



ROYAL LAND COMMISSION

KOMISONI FAKA-TU'I KI HE KELEKELE

His Majesty in Council,
The Royal Palace,
Nuku'alofa.

Your Majesty,

We humbly submit to Your Majesty the Final Report of the Royal Land Commission on its inquiries into the land laws and practices of the Kingdom.

Dated this 30th day of March 2012.

Baron Fielakepa GCQS
(Chairman)

Lord Tupou KGCQS KC
(Commissioner)

Kahungunu Barron-Afeaki CRH SC
(Commissioner)



FOREWORD

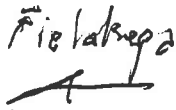
I write this foreword with a heavy heart as the Kingdom of Tonga mourns the passing of His Late Majesty, King George Tupou V on 18 March 2012. I am deeply saddened by this great loss of a King who was admired, loved and respected by His people. Throughout this Commission's journeys people constantly conveyed their heartfelt appreciation to His Late Majesty for the opportunity to be heard and to freely express their aspirations for a land system that is fair and equitable. It is a great honour to present this final report to His Majesty in Council at the very beginning of the reign of His Majesty King Tupou VI.

I give my sincere thanks to the Honourable Prime Minister and the Government of the Kingdom of Tonga for the assistance received from all Government Ministries. I also acknowledge the Honourable Minister of Lands, Survey, Natural Resources and Environment and his staff for their continued support throughout this inquiry. I wish to thank the Governor's Office in Vava'u and the Governor's Office in Ha'apai and the Government Representatives in 'Eua, Niuatoputapu and Niufo'ou. I thank the Tonga Consular offices in Honolulu, San Francisco and Sydney as well as the Tonga High Commission offices in Canberra and (formerly) in Wellington. I thank all District and Town Officers throughout Tonga for their invaluable assistance in organizing our public meetings. I also express my appreciation for the contribution by those who took the time to attend all three phases of the Commission's inquiries and to those who gave us written submissions on land issues of interest. Your views, concerns and proposals provided the foundation for all the 120 recommendations in this report. Your participation

showed that land is a matter that is very close to a Tongan's heart and I hope that your expectations are met.

I give special thanks to Dr. Guy Powles, Dr. Elizabeth Wood-Ellem, Reverend Siupeli Taliai and Mr. Neil Adsett for their insights, advice and technical expertise. To the Commission's Secretary and Secretariat I kindly thank them for their dedication without which this report would not have been possible. Lastly, I thank my fellow Commissioners for their courageous, unselfish and honest contribution to this report.

May God bless you all



Baron Fielakepa GCQS

(Chairman)



EXECUTIVE SUMMARY

Tonga has a very unique system of land tenure. By law, every male Tongan at the age of 16 years is entitled to a tax and a town allotment (clause 113 of the Constitution and section 43 of the Land Act). A tax allotment is land usually with an area of 8 ¼ acres which is normally used for growing crops. A town allotment is a smaller piece of land with a minimum size of 30 perches and a maximum of 1r 24 perches for the construction of a dwelling house.

These allotments are given by a grant and not sold for money. Indeed the sale of land is prohibited under a severe penalty of imprisonment (clause 104 Constitution and section 12 of the Land Act). The only monetary obligation is a payment of an annual rent of 80 seniti to the estate holder in respect of the tax allotment (section 64 of the Land Act).

The other major type of landholding in Tonga is by lease which has certain restrictions. This includes the restriction on a hereditary estate holder's right to lease only five percent of his total estate holding, with the exception of leases to religious bodies and charitable institutions (section 33 of the Land Act). The remaining 95 percent of the estate (subject to the exceptions and land for the personal use of the estate holder and his family) are designated for distribution as tax and town allotments.

This unique system of land tenure was introduced into Tongan law as a result of a visit by His Majesty King George Tupou I to Sydney in 1853 which was described by Rev. Dr. Sione Latukefu in his book *Church and State* (1975) at pages 162-163 as follows:

"There was one experience, however, which left a marked impression on King George and which was later reflected in the 1862 Code of Laws. In Sydney he encountered poverty. It has been said that he saw many poorly dressed people,

obviously ill-fed, sleeping in the parks. He asked about these people, and was told they were homeless people who had no place to go. This state of affairs was greatly surprising to King George, who could not understand how there could be homeless and poverty-stricken people in a land as large and obviously rich as Australia. His heart was so full of pity for the plight of these people that he determined that such an appalling situation should never be allowed to arise in Tonga (informant, Her Majesty the late Queen Salote). The King was also very impressed with the leasehold system of land tenure which he saw in Sydney, and he made up his mind that the land in Tonga should be distributed among his own people on similar lines.

