

Chapter 3

LAND OWNERSHIP – LAND TENURE, RIGHTS TO LAND AND SECURITY

INTRODUCTION

The ownership of land in Tonga is not absolute. It is limited to a life interest (town and tax allotments) which is subject to strict rules of inheritance, and to an interest in land for a fixed term of years (leaseholds). The sale of land is prohibited. Similarly, estate holdings by Nobles and the Government are not absolute. Apart from a specified area of land that a Noble may hold for his personal use, the remainder of the Noble's estate are held for distribution to male Tongans as town and tax allotments and for leasing by the estate holder of up to 5 percent of the total estate area (apart from lease to churches and charitable institutions). The sale of land by estate holders is also prohibited.

As history has shown us, this unique land tenure system was introduced to Tonga as a result of the visit by King George Tupou I to Australia in 1853 where he saw homeless people and decided that such a situation would not happen to his people. A key factor behind the distribution of land was to give people not only a home but also land to grow their food.

Obviously, the population of Tonga has continued to grow while the land area of the Kingdom remains the same. It is therefore clear that not every eligible male Tongan will be able to obtain the land that he is entitled to under the law. The statistics shown in the 1983 Royal Land Commission's Report (see Appendix 12) made it clear that the estate holders were still holding on to large areas of land that should, by law, have been distributed to the people. A report was prepared

by the Ministry for this Commission in 2011. A copy of that report is attached to this Report in Appendix 17. It highlighted a serious lack of information on land distribution and inaccuracies within existing records that have hindered the Commission in making any updated findings since the 1983 Royal Land Commission Report. This issue is discussed in more detail in Chapter 4 of this Report.

Despite the lack of accuracy in Ministry land distribution information, the Commission was still able to estimate from a range of information gathered, that large areas of land are still not distributed. The question then is why are such large areas of land still not distributed as required by the law? If they have been distributed then why have some of these 'allocated' lands not been registered to guarantee and give security to the title of the land occupier under the law? The answers to these questions are important when the Commission reflects upon the views, concerns and proposals made by the public.

Each type of landholding will now be discussed with consideration being given to proposals from the public. In making its recommendations, the Commission was very conscious of its terms of reference - *"to inquire into all matters whatsoever concerning the land laws and practices of our Kingdom with a view to providing more effective and efficient practices...without changing the basic land tenure of our Kingdom"*.

3.1 TOWN AND TAX ALLOTMENTS

3.1.1 RIGHTS TO TOWN AND TAX ALLOTMENTS

Allotments are parcels of land, divided into two kinds being town or tax allotments, with defined land areas under the Land Act. Town allotments have a minimum area of 30 perches and a maximum area of 1 rood 24 perches and Tax allotments (known as bush or country land mainly for farming) have a maximum area of 8 ¼ acres. These allotments are granted from estates on application of a male Tongan of the age of 16 years and upwards.

(i) Legal age for holding an allotment

Under the present law, only a male Tongan of the age of 16 years and upwards may hold a town or tax allotment. The public expressed mixed feelings on this issue with some favouring the retention of the age of 16 years while others wanted the age to be increased to 18, 20 or 21. The 1983 Royal Land Commission favoured the age of 21 years because at the age of 16 years, it reasoned young males were still at school but at 21 years a male Tongan would be mature enough to use the land if he was not pursuing an academic career. The Nobles' Land (Amendment) Bill 2010 also favoured the age of 21 years. Similar arguments were presented by those in favour of increasing the legal age.

RECOMMENDATION 1: THAT the legal age of entitlement to a town or a tax allotment by a Tongan male subject be increased from 16 to 21 years of age.

(ii) Equal land rights for men and women

There was pressure from both men and women in general as well as women's groups for women to have the right to apply for and hold a town and tax Allotment. The Tonga Association of Banks was also in favour of this proposal for a compelling commercial reason being that more than half the Tongan work force were female and yet they were precluded from owning (holding a

registered title) tax and town allotments. Representatives from banks believed that preventing women from owning such allotments did not make business sense especially if they were increasingly the main income earners in families. Women being the main money earners for families, have no registered allotment to secure a loan for development or other purposes. Lack of access to land also restricted women from taking economic risks that would help them realize their full economic potential. Although women could access land through leaseholds, the process of securing such a lease took a long time, involving constant delays in processing before registration. At an economic level, these factors impede the development of the country as a whole.

