

## Chapter 6

### TENANCY AGREEMENTS AND LICENSING OF REAL ESTATE AGENTS

#### INTRODUCTION

The Commission presented to His Majesty, King George Tupou V its Phase Two Interim Report on 28 May 2011. Phase Two involved an inquiry into possible unlawful sales and leases of land that may be contrary to the Land Act, which were mainly carried out through the internet.

Written submissions were invited from any party who had been affected by such dealings and submissions were received from people residing overseas and in Tonga. Those submissions were considered alongside oral evidence of witnesses that gave evidence under oath at formal inquiry hearings conducted by the Commission. The inquiry hearings were open to the public and were held in Neiafu, Vava'u and concluded in Nuku'alofa, Tongatapu. The inquiry was held over a three month period from February to April 2010. A total of 57 witnesses gave evidence and 391 exhibits were tendered.

The Phase Two Interim Report focused on land dealings in Vava'u as the evidence only concerned land in Vava'u. Main issues identified were the use of tenancy agreements over vacant land and family lease agreements to lease land over periods longer than is allowed under the Land Act. These agreements were inquired into to determine their legitimacy in the very unique Tongan land system.

This chapter will not repeat the full contents of the Phase Two Interim Report, which is attached to this Report in Appendix 6. This chapter seeks to update, summarise, highlight and re-evaluate its findings and recommendations and to

discuss them in light of progress that Government has made and relevant proposals received during the public meetings of Phase Three.

## **6.1 LICENSING AND CONTROL OF REAL ESTATE AGENTS AND REAL ESTATE SERVICES**

### **6.1.1 REAL ESTATE AGENTS**

The Phase Two Interim Report discussed in detail the kinds of Real Estate Agents and Commission Agents involved in a new profession in Tonga that began in Vava'u early this century. This new profession was introduced by foreigners who advertised various sites and plots of land for sale mainly through the internet.

A Real Estate Agent can be defined as a person whose business is dealing with land, especially with the buying and selling of land for which he receives a commission or fee for his services rendered. As such, the Agent is a type of middleman who connects the landowner and the buyer/tenant.

The business of Real Estate Agents was first introduced to Vava'u by a person named Robert Bryce in 2004/2005. Other foreigners were later attracted to the business namely, Mr. Neshia Rosic, Mr. Trevor Jefferson and Mr. Gordon Allison. They conducted business mainly through the internet by providing details of land being advertised including photographs and a description of various parcels of land, location, term and price payable. These advertisements were aimed at and drew interest from foreigners most of whom had never visited Tonga. Most communications and correspondences were conducted through the internet between the Real Estate Agent and the client. At other times a Commission Agent who would find and introduce the landowner to the Real Estate Agent would also be involved. The only Commission Agent that the Commission was made aware of was Mr. Hans Schmeiser.

The available land for the Vava'u market is limited. Invariably the Real Estate Agents found themselves dealing in the same parcels of land with the same

Tongan landowner. Competition became fierce in particular between Bryce and Jefferson on the one side and Rosic and Allison on the other side. Allegations of fraud and illegal dealings were made against each other on the internet through the use of various websites and sometimes in face to face altercations. Land officials in the Vava'u office and Tongan lawyers were dragged into these allegations.

A few real estate agents conducted business in Tongatapu. They did not have the same problems that related to the Vava'u Real Estate Agents. The business in Tongatapu involved the more traditional short term renting of houses or leasing of land and sale of leaseholds. The agreements discussed in 6.1.3 below were not used by the Real Estate Agents in Tongatapu.

#### **6.1.2 LICENSING OF REAL ESTATE SERVICES**

The Business Licences Act 2002 and the Business Licences Regulations 2007 provided for all the kinds of businesses that can be practiced in Tonga and which require a licence to be issued. These business Licences were required before a person could carry out that business and were renewed annually. The real estate service licence was one of the business activities covered by the above-mentioned Act and Regulations that required a separate licence after application and on the payment of a fee. This was renewed annually to allow anyone to practice that trade in Tonga.

