

Chapter 8

THE NOBLES' PROPOSED AMENDMENTS TO THE LAND ACT

INTRODUCTION

The Land (Amendment) Bill 2010, a Private Member's Bill, was presented by Lord Fakafanua to the Legislative Assembly in 2010 before the General Election (see Appendix 11). There were two other Bills with consequential amendments to the Act of the Constitution and the Supreme Court Act respectively. The Legislative Assembly by resolution directed that the Land (Amendment) Bill 2010 ("the Bill") be referred to the Royal Land Commission for consideration.

The Bill dealt mainly with governance issues relevant to the proposed transfer of the authority to grant allotments and approve leases over land in hereditary estates from the Minister of Lands and Cabinet to the hereditary estate holders. Other provisions of the Bill sought to provide landholders with more scope and control over their land. The Commission considered it important to put these proposed changes to the public. A summary of proposed changes were therefore provided to the public for consideration during the Commission's Phase Three public meetings from November 2010 onwards.

In this chapter, the Commission examined the various provisions of the Bill, taking into consideration the public's views and the historical account by Dr. Wood-Ellem on the development of Tonga's land laws and land tenure system. The Commission accepted some of the amendments proposed in the Bill, subject to some variations to ensure it was in line with other proposals made earlier in this Report.

8.1 AMENDMENTS PROPOSED IN THE LAND (AMENDMENT) BILL 2010

Before the Bill was presented to the Legislative Assembly in 2010, the Nobles sought and obtained a legal opinion from the Solicitor General who provided an excellent written opinion dated 6 August 2010. A copy of this opinion is attached to this report in Appendix 29. The Solicitor General's opinion suggested that, because of time constraints, the Bill should concentrate on governance issues and leave the technical matters to be dealt with later.

Before continuing with the discussion of the Bill it is appropriate to again look back at history and the development of our land law and land tenure system. The excellent historical account given in Dr. Wood-Ellem's written submission to the Commission (see Appendix 4) shows that the Minister of Lands had the power to grant allotments from all land including those of the Nobles. This was changed in 1915 when the Nobles and Government were the majority in the Legislative Assembly. An amendment was then passed which required the Minister of Lands to consult the Estate Holder before a grant was made and registered. This consultation eventually became a requirement that the permission of the estate holder needed to be given in writing before an allotment could be registered. Dr. Wood-Ellem concluded that "*the 1915 amendment was a significant and major undermining of the basis of land tenure introduced by Tupou I*". During the reign of Queen Salote Tupou III she continued reminding the Nobles and Government the need to continue the vision of Tupou I regarding the fair distribution of land so that Tongans have a home and land to grow food.

The Bill now proposed would appear to complete the process started in 1915 in removing the Minister and Cabinet from the decision making power over the grant and leasing of allotments. The question is, would such a change result in

the increase of public access to land and protect the current land system from political pressure? Would the change result in the continuance of a fair system of distribution of land in line with the basic land tenure? Are the estate holders the appropriate authority to deal with such issues as the distribution of land when they have a self interest in such distribution? Would this put the estate holders in the invidious position of being criticized and taken to court by the public over decisions (or non-decisions) over the granting or leasing of an allotment?

What appears to have brought this move from the Nobles was the change in the political system to be effective from the November 2010 General Elections onward, where the Legislative Assembly selected the Prime Minister from the members of the Legislative Assembly and the Prime Minister thereafter selected his Cabinet from elected representatives. The perceived concern from the Nobles is that the land tenure will be politicized and Nobles may lose control over their estates. There is a possibility under the new political system that Cabinet would not have any Nobles to look after the interests of hereditary estate holders and the Minister of Lands may not be a Noble as has been the tradition in the past. As it turned out however, both the Prime Minister and the Minister of Lands are Nobles.

The Nobles' concerns of possibly losing influence over their estates under the new political system were, in the Commission's opinion, misconceived. The Legislative Assembly is the Supreme Law Maker or Legislature. It can pass whatever law it wishes but it cannot make it apply retrospectively to take away rights that have already been acquired. The law is effective from the day it receives the Royal Assent and is published. In other words, the Legislative Assembly can pass a law that changes the basic land tenure of Tonga for the future. If this is what the Nobles fear then they cannot stop it other than convincing the Legislative Assembly and obtaining the majority vote against such

a law. They cannot do it by taking over the authority to grant and lease land now from the Minister and Cabinet.

8.1.1 GOVERNANCE PROVISIONS

The amendments sought to governance provisions relate mainly to the grant of allotments, leases, subdivision of allotments, exchange of allotments and taking possession of mortgaged land. The amendments in the Bill effectively meant that the consent currently reserved for the Minister of Lands and Cabinet for such matters over all land in Tonga is now limited only to Crown land whilst the same powers over the same matters for land situated on hereditary estates are given to the hereditary estate holders.

