3.2 LEASEHOLDS

A lease of land can be made by an estate holder (Noble or Government) and the holder of a town or tax allotment. The lease is for a prescribed term of years and ends when that term comes to an end. There are processes for renewal but the law does not allow a right of renewal or an option to renew (section 60 Land Act). Under the law, different rights are given to each type of holding with regard to the term or length of time that the land can be leased. An estate holder has rights to lease out a piece of land for up to 99 years. A town allotment holder can lease his allotment for up to 99 years, but the current practice by the Ministry of Lands limits these leases to an initial50 years.. A tax allotment holder can lease his allotment or a part thereof for only 20 years and a renewal is limited to another 10 years.

Concerns were expressed by people on the restrictions on the time that a tax allotment can be leased, the renewal of leases, the rent and upfront money demanded before a renewal was allowed, the limit of 5 percent of the total estate that the estate holder is allowed to lease out, leasing of internal waters (Fanga'uta) and the foreshore, lease to foreigners and other issues which will be covered in this section. The churches had their special concerns on leases as did the commercial banks and the private sector. The Nobles made their own proposals which are in the Land (Amendment) Bill 2010 that was presented to the Legislative Assembly who referred it to the Commission (see Appendix 11). There were also proposals to set up an independent Commission to deal with much of the issues that were raised by the public.

This section will deal with the various proposals and issues regarding leases with recommendations from the Commission where appropriate.

3.2.1 RESTRICTIONS ON LEASEHOLDS

(i) Increase the term of lease of tax allotments

A tax allotment or a part thereof can be leased for a maximum of 20 years with a renewal of 10 more years (sections 56(iv) and 60 of the Land Act). The reason for this is to protect the heir's right to succeed to the allotment and take possession of it with minimum encumbrances. Lease of a town allotment and from an estate holder can be made for up to 99 years.

To better use the land for economic development, members of the public, the Tonga Chamber of Commerce and Industries and the Tonga Association of Banks proposed that the term for leasing a tax allotment should be increased to be on the same basis as a town allotment and an estate of up to 99 years. When the landholder dies, the heir would continue to receive the rent payments. Such rent however, should not be allowed to be paid in advance for more than a specified number of years.

RECOMMENDATION 29: THAT the restriction on the term of a lease of a tax allotment be removed and put on the same basis as a town allotment provided that the rent on leases of both tax and town allotments shall not be paid in advance for more than 2 years.

(ii) Five percent restriction on leases of estates

An estate holder is allowed to lease up to 5 percent of his total estate, not including land leased to religious bodies and charitable institutions (section 33(2) of the Land Act). The estate holder is also allowed to reserve a portion of the hereditary estate of an "area as may be determined by regulation" for his use (section 34(1) of the Land Act). This has not yet been determined. The rest of the estate is left for distribution to the people.

It would appear that the 5 percent restriction has not been monitored nor fully enforced. The 1983 Royal Land Commission report reveals that some of the estates have been leased to a much greater extent than 5 percent.

***RECOMMENDATION 30**: THAT section 34 of the Land Act is amended to give the Minister of Lands the right to determine portions to be reserved for personal use of the hereditary estate holder on the advice of the independent Land Commission before submitting the same to be prescribed by regulations.*

***RECOMMENDATION 31**: THAT the 5 percent restriction on land that an estate holder is allowed to lease should be strictly enforced with penalties. Areas in excess of 5 percent should on expiration of any current lease be returned to the estate holder for distribution as town and tax allotments.*

A transitional period of two years should be provided to allow the Minister of Lands to ascertain land distribution statistics and estate and allotment boundaries as discussed in Chapter 4 of this Report before penalties can be imposed and enforced.

3.2.2 RIGHTS AND DUTIES OF A LESSOR

(i) Heir's approval to be obtained before land is leased

There was a public suggestion that the heir must give his approval before any land is leased in order to protect his future interest. It was also suggested that if the heir leased the family land then he should share the income equally with his siblings. This is covered in earlier discussion in this chapter.

(ii) Landholder's approval to be obtained before his land is sub-leased

There is no requirement under the law that the lessor must agree before a sublease is made. The suggestion is that this should be a condition of the lease

because the lessor has a continuing interest in the land that is imposed on the heir. The Commission suggests that this restriction can be included in the lease agreement that is signed by the parties and there is no requirement to include in the law.

