the

Allegations 3 and 4 also charge the Leader with having breached the requirements of the *Public Finances (Management) Act* and for having disbursed the DSG contrary to the expressed and implied conditions subject to which the DSG was allocated to him.

OLDRL [Allegation 3] and Section 13 (b) of the OLDRL [Allegation 4]

respectively.

The evidence before us in relation to these first 4 allegations indicates to us the following:

We note that the disbursements of the K250, 000.00 were mostly in the form of cheques or 'cash' cheques to individuals who then negotiated encashment. We note that the balk of the disbursements were for relatively small amounts. Most of the individual payments were for K1000.00 or less. The rest are under K3000.00. Apart from one cheque

for K10, 542.00 there were only a handful of cheques for sums ranging from K4, 000.00 to K6, 000.00, but mainly for K5, 000.00.

The first DSG cheque for K100, 000.00, dated 24th January 2002, was banked on 25th of January 2002. Bank records show that 5 withdrawals were made between 29th and 31st January 2002. A total of 19 withdrawals were effected on 1st February; 12 withdrawals on 4th February; 5 withdrawals on 5th February; 14 withdrawals on 6th February; 2 withdrawals on 7th February; 6 withdrawals on 8th February; 6 withdrawals on 11th February; 9 withdrawals on 13th February; 5 withdrawals on 14th February and thereafter 1 or 2 withdrawals each during the next several days. By the 3rd week of February 2002, which is in less than a month from the day the cheque was banked, the funds from the first DSG cheque of K100, 000.00 were nearly depleted. Close to 100 cheques were written in that time.

The second lot of DSG, in 2 cheques dated 6th and 20th March, for K50, 000.00 and K100, 000.00 respectively, was banked on 2nd April 2002. Again, as before, withdrawals happened almost immediately. Bank records show that most of the K150, 000.00 was drawn down by 21st May 2002, through over 95 separate withdrawals.

Given this scenario any reasonable person may be prompted to say that if there was any assessment done on the viability of each proposed project for which funds were committed, it must have been a major effort on the part of the Leader and his electoral workers in order for them to assess and approve so many projects in such a short time. However the evidence we have, tends to indicate to us, that assessment on viability of project proposals cannot possibly have been carried out, because we have discovered that records of disbursements compose mostly of the Member's Disbursement Forms and requests for financial assistance from individuals — and not proper Project Proposals. Those documents are dated to show that they were prepared or written out on the corresponding days the respective cheques were written and possibly

We have grouped the various disbursements into the type of activities funded, mainly for the purposes of our own understanding of these matters. As a result we find that a total of about K117, 304.00 was disbursed to groups, and the reminder was paid to individuals.

cashed as well.

Of the disbursements to individuals, the highest amount by far, by type, was disbursements to individuals as school fees. We have identified 68 separate payments totalling K62, 500.00 disbursed as school fees. It seems the vast majority of these were paid from out of the first K100, 000.00 DSG cheque, and that within the first two weeks from it being banked. We note that only 11 school fee disbursements seem to have been made from out of the second lot of DSG, but there could have been more. On a few instances school fee disbursements were paid direct to respective institutions. Whilst we cannot say whether paying for individuals' school fees is one of the intended purposes of the DSG, at least, direct payment to schools would perhaps project an image of propriety, but unfortunately the balk of the disbursements in school fees were made direct to individuals concerned. We are prompted to say therefore that direct payments to individuals cannot eliminate the possible appearance of giving benefits to one's friends or supporters.

In fairness to the Leader we have tried to fit or slot his disbursements into one of the general categories under the Objectives of the DSG Guidelines. However we are unable to place or fit nearly all the disbursements to individuals and most of the other types of disbursements into any category of objectives in the Guidelines. We tried to loosely identify the disbursements generically as "economic activities", under the specific category of "self-employment and income generation". Despite our efforts we are unable to accept that expenditures such as school fees, medical fees, purchase of store cargo, funeral or death related expenses, airline tickets and PMV fares, sports or recreational activities and the like could possibly be characterized as "economic activities" or "selfemployment and income generation". These types of disbursements obviously cannot easily or at all be categorized into any of the infrastructure development objectives of the Guidelines. Most of the Leader's disbursements were for the benefit of individuals or family units only and not for the whole village or district, which is contrary to the requirements of the DSG Guidelines.

We note that the Leader seems not to have funded any infrastructure projects (either new or existing) by the DSG funds in question which would have benefited the district or a village or community in the district. When he gave evidence the Leader tried to differentiate between the discretionary component of the DSG with the non discretionary component and other Rural Action Programme Funds (RAPF). He left it open for this Tribunal to accept that the more permanent, self-reliance or capacity enhancing social and economic infrastructure projects are funded from out of the non discretionary component of the DSG or other RAPFs.

It was pointed out to the Leader that whilst the DSG Guidelines regulated the use of the entire DSG, the utilization and disbursement of the discretionary component of the DSG particularly can only be in accordance with the Guidelines. It was further pointed out to him that the "discretion" was only in relation to the respective MPs' exclusive power to select or nominate projects, and it would not, for instance, mean that the requirement for Project Proposals can be dispensed with or that no viability assessments are to be done or that project inspections are unnecessary. Indeed it did not mean that there was an open handed discretion to use the funds on purposes other than for which these funds

were made available. To this the Leader declared that he disbursed his

2002 DSG discretionary component toward intended purposes.

We gather the Leader wants us to accept that the discretionary component of the DSG is only meant for activities like the type he expended the funds on. The Leader seems to be of the view that the bigger projects, those capable of building capacity or infrastructure and which are for the benefit of the whole district or village, are only funded from the non discretionary component and other RAPFs. Unfortunately that is an erroneous misconception with which we cannot agree. In our view the DSG discretionary component is, and was always intended to be, a key source for district infrastructure development and for capacitating or enhancing or fostering rural economic activity. We think the DSG expenditure activities must closely, if not exactly, reflect the overall aspirations manifested in the DSG Guidelines.