A summary of the governance provisions of the Bill was included in the matters the Commission put to the public during its Phase Three meetings for their comment. The response from the public was almost always negative in that they did not want the Nobles to be given the sole power over their estates concerning matters within the governance provisions. The public preferred to keep this authority with Cabinet and the Minister of Lands. The public viewed the current roles of the Minister of Lands and Cabinet as an essential check on the exercise of powers under the Land Act.

The Commission favours giving some control over the exercise of governance powers to the Minister of Lands who would act on the advice of the independent Land Commission. In earlier chapters in this Report, the Commission also proposed that powers over land matters currently vested with Cabinet and Privy Council be transferred to the Minister of Lands to exercise on the advice of the independent Land Commission.

However, it is important that people keep in contact with their estate holder. So the first approach for an application for a grant, lease, subdivision or exchange of an allotment situated in a hereditary estate must therefore be made to the estate holder. Should agreement be reached and a grant, lease, subdivision or exchange is allowed then it is taken to the Minister for registration. If agreement is not reached and a grant, lease, subdivision or exchange is not allowed then the applicant can take his application to Minister of Lands to act pursuant to section 34(1) of the Land Act and seek decision on a lease, subdivision or exchange on the advice of the independent Land Commission. The Minister of Lands would consider the matter together with the views of the estate holder and act on the advice of the independent Land Commission. The legal opinion provided by the Solicitor General to the Nobles (see Appendix 29) also provided in a third option the establishment of an independent authority to determine land matters to ensure transparency, independence, accountability, efficiency and reasonable timeframes. The Commission supports the introduction of an independent body that can consider the interests of each of the stakeholders in land ownership and can give independent and transparent decisions. The decision of the Minister of Lands can be appealed to the Land Tribunal whose decision shall be final on the exercise of administrative discretions by the Minister, but is subject to judicial review on a point of law by the Land Court with leave of the judge of that Court. Chapter 7 of this Report discusses the establishment, functions and powers of the independent Land Commission and the Land Tribunal.

If the recommendation for the establishment of an independent Land Commission is not approved then the Commission suggests that the present authority of the Minister of Lands and Cabinet on grants of allotments, leases and exchange of allotments be retained.

The amendments proposed by the governance provisions were:

(i) Grant of allotments

(a) General powers of the Minister

Section 19(2) and (3) provided respectively that amongst the Minister of Lands' powers was to grant allotments and issue permits. The amendment proposed in section 6(a) and (b) of the Bill proposes to limit the Minister's powers to grant allotments and permits only from Crown Land. The Commission does not support these amendments particularly as the Minister may also grant allotments from hereditary estates pursuant to section 34 of the Land Act. The issuance of permits should be streamlined with recommendations below regarding proposed amendments to sections 14 and 15 of the Land Act.

(b) Hereditary Estate Holder's right to grant allotments

Section 33 of the Land Act provides that the holder of a hereditary estate may grant leases from his estate. The amendment proposed in section 10 of the Bill proposed to add an explicit right for the estate holder to also grant allotments or approve leases from his estate. The Commission supports this amendment as it would allow an applicant for grant of an allotment or a lease to approach the estate holder first. If granted then it should be submitted to the Ministry of Lands for registration. If no grant is made, the applicant can take the matter to the Minister of Lands to review.

RECOMMENDATION 100: THAT section 33 of the Land Act is amended to give the hereditary estate holder the explicit right to grant allotments or approve leases on his estate. If the estate holder refuses to make a grant the applicant may refer the matter to the Minister for a decision on the advice of the independent Land Commission. If the Minister refuses to make a grant in respect of Crown Land, then application for review can be made to the Land Tribunal.

(c) Hereditary Estate Holder not to refuse land for allotments

Section 34 of the Land Act provides that the holder of a hereditary estate shall admit into possession any person who has been granted an allotment upon his estate by the Minister of Lands. It also gives the estate holder the right to reserve a portion of his estate (area to be determined by regulation) for his own use. The amendment in section 11 of the Bill would remove the Minister's power to grant an allotment from hereditary estates. It would also empower the hereditary estate holder himself to determine what portion of his estate he would reserve for his own use, instead of having it determined by regulation (which is to be prescribed by the King in Privy Council according to section 22 of the Land Act).

The Commission does not support these amendments. The Minister should retain the right to grant allotments from hereditary estates, which he shall exercise on the advice of the independent Land Commission. Further, the hereditary estate holder should not be allowed to determine such portion of his estate that shall be reserved for his personal use. This should be determined by the Minister of Lands acting on the advice of the independent Land Commission before regulations setting out the defined portion are prescribed.

RECOMMENDATION 101: THAT section 34 of the Land Act is amended to give the Minister 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.