Evidence was received from the Officer in Charge of the Vava'u Section of the Ministry of Labour, Commerce and Industries (MLCI), Mrs Sapate Toke, that a moratorium on the issuance of real estate service licences was conveyed to her from Head Office in Nuku'alofa to be effected from March 2007. This moratorium was conveyed to her verbally and since March 2007 she had abided by it and had not issued any real estate service licences. The moratorium on real

estate service licences since March 2007 meant that no such licences were issued by the Vava'u office since that date.

In spite of having no real estate service licences as required by the Business Licences Act, all persons practicing as real estate agents had continued their trade in Vava'u in disregard of the law and with impunity. It is obvious that the Ministry responsible for the issuance of these licences was aware of the moratorium and the unlawful practice of the real estate agents in Vava'u but had failed to instigate prosecutions for the offences as directed under the Act.

The Commission recommended in the Phase Two Interim Report<sup>20</sup> that the MLCI explain and justify the moratorium placed by the Minister on the issuance of real estate licences in Tonga from March 2007 and why Vava'u had been treated differently from Tongatapu.

In his evidence at the inquiry hearings, Sione Vailanu, Deputy Secretary of the MLCI advised that the moratorium on the issue of real estate service licences was made because the land deals made by foreigners resulted in their getting more money than the Tongan landowner. In spite of the moratorium, he issued the licences in Tongatapu in respect only of "house rentals" and with the approval of their Minister. While the MLCI was issuing licences in Tongatapu, it did not inform the office in Vava'u which continued to enforce the moratorium and refused all applications for a real estate service licence.

### **6.1.3 RECOMMENDATIONS IN THE PHASE TWO REPORT AND LEGISLATIVE AMENDMENTS INITIATED BY THE MINISTRY OF LABOUR, COMMERCE & INDUSTRIES**

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<sup>20</sup> See recommendation 7.1 i), Chapter 7 of the Phase Two Interim Report.

The Commission recommended that the MLCI reconsider the reason, justification and usefulness of the moratorium he had issued effective from March 2007 stopping the issuance of real estate service licences. Their Minister should also ensure that his Ministry act within the provisions of the Business Licences Act 2002 in the issuance of licences and apply the same standard throughout the whole of Tonga. Immediate action was required to ensure that both Tongatapu and Vava'u are given and act within the same directions from Head Office. And, those continuing their real estate businesses in Vava'u in spite of the moratorium and having no such licence should be investigated subject to the question of the validity of the moratorium in light of the Business Licences Act or any other law in Tonga.

**(i) Greater control on the issuance of business licences for real estate services**

The recommendation in paragraph c), Chapter 7 of the Phase Two Interim Report proposed greater control on the issuance of a real estate service licenses. It also proposed greater restrictions on academic qualification, experience, credit ratings and financial viability. The power to issue real estate business licenses under the Business Licences Act was vested in the Business Licensing Officer. Legislative amendments are required to impose greater control on both the requirements of an application for a licence and the conditions attached to a licence issued.

The CEO of the MLCI, Mr. Tatafu Moeaki, advised the Commission via email correspondence (attached to this report in Appendix 22) that the MLCI having further considered the risks especially to Vava'u from the alleged land dealings and the need for appropriate mitigating measures, proposed amendments to the Business Licences Regulations 2007 ("the Principal Regulations"). The Business Licences (Amendment) Regulations 2010 ("the amendment Regulations") came

into force in October 2010. The amendments relevant to this discussion featured the following:

**(a) Amendment to Schedule 2**

Schedule 2 of the Principal Regulations lists business activities that require a business licence. Two amendments were made to the list of business activities. Firstly, the category “Real Estate Services” was deleted so that real estate services were no longer recognized as a business activity under the Principal Regulations and this type of business licence could no longer be issued. Secondly, the words “without operators” after the words “Rental/Leasing services” were deleted, which means that “Rental/Leasing services” was no longer subject to the qualification “without operators”.

Because of the above amendments, some of the businesses<sup>21</sup> who previously held real estate service business licences now operated under a rental/leasing business licence. This was in line with the MLCI’s past practice, as discussed in the Phase Two Report<sup>22</sup> of real estate service business licences being issued to Tongatapu real estate agents despite the moratorium. Those licences were issued subject to the condition that it would only be used for what are commonly known as house rentals.