The pattern that emerges from a perusal of the evidence, including the summary of records of payments submitted to the Commission by the Leader; the copy of the Member's Disbursement Forms, copies of the

many request for financial assistance [not proper Project Proposals] and copies of nearly 100 cheques showing relatively small amounts, is that the Leader's 2002 DSG discretionary component was treated as a social welfare fund, and not properly utilized as the district support grant with emphasis on infrastructure that it was always meant to be. Committing sums like K200.00, K300.00, or K500.00 or even K1, 000.00, to individual persons cannot, in our minds, build or enhance capacity in the district or villages. There are no project inspection reports before us to prove if there are any viable projects up and running.

Allegation 1

As we alluded to before, except Allegations 3 and 4 which also charge the Leader with having breached the requirements of the *Public Finances* (*Management*) *Act* and for having disbursed the DSG contrary to the expressed and implied conditions subject to which the DSG was allocated to him, Allegations 1 – 4 assert the following charges in the use and expenditure of the K250, 000.00. We need to restate those charges fully so that we may properly address the accusation raised by each of them in an orderly manner. Because these accusations are repeated in all four allegations what is said for the 1st Allegation is equally valid for the other three unless otherwise stated to be the case.

"(i) deposited those cheques into an account titled "Moi Avei's Discretionary Funds" account No. 968-38670974 held at the BSP Ltd Waigani branch and failed to ensure that that public money was properly applied to the rural infrastructure projects for which it had been allocated; and

- (ii) converted a substantial part of that public money to his personal use and the use of his associates; and
- (iii) made approximately 59 unverifiable and/or improper cheque payments totalling K79, 397.77; and
- (iv) made approximately 37 unverifiable and/or improper eash cheque transactions totalling K71, 910.00; and
- (v) failed to acquit that public money."

[i]

In relation to the accusation in (i) we note that much was made of the Leader having deposited the DSG cheques into an account titled "Moi Avei's Discretionary Funds" instead of the District Treasury as it is supposed to be, in accordance with Section 95A (6) of the OLPGLLG.

We are of the view that there should never be any controversy over this. By law the entire DSG is to be paid through the District Treasuries. It seems to us that the reason why the non discretionary component is thereafter paid by the District Treasury to the JDP&BPC is most likely because the JDP&BPC has the capacity to manage the funds, including assessing project proposals and retaining records for purposes of acquittals and the like. On the other hand the MPs' discretionary component is administered by the District Treasury because MPs would lack the capacity to manage the funds properly, unlike the JDP&BPC. However the MPs would obviously receive project proposals and commit funds. The cheques though are raised and issued by the District Treasury, which the MPs would then present to the respective recipients in accordance with the DSG Guidelines.

The DSG Guidelines give the impression that the MPs' discretionary component will be made direct to the respective MP. In fact we find that in practice the ORD has written out cheques and given them directly to MPs. It does seem to us that that practice is contrary to the clear law in the OLPGLLG. Having thoroughly perused the OLPGLLG we note that in Division 2 of it the broad "Fiscal Regime" is set out. Within that Subdivision D specifically sets out the "Financial Grants and Assistance". Section 95A and 95B [which deals with DSG and PSG respectively] are in Subdivision D. We further note that in all of the related provisions relating to financial grants in Subdivision D; which includes Sections 92 [Economic Grants]; 93 [Development Grants]; 94 [Town & Urban Services Grants]; 95 [Other Conditional Complementary Support Grants]; and 97 [Economic Grants], the grants are to be made available and channelled through the Provincial and District Treasuries.

We must say that this unlawful practice of giving cheques directly to the MPs may have contributed to the laxity in adhering to proper record keeping and substandard accountability or acquittal practises.

Nevertheless we think the argument that there are, or as in this case, there were no District Treasuries at the relevant times, is not strong enough to circumvent the clear requirements of an Organic law. In any event there are Provincial Treasuries and these would be the best alternative where there are no District Treasuries.

However, in saying that we are of the view that Sir Moi is not specifically charged with failing to deposit DSG money into the appropriate District Treasury. We think the reference in the first 4 allegations about where Sir Moi deposited the DSG cheques is not stated as an unlawful activity in

itself, amounting to consequential misconduct. In our view the act of depositing DSG cheques into the "Moi Avei Discretionary Fund" account is not constructed or stated as a charge in itself in the Public Prosecutor's Referral. On the contrary it is the latter part of that pertinent paragraph, about the Leader's failure to ensure that public money was properly applied to the rural infrastructure projects for which it had been allocated, which bears out the unlawful activity.

DSG cheques in the District Treasury accounts, he has unfortunately not stated that clearly. In any case it is the ORD or the Finance Department which must forward the cheques to the District Treasuries, so the failure cannot be safely attributed to the Leader, or any other MP for that matter. Therefore we must conclude that the Leader is here [in (i)] only accused of having failed to ensure that public money was properly applied to the rural infrastructure projects for which it had been allocated.