(d) Tongan subject may apply for allotment

Section 43(2) of the Land Act provides that all applications for grant of an allotment are to be made to the Minister of Lands together with a copy of the applicant's birth certificate. The amendment in section 13 of the Bill proposed to

streamline the process for applying for grants, so that applications to the Minister are made only in respect of Crown land. Application for grants from hereditary estate would be made to the hereditary estate holder. The Commission supports this amendment as it allows the applicant for an allotment in a hereditary estate to apply to the estate holder first. The applicant still has his remedies through the review processes above discussed if he is not satisfied with a decision.

RECOMMENDATION 102: THAT section 43(2) of the Land Act is amended so that application for grant of an allotment is made to the Minister in case of Crown Land and the hereditary estate holder in respect of his estate.

(ii) Leases

Some of the governance provisions related to the administration of leases as per the following provisions:

(a) Conditions of holding

Section 18(1) of the Land Act provides that religious bodies, charitable and social organizations shall not transfer or sub-let land leased to them or use the same for any other purpose other than the purpose declared at the time of making the lease unless the prior consent of Cabinet has been obtained. The amendment proposed in section 5 of the Noble's Bill would limit the requirement for Cabinet consent to leases over Crown land and add the requirement for consent of the hereditary estate holder where it concerned leases on hereditary estates.

Section 18(2) provides that where section 18(1) has been contravened, the Minister may institute proceedings with the Land Court with the consent of Cabinet. The amendment proposed in section 5 of the Noble's Bill would limit the need for Cabinet consent only to the Crown land and add the requirement for the consent of the estate holder where it concerns hereditary estates.

The necessary consequential amendment to Clause 108 of the Constitution was made in section 3 of the Act of the Constitution (Amendment) Bill 2010 (see Appendix 11).

The Commission supports these amendments provided that where the hereditary estate holder refuses to give his consent, the applicant can seek a review of the matter by the Minister of Lands who shall decide on the advice of the independent Land Commission. Where the Minister refuses to give his consent in relation to Crown Land then the applicant can refer the matter to the Land Tribunal for a decision.

(b) Renewal of leases

Section 36 of the Land Act provides that where a hereditary estate holder or landholder refuses to renew a lease after a request by the lessee which was made three months before the expiry of that lease, the Minister of Lands may with the consent of Cabinet grant a renewal to the lessee for a period not exceeding the period of the expiring lease. The total period of the leases shall not exceed 99 years, unless the consent of His Majesty in Privy Council has been obtained. The amendment proposed by section 12 of the Bill would remove the Minister's power to grant the renewal of the lease with the consent of Cabinet so that the right to renew rests with the hereditary estate holder or the allotment holder. The Commission does not support this amendment thereby leaving the power under section 36 to the Minister to exercise on the advice of the independent Land Commission. Where the Minister refuses to give his consent in relation to Crown Land then the applicant can refer the matter to the Land Tribunal for a decision.

(c) Lease of allotment by holder

Section 56(i) of the Land Act provides that a landholder can lease his town or tax allotment with the consent of Cabinet. The amendment proposed in section 20 of the Bill adds the consent of the hereditary estate holder where it concerns leases of land situated in hereditary estates. The Commission supports this amendment provided that where the hereditary estate holder refuses to consent; the matter may be taken to the Minister to decide on the advice of the independent Land Commission. Where the Minister of Lands refuses to give his consent in relation to Crown Land then the applicant can refer the matter to the Land Tribunal for a decision.

(d) Automatic right of renewal

Section 60, which provides that no lease granted under that Part of the Act shall contain an automatic right of renewal or an option to renew. Any renewal shall be subject to consent of Cabinet and not exceed 10 years in respect of a tax allotment.

The amendment in section 22 of the Bill proposed that leases granted under the Land Act may contain an automatic right of renewal or an option to renew. Leases of tax allotments are limited to a term of no more than 30 years in total. The Commission does not support this amendment and leaves it open to the parties to agree on the term of the lease provided that where the hereditary estate holder refuses to consent; the matter may be taken to the Minister of Lands to decide on the advice of the independent Land Commission. Where the Minister of Lands refuses to give his consent in relation to Crown Land then the applicant can refer the matter to the Land Tribunal for a decision.

(e) All leases subject to Cabinet consent

Section 89 of the Land Act provides that no lease shall be granted except with the consent of Cabinet. It also provides that a widow cannot lease the land of her deceased husband. The amendment proposed in section 24 of the Noble's Bill sought to limit the requirement for Cabinet consent only to leases over Crown Land and add the requirement that lease of land situated on hereditary estates shall be subject to the consent of the hereditary estate holder.