In support of this call for equality, certain national and international commitments made by Tonga to gender equality were brought to the attention of the Commission. At a national level, the National Policy on Gender and Development calls for equality amongst all members of society with particular reference to equal share and access to property. At a regional and international level, Tonga has committed itself to gender equality conventions and agreements³ and as a party, Tonga is subject to international obligations to comply with the provisions of those conventions and agreements.

It was also proposed that women should not be granted tax allotments for bush and farming purposes because it has never been the traditional role of Tongan women to do heavy and hard labour work which was associated with farming. There are clear gender roles within Tongan society that are valued and reflect much of Tonga's basic cultural values and aspirations. Despite the increase in female income earners, this has been predominantly in sectors that do not

³ Beijing Platform for Action of Women (September 1995), Millennium Development Goals (September 2005), Commonwealth Plan of Action for Gender Equality 2005-2015, Revised Pacific Platform for Gender Equality 2005-2015, The Convention of the Rights of the Child (ratified by Tonga in 1995).

involve heavy or soiled kinds of work such as farming. These gender roles remain very important in Tongan society and should be protected and maintained. For now, the Commission feels that the present law giving men only the right to register these allotments works well for Tonga.

Tonga's well established gender roles in society appear to conflict with a range of gender equality measures sought by international pressure groups that Tonga is associated with. However, it is also important to reflect and maintain what is important to Tongan culture and what sets Tonga apart as unique and special within the global context. To this end, it is suggested that more 'equitable' measures be adopted when considering what is fairer to women, within Tongan society values and not those of other societies.

Caution needs to be applied to notions of gender equality that have evolved in very different societies with very different histories, cultures, world views and ideologies. For example, to seek 'equality' for women in Tonga applying international equality concepts would also mean the removal of the institutions such as 'fahu' and 'mehikitanga' which afford Tongan women very special and unique gender roles in our society. To take away these ancient and highly valued institutions would also take away from the very core of Tongan culture. Therefore, more 'equitable' solutions have been sought by the Commission that seek to deal more fairly with Tongan women and land but, that also protect and maintain our own highly valued and unique culture.

A suggestion was also made from the public to give women the right to apply for and hold *only* a town Allotment upon which she can build a house. Tongan women have traditionally and continue to uphold their gender roles in Tonga. Modern Tongan women continue to adhere to and value many of their traditional gender roles within society. It is considered that a grant of a town

allotment to women would more fairly mirror the modern woman's role in Tongan society. The grant of a town allotment would also reflect the modern woman's increasingly important role as an income earner and soiled work and empower her to provide a home for family.

RECOMMENDATION 2: THAT a woman who is a Tongan subject upon attaining the age of 21 years has the right to apply for grant of a town allotment, which can be registered under her name. Upon her death, the land shall devolve according to the succession laws, which shall be amended accordingly. For now women should not be allowed to apply for and gain a registered tax allotment. The status quo should remain with men being allowed to hold tax allotments.

In the case of succession, it was suggested that inheritance of land should be applied, starting from the eldest child regardless of gender. There were certain circumstances raised by the public such as the rights of an innocent wife, the rights of a daughter(s) in the event of a couple having no sons and the rights of a widow which will be addressed later.

(iii) Women's limited rights

At present, daughters have the right to hold these allotments if there is no son but only until they marry. And a widow has the right to reside and use the allotment until she is proved to have committed fornication or adultery, remarries or dies. There are also recommendations later which will give women certain rights to land in particular situations.

(a) Daughter's rights

Under the present law, if there is no male heir to succeed when the holder dies then all unmarried daughters jointly hold the allotment for life or until they marry or commits adultery or fornication. This restriction should be removed to promote fairness as men's land rights are not subjected to the same

requirement. Removal of this restriction is also in line with subsequent discussions on the daughter's right to succeed in the absence of a male heir.

RECOMMENDATION 3: THAT the termination of an unmarried daughter's right upon proof of her having committed adultery or fornication is repealed.

The general proposal received from the public was to remove the restrictions and allow the daughter to hold the allotment even if she marries. This finds justification in particular when the land was not inherited by the father from his family but is newly acquired and developed by the father and his wife and children.

Newly acquired land is a registered town or tax allotment that has been registered to a land holder upon a grant, which has not been transferred to him through any rights as an heir. When the landholder dies, this newly acquired land devolves to an heir and therefore becomes family or hereditary land.

However, whether the land is newly acquired or family/hereditary land, a landholder and his family (including his daughters) do contribute to the development of that land during his life interest. As such, the daughter's right to succeed should not be limited only to newly acquired land.