One can observe the influence of his overseas experience in the provision of the Code which compels the chiefs to allot portions of land to the people and as long as they pay their tribute and rent to the chief, they cannot be dispossessed (Clause XXXIV: 6 and 7)."

In his *Overseas Missions of Australian Methodist Church Vol. 1 Tonga and Samoa* [1975], Rev. Dr. A. Harold Wood wrote:

"The most significant result of the visit was the King's [Tupou 1] resolve that there should be no sale of land in Tonga, but only a leasehold system that would retain ownership in the government itself. Prevention of alienation of land to any foreigners was a vitally important policy for Tonga's future." (pp.115-116)

In her written submission to the Commission of 7 July 2011¹, the historian Dr. Elizabeth Wood-Ellem stated:

¹ See Appendix 4

“There is clear evidence that Tupou I’s vision for Tonga was based on his recognition that security of tenure of smallholders was necessary to ensure that food would be assured and plentiful. This was his vision not only for peace and stability in the kingdom, which he would unite under a central government, but also of equality and equity for all Tongans.”

It was into this unique land tenure system that the Royal Land Commission was established under a Commission issued by His Majesty, King George Tupou V on the 9 October 2008 and confirmed by the King in Privy Council on the 10 October 2008 under the powers given by Section 2(1) of the Royal Commissions Act (Cap. 41), “to inquire (without changing the basic land tenure of our Kingdom) into all matters whatsoever concerning the land laws and practices of our Kingdom with a view to providing more effective and efficient practices”.

In pursuance of the terms of reference, careful consideration was given by the Royal Land Commissioners to identifying and prioritizing a range of land issues into order of importance. It became clear from initial consultations shortly after the Commission in October 2008 with His Majesty King George Tupou V, the Prime Minister, Hon. Dr Feleti Sevele, the Minister of Lands, Lord Tuita and other key community leaders that there were a series of pressing issues that were of national concern. These priority areas were divided into three phases to be inquired into by the Commission.

In Phase One, the Commissioners inquired into the workings of all Divisions of the Ministry of Lands, Survey, Natural Resources and Environment (“the Ministry”) and conducted an overall review of the Ministry. This was considered necessary because of reported public dissatisfaction with the performance of the Ministry and long delays with work to finalize the registration of interests and titles to land.

The Commission conducted this review through interviews of employees of the Ministry and site visits to all its Divisions. Assessments were conducted on record keeping documentation and security, filing system, compilation of a database record of all backlog files and the role of information technology in record keeping and files management.

The Commission also conducted study visits of the Land Registry offices in Wellington, New Zealand (LINZ), Apia, Samoa, Singapore and Sydney, Australia. The Commission identified some aspects from these Land Registries that could be adopted in Tonga. One of the Commissioners used the opportunity of a visit to the Cook Islands to carry out a study of the Land Registry office of that country and its practices.

Phase One was completed in January 2010 and an Interim Report of the Commission's findings and recommendations was submitted to His Majesty King George Tupou V on 25 February 2010 and also made available to Government for consideration. A copy of this Phase One Interim Report can be downloaded from the Commission's website www.tongaroyallandcommission.com.

Chapter 5 of this final report deals with the problems the Commission found with the workings of the Ministry under Phase One and appropriate recommendations and legislations have been proposed.

Phase Two involved inquiries into land dealings through the internet which may be contrary to the Land Act and laws of Tonga. This involved land dealings by real estate and commission agents mainly in Vava'u and Ha'apai. No evidence of this kind of activity was apparent in Tongatapu.

This matter was brought to the notice of Government in 2007 by one of the Commissioners, Mr. Kahungunu Barron-Afeaki SC who was then representing dissatisfied clients over land deals in Vava'u made over the internet. A copy of that report was given to Government².

The Commission received written submissions from foreigners and Tongans who were affected by such dealings. Evidence was heard in public inquiry hearings from victims and from others who were involved in these land transactions. The first part of the inquiry was held in Neiafu, Vava'u and ended in Tongatapu.

Phase Two inquiries were completed in April 2010 and an Interim Report of the Commission's findings and recommendations was presented to His Majesty on the 28 May 2010 and also submitted to the Government and the Legislative Assembly. A copy of the Phase Two Interim Report can be downloaded from the Commission's website www.tongaroyallandcommission.com.