Having done that, on the bases of all the things we have said about the manner of expenditure of the DSG by the Leader, we must find that the Leader failed to ensure that public money was properly applied to the rural infrastructure projects for which it had been allocated. Consequently we find Sir Moi Avei guilty of misconduct in office in relation to the charge contained in (i).

[ii]

In relation to this accusation we find no evidence that Sir Moi converted DSG funds to his own use, neither do we find evidence that he converted the said funds or any part of it to the use of his associates. The word

"associate" is defined in the OLDRL as "in relation to a person to whom this Law applies, includes a member of his family or a relative, or a person (including an unincorporated profit seeking organisation) associated with him or with a member of his family or a relative." We think this definition is restrictive and not general enough to include, as "associate", any of the individuals or groups of individuals to whom DSG funds were disbursed by the Leader.

[iii, iv & v]

The accusations in (iii), (iv) and (v) are best dealt with together. Sir Moi is accused of having made approximately 59 unverifiable and or improper cheque payments totalling K79,397.77 and approximately 37 unverifiable and or improper cash cheque transactions totalling K71,910.00 and that he also failed to properly acquit those public monies.

One thing is certain, for whatever it was worth the Leader filed acquittals in relation to the expenditure of his electorate's 2002 DSG discretionary component. We cannot say he failed to acquit. Otherwise if there were no acquittals at all, evidencing the various expenditures, we would not have been able to detect the many instances of unauthorised payments or commitments that we said we have detected by way of findings of fact. As far as we can make out most of the cheque or cash cheque payments have been accounted for. In that respect the expenditures are verifiable. Whether those payments were proper or not is another matter.

However, in saying that, we do note that making cash cheque payments is not a prudent practice. It does not equate with good management practice when public funds are involved. Payment records are a primary source of evidence of correct expenditure. Payment records make the accounting and acquitting process simpler and create clear tracks for tracing and verification. Therefore we must say that if it were not for the evidence of summary of records of payments and other documents that have enabled us to conclude that there was misapplication of entrusted funds, we would have readily found fault with the otherwise substandard record keeping displayed by the Leader. In that regard we must re-echo our earlier comment, that the reason why the OLPGLLG requires expenditure of MPs' discretionary component of the DSG to be managed through the District Treasury, is because of the need to keep proper records of the expenditure of public money, something which the MPs may not be properly or adequately capacitated to do.

We have already concluded that the Leader failed to ensure that public money was properly applied to the rural infrastructure projects for which it had been allocated. We found fault with the application of public funds, which, as we said is on the bases of the records available. Therefore we cannot say the records are unverifiable.

Therefore we are not satisfied that there was misconduct on the part of the Leader in relation to the accusations levelled against him in the said paragraphs (iii), (iv) and (v).

Allegation 2

Allegation 2 is in the same wording as the charge in paragraph (ii) of Allegation 1, which is that the Leader used public office for personal gain and or for the benefit of his associates. But by this count the Leader is charged with the breach of Section 5 of the OLDRL, whereas in

Allegation 1 he was charged with the breach of Section 27 (1) and (2) of the Constitution. Sections 27 (1) and (2) of the Constitution are wide, all encompassing integrity provisions whereas Section 5 of the OLDRL creates a specific charge of having used public office for personal gain.

We have already dealt with this accusation in the context of Allegation 1 and we see no need to repeat what we said earlier. We only wish to say that we would not go as far as saying that there is duplicity of charges here. Breach of duties imposed by the Constitution and the OLDRL are separate matters and so we think proffering separate charges is otherwise valid and proper. We further say that there is no evidence to suggest that the Leader personally gained or that he created opportunities for anyone, who maybe considered as his associate, to benefit.

We therefore dismiss the 2nd Allegation against the Leader.

Allegation 3 & 4

For the purposes of Allegation 3 & 4 we wish to deal only with the additional charges or accusations that the Leader breached the requirements of the *Public Finances (Management) Act* and failed to disburse the DSG contrary to the expressed and implied conditions subject to which it was allocated to him. Otherwise the other accusations in the 3rd and 4th Allegations have been fully dealt with above.

Under Section 117 of the *Public Finances (Management) Act* Financial Instructions are issued by the head of the Department. These are to

regulate or manage and control the manner in which public funds, including DSG, are expended.

The Tribunal did not hear any witnesses from the Finance Department.

Consequently we are unable to say what Financial Instructions were in place and if so whether any such was breached.

The accusation that the Leader failed to disburse the DSG contrary to the expressed and implied conditions subject to which it was allocated to him has also already been fully addressed in relation to the first of the 5 accusations we dealt with earlier. We need only repeat our finding that the Leader failed to disburse the DSG in accordance with the expressed and implied conditions subject to which it was allocated to him.

B. <u>ALLEGATION 5</u>

This allegation relates to the Leader's duty to furnish complete acquittals of the discretionary component of the 2002 DSG. The charge contained in this allegation is that the Leader failed to properly acquit that public money, and he thereby did not comply with obligations imposed on him by Section 27 (1) and (2) of the Constitution. As in the first 4 allegations the assertions about the lack of worthy conduct is repeated.