RECOMMENDATION 4: THAT the restriction on the inheritance of a daughter when she marries should be removed. Where there is no male heir of the deceased landholder, his daughters shall succeed as follows. If there is more than one daughter then the eldest will inherit the land until she dies then the land will go to her sisters in turn according to age starting from the eldest until they respectively die. When the final daughter dies then the land will devolve to the children of the daughters (sons in order of age, then daughters in order of age, if there are no sons) starting from the eldest daughter and continue under the laws of inheritance.

(b) Rights of a widow

In the case of a widow, her right to the allotment of her deceased husband is only to have the use of the land during her life or until she is proved to have committed fornication or adultery, re-marries or dies. This restriction should be removed to promote fairness as men's land rights are not subjected to the same requirement. Removal of this restriction is in line with the earlier discussions on an unmarried daughter's right.

RECOMMENDATION 5: THAT the termination of a widow's life interest upon proof of her having committed adultery or fornication is repealed.

A widow cannot lease or mortgage the land. The proposal from the public and other special interest groups were to allow a widow to lease or mortgage land with the consent of the heir as she may need money to develop the land she has inherited.

RECOMMENDATION 6: THAT a widow be allowed to lease or mortgage the land she holds as a widow but only with the consent of the heir.

There was a suggestion to review the rights of a widow who lives overseas. The purpose of a widow's right is to have a home to live in for the rest of her life. If she lives overseas then this purpose is nullified. The suggestion is that there should be a legal provision to force such a widow to surrender her rights to the heir. This may be very relevant where the widow is the second or third wife of the landholder and the heir is a son with the first wife. The Commission does not support the proposal to take away the right of a widow who resides overseas. However, a widow's rights would be subject to a caretaker's rights as in Recommendation 10 below.

In a similar way a suggestion was made that an heir who resides overseas should be required to surrender his interests in favour of a family member residing in

Tonga. The Commission does not support this proposal, but as with the widow, the heir's rights would also be subject to the rights of a caretaker.

Where newly acquired land is obtained by a husband and wife, if the husband dies his widow is subject to the same restrictions as a widow of family land.

The proposal from the public was for the widow of newly acquired land to be given more rights to this land because it was not family land. Such rights should include the right to mortgage or lease that land.

The Commission supports leasing or mortgaging by the widow of her land with the consent of the heir. However, where the land is newly acquired land and the widow and her deceased husband had no children then consent is not required.

RECOMMENDATION 7: THAT the rights of a widow to land that has been newly acquired by her husband should allow her to lease or mortgage the land with the consent of the heir, and where she had no children with her husband, then consent is not required.

Some members of the public also proposed that the widow should be able to choose who will succeed to this newly acquired land where her husband has died and there is no heir. The purpose of this proposal was to allow adopted or illegitimate children of the holder of newly acquired land, particularly those who had lived with and taken care of the holder and his wife, to inherit this land.

The public also expressed mixed opinions on the rights of an illegitimate or adopted child to inherit land. Where the couple had no children and the land had been newly acquired and not inherited from the father's family, then there could be good reason for the land to devolve to an adopted child, especially where he has lived and looked after the adoptive parents. An illegitimate child who has

been legally adopted would also qualify to succeed. The adoption of an illegitimate child would therefore be a matter for serious consideration by the landholder and his wife, especially in relation to land inheritance.

In light of these proposals, the Commission considered that giving such a right to the widow equated to "willing" land to others. However, it is considered that legally adopted children in this particular instance could inherit such newly acquired land. So, in reality should a couple in the above circumstances be serious about their adopted or illegitimate child inheriting their land, then they would legally adopt that child.

RECOMMENDATION 8: THAT legally adopted children (sons in order of age, then daughters in order of age, if there are no sons) shall succeed as heir to newly acquired land in the absence of any legitimate children of the landholder.

(c) Rights of a deserted wife

Continuing with the rights of women, the position of an innocent wife who has been deserted by her husband was raised in the public meetings with the proposal that she should be entitled to continue living in the family home that she has helped to develop, especially if she has children from the marriage. Such situations have been legislated for in other countries and the Commission favours a similar remedy in Tonga. It was also expressed by the public that in general a wife who had taken care of her husband and raised their children - surely deserved more than the current restrictive land rights over such land.

RECOMMENDATION 9: THAT a deserted wife shall have the right to remain on the family land and home with her children until she remarries or dies.