**(b) Amendment to Schedule 3**

Schedule 3 of the Principal Regulations prescribed conditions for issuance of certain business licences, including the business licence for importing. This Schedule was amended by adding a condition on Rental/leasing that prohibited its use for the business of renting of land.

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<sup>21</sup> Including Mr. Nisha Rosic (Vava’u) and Mrs. Christine ‘Uta’atu’s company Pacific Development Ltd (Tongatapu)

<sup>22</sup> Refer to paragraphs 2.18 and 2.19 of the Phase Two Interim Report.

The Commission understands that the MLCI made the above amendments to eliminate the risk of “Real Estate Services” being used by real estate agents for dealings over land by removing this activity from the list in Schedule 2. Rental/Leasing business licences, which were now being used by businesses that previously held real estate service licences was also subject to the condition that it could not be used for rent of land.

However, without strict compliance monitoring by the MLCI, it is possible that this amendment only has the effect of being ‘window dressing’ (changing the name or type of the licence issued), while businesses continued to carry out the activities of real estate agents, which was not limited to property rental/leasing. For example, Pacific Development Ltd of Tongatapu now operates on a Rental/leasing business licences while its activities are not limited only to property rental/leasing and include property sales and development. Mr Nesha Rosic had also been issued a Rental/leasing business licence in 2011 to operate in Vava’u and the Commission was not aware of whether he has limited his activities to those allowed under that business licence.

In the absence of strict monitoring and compliance control by MLCI, it is likely in light of evidence gathered to date that businesses, who previously provided real estate services, would continue to provide those services, particularly where their activities are financially lucrative. The Commission’s recommendations in the Phase Two Interim Report did not propose the removal of real estate services as their services are essential to the development of the property market. Businesses that operate real estate services lawfully and successfully should not be punished because some real estate agents have acted unlawfully and/or unethically. That is why the Commission confirmed its recommendation in (ii) below for the establishment of a National Real Estates Authority to control, monitor and provide standards to regulate the operation of real estate agents.



***RECOMMENDATION 79: THAT Schedule 2 of the Business Licences Regulations 2007 is amended to add "Real Estate Services" to the list of business activities.***

The Business Licencing Office should work closely with the National Real Estate Agents Authority to carefully consider an application for a real estate services licence. This could be done by directing an applicant to consult with the Authority first to obtain their approval in writing before lodging their application for a Real Estate Services Licence. The MLCI is already using this same process to vet "sector specific" requirements. For example, prior consent or approval is required from the Tonga Law Society for law practitioners, Ministry of Works for construction and the Tonga Electric Power Board for electrical work. These sector specific requirements are prescribed in section 2 of the application form for a business licence in Form 1 of the Business Licence Regulations 2007, as amended. The Authority could vet the applicant to ensure their qualification, experience and background was satisfactory before it supported the application.

***RECOMMENDATION 80: THAT Section 2 of Form 1 of the Business Licences Regulations is amended to require written approval from the Tonga National Real Estate Authority to accompany an application for a Real Estate Services Licence.***

Other types of licences listed in Schedule 2 of the Business Licences Regulations had been used in the past to assist dealings over land related such as a Commission agents<sup>23</sup> licence. For example, Hans Schmeiser who did not have a real estate services licence, but operated instead on a Commission Agents' Business Licence and played a major role in facilitating land dealings identified in the Phase Two Interim Report.

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<sup>23</sup> Business activity 1.j) listed under Schedule 2 of the Business Licences Regulations

The restriction imposed by the amendment to Schedule 3 of the Principal Regulations on Rental/Leasing licences do not apply to Commission agents. As such, this type of licence can still be used to 'assist' land dealings as Hans Schmeiser did in the past. To avoid this, Schedule 3 of the Principal Regulations should be amended to prohibit the use of Commission Agent's licences to render services that facilitate unlawful land dealings. Strict compliance monitoring by MLCI as discussed above would be crucial to effective implementation of the Principal Regulations, as amended.