It is particularly alleged that having been issued directions under Section 27 (4) of the Constitution, requiring him to furnish to the Commission a summary of the acquittals made to the ORD for the years 2000 to 2002, by 31st January 2003, prior to receiving further electoral funds from the ORD, Sir Moi failed to provide complete acquittals of the 2002 discretionary component of the DSG as required by the summary of

acquittals for his 2000-2002 electoral funds contrary to the directions. The Leader, by failing to acquit that public money, acted contrary to the requirements of the OLPGLLG, the requirements of the *Public Finances* (Management) Act and the implied conditions subject to which he was given control of that public money. As a consequence of all of these acts the Leader is charged that he is guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

In relation to the charge in this allegation we must say that it is unclear what or which other electoral funds the Leader was allocated in the years 2000 and 2001. We are also unable to say what "complete acquittals" may or would amount to. We say that because the evidence before us is mostly to do with the use of the 2002 DSG discretionary component and there is, as far as we can make out, acquittals for the various disbursements made for the year 2002. The Leader may have been served directions to file acquittals as alleged but as to whether he was late in filing the 2000-2001 acquittals or he failed to do so is not clear to us.

We must therefore dismiss this 5th Allegation against the Leader.

Nevertheless, in the interests of the public at large, we must add the following comments: The Leader committed money towards too many activities in relatively insignificant amounts. This, no doubt, placed him in a situation where he could not possibly acquit every expenditure properly. The Guidelines require the Leader, like every other MP, to furnish copies of Project Proposals, Disbursement Forms and receipts and quotations and the like, including reports of project inspections where appropriate. However when all of the allocated funds are committed in a matter of days or weeks, proper accounting and acquittal can be

extremely difficult. It is also imminently possible for the integrity of the acquittals to be suspected in these sorts of circumstances.

Therefore we are prompted to say that DSG is a Constitutional grant. It is available to all electorates every year. One MP may represent the respective electorate for a minimum of 5 years with no guarantee that he or she would be returned for another term. However the financial grants would always be available to every electorate each year, for as long as the requirement of the law (OLPGLLG) is current. Therefore it seems to us to be a sensible practice for MPs to concentrate on impact projects or activities which can be fully and properly funded selectively across the electorate, mindful always that any part of the electorate, or indeed any proposed project, that miss out in one year would be considered for the next or following years. A minimum number of successful impact projects, sustainable if possible, is a much better option than spreading a quarter of a million kina into so many social welfare type activities, with negligible or no lasting benefit to everyone in the district or villages. Certainly acquitting public money in such circumstances can be needlessly difficult and time consuming. The time and of course expenses involved, the latter no doubt coming out of the DSG itself, can be saved.

C. ALLEGATION 6

The 6th Allegation is a straight forward charge that the leader, whilst being the tenant of a National Housing Corporation (NHC) house, consequential upon a tenancy agreement with the NHC, failed to pay rentals as and when the same fell due. The Leader is charged by this allegation that he, by failing to pay house rentals, became guilty of misconduct in office contrary to Section 27 (5) (b) of the Constitution.

Evidence against the Leader is contained in the affidavit of Walter Kapty, the former Managing Director of NHC. At the relevant times, when the Leader incurred the rental debts, Mr. Kapty was the Executive Director of the NHC. He had exercised powers, among others, of supervision over the Southern Property Division Director and Finance Management activities of the NHC. During the Ombudsman Commission's investigations over this matter, Mr. Kapty had also authorised the collation of documentary evidence from among the NHC records pertaining to the NHC house occupied by the Leader. These records were made available to the Ombudsman Commission which eventually become part of the Statement of Reasons, and consequently, before us as evidence now are the copy records that Mr. Kapty exhibited in his affidavit.

We are able to elicit the following from Mr. Kapty's evidence and the other evidence before us:

Sir Moi executed a tenancy agreement with the NHC on 16th August 1995 over the property described as Section 51 allotment 128, Konedobu Port Moresby, N.C.D. He did not pay the compulsory tenancy fees at the time he executed the tenancy agreement. He also did not pay the K110.00 rental for the property which was payable every fortnight. The Leader made no payments starting from the date the first rental became payable a month after he executed the tenancy agreement on 16th August 1995.

The situation remained that way and the arrears were accruing until the end of May 1998. On 29th May 1998 the Leader made two lots of payments. He paid in the sum of K220.00, which was presumably toward the compulsory tenancy fees that he should have paid upon execution of the tenancy agreement. On the same day the Leader made another

payment of K7, 370.00, quite obviously to pay for most of the outstanding arrears to that point in time, which was about K7, 733.57. That left debit arrears of K133.57.

Then for a period of just short of five (5) years the Leader made no effort to pay rentals as and when the same became due.

The Leader made his second payment on 13th March 2003 when the arrears had reached K13, 883.57. He paid in a sum of K3, 000.00 on 13th March 2003, which left an arrears balance of some K10, 883.57.

Then the unpaid rental arrears began to accrue again and continued for another period of just under two (2) years. The records before us show that the arrears reached a total of K16, 273.57 by 22nd January 2005. The Leader made his 3rd lump sum payment on 1st February 2005. He paid in a sum of K5, 000.00, leaving arrears of K11, 273.57. The total arrears reached about K11, 493.57 on or around 19th February 2005.

Evidentially the Leader thereafter seems to have made permanent arrangements to have direct deductions of his salary and have the deductions credited to NHC around about that time because by 2nd March 2005 regular payments of K660.00 began to be paid to the NHC.

It is clear the Leader owed the NHC and was carrying a liability even soon after he executed the tenancy agreement because he did not pay the compulsory tenancy fees at the time he executed the tenancy agreement. He also did not pay the K110.00 rental for the property which was payable every fortnight. The Leader was never in the clear even when he

was served with the notice, by the Commission, to exercise his right to be heard on allegations of misconduct in office on or around 13th April 2005. For 9 years Sir Moi was in a debt situation in his relationship with the NHC. He allowed years to pass at a time before he acted to pay lump sums, but that did not help because the arrears kept increasing. And eventually this drew the Commission's attention on him.