Consequential amendments to clause 114 of the Constitution in terms of leases, sub-lease, transfer of lease or transfer of sub-lease were made in section 5 of the Act of the Constitution (Amendment) Bill 2010.

Apart from the proposed amendment to the widow's right which is discussed in Chapter 3 with the appropriate recommendation, the Commission supports these amendments provided that Cabinet's consent is to be replaced by the Minister of Lands (to be in line with proposals in Chapters 5 and 7 to transfer Cabinet and Privy Council's powers to the Minister of Lands) and where the hereditary estate holder refuses to consent; the matter may be taken to the Minister of Lands to decide on the advice of the independent Land Commission. Where the Minister refuses to give his consent in relation to Crown Land then the applicant can refer the matter to the Land Tribunal for a decision.

(f) Term of leases

Clause 105 of the Constitution provides that Cabinet shall determine the term of leases, except that leases exceeding 99 years shall be subject to the consent of Privy Council. The amendment proposed by section 2 of the Act of the Constitution (Amendment) Bill 2010 would give Cabinet the power to determine lease terms on Crown Land and hereditary estate holders the power to determine term of leases on hereditary estates.

RECOMMENDATION 103: THAT sections 18(1)-(2), 36, 56(i), 60 and 89 of the Land Act and Clauses 108 and 114 of the Constitution are amended so that Cabinet and Privy Council's consent is replaced by that of the Minister of Lands which is to be limited only to leases on Crown Land. The consent of the hereditary estate holder should be sought for leases on his estate, and if he refuses or no agreement is reached, the matter can be taken to the Minister of Lands who would decide on the advice of the independent Land Commission. The Minister's decision in respect of hereditary estates and Crown Land may be appealed to the Land Tribunal. All leases over 99 years would require the consent of the Minister on the advice of the independent Land Commission, subject to appeal to the Land Tribunal.

(iii) Subdivision of allotments

(a) Subdivision of land into allotments exceeding area prescribed

Section 47 of the Land Act provides that a hereditary estate holder can subdivide land into allotments exceeding the area prescribed in the Land Act provided that Cabinet consents. The amendment proposed by section 15 of the Bill would remove the requirement for Cabinet to consent to the proposed subdivision. The Commission does not support this amendment and proposes that instead of Cabinet, the consent of the Minister of Lands shall be sought. The Minister would act on the advice of the independent Land Commission.

RECOMMENDATION 104: THAT section 47 of the Land Act is amended so that such subdivision is subject to the consent of the Minister of Lands instead of Cabinet. The Minister of Lands would act on the advice of the independent Land Commission. The Minister's decision may be appealed to the Land Tribunal.

(b) Subdivision of town and tax allotments

Section 51(1) of the Land Act provides for subdivision of a town allotment that is not less than 1618.7 square metres upon application to the Minister who shall not grant allotments there from that are less than 752 square metres. The amendment proposed by section 17 of the Noble's Bill was to add the consent of the hereditary estate holder where it concerns grants from hereditary estates.

Section 53(1) of the Land Act provides for subdivision by the Minister of Lands of tax allotments with the consent of Cabinet. The amendment proposed by section 18 of the Bill was to add the consent of the hereditary estate holder where it concerned subdivisions in hereditary estates.

The Commission supports this amendment provided that where the hereditary estate holder refuses consent; the matter can be referred to the Minister of Lands who will act on the advice of the independent Land Commission.

RECOMMENDATION 105: THAT sections 51(1) and 53(1) of the Land Act are amended to limit the consent for subdivisions on Crown Land to the Minister of Lands without the need to go to Cabinet. For subdivisions of land on hereditary estates, the consent of the estate holder shall be sought provided that upon his refusal the matter may be referred to the Minister of Lands. The Minister will act on the advice of the independent Land Commission. The Minister's decision may be appealed to the Land Tribunal.

(c) Leases to occupiers of land in excess of statutory area

Section 91(1) of the Land Act provides that where a person holds land as a tax allotment and the area of such land is greater than the statutory area, the Minister of Lands may give notice to that holder of his intention to subdivide that land to grant to the same person from that land a tax allotment of the statutory area. The amendment proposed by section 25 of the Bill is to limit the

Minister's power only to Crown land and add to empower the estate holder to do the same where it is land situated in hereditary estates. The Commission does not support this amendment as it should be a matter for the Minister of Lands to decide on the advice of the independent Land Commission.

(iv) Exchange of allotments

Section 55 of the Land Act provides that exchange of allotments shall be allowed only with the consent of Cabinet, including consent to exchange of an allotment held in trust for a minor. The amendment proposed in section 19 of the Bill limited the requirement for Cabinet's consent only to the exchange of allotments over Crown Land and added the requirement that the hereditary estate holder's consent shall be obtained where it concerned land on hereditary estates. In the case of land held in trust, it shall be allowed only by a Court.