***RECOMMENDATION 81: THAT Schedule 3 of the Business Licences Regulations is amended to prescribe the condition that Commission Agents Business Licences shall not be used to facilitate land dealings.***

**(ii) National Real Estate Authority**

The recommendations in paragraphs d) to g) of Chapter 7 of the Phase Two Interim Report proposed the establishment of a National Real Estate Authority to perform the following functions:

- (a) govern, control and discipline those carrying on the business of real estate agents;
- (b) monitor, control and discipline the use of the internet for land deals by Real Estate Agents licensed in Tonga;
- (c) ensure that Real Estate Agents are not involved in unlawful dealing with land and do not give legal advice to clients or landowners if they are not licensed to practice law in Tonga;
- (d) cooperate with the Ministry of Lands in the exchange of information in order to make available to the public any agreement that involves a particular allotment of land.

***RECOMMENDATION 82: THAT legislation is enacted to establish a National Real Estate Authority to perform the functions in a) to d).***

## 6.2 TENANCY AGREEMENTS

The foreign Real Estate Agents and Commission Agents became aware that under Tongan law, there was no freehold land as they may have had in their own countries of origin and the sale of land was forbidden and unlawful in Tonga. Real Estate Agents had appeared to have formed certain views about Tongan land law and there was evidence gathered indicating they were giving advice on Tongan land law when answering queries from clients with or without the help of Tongan lawyers. Also, with the help of Tongan lawyers, these Agents introduced various agreements to try and get around the strict requirements of Tongan land law.

### 6.2.1 FEATURES OF THE TENANCY AGREEMENT

The first of these kinds of agreements were the Tenancy Agreement used by Hans Schmeiser and Gordon Bryce with the help of lawyer, Laki Niu. A tenancy agreement was entered into between the foreign buyer and the Tongan landowner under which the buyer agreed to construct buildings on the plot of land which after construction were owned by the Tongan land owner. The buildings were then rented to the foreign buyer for lengthy terms of between 50 and 99 years with an option to renew. There was an initial substantial upfront payment under the Tenancy Agreement to the Tongan landowner including the commission for the Real Estate and Commission Agents plus a smaller monthly rent payable to the Tongan landowner for the duration of the tenancy. These tenancy agreements were effectively made over buildings on the land and those to be constructed. At the time the agreement was made, the land was vacant (open land).

A sample of the Tenancy Agreement drafted by Laki Niu and used by Robert Bryce is shown in Appendix 23. It had the following features:

- (i) It was an agreement between the landowner, his wife and eldest son, and the tenant;
- (ii) The tenant agreed to construct buildings on an identified part of the property of the landowner;
- (iii) Upon construction of the buildings, these structures became owned by the landlord;
- (iv) The landlord then rented these buildings to the tenant under the Tenancy Agreement;
- (v) A substantial upfront amount of money in US dollars was paid by the tenant on signing the Tenancy Agreement to a bank account nominated by the agent;
- (vi) The upfront payment included the money agreed to be paid to the landowner and the commission of the agent;
- (vii) A smaller monthly rental payment in US dollars was payable to the bank account of the landlord;
- (viii) The term of the Tenancy Agreement was normally for a period of between 50 years to 99 years with a right of renewal and of assignment.

### **6.2.2 LEGALITY OF TENANCY AGREEMENTS**

All the lands that were the subject of these Tenancy Agreements were part of tax allotments. They would therefore be subject to the restriction on leasing of 20 years plus a 10 year renewal. However, Real Estate Agents claim that these are private contracts between the parties that do not affect the ownership of the land and buildings. The land and buildings were retained and owned by the landowner and therefore the contract was not bound by the Tongan Land Act and was not restricted nor needed to go through the process required by that Act. What the landowner had appeared to agree to under the Tenancy Agreement was to rent his own buildings to the tenant.

It is therefore a purely commercial agreement for the occupancy of buildings that would be subject to the normal commercial law and the laws of contract. It was argued therefore that the land law of Tonga did not apply to the Tenancy Agreement so the restrictions under the Tongan land law did not apply. This meant that the 20 years restriction on leasing of a tax allotment or part thereof did not apply to the Tenancy Agreement with its term of over 50 years because this was not a lease of land. A letter from Laki Niu expressing his opinion on the Tenancy Agreement is found in Appendix 24.