(iii) Leased land should be returned to landholder in the same condition

Another public suggestion was that leased land should be returned in the same condition as it was when it was granted. This should also be included in the lease agreement and no change in the law is required.

(iv) Form of leases, applications, transfers and permits

Section 124 of the Land Act requires that in regard to leases, the forms of applications, leases, transfers and permits shall be as set out in Schedule IX "with such variations as circumstances may require". The Commission suggests that the parties should be given the freedom to agree and on any variation to the set form of lease they may wish provided it is within the law.

In addition, like the recommendation of the 1983 Royal Land Commission, the name of the real lessor who is the holder of the land, should be on the form and not that of the King as has been the practice to date. The real lessor should sign the lease instead of the Minister of Lands and another Minister.

A compulsory set form that satisfies the statistical requirements of the Land Act and the Ministry of Lands may be a good idea. This set form may also allow the Ministry to process the information much easier. The commercial terms of the agreement should not form part of the set form and could be dealt with by the parties outside the Ministry's set form requirements. Given the serious administration issues at the Ministry, it is likely more processing problems may arise if any form can be used.

***RECOMMENDATION 32**: THAT the parties to a lease are given the freedom to agree on any terms and conditions within the law. The lease form should be updated and made user-friendly to increase efficiency of processing at the Ministry of Lands. The parties shall have the freedom to vary within the law the terms and conditions appearing in the lease form. Amongst other form improvements, the lessor who has traditionally recorded as the King should be changed to now record the landholder as the lessor to the lease agreement and the signatory as lessor.*

3.2.3 RIGHTS AND DUTIES OF A LESSEE

(i) Compensation for improvement of the land

When a lease is granted and the lessee constructs a building and other improvements on the land, it has been suggested that when the lease ends or is not renewed then the lessor should pay compensation to the lessee for the value of the improvements. Again this is a matter that should be considered between the parties before they enter into the lease agreement and what they agree on can be included in the lease agreement. The parties may agree that all improvements will become the property of the lessor at the end of the lease and the rent payments may well take this into account. This has been covered by the amendments to section 124 of the Land Act already recommended.

(ii) Notice of intention to take possession where lessee defaults

Under the current form of lease if the lessee defaults on the payment of the rent for 21 days then the lessor can take possession and sell the assets on the land to recover the outstanding rent. It was suggested by a law practitioner that notice should be given before possession is taken and that it should be made clear in the law that once the outstanding rent is recovered then the lessor must return the land and remaining assets to the lessee.

***RECOMMENDATION 33**: THAT written notice of one month of intention to take possession is given to the lessee before a lessor takes possession of leased land and sells assets to recover the rent. In addition, the law should make it clear that when the lessor takes possession for default of payment of rent that on the recovery of the rent the land will be returned to the lessee. That the notice process is prescribed as follows – the lessor gives a one month notice to a lessee in default; and a month period is allowed to the lessee to make a response. If the response (or lack of any response) from the lessee is unsatisfactory to lessor then the lessor can give notice to repossess the land and dwellings on the land.*

(iii) Facilitate lease payments from Tongans living overseas

Tongans living overseas who have leases in Tonga asked for a more convenient way for them to make their rent payments.

***RECOMMENDATION 34**: THAT the Ministry of Lands provides a way for the payment of rent for leases by overseas residents through Tongan representative offices overseas (such as the Tongan consulate or embassies) or through the internet, taking into account Recommendations 25 and 26.*

(iv) Demand for money before a lease is given or renewed

Public concern was expressed where money was demanded by an estate holder expressly or impliedly before a lease was given or renewed. The same concern was expressed with an application for a town or tax allotment and dealt with above. The Commission considers that these practices run contrary to the general policy of the Tongan land tenure system where the sale of land is prohibited.

***RECOMMENDATION 35**: THAT the practice of demanding the payment of money, whether expressly or impliedly, before a grant or a renewal of a lease is made is prohibited and made an offence.*

3.2.4 PROCESS OF APPLYING FOR A LEASE

An application for a lease is made to the estate holder or the landholder. A prescribed form in the Land Act is filled in by the parties which identify the land, the annual rent, the term of years and the purpose for which the land will be used. The application is lodged with the Ministry of Lands and once approved by the Minister of Lands, is forwarded to Cabinet for approval. All leases, subleases and renewals require the approval of Cabinet.