The Commission supports this amendment provided that where the hereditary estate holder refuses consent; it may be referred to the Minister of Lands for his decision on the advice of the independent Land Commission. However, Cabinet's consent for exchange of allotments over Crown Land should be replaced with consent from the Minister of Lands to be in line with proposals in Chapters 5 and 7 for the Minister to take over the powers over land matters that are currently vested with Cabinet and Privy Council. Land held in trust for a minor may be exchanged with the consent of the Minister of Lands instead of Cabinet or a Court.

RECOMMENDATION 106: THAT section 55 of the Land Act is amended so that the Minister of Lands' consent is sought for exchanges of allotments on Crown Land. The hereditary estate holder's consent shall be sought where it concerns land on his estate provided that where he refuses, the matter may be referred to the Minister of Lands. Exchange of an allotment that is being held in trust for a minor shall be with the consent of the Minister of Lands regardless of whether it is located on Crown or hereditary land. The Minister will act on the advice of the independent Land Commission. The Minister's decision may be appealed to the Land Tribunal.

(v) Notice of intention to take possession of mortgaged land

Section 109(1) of the Land Act, which provides that upon default by a mortgagor, the mortgagee shall provide 14 days notice to both the Minister and the mortgagor of the intention to take possession. The amendment proposed by section 29 of the Noble's Bill requires that notice also be served on the hereditary estate holder. The Commission supports this recommendation as it would keep them informed of the status of such land in their various estates.

RECOMMENDATION 107: THAT section 109(1) of the Land Act is amended so that notice of an intention to take possession of mortgaged land upon default shall also be provided to the hereditary estate holder where such land is situated on his estate.

8.1.2 OTHER PROVISIONS

Apart from the governance provisions discussed above, some amendments in the Nobles' Bill related to other provisions of the Land Act.

(i) Usage of the “King with the consent of Privy Council”

Amendments to sections 11, 19(3), 22(1), 36(1), 124(3), 141(1), 143(1) of the Land Act are proposed²⁹ to standardize the usage in reference to “the King in Privy Council” or “His Majesty in Privy Council” instead of “the King with the consent of Privy Council”. This is done in conformity and to be consistent with various amendments made to the Constitution. The Commission supports these proposed amendments.

RECOMMENDATION 108: THAT sections 11, 19(3), 22(1), 36(1), 124(3), 141(1) and 143(1) of the Land Act are amended to standardize the usage of “the King in Privy Council” or “His Majesty in Privy Council” throughout the Land Act.

(ii) Alien not to occupy land

The amendment proposed to sections 14, 15, 19(4) and 93 of the Land Act³⁰ would effectively remove the requirement for aliens (being a non-Tongan) to obtain a permit from the Minister of Lands before they can occupy land for residential purposes. The requirement to obtain a permit still applies to occupation of land by an alien for commercial purposes.

In light of the discussion regarding tenancy agreements in Chapter 6, the Commission supports alien occupation of land both for residential and commercial purposes being governed by a tenancy agreement instead of permits for occupation. Tenancy agreements would provide better protection for Tongan landholders and this is important as the public expressed their concern during public meetings over the increasing number of Chinese nationals/descendants occupying land in Tonga. A tenancy agreement would clearly stipulate conditions of occupation including term, rent and any other

²⁹ Respectively in sections 2, 6, 7, 12, 30, 32 and 34 of the Land (Amendment) Bill 2010

³⁰ Respectively in sections 3, 4, 6 and 26 of the Land (Amendment) Bill 2010

matters that may be relevant to the land to be occupied and unique to the relationship between the parties to the tenancy agreement.

The Commission does not support the amendments proposed in the Bill in this regard. Alien occupation of land should be governed by a tenancy agreement and these provisions should be amended accordingly.

RECOMMENDATION 109: THAT sections 14, 15, 19(4) and 93 of the Land Act are amended to remove the requirement for permits issues by the Minister of Lands before an alien (non-Tongan) may occupy land in Tonga for residential or commercial purposes. Such occupation should be regulated by tenancy agreements between the landholder and the occupier.

(iii) Appointment of a Trustee

Section 19(8) of the Land Act empowers the Minister of Lands to appoint a trustee(s) to act for a Tongan (other than a Noble or matapule) who is entitled to succeed to land, but is under the legal age for succession. Section 6 of the Bill proposed an amendment to this provision. According to the explanatory notes, the amendment sought to impose a time limit of six months for an application to Court for appointment of a trustee(s) after which the Minister of Lands may make the appointment.

Form 9 in Schedule IX of the Land Act is prescribed for this purpose. During the Commission's public meetings and inquiries in Phase One, there was no issue raised with delay in appointing a trustee by the Minister of Lands when required. The heir or his guardian when lodging an heir's affidavit within a year of the landholder's death should inform the Ministry if the heir was a minor and for the need to appoint a trustee(s). The Commission supports the proposed amendment for an application to the Court for the appointment of a trustee

within six months of date of death of the holder after which time the Minister may make the appointment.