In his evidence at the Commission inquiries, Laki Niu also expressed the view that the Tenancy Agreement was binding on all who sign it. In the case of the Tenancy Agreement in Appendix 23, this would mean the rental tenant, the registered land owner, his wife and their eldest son. This was in order to bind all the immediate prospective heirs. It was also indicated by Laki Niu that when these parties die the Tenancy Agreement would terminate even though on paper it may have more years to run. This would appear to the Commission to be quite misleading to the tenant and there was no evidence to show that they were informed of this when they entered the Tenancy Agreement or were aware of this limitation – for the life term of those who signed the agreement instead of the term of years indicated in the Tenancy Agreement. Such an important term should have been clearly stated in the agreement to inform the tenant who in most cases reside in a foreign country.

A contrary view and interpretation says that this kind of Tenancy Agreement is void and illegal. This was based on the general principles and intentions of Tongan land laws and of the protections they aimed to afford to Tongans. The strict requirements of section 13 of the Land Act were raised. This forbade any dealing with land outside the provisions of the Land Act, unless approved in writing by the Minister of Lands, and deemed such dealings as illegal and subject

to a monetary penalty. This view was fully expressed by Kahungunu Barron-Afeaki SC, in his capacity as a legal counsel in a report that was made in December 2007 on behalf of his then clients. This report was given to Government. It is noted that this report was furnished well before the existence of the Royal Land Commission and the appointment of Kahungunu Barron-Afeaki as a Royal Commissioner. A copy of this report is attached as Appendix 25.

In Tonga under current law, a building may be severed from the land on which it stands, so as not to constitute a fixture<sup>24</sup>. A contract can be made conferring an interest over the building on the land without conferring an interest on the land upon which the building stands<sup>25</sup>.

As such, the issue to be considered here in determining the legality of these kind of tenancy agreements is whether that agreement is limited to just the building and does not extend to the land upon which it stands. Laki Niu was also of the opinion that the Tenancy Agreement he drafted included the land upon which the building rested as it must also include access to the building through the land.

### **6.2.3 PROPOSALS FOR CHANGE**

During the Commission's public meetings, some members of the public preferred that a house was not a fixture and remained separate in law from the land as it more suited Tongan customs and ways. For example, a person may build a house on some land that he occupied (with or without permission), but should he later leave or be ejected from the land, he could take his house with him leaving behind just the land. The law, as it stands was reasonable – so that one can take his roofing, timber and what can be detached from the land so that they can easily rebuild on another piece of land and provide a shelter for their family.

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<sup>24</sup> Kolo v Bank of Tonga (CA unreported, 7 August 1998)

<sup>25</sup> Mangisi v Koloamatangi (Unreported Judgement of the 23<sup>rd</sup> July 1990 Appeal No.11/98)

However, other members of the public believed that disputes arise because houses are severed from the land at law. For example, a house built on the family land by the younger siblings (of the land holder who was the eldest and heir) was removed by them upon the parents' death when disputes arose with the heir. A law practitioner also voiced his concern that this separation of buildings and land defeated the purpose of the Land Act, that all matters relating to the land must go through the Minister of Lands so that it complies with what is prescribed under the Land Act and is approved by the Minister. The purpose of the Land Act was defeated because the Chinese and others could for example, occupy the land under a contract for use of a small retail store, but they would also have access and control over the whole plot of land upon which the small store was located. This access and effective control over the land through a rental agreement gave rights to the tenant without having to notify, register or seek the approval of the Minister or Cabinet.

Commercial Banks in Tonga and the Tonga Chamber of Commerce and Industries also support adopting the English common law position. Severing the houses from land reduced the market value of that piece of land. Women and anyone who were not the registered holder of an allotment applying for a mortgage must obtain a lease over the land to ensure that the lessee holds the interest over both the house and the land. But obtaining a lease involves a complex process which usually results in banks tightening its review of mortgage applications making it the more difficult to obtain a mortgage. Tonga should assist sectors that are major contributors to economic growth such as tourism. These sectors could expand only if people were free to use their properties (including land) to secure a loan for development projects.