The Land (Amendment) Bill 2010 proposed by the Nobles (see Appendix 11) inter alia, removed the power of approval from Cabinet and gave it to the estate holder where the lease is from his estate including town and tax allotments in his estate. A large majority of the public did not agree with the proposed change and preferred the approval to be left with Cabinet. Some expressed concern at the delays in obtaining the approval of Cabinet and suggested that the approval be made by the Minister of Lands. Delays in the process have been identified throughout the Commission's inquiries and in the Phase One Report (see Appendix 5). These systematic delays arise from within the process of the Ministry after receiving the application and before making the submission to Cabinet. If an independent Land Commission was established, the approval of leases could be made by the Minister of Lands on the advice of the independent Land Commission and should, for example speed up the process.

The Commission makes no recommendation at this stage. However, the proposed transfer of the power to approve leases from Cabinet to the Minister of Lands and the establishment of an independent Land Commission (whose functions will include advising the Minister of Lands on the approval of leases) are discussed later in this Report.

(i) Independent body to give advice

Because of the problem some people have had with leases and their renewals there was a suggestion that Government set up an independent body or branch who the public can consult for advice on leasing land. Such advice would normally be given by lawyers and estate agents but costs would be involved. There is also the question of the independence of such a body or branch of Government.

Separate suggestions for an independent Land Commission were made by Reverend Siupeli Taliai, Dr. Elizabeth Wood-Ellem and Dr. Guy Powles. Although different in some respects the aim is to have an independent body that will be responsible to provide equitable treatment to the land rights of all under the law. Discretionary powers in the Land Act now with the Minister and Cabinet will be given to the Minister to exercise on the advice of that Commission. The aim is to get more efficiency and fairness into land practices. This proposal will be discussed further together with the proposal for an independent Land Commission in Chapters 5 and 7 of this Report.

(ii) Church leases

The Commission met with church leaders in one of its special interest group meetings. Following this meeting, a written submission from church leaders was submitted to the Commission and is attached to this report in Appendix 13.

Leases to churches have become a major public topic of discussion with the news of the renewal of the lease of the Free Wesleyan Church for its school Tupou College (Toloa). It was reported that the estate holder requested $2,000,000.00 as an upfront payment before the renewal was to be granted and also an additional $50,000.00 per annum in rent. It is believed that the church is still negotiating the renewal with the estate holder.

The Commission understands that the basic land tenure of Tonga revolves around the granting of land for no payment (except that of the 'pepper corn rent' of 80 seniti per year for a Tax allotment). Estate holders are allowed to lease only 5 percent of their estate, *other than land leased to religious bodies and charitable institutions* (section 33(2) Land Act). The remainder of the estate is subject to distribution as town and tax allotments subject however to a certain part which the estate holder can keep for his own use (section 34(1) of the Land Act). The question one asks is why are the leases to churches and charitable organizations exempted from the 5 percent lease limit? The only credible answer is that these leases were, traditionally set at a considerably low rent in view of the charitable work of these institutions. In fact history has proved that these leases have sometimes been for very low rentals of one seniti (peni taha) or more, and are commonly known as a *pepper corn rent.* We believe that even today this pepper corn rent is still used in many of the church leases.

It was not surprising therefore that concerns were expressed by the public and church leaders over leases and renewals to churches and to church schools with various proposals to resolve these concerns.

(a) *Special consideration of church leases*

It was proposed that special consideration was given to the lease of land to a church in light of the purposes of a church and the schools they run. Rent should not be set too high (at commercial rates) and lease renewals should be made easy. Church schools provide necessary education to the children and youth of our country. They are not operating for profit. It was therefore suggested that the Government should pay the rent for the lease of land for church schools.

***RECOMMENDATION 36**: THAT rent on leases to churches and charitable institutions are kept low and Government considers paying for the lease rentals for church schools. The rent should be set by Government or the independent Land Commission. Should commercial ventures be undertaken by churches on any land it has leased then Government should not pay for the rent.*

(b) *A single lease to cover all purposes of leasing land by a church*

There was also a request from the church leaders that they be given only one lease to be used for the different purposes of the church like a chapel, church halls and similar purposes. This may be difficult under the present law which requires that the purpose of each lease must be identified. All the purposes mentioned here may find a common purpose of *charitable purpose* but other common purposes may be used to satisfy the requirement of the law.