RECOMMENDATION 110: THAT section 19(8) of the Land Act is amended to impose a time limit of six months from the date of death of the landholder within which the Court may appoint a Trustee after which time the Minister may make the appointment.

(iv) Alternative method for payment of rents to estate and land holders

The amendment proposed to section 19(7) of the Land Act provides that the Minister of Lands, who collects rents on behalf of estate holders and landholders, can then pay rent collected to an alternative payee appointed in writing by the estate holder or the landholder instead of paying it to the Government Treasury.

However, appointment of an alternative payee to receive rent payments directly from the Minister of Lands instead of Treasury would encounter difficulties as all disbursement of funds from Government Ministries are processed through Treasury except where payments are made from an imprest account. It would also impose on the Ministry of Lands' currently dire resources, whereas this service is provided effectively by Treasury. The Commission did not receive any complaints from the public in this regard and does not see merit in making this change at this stage. The Commission does not support this amendment.

The amendment also proposed to repeal the "ten-percent" rental deduction (that Treasury is required to deduct from rents) and replace it with "two and a half percent". The Commission understands that the "ten-percent" to be deducted was to reflect the ten percent of stamp duty imposed by the Stamp Duty Act. However, the Stamp Duty Act has been repealed effective from 30 August 2010. Although stamp duty no longer applies, consumption tax does. The

explanatory notes to the Bill did not provide reasons for imposing two and a half percent instead of ten percent. It may be for administration costs of collecting and paying out of rents. However, consumption tax of 15 percent is more than enough to cover any costs associated with the collection of rents. Therefore, the Commission does not support this amendment.

Because of the amendments proposed to section 19(7) of the Land Act proposing new methods of payment, consequential amendments were also made to sections 31 and 57(2) of the Land Act. However, because the Commission did not support the amendments proposed to section 19(7) and for consistency, the same would apply to the amendment proposed to section 31 and 57(2). The Commission does not support these amendments.

(v) Imposing penalties by regulations

Section 22(4) of the Land Act provides a penalty for breaching any regulations made under the Land Act. Section 7 of the Bill proposes to repeal subsection (4) of section 22 and in its stead provide that any regulations made may prescribe the penalties for breach of those regulations. The Commission supports this amendment as it would make sure that the penalty prescribed reflects the severity of the offence.

RECOMMENDATION 111: THAT section 22(4) of the Land Act is repealed and replaced with the new wording proposed in section 7 of the Land (Amendment) Bill 2010.

(vi) Minister to define boundaries

Section 23(4) of the Land Act provides that, for the purposes of defining holdings and boundaries of a landholder's allotment, the Minister "may" serve a notice on the holder or his representative in the district where the land in question is situated. This requirement is discretionary ("may") in the English text of the Land

Act, whilst it is mandatory (“shall” or “kuo pau”) in the Tongan version of the Land Act. Section 8 of the Bill proposed to amend the English version from “may” to “shall” to be consistent with the Tongan text. The Commission supports this amendment. The Commission also notes the importance of defining boundaries in light of deficiencies in the Ministry’s land records as discussed in Chapter 4.

RECOMMENDATION 112: THAT section 23(4) of the Land Act is amended, in the English version only, as in section 8 of the Land (Amendment) Bill 2010.

(vii) Age for qualification for an allotment

The amendment to sections 43 and 51(1) of the Land Act proposed to increase the age for qualification for an allotment from 16 to 21 years. This would bring the legal age in line with similar definitions age of legal capacity in other legislation in Tonga. The Commission supports this amendment, which has been discussed in Chapter 3 with the appropriate recommendation.

(viii) Forfeiture

The amendment to section 44 of the Land Act sought by the Nobles in their Bill, proposed to add a requirement that is to be considered before forfeiture proceedings are initiated against holder of an allotment who has abandoned that allotment for more than two years. The amendment allowed a person to make provision for the use of his allotment in his absence in order to avoid forfeiture. It also encouraged landholders to work and develop their land and not leave it untended. The Commission supports this amendment, which was also discussed in Chapter 3 with the appropriate recommendation.

(ix) Rules for taking lands for allotments

The proposal in the Nobles Bill to repeal section 50 of the Land Act is not supported by the Commission. The explanatory notes to the Bill do not provide specific reasons for this proposed repeal, but the Commission considers it would

effectively remove what little measures of control imposed on hereditary estate holders in distributing land from their estates. The current section also provides some guidance to estate holders in considering applications for grants of an allotment.