***RECOMMENDATION 83: THAT the interest over land shall include interest over fixtures on that land (including dwellings).***



#### **6.2.4 REGISTRATION OF TENANCY AGREEMENTS**

There is no requirement to register Tenancy Agreements through the Ministry of Lands and that they come under the Land Act in Tonga. So a search of the Lands Office and its Registry would not show whether a particular piece of land was subject to a tenancy agreement over the building on the land. The only person who would know this important land interest is the landowner and the tenant. One of the very basic bastions of centralizing all land related registrations is to inform the Government and the public of the proper and accurate legal standing of all lands. To not be able to do this for these Tenancy Agreements makes a farce of the basic aims of the Land Act.

The CEO of the Ministry of Lands, Dr. Nailasikau Halatuituia, informed the Commission by letter dated 24 May 2010 of the Ministry's position. A copy of this letter is attached to this report as Appendix 26. The Ministry recognized the 5 year agreement for farming purposes as has been exercised for decades, but it did not recognize tenancy agreements. He suggested that the legality and validity of tenancy agreements needed to be clearly defined.

It is important that tenancy agreements, especially for lengthy periods are registered so that the public has notice of this when they are dealing with or are interested in that land. It would also serve to protect the interests of the parties as recorded in any such agreement. If the common law position was adopted, then the Minister of Lands should be empowered to keep a register of tenancy agreements that are allowed under the law.

#### **6.2.5 RECOMMENDATIONS IN THE PHASE TWO REPORT**

The recommendations in paragraphs a) and b) of Chapter 7 of the Phase Two Interim Report called for enactment of legislation on a priority basis for the clarification, registration and control of all tenancy agreements. The Commission

considered it necessary that legislation was enacted to regulate the use of tenancy agreements, but any new legislation cannot apply retrospectively. Hence, the further recommendation for tenancy agreements considered by the Commission in Phase Two was for the parties to seek remedy in Court where the various kinds of tenancy agreements currently used could be determined particularly where there was a dispute as in the Nuapapu land agreements, as discussed below.

The Commission proposes to define a tenancy agreement as a rental agreement over a property (land and dwelling) between the property owner and tenant, for a defined number of years. This agreement would be at an agreed rental with a range of established tenancy rules that were legally binding on both parties relating to required security/bond deposit payments, method of payment of rental, notification periods, rights to quiet enjoyment by tenant, terms for repossession of property, access rights of owner, property inspections, the good condition of the property and chattels, insurance and rights and other obligations of both parties.

***RECOMMENDATION 84: THAT the Land Act is amended to recognize tenancy agreements and their registration.***

## **6.3 OTHER AGREEMENTS USED BY REAL ESTATE AGENTS AND ISSUES INDENTIFIED IN THE PHASE TWO REPORT**

### **6.3.1 Other agreements used by real estate agents**

Apart from Tenancy Agreements, Real Estate Agents also used other forms of agreements as is discussed in the Phase Two Interim Report, Chapter 3, paragraphs 3.13 to 3.25.

The Commission confirms its recommendation in 7.1 a), Chapter 7 of the Phase Two Interim Report. The parties to these agreements expected the Commission to make a ruling on the legality of these agreements, but that was not the role of this Commission. It is a matter for the parties to take to Court.

It was evident from the inquiry that these agreements were used to get around the restriction on the term of leasing a tax allotment, which is limited to 20 years and a 10 year extension. The Commission therefore recommended in 7.1 k), Chapter 7 of the Phase Two Interim Report that the Government consider increasing the existing number of years that a tax allotment may be leased. The same is discussed further in Chapter 3 of this Report.

### **6.3.2 Nuapapu Island Agreements**

The biggest problem the Commission encountered during its inquiries was a land deal in respect of the property Houmatoka on the island of Nuapapu, Vava'u where the inevitable conflict between the Tenancy Agreement of Bryce and Schmeiser and the Lease Agreement of Rosic and Allison came to a head. This matter was fully discussed in Chapter 4 of the Phase Two Interim Report.

The Commission suggested that the problem could only be solved through a properly conducted court action and further confirms its recommendation in 7.1

h), l) and j), Chapter 7 of the Phase Two Interim Report. These recommendations were made specifically to address the issues uncovered in the inquiry because of the Nuapapu land deals.