***RECOMMENDATION 37**: THAT a definition of "Charitable Purposes" is provided so that all the church's purposes are covered under the one lease.*

(c) *Perpetual leases*

A suggestion for churches to have *perpetual lease* of 999 years may not fit well with our land tenure system because it is tantamount to freehold. A difficult decision will be required as to which religious body or charitable institution would be entitled to such a lease. As the name indicates it is perpetual or "everlasting".

(d) *Too much land is held up in church leases*

A suggestion from the public that less land should be leased to churches so that more is available for distribution to the public needs careful consideration based on correct record of the different land holdings on each estate today. The other choice is to include all leases to churches and other charitable institutions in the 5 percent limit that estate holders are allowed to lease. This will make clear that

95 percent of the total estate of every estate holder (apart from land for their personal use) is to be distributed as town and tax allotments.

(e) *Allowing a lease despite an objection from the estate holder*

Public proposals were also put that the Minister of Lands and Cabinet should fully use and enforce their power under section 36 of the Land Act to allow a renewal of a lease in spite of an objection from the estate holder. The Commission is of the opinion that there is always the legal remedy of the Writ of Mandamus available to a lessee if he is not satisfied with the Minister carrying out his duties required by section 36.

(f) *Churches to own registered land like a natural person*

Another suggestion was that churches be allowed to own an allotment like a natural person. A church can therefore have a piece of land registered in its name without the requirement to lease. This was a novel suggestion which could be outside the work of the Commission as it required a change to the basic land tenure, which allowed a natural person to be registered as the holder of an allotment as opposed to a lease. It does not allow a legal person (who is not also a natural person) including religious bodies and charitable bodies to have such holdings, which includes strict rules of inheritance.

(iii) Lease of Internal Waters (Fanga'uta)

Fanga'uta has been a breeding ground for fish and other marine organisms for generations. It has also been the source of food for surrounding villages. Through the years the Minister of Lands on behalf of Government allowed people to reclaim, lease and register as a town allotment some coastal parts of Fanga'uta to build homes and for other purposes. The latest lease by the Minister of Lands which has brought some public re-action is for an area of 471 acres around the island of Siesia by a group to develop as a resort and marina

known as the Lomipeau Project. The concerns by the public were expressed to the Commission in particular by people of Folaha, Nukuhetulu, Vaini, Pea, Veitongo, Havelu and Ma'ufanga who have been getting shell fish, fish and other marine life as food for generations. Their fears revolved around the loss of these sea foods and the likely impact on the environment with the construction activities that will be involved over a large area by the Lomipeau Project. A petition to the Legislative Assembly was lodged in September 2010 to stop the Lomipeau Project until an independent environment impact assessment has been made. An environment impact assessment was already underway when this petition was filed. A copy of this petition was given to the Commission. Those involved in the Lomipeau Project have held public meetings with the people in particular those villages who are concerned about any harmful impact including loss of sea food. An environment impact assessment has been completed and is in processing with the Department of Environment.

A policy and special legislation may be considered for Fanga'uta and its future use which will require studies by people with special skills in the marine life of the area and the impact on the environment. There have been a number of environmental studies already conducted on the Fanga'uta lagoon over the past decade. They provide a reasonable snap shot of the deteriorating state of the lagoon from silting and human use. This deterioration has taken place without Lomipeau's presence or starting any activity so far. The Lomipeau project aims to dredge and open up disappearing channels and re-introduce 'fresh sea waters' back into the lagoon entrance area to enhance the regeneration of marine life. The area is over fished and marine life is degenerating mainly because of human activity. This matter is discussed further in Chapter 4 of this Report.

(iv) Lease of the Foreshore

The foreshore, also more commonly known as beach frontage in the Constitution, covers the area which is 50 feet (15.24 metres) above high water mark. The foreshore belongs to the Crown and can be leased by the Government *for erecting of a store, jetty or wharf* and the Minister of Lands, with the consent of Cabinet, has the power to grant such a lease (Constitution, clause 109).

(a) *Conflict between section 113 of the Land Act and clause 109 of the Constitution*

Section 113 of the Land Act is slightly different in that it also allows the Minister, with the consent of Cabinet to grant *permits to reside on any portion thereof and lease for the same purpose*. There appears to be a conflict between clause 109 of the Constitution and section 113 of the Land Act as the Constitution does not cover permitting or leasing the foreshore for the purpose of residing.