It has never been altogether clear to us what the Leader is saying against the charge in this allegation to back up his denial of it. He seems to be saying he never received the arrears and other notices. Then he seems to be saying also that he was negotiating the purchase of the house and so he did not have to pay rent. To compound our difficulties in appreciating the Leader's reasons for both the non payment of rent and his subsequent denial of this charge, he has proffered yet other arguments. The Leader seems to say that he really did not feel obligated to pay rent because there was no permanent arrangement with the NHC for him to do so. He has also tossed in the argument that the whole matter is a private one between him and the NHC and that it really is not a Leadership Code issue.

As a leader, Sir Moi was always obligated by law, Section 27 (1) of the Constitution, to conduct himself in both his public and private life and in his associations with other persons in such a way that he did not demean the leadership offices or positions he occupied and also not allow his public or official integrity and his personal integrity to be questioned.

Sir Moi knew he had to pay rent to the NHC, consequent upon the execution of a tenancy agreement with it over the subject property. Also consequent upon the tenancy agreement Sir Moi had exclusive occupation of the property. He certainly never abrogated any rights under

the agreement if living in the house did not suit him and his family's convenience and safety. In fact we note with interest that he has since proceeded to complete purchase of the property. The point we make is that whether he sometimes did not live in the house because of break-ins does not and did not relieve him of his contractual obligations, and certainly it seems not to have discouraged him in his long term interest in the property. The various letters to him from the NHC indicates to us that people were frustrated with the Leader's conduct. That just goes to show how some members of the public were given cause to view the Leader's integrity and the integrity of the offices he occupied in those years. The Leader was receiving substantial fortnightly Housing Allowances at the time and the fact that his fortnightly rental obligation to NHC was only a small portion of that allowance really does not make the Leader's pleas or excuses or his explanations convincing or compelling.

In the end we must find Sir Moi Avei guilty of misconduct in office in that he failed to conduct himself in his public or official life and in his private life and in his association with other persons in such a way that he demeaned the various public offices and positions he occupied and allowed his public or official integrity and his personal integrity to be called into question when he failed to pay to the NHC his rental as and when the same fell due.

D. ALLEGATION 7

By Allegation 7 Sir Moi is charged that between August 1995 to December 2004, he, as a leader for the purposes of the Leadership Code, failed to carry out the obligations imposed by Section 27 (1) of the

Constitution. The Leader is further charged that he failed to carry out the obligations imposed by Section 27 (2) of the Constitution.

Sir Moi is specifically charged that he conducted himself in ways that might be expected to give rise to doubt in the public mind-as to-whether he was carrying out or has carried out the duty imposed by Section 27 (1) of the Constitution, in that he knowingly, recklessly or negligently omitted to disclose to the Commission substantial information in relation to his rental liabilities in his annual statements for six consecutive reporting periods 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, and 2000/2001. Consequently Sir Moi is said to have rendered himself guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Evidence in relation to this allegation is the same as in Allegation 6. It is not disputed that the Leader, during all of the reporting periods between 1995 and 2001, did not disclose to the Commission that he owed money in unpaid rentals to the NHC. Leaders are obliged by law to report liabilities in their annual statements to the Commission. The pertinent law is Section 4 of the OLDRL, which read in part:

"4. Statement of income, etc

- (1) A person to whom this Law applies shall -
 - (a) within three months after Independence Day; or
- (b) within three months after becoming such a person, as the case may be, and at least once in every period of 12 months while he remains such a person, give to the Ombudsman Commission a statement to the best of his knowledge setting out, in respect separately of himself and his spouse and any of his children under voting age —

(h) the liabilities incurred or discharged by each of them during the period to which the statement relates, and the amount of each such-liability."

Any non compliance with the requirements of Section 4 (1) (h) or a Commission direction under subsection (4) thereof would make a leader guilty under subsection (6) (a) or (6) (b) respectively. Because we will recite these provisions further on, for the purposes of our discussions in relation to Allegation 8, we do not state them at this juncture. However we, as stated earlier, find nothing wrong for a leader to be charged with the all encompassing Constitutional provision, Section 27 (5) (b), for a specific breach of any misconduct described in the OLDRL, for after all they both compose of the Leadership Code.

As we have already found in relation to Allegation 6, the Leader was in debt to the NHC. He always owed money to the NHC. He made three (3) lump sum payments but he still had arrears owing despite that. More over the lump sum payments were made years apart at a time. The first payment was made after almost three (3) years of continuous non payment. Then the second lump sum payment was made after the lapse of close to five (5) years (from 29th May 1998 and 13th March 2003). The third lump sum payment was made after almost two (2) years had lapsed.

The evidence shows Sir Moi never declared this particular liability. The leader has informed this Tribunal that he made an honest mistake. This is the same explanation he gave to the Commission in his reply to the latter's notice to exercise the right to be heard.

Yet we think Sir Moi ought to have known or remembered that he had to pay rent to the NHC. He was in lawful occupation of a house that was not his. How could he or anyone, whether leader or not, possibly forget that he had to pay the rent just like any other tenant. It seems to us to be quite telling that this Leader remembered to pay lump sums to partially reduce arrears once in a while, albeit at intervals of years apart. We cannot accept that he forgot his obligations. Certainly his failures were a cause for consternation at the NHC such that he was, over the years, reminded in writing, advising him of his obligations. He must have received the advices or notices of his arrears from NHC because he felt obligated to make partial payments, albeit very irregularly.