The problems revealed in the inquiries by the Commission under Phase Two have been dealt with in the Phase Two Interim Report and also in Chapter 6 of this Report with appropriate recommendations and legislations.

Following a Royal Command by His Majesty to consider giving the status of freehold land to reclaimed land, the Commission gave a written Advice to His Majesty on 3 May 2010. A copy of this Advice is attached to this Report as Appendix 15. This matter is also dealt with in Chapter 3.

Phase Three consisted of wide scope inquiries into the public's views and concerns relating to land laws and practices in Tonga. These inquiries were

² See Appendix 25

conducted in public meetings in Tonga, the United States of America, New Zealand, and Australia where large Tongan populations existed.

The public meetings provided a forum for open dialogue with Tongans on land issues of concern. Proposals and problems raised at these meetings were taken into consideration and form the basis for recommendations to amend the Land Act and change land practices to ensure they are in line with the land needs of Tongans.

The Commission also received 24 written submissions from both Tongans and non-Tongans expressing their views on Tongan land tenures and land practices. These written submissions have been given due consideration by the Commission.

The Commission also had meetings with special interest groups to get their views on Tongan land laws and land practices. These groups included representatives of the banks in Tonga (meetings were also held with the head offices of ANZ Bank in Melbourne and Westpac in Sydney, Australia), representatives of the Tonga Chamber of Commerce, representatives of Women's groups, members of the Tongan Law Society, representatives of church denominations in Tonga, People's Representatives to the Legislative Assembly and Noble Estate Holders.

A proposed Bill to amend the Land Act was submitted to the Legislative Assembly by some Nobles in 2010. The most significant part of this Bill was to transfer the powers for approval of leases from Cabinet, and the power to grant land from the Minister of Lands, to the Hereditary Estate holder where in involves land on his estate. This Bill was referred to the Commission by the Legislative Assembly of Tonga. It was included in the matters referred for discussions at meetings with the public who expressed their views, mostly not

supporting the proposed Bill. The Bill was also discussed with Noble Estate Holders at the meeting referred to in the preceding paragraph.

The Commission also engaged the services of Warrick Ve'a of the Ministry of Lands to help compile statistics on the different types of land holdings and to identify all land that had been registered in an effort to see what land (if any) remained available to be granted to Tongans.

Throughout the public meetings both in Tonga and overseas the Commission identified nine main areas of interests expressed from the public, which were:

- (i) The law relating to succession to land and proposals for change, including to allow adopted and illegitimate sons and daughters of the landholder to be included in the line of succession to an allotment.
- (ii) Women's rights to land and proposals for change including equal rights for women as men under the Land Act including the right to apply for an allotment to register in their names. Some sections of the Land Act, such as section 7, should be amended to allow women to apply for an allotment.
- (iii) Freehold land and the proposal to introduce freehold land only for identified pockets of land such as reclaimed land.
- (iv) Rights of mortgagors and the proposal for the term of mortgages allowed under the law to be reduced and a call for revision of Banks' mortgage policies and practices.

- (v) Leaseholds and the proposal for establishment of an independent body to facilitate the negotiation of leases and offer advice to both the landholder and the lessee on rent, term of leases and other relevant matters. It was further proposed that a lessee should not be able to sub-lease without the consent of the lessor.
- (vi) Abandoned or unused land and the proposal to consider a scheme through which abandoned land could be made available for use by either the family members of the landholder or any other person who needs land for farming or commercial purposes.
- (vii) Rights of Tongans residing overseas who have changed nationality. Tongans in America, New Zealand and Australia did not support any proposal to remove their rights and those of their children to hold registered land in Tonga, where they had naturalized in a foreign country or lived outside of Tonga for extended periods of time.
- (viii) Family Trust over land and the proposal for new legislation to be put in place to enable families to establish a family trust for lands belonging to that family which would supersede the rights of the heir.
- (ix) Foreshores and sea areas adjoining land and the proposal for lease of foreshores to be considered in close consultation with the Hereditary Estate holders of adjoining estates and local residents to ensure that the lessee would contribute to community activities and respect the rights of villagers.

Each of these areas and proposals are discussed in this Report with recommendations from the Commission.