RECOMMENDATION 38: THAT the conflict between clause 109 of the Constitution and section 113 of the Land Act should be resolved by appropriate amendments to allow or not allow the leasing of the foreshore for the purpose of residing. The practice of the Minister of Lands in leasing the foreshore has to comply with the law.

(b) *Consultation before leasing of foreshores*

People have complained that parts of the foreshore adjacent to their registered allotment have been leased to others thereby impeding their open space and access to the sea. They also suggest that any lease of the foreshore should be to people of the adjacent village who have customary obligations to the estate holder and contribute to the welfare of the village. Others have suggested that the foreshore should not be leased but kept open for the use by the public. The Commission suggests that the Minister of Lands should consult with the estate holder and locals in estates adjoining the foreshore to be leased.

(c) *Access to foreshores*

The Commission was informed in one of the public meetings in the Ha'apai group that when they would go fishing and need to rest in the foreshore of another island, they were chased away by the residents of that island and it is understood that this is common in coastal communities designated under the Fisheries laws. The foreshore belongs to the Crown and should be open for the use by all the public. Government and the Ministry of Fisheries need to clarify the right of access and use of the foreshore and surrounding sea to all and especially those in the outer island groups.

(v) Lease to foreigners

There was a desire expressed that when land is made available for leasing, priority should be given to a Tongan national. This concern appears to have come about because of the influx of Chinese and their taking over local stores and their leases. Such a desire may be difficult to legislate in view of the Constitution with its provision against discrimination on the ground of race and also in light of international conventions against discrimination.

Much concern has been expressed by the public regarding the influx of Chinese into Tonga. However, it is the Commission's view that much of these concerns are not properly founded including the allegation that there are very large numbers of Chinese living in Tonga who are 'buying up' large tracts of land and thereby dispossessing the Tongans.

3.3 MORTGAGES

Mortgages were first introduced to Tonga in 1976 with an amendment to the Land Act that allowed land to be mortgaged as a security for a loan from the bank or other authorized lenders. This was a necessary consequence of the introduction of the first commercial bank to Tonga in 1972, the Bank of Tonga which is now the Westpac Bank of Tonga.

A mortgage is a security that the bank takes for the money it has lent to the borrower. The bank is the *mortgagee* and the borrower is the *mortgagor.* In the event of a default on repayment of the loan, the bank can use or sell the mortgaged property to get its money back. Because there is no freehold land in the land tenure of Tonga, the bank is actually selling a lease of the land for the remainder of the term of the mortgage.

Due to the current world recession, there have been a large number of public notices recently by the commercial banks in the local newspapers inviting tender for the sale of properties because of default by the mortgagee. This has drawn the attention of the public to mortgages and has been reflected in their comments at the public meetings with the Commission. The views of the banks were given in a written submission and also at meetings the Commission held with ANZ Bank in Melbourne and Westpac banking Corporation in Sydney, Australia. The written submission from the Tonga Association of Banks is attached to this Report in Appendix 14.

3.3.1 TERM OF MORTGAGES

The maximum term of a mortgage for a town or tax allotment or a part of a hereditary estate is 30 years. This means that should the bank take possession of a landholder's allotment or estate, they can only do so for no more than 30

years. The land will then revert to the landholder or his heir. A lease, however, can be mortgaged for the remainder of its lease term.

Some people view the maximum term of 30 years for a mortgage as too long. They proposed a reduction in the maximum term to be commensurate with the amount borrowed and to shorten the period that a person will mortgage his land. The banks on the other hand say that the maximum term is too short for a loan for developmental purposes. The longer the term the more likely that the bank can get a buyer to get back its money upon default by the borrower. A buyer (in a mortgage sale) will not want to buy an interest in land that will only be for a short time. It was also pointed out that the shorter the term the greater the rate of repayments required of the borrower.

A suggestion was made by the public to give the borrower an option to give a longer term because of the requirement for development. If such an option is allowed then the borrower would need to be informed clearly what he was agreeing to and the consequences of a default.

RECOMMENDATION 39: THAT a mortgagor be given the option to have a mortgage for a term longer than 30 years because of development purposes for which a loan is required.