Legislation as recommended above, may remedy and clarify the legal standing of such future agreements, but any new legislation cannot be retrospective (under the Tongan Constitution) hence the requirement for court action in these agreements. In the absence of any clear law on these points, a final court decision would have to be made on the agreement entered into, the legality of the Tenancy Agreement, the legality of the subsequent lease agreement and the lease granted by Government and the large amount of money received by the landowner. It is not the Commission's function to give a decision or an opinion on this matter. This is best left to the jurisdiction of the Court.

The Commission also noted that no progress had been made by Government and its relevant Ministries towards implementing these recommendations.

**(i) Ministry of Lands - Investigation into the registration of the allotment "Houmatoka" and registration and enforcement of caveats**

The Commission recommended that Government investigate the whole background to the registration of the name of Piea Fe'aomoeata in the Land Registration Book in relation to the property Houmatoka<sup>26</sup> in Nuapapu Island, Vava'u on the 29<sup>th</sup> June 2007, when his father who was registered as owner in the Deed of Grant was still alive, and the involvement of the then Acting Governor Tu'a Taumoepeau and the land registration officer Makafilia Mafi including their involvement and approval of the L9 application for lease on the same day by Escape Vava'u Ltd and Island Real Estate Ltd.

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<sup>26</sup> See in Chapter 4, Phase Two Interim Report

The Commission also recommended that the Ministry of Lands' duties regarding the registration and enforcement of caveats<sup>27</sup> be strengthened and put into effect. This was due to advice from the Secretary of the Ministry of Lands that once a caveat has been registered - they (the Ministry) stop all dealings and applications in connection with the land, but they have no control over buildings or works or structures on the land.

The Commission inquired with the Ministry of Lands in July 2011 seeking advice on any actions they have taken towards implementation of these recommendations and other recommendations relevant to the Ministry in the Phase Two Report. Mr, Salesi Fotu, Acting Secretary for the Ministry of Lands, Survey, Natural Resources & Environment advised the Commission on 15 July 2011 that the Ministry had *noted* the recommendations (see Appendix 20). He did not provide any indications that any further action had been taken to put the Commission's recommendations into effect. The latest update from the Ministry on 6 March 2012 (see Appendix 21), likewise, did not indicate any further action had been taken towards implementing these recommendations.

**(ii) Ministry of Works – construction without a building permit**

The Commission during the inquiry ascertained that Gordon Allison was conducting construction work in Nuapapu without a building permit from the Ministry of Works<sup>28</sup>. The Commission recommended that the Ministry of Works follow this up and explain why it had allowed the construction of buildings in Nuapapu Island by Gordon Allison to continue without a building permit as required by law. To date, no information has been forthcoming from the Ministry of Works regarding this issue.

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<sup>27</sup> See discussion in 4.24 to 4.28, Chapter 4, Phase Two Interim Report

<sup>28</sup> See discussion in 4.29, Chapter 4, Phase Two Interim Report

#### **6.3.4 USE OF THE INTERNET**

The Commission has become mindful of the powerful influence of the internet and its key role in effecting 'sales' of land and tenancy agreements to mainly foreigners based overseas.

The internet sites that purport to offer Tongan land for 'sale' by Agents must be brought under control. If such websites are registered within the jurisdiction of Tonga's Intellectual Property territory that include specified internet carrier addresses - then control can be easily affected. However, should websites exist under the jurisdiction of other countries then, international cooperation is required to authorize the regulating and/or closing down of websites that purport to sell in or deal with any Tongan lands.

Once an Agent has been identified as unlawfully conducting any land/tenancy agreement related business in Tonga, whether from within or outside the Tongan jurisdiction their websites can be advertised on official Tongan Government websites and other authorized internet publications as unlawful and not authorized by the Tongan Government.

Further, the source country of registration of those websites can be identified and formal Government requests can be made to close down those websites by official Government Orders at Ministerial level or by a Cabinet Decision. Other measures could also be sought by the Tongan Government within those jurisdictions. To this end, it is of importance that the Government also seek reciprocal agreements with a range of countries that would encourage cooperation in bringing such rogue land related activities under control.