We repeat we cannot accept the plea or excuses that he made an honest mistake in the circumstances. For us to do that would be against the evidence available. The Leader, we note, remembered to declare and disclose other similar liabilities at the relevant times.

In relation to this allegation we find Sir Moi Avei guilty of misconduct in office in that he failed to conduct himself in his public or official life and in his private life and in his association with other persons in such a way that he demeaned the various public offices and positions he occupied and allowed his public or official integrity and his personal integrity to be called into question in that he knowingly, recklessly or negligently omitted to disclose to the Ombudsman Commission information in relation to his rental liabilities in his annual statements for six consecutive reporting periods 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, and 2000/2001. We find that Sir Moi Avei rendered himself guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

E. ALLEGATION 8

The leader is charged by this 8th Allegation that he, from August 1995 to December 2004, failed to furnish accurate details on matters relating to annual statements required under Section 4 (1) of the OLDRL in that he knowingly, recklessly or negligently gave to the Commission six annual statements respectively for the 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, and 2000/2001 which were false, misleading and incomplete in material particulars in respect of his rental liabilities. In so failing the Leader is charged that he became guilty of misconduct in office under Section 4 (6) (a) of the OLDRL.

Allegation 8 is a charge that the Leader improperly conducted himself by failing as asserted in Allegation 7. Whereas in Allegation 7 Sir Moi was charged that he was guilty of misconduct in office contrary to Section 27 (5) (b) of the Constitution, he is, by this 8th Allegation, charged that he rendered himself guilty also under Section 4 (6) (a) of the OLDRL.

We note that the Leader has already been charged with not complying with the specific requirements of Section 4 (1) of the OLDRL under Allegation 7, wherein he was accused of being guilty under Section 27 (5) (b) of the Constitution. For the time being we do agree that there is a seemingly duplicitous situation, because the Leader is accused again of being guilty under Section 4 (6) (a) of the OLDRL, which is a more specific provision relative to the breach of Section 4 (1) of the OLDRL. We do not consider that there is duplicity and for the following reasons.

By this 8th allegation the Leader is accused of a different failure but on the basis of the same omissions that founded the failure contained in Allegation 7. The failure or charge in Allegation 7 is grounded upon facts about the Leader not disclosing his rental liabilities to the Commission. However, this time, by Allegation 8, the Leader is also accused of having given the six consecutive annual statements spoken of in Allegation 7 which were false, misleading and incomplete in material particulars in respect of his rental liabilities. Obviously the Public Prosecutor intended Allegation 8 to be substantially different from Allegation 7 and we think it is a different charge in form. The difference we note is in the reference to "false, misleading and incomplete material particulars". These assertions are not contained in Allegation 7. The accusation in Allegation 7 is really a charge that the Leader breached Section 4 (1) (h) of the OLDRL which we have already recited for the purposes of Allegation 7.

Thereby the Leader is said to have rendered himself guilty under Section 4 (6) (a) which provides:

- (6) A person to whom this Law applies who -
- (a) fails without reasonable excuse (the burden of proof of which is upon him) to give to the Ombudsman Commission or other authority a statement in accordance with Subsection (1), or to give any explanation or details required under Subsection (4); or

is guilty of misconduct in office."

The Leader ought to have been charged that he rendered himself guilty under the succeeding provision which is Section 4 (6) (b) which provides:

"(6) A person to whom this Law applies who –

(b) knowingly, recklessly or negligently gives such a statement or explanation, or any such details, that is or are false, misleading or incomplete in a material particular,

is guilty of misconduct in office."

Now in saying all of that we think there really is no prejudice to the Leader because the allegation is in the form and, we think, not in the citation of provision of law. However, nevertheless, having carefully perused the evidence we have before us we are unable to detect any annual statements which contained "false, misleading and incomplete material particulars" in relation to the Leader's rental liabilities. If there are any such statements, these have not been pointed out to us.

We also, for the record, wish to say that we stand by our ruling in the 1st preliminary application, which was in relation to a challenge of the validity of the 9 allegations, wherein we ruled that there was no duplications situation with or in any of the allegations. On its own Allegation 8 contains an otherwise valid charge. It is just that it is not sustained on the evidence before us.

Consequently we dismiss this 8th Allegation against the Leader.

F. <u>ALLEGATION 9</u>

In Allegation 9 the Leader is charged that from August 1995 to December 2004 he failed to cooperate to the best of his ability with the Ombudsman Commission in that he knowingly, recklessly or negligently omitted to disclose to the Ombudsman Commission substantial information in

relation to his rental liabilities in his annual statements for six consecutive reporting periods, thereby contravening Section 23 of the OLDRL.

Section 23 of the OLDRL reads:

"23 Failure to co-operate

A person to whom this Law applies who obstructs, or fails to co-operate to the best of his ability with, the Ombudsman Commission, or other authority or a tribunal in any investigation or proceedings under or for the purposes of this Law (whether in relation to himself or some other person) is guilty of misconduct in office."

The evidence before us clearly does not show that the Leader failed to cooperate with the Commission or other authority or a tribunal when asked to do so, at any time in relation to any investigation or proceedings including this Tribunal's inquiries. The Commission's counsel, Mr. Nemo Yalo, who was a witness in these proceedings, in fact admitted in his evidence that the Leader did not fail to comply with such a request.