3.3.2 PURPOSE OF A MORTGAGE

Under current law, the money received by the mortgagor by mortgaging an allotment or a part of a hereditary estate has to be used for the improvement of those lands (sections 100(1)(iii) and 101(1)(ii) of the Land Act).

The banks expressed concern with this limitation in their written submission. They argued that from their experience, the limitation hinders the economic development of the landholder as he will not be able to use the loan for

development of a business or other personal requirements such as the education of his children. In some instances people had reverted to surrendering their allotment so that it can be leased then a mortgage is taken over the lease satisfying the requirement of the borrower as the purpose of the mortgage is not restricted on a lease. This is a long process which has the effect of the landholder having only a leasehold interest over his land.

RECOMMENDATION 40: THAT the purpose for which the loan under a mortgage is made should not be restricted and Section 100(1)(iii) and 101(1)(ii) of the Land Act should be amended accordingly.

A suggestion was made to allow the use of what is commonly known as "all money mortgages" in Tonga. This kind of mortgage would in effect secure an overdraft with the bank for whatever amount without the necessity of going through the process of applying for a variation of the mortgage. "All money mortgages" would be allowed once the restriction on the purpose of a mortgage was removed as recommended above.

3.3.3 SEVERANCE OF HOUSE FROM LAND

Under current law, a house or any other fixture on the land does not form part of the land. Each can be subject to different ownership. This is highlighted with the land deals in Vava'u that are reported in the Phase Two Interim Report (see Appendix 6) and also reported in Chapter 6 of this Report dealing with real estate agents.

The separation of the house from the land has caused some problems to the banks with mortgages. The land gains more value if the house is included. The land may be for example, registered in the name of the eldest son but the house was built by the younger siblings.

Without freehold title and with the current land ownership laws in Tonga, the Commission supports a change of law to merge land and fixtures. Further discussion and appropriate recommendations are made in Chapter 6 of this Report.

3.3.4 REVIEW OF LIMITATIONS

The loss of a family home because of a default in the payment of a mortgage can have a devastating effect on a family.

(i) Restrictions on mortgages over town allotments

It was suggested that greater restrictions are placed on applications for a mortgage of a town allotment to help reduce family homes being forfeited to the bank and the family in effect being left homeless. This could of course be seen as interference with the freedom of an individual to make up his own mind especially when Tongans are well educated and have access to proper advice. This concern should however be kept in mind and reconsidered in the future.

(ii) Heir should consent to a mortgage before it is approved

There was a suggestion that the heir must give his consent to a mortgage being sought by the landholder. There is a valid concern for the heir in this situation which should be dealt with in the family and not require legislation.

(iii) Size of land subject to a mortgage

A suggestion was made that the size of the land to be mortgaged should be equated to the amount of the loan. This is a matter for the bank and the borrower to agree on.

(iv) Interest rate on mortgages should be reviewed

Another suggestion was to review the interest rate that banks charge on mortgages. This is a matter for the bank and the National Reserve Bank of Tonga to consider bearing in mind the country's economic status.

(v) A widow should be able to lease or mortgage land over which she holds an interest as a widower

The Commission supports the suggestion for the widow to be allowed to mortgage her land interest as a widower, with the consent of the heir. Similarly support was given for leasing by the widow on the same condition. The appropriate recommendations were made above.

(vi) Condition of mortgaged land when it is returned to the landholder

Land that was sold on a mortgagee sale should be returned in the same condition that it was in when the sale was made. This should be included in the terms of the mortgage agreement and also in the sale agreement.

(viii) Public awareness programmes

A public awareness programme was suggested to educate people about their rights and duties under a mortgage as well as the consequences of their default in paying the loan. This is well intended and should be considered by the Government.

(ix) Bankruptcy laws

There is no bankruptcy law in Tonga since the repeal of the that part of the Civil Law Act where English statutes of general application were applied in the absence of a Tongan law. Tonga needs to enact its own bankruptcy legislations to assist economic development. The bank also supported the need for bankruptcy legislation to help with their defaulting customers. The Commission supports the enactment of bankruptcy legislation and leaves this matter to be

considered further by Government. The Commission notes that even with the introduction of bankruptcy that the current maximum term of 30 years remains the same for land to be possessed by a bank, should a landholder be adjudicated bankrupt.