Some foreign jurisdictions require Court Orders which can be obtained in Tonga from the Supreme Court ordering the closing down of specified websites and/or the deletion of specified information and the undertaking by that website not to continue. These Court Orders could then be communicated to other countries from which these offending land dealers reside and appropriate action sought.

Internet censorship by the Tongan Government in the Kingdom of Tonga is very limited with its development being still much at an infancy stage. There are a wide variety of laws and administrative regulations relating to the internet that are absent and require attention. As a result, there is almost no effective control, regulation or censorship of any internet content. Tonga's internet environment remains effectively naïve and under-developed with very little restriction or effective policing.

The Tongan governmental authorities need to develop basic abilities to not only block or filter website content but to also monitor the Internet access of individuals, as has been experienced with the Land Agents in Vava'u and even a Land Agent, Robert Bryce who is now based in Fiji conducting business relating to dealing in Tongan lands without any Government approvals or licenses to do so.

Should any websites be blocked or restricted it is however, in the interests of transparency that the Government advertise and notify the public of the website address and the reasons for the site being restricted, blocked or filtered. It is important to ensure that such Government censorship is conducted with transparency to ensure public confidence is maintained and basic freedoms of the market place and freedoms of expression are not unreasonably censored or blocked.

A list of internet offences need to be indentified and developed that would include the conducting of such land related business in Tonga without the required Government approvals and licenses. A further restriction may be considered where it is unlawful for any lands to be advertised for 'sale' or lease or for tenancies outside the Government internet jurisdiction. This aspect would however need to be carefully considered. Such a restriction would however, enable Tonga to protect and enforce its unique land laws. A specialized internet unit needs to be established by Government to regulate and restrict Internet activity in accordance with the Laws of Tonga.

***RECOMMENDATION 85: THAT a specialist Internet Unit is set up by the Government to define, protect and maintain the basic rules and functions of Tonga's internet system. That, reciprocal right treaties are entered into that would assist Tonga in controlling and regulating its internet services and hence any dealings with land in Tonga.***

***RECOMMENDATION 86: THAT funding is sought for the key recommendations made by the Commission. Aid funding could be sought from neighbouring countries such as New Zealand and Australia with well established National Real Estate Authorities in conjunction with supporting Governmental assistance.***

### **6.3.5 ENFORCEMENT OF LEGISLATION**

Existing legislation and any new legislation in light of the recommendations in this report should be effectively enforced. The Phase Two inquiry showed how the MLCI could not effectively enforce laws that control and regulate business licences and operations. Firstly, the OIC in Vava'u was well aware of foreign real estate agents who were operating without a licence, but nothing was done to stop them. The MLCI sought the assistance of the Ministry of Police in July 2011 to investigate allegations against Mr. Trevor Jefferson and requested their



consideration of removing his website from the internet in light of breaches of the Business Licence Act. The MLCI still awaits advice from the Ministry of Police on progress with the investigation. Secondly, the Ministry of Works was well aware that Gordon Allison was conducting construction work on Nuapapu island without a building permit.

The public raised concerns during the public meetings displaying negative and distrustful sentiment that existed toward these foreigners, real estate agents. These real estate agents were perceived by the public to be unlawfully selling and dealing with Tongan land and people wanted them stopped if they were in fact engaging in unlawful land dealings and sales. There was also concern expressed that the land agents advertised small islands, coastal land, Royal estates and even land belonging to individual land owners without the knowledge nor approval of those land holders.

In the Commission's meeting with the People's Representatives to the Legislative Assembly, this issue was raised again due to concerns voiced over problems in Vava'u that resulted in quarrels arising from the same type of agreement over land where foreigners acted as agents. It had reached a stage where these problems were occurring almost daily. The Commission also heard of allegations of assaults and burglaries which were the responsibility of the Minister of Police.

It is of note that apart from the oral evidence at public meetings, very little documentary evidence in support of these kinds of complaints was forthcoming. However, the fact that these concerns were regularly raised throughout the public meetings and independently from the Phase Two inquiry hearings, have given further support to the Commission's views.

Laws, once passed need to be fully enforced in order to be effective. Clear and strong penalties need to be imposed on offending land dealers to deter offending.