We can only say the charge in this allegation has not been made out to our satisfaction. We say nothing further than this. Suffice to say there is no evidence to sustain this last allegation.

Therefore we dismiss this 9th and last Allegation against the Leader.

Mr. Chronox Manek, Public Prosecutor.

Young & Williams Lawyers for the Leader

SCHEDULE ONE

[THE 9 ALLEGATIONS]

Allegation 1:

THAT from January 2002 to October 2002 the Leader failed to carry out obligations imposed by Section 27 (1) of the Constitution;

By conducting himself in his public life and in his associations with other persons in such a way that he:

- (a) placed himself in a position in which he had a conflict of interests; and
- (b) demeaned his offices or positions as member of Parliament for Kairuku-Hiri Open and member of the Central Provincial Assembly; and
- (c) allowed his public or official integrity and his personal integrity to be called into question; and
- (d) endangered and diminished respect for and confidence in the integrity of government in Papua New Guinea;

AND FURTHERMORE the Leader failed to carry out the obligations imposed by Section 27 (2) of the Constitution;

BY using his office for personal gain and entering into transactions and engaging in an activity that might be expected to give rise to doubt in the public mind as to whether was carrying out or has carried out the duty imposed by Section 27 (1) of the *Constitution*;

IN THAT having being allocated K250, 000.00 from the National Government, in the form of three cheques being public money allocated for the development of the Kairuku-Hiri Open Electorate in respect of year 2002, he-

- (i) deposited those cheques into an account titled "Moi Avei's Discretionary

 Funds" account No. 968-38670974 held at the BSP Ltd Waigani branch
 and failed to ensure that that public money was properly applied to the
 rural infrastructure projects for which it had been allocated; and
- (ii) converted a substantial part of that public money to his personal use and the use of his associates; and
- (iii) made approximately 59 unverifiable and/or improper cheque payments totalling K79, 397.77; and
- (iv) made approximately 37 unverifiable and/or improper cash cheque transactions totalling K71, 910.00; and
- (v) failed to acquit that public money;

THEREBY being guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Allegation 2:

THAT from January 2002 to October 2002 the Leader, except as specifically authorised by law, directly accepted on behalf of himself a benefit by reason of his official position;

AND FURTHERMORE except in the course of and for the purpose of his official duties or his official position, used his official position for the benefit of himself;

IN THAT having accepted K250, 000.00 of public money from the National Government in the form of three cheques from the Office of Rural Development, allocated for the development of Kairuku-Hiri Open Electorate, he;

- (i) deposited those cheques into an account titled "Moi Avei Discretionary

 Fund" account No. 968-38670974 held at the BSP Ltd Waigani branch and
 failed to ensure that that public money was properly applied to the rural
 infrastructure projects for which it had been allocated; and
- (ii) converted a substantial part of that public money to his personal use and the use of his associates; and
- (iii) made approximately 59 unverifiable and/or improper cheque payments totalling K79, 397.77; and
- (iv) made approximately 37 unverifiable and/or improper cash cheque transactions totalling K71, 910.00; and

<u>THEREBY</u> being guilty of misconduct in office under Sections 5 (1) and 5 (2) of the Organic Law on Duties and Responsibilities of Leadership.

Allegation 3:

THAT from January 2002 to October 2002 the Leader intentionally applied money forming part of funds under the control of Papua New Guinea to purposes to which it could not lawfully be applied;

IN THAT having accepted K250, 000.00 of public money from the National Government in the form of three cheques from the Office of Rural Development, allocated for the development of Kairuku-Hiri Open Electorate, he;

(i) deposited those cheques into an account titled "Moi Avei Discretionary Fund" account No. 968-38670974 held at the BSP Ltd Waigani branch and

failed to ensure that that public money was properly applied to the rural infrastructure projects for which it had been allocated; and

- (ii) converted a substantial part of that public money to his personal use and the use of his associates; and
- (iii) made approximately 59 unverifiable and/or improper cheque payments totalling K79, 397.77; and
- (iv) made approximately 37 unverifiable and /or improper cash cheque transactions totalling K71, 910.00; and
- (v) failed to properly acquit that public money;

contrary to:

- (i) the requirements of the Public Finances (Management) Act; and
- (ii) the expressed and implied conditions subject to which that money had been allocated;

THEREBY being guilty of misconduct in office under Section 13 (a) of the Organic Law on Duties and Responsibilities of Leadership.

Allegation 4:

<u>THAT</u> from January 2002 to October 2002 the Leader intentionally agreed to apply money forming part of funds under the control of Papua New Guinea to purposes to which it could not lawfully be applied;

<u>IN THAT</u> having accepted K250, 000.00 of public money from the National Government in the form of three cheques from the Office of Rural Development, allocated for the development of Kairuku-Hiri Open Electorate, he;

- (i) deposited those cheques into an account titled "Moi Avei Discretionary Fund" account No. 968-38670974 held at the BSP Ltd Waigani branch and failed to ensure that that public money was properly applied to the rural infrastructure projects for which it had been allocated; and
- (ii) agreed to convert a substantial part of that public money to his personal use and to the use of his associates; and
- (iii) agreed to make approximately 59 unverifiable and/or improper cheque payments totalling K79, 397.77; and
- (iv) agreed to make approximately 37 unverifiable and/or improper cash cheque transactions totalling K71, 910.00; and

contrary to:

- (i) the requirements of the Public Finances (Management) Act; and
- (ii) the expressed and implied conditions subject to which that money had been allocated;

<u>THEREBY</u> being guilty of misconduct in office under Section 13 (b) of the *Organic Law on Duties and Responsibilities of Leadership*.