(x) Independent body to provide advice on mortgages

A suggestion was made that an independent body be set up to advise the public before they enter into a mortgage. Such advice would normally be given by a lawyer but that would be at a cost. This body would also give advice on the value of the property so the landholder knows what he can ask the bank to loan him. A similar independent body was suggested above to give advice with leases. The Commission considers that such advice should be left to lawyers and the private sector.

(xi) Discharge of mortgage

It was suggested that section 108(4) of the Land Act should be amended so that it is the mortgagee or his lawyer who certifies or signs correct the discharge of a mortgage. When a mortgage is to be discharged it means that the mortgagor's obligations under the mortgage have been met and the mortgagor no longer has any interest in the mortgage.

RECOMMENDATION 41: THAT section 108(4) and Form 5 of Schedule VIII of the Land Act is amended so that it is the mortgagee or his lawyer who certifies that the discharge of the mortgage is correct for the purposes of the Land Act.

3.4 PERMITS

Under section 14 of the Land Act, a permit is required before a foreigner can reside or occupy any land. Such permit is issued by the Minister of Lands. This process is not used very much today but it still remains as part of the law.

In the Land (Amendment) Bill 2010 from the Nobles (see Appendix 11), it was suggested that permits be required only where the foreigner occupies the land for commercial purposes. This will have the effect of not requiring a permit for a foreigner occupying the land for anything other than commercial purposes.

Because widows are not allowed to lease her holding under the present law, a practice has evolved where the widow issues a permit under section 14 which ends on her death or re-marriage.

The Commission suggests that the requirement of permits for foreigners is something of the past which is not used today. It should therefore be removed from the Land Act. In its place, a regime of Tenancy Agreements is suggested. This matter is discussed further in Chapter 6 with appropriate recommendations.

3.5 FREEHOLD

Freehold land is land that one holds with considerably less restrictions or encumbrance than a Tongan landholder has. You can do as you wish with that land, sell it or give it away. Such freehold land holdings are common overseas, yield high returns and encourage foreign investors and development projects because of what is understood to be the complete ownership and security of land title.

The land tenure system of Tonga does not provide for any freehold title. This was an essential part of the land system that began with King George Tupou I which was based on leasehold titles and the distribution of land to the people to have a home and land to grow crops for their use. The sale of land is prohibited by the Constitution (clause 104) and the Land Act (section 12), which makes it a criminal offence that is subject to a maximum of 10 years imprisonment.

His Majesty, King George Tupou V, requested the Commission to inquire into the possibility of creating limited freehold titles in Tonga in respect to reclaimed foreshore land from the sea. The Commission gave a written Advice to His Majesty on 3 May 2010 and a copy of this Advice is attached to this report in Appendix 15. The Advice indicated that it was possible to create new freehold land with land that had been reclaimed from the foreshore (sea water front) or lagoon area with new legislation.

One of the matters raised for consideration was the prohibition on the sale of land in Tonga under the Constitution and the Land Act and the reason for that prohibition and the difference that will be made with a freehold title. What are the advantages of a freehold title in limited pockets as opposed to the present system where the sale of land is prohibited?

The freehold suggested for Tonga is only in respect of land that has been reclaimed from the sea. The foreshore and the seabed beyond are owned by Government. Therefore Government would control the creation of freehold land by identifying which area would be reclaimed bearing in mind the impact on the environment and the interests of the local community. Government would possibly use such land as it wished including selling it for the benefit of the country.

The advantage that freehold of reclaimed foreshore land would have is that such land can be made attractive for investors in constructing infrastructures for tourism and other businesses that would be beneficial in the development of Tonga. The leasing of land under the present system is less attractive to foreign investors.

The prospect of having land with freehold title was discussed at meetings with the public who expressed their views as follows:

(i) it will eventually lead to the sale of hereditary or family land;

(ii) it will benefit only the wealthy who will have enough money to buy freehold land;

(iii) reclamation will impact the environment and sea organisms.

(iv) it will impact on the rights of people living next to the foreshores.

These are matters that would be fully considered by the Government, with public consultations if necessary, before reclamation of the sea is given effect.

The views in favour of freehold were:

(v) it would make more land available for distribution;

(vi) it should be reserved for Tongans and those within the immediate vicinity to the reclamation;

(vii) that the reclamation of the such new lands should be limited only to lagoon areas.