(x) Lease of land by a widow

The amendment to section 56(ii) of the Land Act was proposed to allow a widow to lease land over which she holds a widow's interest provided the heir also consents. The Commission supports this amendment, which has been discussed in Chapter 3 of this Report with the appropriate recommendation.

(xi) Encumbrance or security bar to leasing an allotment

Section 56(v) of the Land Act provides that a mortgage is the only recognized encumbrance that would avoid the granting of leasehold over an allotment. The amendment proposed to include any other encumbrance or security over the allotment concerned. The Commission supports this amendment only to include any interest provided under the Land Act and not by any other Act.

RECOMMENDATION 113: THAT section 56(v) of the Land Act is amended to recognize encumbrances and securities over land that is allowed under the Land Act.

(xii) Rent payable on a lease

Section 57(1) of the Land Act provides that the rate for rent payable in respect of a lease is \$10 (pa'anga) per acre unless altered by His Majesty in Council. By Order, His Majesty in Council declared in 1978 that the rental shall be as agreed between the parties. The amendment proposed would effectively repeal the current wording and replace it with the wording of that Order. The Commission supports this amendment.

RECOMMENDATION 114: THAT section 57(1) of the Land Act is repealed and replaced with the new wording proposed in section 21 of the Land (Amendment) Bill 2010.

(xiii) Penalty for Tofi'a Holder who does not deliver receipt for rent

Section 65(2) of the Land Act provides that it is an offense for a hereditary estate holder not to issue a receipt for rent received to a land holder. The penalty upon conviction is a fine of \$4 (pa'anga). The Bill proposed to repeal this subsection. The offense was not complying with the requirement under subsection (1) to keep a rent roll, but rather the failure to deliver a receipt for payment of rent. This is a minor event with a very low penalty and such proceedings would waste the Court's time. It is unlikely that such prosecutions had been pursued in the past. The Commission supports this amendment.

RECOMMENDATION 115: THAT section 65(2) of the Land Act is repealed.

(xiv) Reports to Cabinet

Section 95 of the Land Act provides that applications for leases under sections 90 and 91 of the Land Act shall be submitted to Cabinet for consent together with a report from the Director of Agriculture as is required under section 94 of the Land Act. The amendment Bill proposed to add a new subsection (2) to this section to limit its application only to leases of Crown Land. The Commission does not support this amendment because the sections should apply to all leases.

(xv) Registration of Caveats

The amendment sought in the Bill to sections 107(1) and 131 of the Land Act proposed to add "caveats" to the list of documents to be registered, as affecting a mortgage or leasehold respectively. The Commission supports these amendments.

RECOMMENDATION 116: THAT section 107(1) and 131 of the Land Act are amended to add caveats to documents required to be registered under those sections.

(xvi) Registration of a deed of lease

Clause 110 of the Constitution provides the criterion for registration of a deed of lease. A similar criterion is provided in section 124(4) of the Land Act. Section 30 of the Bill proposed to amend section 124(4) of the Land Act so that the criterion for registration of a deed of lease is as set out in Clause 110 of the Constitution. Amendments to clause 110 of the Constitution is then proposed in the Act of the Constitution of Tonga (Amendment) (No.4) 2010 (see Appendix 11), which was one of the consequential Bills tabled together with the Land (Amendment) Bill 2010.

The amendment to Clause 110 of the Constitution outlines the signatories on leases. The King shall sign leases in respect of Royal Estates and Royal Family Estates, the estate holder shall sign leases in respect of his hereditary estate and the Minister of Lands shall sign all other leases. The amendment proposes that the Minister of Lands is to sign for the lessor in all other leases, which will include leases by individual landholders of their registered allotments to others.

However, following on from discussion of section 124 of the Land Act in Chapter 3 of this Report, the real lessor should sign the deed of lease. Hence, the proposed amendment to section 124(4) of the Land Act and Clause 110 is supported, subject to variation so that the Minister of Lands signs on leases over Crown Land and the landholder would sign leases over his registered land. The appropriate recommendation has been made in Chapter 3 of this Report.

(xvii) Notice of resumption

The amendment to section 142 of the Land Act provides for an increased period required for notice preceding resumption of land by the Crown. The notice period is increased from 30 days to 90 days. The Commission supports this amendment.

RECOMMENDATION 117: THAT section 142 of the Land Act is amended to increase the notice period from 30 days to 90 days.

(xviii) Charging Orders over interest in land

The amendment to section 151 of the Land Act by adding a new subsection (3) will ensure that charging orders shall not be granted for enforcement of judgment. The Supreme Court can issue a charging order against a debt, but it does not have jurisdiction over land matters. There was concern that this amendment would bar the Supreme Court from issuing a charging order over land that was subject to a mortgage. However, where there's a registered mortgage, a charging order would not be required as it is not an unsecured debt. The Commission supports this amendment.