Allegation 5:

<u>THAT</u> from December 2002 to January 2003 the Leader failed to carry out obligations imposed by Section 27 (1) of the *Constitution*;

By conducting himself in his public life and in his associations with other persons in such a way that he:

- (a) placed himself in position in which he might be compromised when discharging his official duties; and
- (b) demeaned his offices or positions as Minister for Higher Education; Minister for Science and Technology; Minister for Planning and Implementation; Minister for Bougainville Affairs; Minister for Petroleum and Energy and Deputy Prime Minister; member of the Parliament for Kairuku-Hiri Open and member of the Central Provincial Assembly; and
- (c) allowed his public or official integrity and his personal integrity to be called into question; and
- (d) endangered and diminished respect for and confidence in the integrity of government in Papua New Guinea;

<u>AND FURTHERMORE</u> the Leader failed to carry out the obligations imposed by Section 27 (2) of the *Constitution*;

BY engaging in an activity that might be expected to give rise to doubt in the public mind as to whether he was carrying out the duty or has carried out the duty imposed by Section 27 (1) of the *Constitution*;

IN THAT having being issued directions under Section 27 (4) of the *Constitution*, requiring him to furnish to the Commission a summary of the acquittals made to the Office of Rural Development for the years 2000 to 2002, by 31st January 2003 prior to receiving further electoral funds from the ORD, Sir Moi Avei failed to provide complete acquittals of the 2002 District Support Grant "Discretionary Component" as required by the summary of acquittals for his 2000-2002 electoral funds contrary to the directions;

(a) failed to acquit that public money;

contrary to -

- (i) the requirements of the Organic Law on Provincial Governments and Local Level Governments; and
- (ii) the requirements of the Public Finances (Management) Act; and
- (iii) the implied conditions subject to which he was given control of that public money;

THEREBY being guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Allegation 6:

THAT from August 1995 to December 2004 the Leader failed to carry out obligations imposed by Section 27 (1) of the *Constitution*;

BY conducting himself in his public life and in his associations with other persons in such a way that he:

- (a) demeaned his offices or positions as member of Parliament for Kairuku-Hiri Open and member of the Central Provincial Assembly; and
- (b) allowed his public or official integrity and his personal integrity to be called into question; and
- (c) endangered and diminished respect for and confidence in the integrity of government in Papua New Guinea;

<u>AND FURTHERMORE</u> the Leader failed to carry out the obligations imposed Section 27 (2) of the *Constitution*;

BY engaging in an activity that might be expected to give rise to doubt in the public mind as to whether he was carrying out or has carried out the duty imposed by Section 27 (1) of the *Constitution*;

IN THAT having entered into a Tenancy Agreement with the National Housing Corporation in 1995 over a rental property located at Section 51 Allotment 128, Konedobu, he

- (i) being entitled to housing allowances paid to him by the National Parliament on a fortnightly basis; and
- (ii) continued to be the legal tenant of the property; and
- (iii) failed to pay the rentals as and when they fell due;

THEREBY being guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Allegation 7:

THAT between August 1995 to December 2004 the Leader failed to carry out the obligations imposed by Section 27 (1) of the Constitution;

By conducting himself in his public life and in his associations with other persons in such a way that he:

- (a) demeaned his offices or positions as member of Parliament for Kairuku-Hiri Open and member of the Central Provincial Assembly; and
- (c) allowed his public or official integrity and his personal integrity to be called into question; and

(d) endangered and diminished respect for and confidence in the integrity of government in Papua New Guinea;

AND FURTHERMORE the Leader failed to carry out the obligations imposed by Section 27 (2) of the Constitution;

BY using his office for personal gain and entering into transactions that might be expected to give rise to doubt in the public mind as to whether he was carrying out or has carried out the duty imposed by Section 27 (1) of the *Constitution*;

IN THAT he knowingly, recklessly or negligently omitted to disclose to the Ombudsman Commission substantial information in relation to his rental liabilities in his annual statements for six consecutive reporting periods 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, and 2000/2001;

THEREBY being guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Allegation 8:

THAT from August 1995 to December 2004 the Leader failed to furnish accurate details on matters relating to annual statements required under Section 4 (1) of the Organic Law on the Duties and Responsibilities of Leadership;

<u>IN THAT</u> he knowingly, recklessly or negligently gave to the Ombudsman Commission six annual statements respectively for the 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, and 2000/2001 which were false, misleading and incomplete in material particulars in respect of his rental liabilities;

<u>THEREBY</u> being guilty of misconduct in office under Section 4 (6) (a) of the Organic Law on the Duties and Responsibilities of Leadership.

Allegation 9:

<u>THAT</u> from August 1995 to December 2004 the Leader failed to cooperate to the best of his ability with the Ombudsman Commission;

<u>IN THAT</u> he knowingly, recklessly or negligently omitted to disclose to the Ombudsman Commission substantial information in relation to his rental liabilities in his annual statements for six consecutive reporting periods namely:

- (1) 16th July 1995 to 15th July 1996; and
- (2) 16th July 1996 to 15th July 1997; and
- (3) 16th July 1997 to 15th July 1998; and
- (4) 16th July 1998 to 15th July 1999; and
- (5) 16th July 1999 to 15th July 2000; and
- (6) 16th July 2000 to 15th July 2001

THEREBY contravening Section 23 of the Organic Law on the Duties and Responsibilities of Leadership.