The total area of land proposed to be reclaimed and possibly declared freehold land is very small. The Commission identified small parts of the coastal areas in Nuku'alofa (Tongatapu), Neiafu (Vava'u) and Pangai (Ha'apai) that could be reclaimed and declared freehold for development purposes. The Ministry of Lands provided images of these identified areas and provided a calculation of these areas, which amounted to a total of 0.14 percent of the total land area of Tonga – a very limited area of land for consideration for freehold land. A copy of the calculation and the images of identified areas are attached to this Report in Appendix 16.

Samoa has limited pockets of freehold land that comprises only 12 percent of the total land area. The remainder of land is held under traditional land titles. The presence of freehold land has not negatively impacted on their economy, their culture and traditional land ownership.

***RECOMMENDATION 42**: THAT Government, after a consultation process, is given the right to identify limited coastal areas, including the lagoon area that it may reclaim or allow to be reclaimed and hold as freehold land to be used for the benefit of the country. Such freehold land may be sold.*

An interesting suggestion was made at the meeting with the ANZ Bank in Melbourne to designate areas that would have a special status which would take them outside the restrictions of the present land tenure system. This will encourage overseas investors and promote economic development. This would

involve the zoning of areas for special designated purposes such as tourism, industrial and a business district.

This would involve a change to a different type of land ownership for these areas, to freehold land, and puts it outside our terms of reference of "*without changing the basic land tenure*". In spite of this, the Commission feels that the suggestion should be brought to the notice of Government to be considered as it involves future development for Tonga and could be beneficial to the country. As such, no legislative amendment is proposed at this stage.

The zoning of land for special designated purposes is common and successful in other countries and quite evident in our Pacific neighbours to their benefit. Fiji for instance has successful examples of special zoning for hotels and other tourism facilities which make these areas attractive to investors. The same could be implemented in Tonga.

***RECOMMENDATION 43**: THAT Government considers designating certain zones for specific purposes such as tourism facilities and accord them freehold title.*

3.6 FAMILY TRUST

A Family Trust can be created by agreement among the family members of how the family land and its interests could be managed, maintained, divided and shared among the family. Such an agreement is not provided for in the Land Act and therefore illegal by virtue of section 13 of the Land Act.

The alternative view was that the law is silent on this topic and therefore should a family trust be formed it would amount to an informal agreement between family on whatever they decide to include in that agreement. Many family agreements over how they look after their family land already exist today but they have not been called a 'Family Trust'.

The agreement, under the current laws, would be unenforceable as it would appear to deprive the land owner and heir of some of their rights under the Land Act. However, where families share a collective outlook to looking after the family land, and the legal landholder and heir also agree then it becomes a very useful and constructive vehicle for the family.

Family Trusts are used in New Zealand and other Pacific countries for the benefit of the family. This is relatively easy in these countries where land is held in a freehold title. In Tonga where land is held subject to inheritance by an heir, the matter could be a little more complicated. The Family Trust would have the effect of taking away the right of the heir to inherit the land and put it in a Trust for the benefit of members of the family including the heir.

When the idea was put to the public there was a lot of support for allowing the creation of a Family Trust with the option for each family whether to have the land in the Family Trust or leave it to the heir as present. The concern expressed

by some members of the public was that in some cases an heir had divided his land and gave this to others outside the family circle and the heir's siblings were left without any interest in the family land. It is because of such situations that people have expressed support towards the creation of a Family Trust. At this stage, it is really something to be considered carefully by each family according to their individual situation and future plan.

The Commission draws attention to the fact that this would remove the right of the heir to succeed requiring a change in the basic land tenure and is therefore outside its terms of reference. However, the Commission feels that such a choice should be made available to the heir and his family to create a Family Trust.

Providing the heir with the option to enter his land into a Family trust and forfeit his rights of inheritance can be seen as being akin to his right to surrender land to another legal entity but, not the estate holder. An amendment to the Land Act would be required but, this pathway could now be construed as being outside our terms of reference. Creation of a Family Trust would create a legal person not unlike a cooperative or a company that is acknowledged as being able to hold land in Tonga. The law changes would need to be made to the Land Act and also the creation of Trusts related legislation to provide legal mechanisms to empower Family Trusts – a new concept in Tonga.

RECOMEMNDATION 44: THAT consideration is given to legislate allowing the creation of a Family Trust giving an option to the family to manage, maintain, divide and share the family land and interests therein instead of the current and individual landholders rights and those of the heir.