RECOMMENDATION 118: THAT section 151 of the Land Act is amended by adding a new subsection (3) which will prohibit the issuance of charging orders over land.

A consequential amendment to the Supreme Court Act is provided in the Supreme Court (Amendment) Bill (see Appendix 11), which was one of the consequential Bills tabled together with the Land (Amendment) Bill 2010 before the last national elections. This amendment adds a new section (section 17), which would effectively bar the Supreme Court from issuing charging orders over interests in land in conformity with the amendment to section 151 of the Land Act. The Commission supports this amendment.

RECOMMENDATION 119: THAT the Supreme Court Act is amended by adding a new section 17 as proposed in the Supreme Court (Amendment) Bill 2010.

The Commission also notes that the issue of whether the Supreme Court has the power to issue charging orders over land awaits decision by the Court of Appeal. The Commission also notes that the Supreme Court (Amendment) Bill 2011 was tabled before the Legislative Assembly in October 2011. This Bill proposed to empower the Supreme Court to issue charging orders over land. The Legislative Assembly did not support this Bill and had referred it to their Law Committee for consideration. Decisions are pending from the Court of Appeal and the Legislative Assembly Law Committee. These were not available before this Report was finalized. These may have an impact on any recommendations by the Commission concerning charging orders.

The public's reaction to some of the amendments proposed in the governance provisions in the Land (Amendment) Bill 2010 highlighted the need for transparency and accountability in the exercise of powers under the Land Act. The particularly strong concern from the public was that giving Nobles the powers in determining grant of allotments, leases, subdivisions and exchange of allotments that are currently vested with the Minister of Lands and Cabinet would remove the necessary "check" on the exercise of these powers by hereditary estate holders. With the proposed transfer of Cabinet and Privy Council's powers over land matters to the Minister of Lands, the presence of the independent Land Commission becomes vital to ensure independence, transparency and the effective and efficient exercise of powers under the Land Act.

8.2 CLAUSE 67 OF THE CONSTITUTION

As mentioned in Chapter 2 of this Report, there were concerns from the public regarding the law that gives only Nobles the right to discuss and vote on matters regarding Noble and Royal estates. The suggestion was to repeal this provision and have these laws discussed by all the members of the legislative Assembly. The law in question is Clause 67 of the Constitution which states -

“It shall be lawful for only the nobles of the Legislative Assembly to discuss or vote upon laws relating to the King or the Royal Family or the titles and inheritances of the nobles and after any such bill has been passed three times by a majority of the nobles of the legislative Assembly it shall be submitted to the King for his sanction.”

Prior to 2010 “nobles of the Legislative Assembly” included the Ministers who sat in the Legislative Assembly as nobles under Clause 51 of the Constitution. The Constitution (Amendment) Act 2010 removed this entitlement from Ministers but retained Clause 67 without any changes. The effect is that Clause 67 would apply only to the 9 Noble representatives in the Legislative Assembly.

Clause 67 gives the right to only the nobles of the Legislative Assembly to discuss or vote upon laws:

- (i) relating to the King or the Royal Family, or
- (ii) relating to the titles and inheritances of the nobles.

The Tongan version of (ii) says “*ngaahi lao kau ki he ngaahi hingoa mo e ngaahi tofi’a ‘o e kau nopele*”. The translation of “inheritances” should be “*ngaahi tukufakaholo*” as the term “*ngaahi tofi’a*” has a wider meaning with regard to land and all the estates of nobles which would lead to severe and unreasonable

restrictions on the ability of the Legislative Assembly to discuss any law concerning land. Most of the land in Tonga belongs to a “tofi’a” and discussions and voting on laws concerning a “tofi’a” would be restricted to the nine members of the Legislative Assembly who represent the nobles by virtue of Clause 67. The other seventeen members cannot take part in these proceedings.

The Commission is of the view that the English version of Clause 67 is correct as the use of the word “tofi’a” in the Tongan version leads to severe and unreasonable situations where only the nine noble members will be making decisions in their own causes and serving only the interests of the nobles without regard to the voice of the people.

If Clause 67 is interpreted in accordance with the English version the laws which only the nine Nobles of the Legislative Assembly can discuss and vote on are those *relating to the King or the Royal Family* and those *relating to the titles and inheritances of nobles*.

The Commission supports the concern voiced by the public and makes the following recommendations:

RECOMMENDATION 120: *That (i) the Tongan version of Clause 67 of the Constitution is corrected by changing the word “tofi’a” to “tukujakaholo” and; (ii) adding the following proviso Clause 67 - “Provided that this clause shall not apply to laws concerning the granting of allotments or the leasing of land from the estates of nobles and any other dealings with land allowed under the Land Act”.*

Alternatively, clause 67 could be repealed.