Other areas of interest to the public included:

- (x) The distribution of land to be re-organized to allow more people to own land. This led to the proposal for reduction of the legal size for a town and tax allotment.
- (xi) The need for improvement of the working relationship between hereditary estate holders and the people which could be achieved through the proposal for a specified time period within which a Hereditary Estate holder must make a decision regarding an application for a grant of land.
- (xii) The need to review and improve the land practices of the Ministry of Lands, including computerization of its records as current manual upkeep of land records, under the deeds system is time consuming, cumbersome and unreliable. The Ministry of Lands should also specify a timeframe within which it would complete a land transaction or query from the public.
- (xiii) The consideration of the special use of land by churches and villages and the proposal to create a separate type of leasehold for churches and reservation of land in villages for recreational or sport purposes.
- (xiv) Urgent consideration of people's needs for cemeteries and the proposal for Government to make more land available for use as cemeteries, more efficient burial methods and the need to clarify the laws governing cemeteries and burials.

- (xv) The Land Act should be revised to provide more protection for family lands and more opportunities for the landholder to benefit from his land such as the landholder receiving a share of financial gain if any discovery of natural resources made on his land.

- (xvi) The need to provide assistance to the public in promoting awareness and enforcement of their land rights. This led to the proposal for establishment of a legal aid program to assist people who seek legal advice on land matters or the enforcement of their rights.

- (xvii) The land needs of Tongans living overseas. An heir residing overseas who wished to make an heir's claim (on the death of the landholder) or Tongan lessees residing overseas who wished to lodge the payment of annual rent should be able to complete these land transactions through Government representative offices overseas.

- (xviii) The legal status of certain matters in accordance with the needs of the people such as the question, "should land be separated from the house and other fixtures built on the land?"

- (xix) That development projects should be encouraged to assist Government revenues which should be carried out in a reasonable manner that ensures the retention of land by the landholder.

The Commission has taken these matters of public interest into account and dealt with them in Chapters in this Report.

The Commission also took the opportunity to consider the Report of the 1983 Royal Land Commission. There were many similarities between the issues

considered by that Commission and this Commission. Some of the recommendations of the 1983 Commission fell within those made by this Commission and are re-considered. It appears that many of the recommendations of the 1983 Commission had not been implemented. The Commission suggests that Government consider the 1983 Report taking into account developments since then.

The Constitution and the Land Act were also consistently referred to by the Commission. Where changes have been recommended they have been made with appropriate amendments to the Constitution and Land Act.

This Report will take into account all three phases of inquiry completed by the Commission with an emphasis on the results of wide public consultations under Phase Three. Work completed in Phase One and Phase Two of the inquiries have been considered and updated in this Report.

There are many recommendations made throughout this Report. Some of these are of an urgent nature requiring immediate action. These include the following recommendations:

- (1) Recommendation 26 - to allow claims by the heir and widow and other land transactions through the office of the Government representatives in foreign countries.
- (2) Recommendation 45 - the Ministry should complete the process of surveying and draughting which began in the 1970s to confirm the boundaries of estates to allow the issue of estate deeds.
- (3) Recommendations 46 and 47 - the Ministry to complete its records of registered land to identify land available to grant from each estate.

- (4) Recommendation 67 - to refurbish high safety level storage facilities (strong room) for all original hard copies of land records and maintain back-up copies.
- (5) Recommendations 69, 70, 71 and 72 concerning computerizing land records.
- (6) Recommendation 99 that a working group be formed to develop the formation of the Independent Land Commission and Land Tribunal and to oversee the implementation of the recommendations in this Report.

Legislations have been drafted and are provided in support of recommendations. The Land (Amendment) Bill 2012 has been drafted to modernize the Land Act and make many very small overdue changes to make the law more fair and the Land Act easier to administer. The Commission suggests that this Bill should be easy and simple to accept and recommends its implementation by Government and the Legislative Assembly as soon as possible.

The Land (Amendment) (No.2) Bill 2012 brings in the new institution of an independent Land Commission and a Land Tribunal to help the Minister in making administrative decisions allowed under the Act with rights of appeal to the Land Tribunal on points of law. With the creation of these institutions the work of the Minister and his Ministry will become more efficient and transparent.

A third Bill to cover the remaining recommendations requiring legislation is also attached as the Land (Amendment) (No.3) Act 2012. Some of the amendments will require going outside the terms of reference of the Commission but have been included because of public demands and because the amendments are consistent with the overall principle that is unique to the land laws of Tonga of granting land to Tongans and not selling them. Efficiency in land law practices was also a factor taken into account with this Bill as it was with the others. The

proposed Bill takes into account concerns raised by the public and special interest groups. This third Bill was drafted on the assumption that the first two Bills will have been enacted, and it should be considered only after the enactment of the first two Bills.

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