(iv) Caretaker rights

Another situation brought to the notice of the Commission by the public was the case where the holder and all his children live overseas and only a family member remained in Tonga to look after the allotment and perform obligations to the estate holder which continue for years. The suggestion is that such a family member should be given some rights over the allotment so that the heir cannot simply evict that family member after the death of the holder. This should encourage more active interest from heirs living long term overseas over their land in Tonga.

RECOMMENDATION 10: *THAT a family member who has, with consent from the holder lived on and looked after the family land for over 5 years should be given residential rights to the allotment and not be evicted by the landholder, widow or the heir. This residential right shall be equivalent to the number of years that the family member has lived on and looked after the family home. Should the land holder, widow or heir want to take control of the property before the end of that period then he will have to pay reasonable compensation to such family member for an amount agreed between them. If they do not agree on an amount, such compensation shall be fixed by the independent Land Commission.*

(v) Idiot or Imbecile not to succeed to an allotment

The succession of a person who is an idiot or imbecile was raised. It was pointed out that such a person could not succeed to a hereditary title and estate under section 30 of the Land Act. This should also apply to inheritance of an allotment.

RECOMMENDATION 11: *THAT any person who is an idiot or imbecile shall not inherit land or hold title to land. If required, a determination a person's state of mind for purposes of inheritance to land shall be by way of a medical certificate from the Director of Health.*

RECOMMENDATION 12: THAT any person who is an idiot or imbecile shall not inherit title to a hereditary estate. If required, a determination of a person's state of mind for purposes of inheritance to title to a hereditary estate shall be by way of a medical certificate from the Director of Health.

(vi) Locality should not be determining factor in application for a grant

It was also suggested by the public to the Commission that a person should be allowed to apply for an allotment anywhere in Tonga and should not be limited to the locality where he lives as specified in section 35 of the Land Act.

RECOMMENDATION 13: THAT a person may apply for an allotment anywhere in Tonga subject to section 35 of the Land Act.

(vii) Right of election of son and grandson of landholder

Sections 84 and 85 of the Land Act gives the son or grandson holding a registered allotment who is also an heir to a family allotment the right to elect whether to hold on to his current allotment or take that of his father or grandfather. The suggestion was to remove the right of the grandson to elect so that if the eldest son elects to keep his own land then the choice will be given to the next son (brother of the heir) and continue this by age along the brothers of the heir.

What has developed from this is the ability of a landholder to effectively hold and control two allotments which was never the intentions of King George Tupou I. This exploitation should be hence prevented.

RECOMMENDATION 14: THAT where the heir already holds a registered allotment and elects to keep his own land then the right of election to the family land shall go to his brothers in turn, in the line of succession instead of his son in accordance with the established succession laws.

It was also suggested that the right to elect under sections 84 and 85 of the Land Act should not be restricted to the son or grandson but be open to anyone who is an heir to an allotment.

RECOMMENDATION 15: THAT the right of election should not be restricted only to the son and grandson of the landholder, but this right should be available to everyone in the line of succession.

(viii) All children of landholder should get a share of his land

It was also suggested by the public that all legitimate children of the landholder should share the land. This could be accommodated if the proposal for the frequently suggested Family Trust is given effect. The same may also apply in a Family Trust to the suggestion that the landholder and his wife should be given the right to elect who of the children will succeed to the land.

(ix) Further proposals for change to be considered by Government

There were also some proposals from the public regarding town and tax allotments which in the opinion of the Commission it could not deal with in light of time and resource constraints but warranted referring to the Government for their appropriate consideration. These were as follows:

- (a) That the landholder should get a share of any financial gain from natural resources discovered under his land. Some years ago there were oil exploration activities in Tonga which required drilling exploratory wells on registered allotments. If oil had been discovered, the landholder was asking to have a share in the profits from such a discovery. Similarly, the same share interest was sought if precious stones or other minerals were discovered under the land of the landholder.
- (b) People wanted clarification on the right to drill a bore (well for water) on their allotment. This may be something for the Tonga Water Board to consider and duly inform the public.

- (c) Section 74 of the Land Act still requires the holder of a tax allotment to plant 200 coconuts on his land. This is not enforced today but the suggestion was that because of the importance of coconuts commercially and for domestic use the law should be strictly enforced. Whether this is relevant today with the limitations of the copra industry needs to be considered by Government.
- (d) Section 64 of the Land Act imposes a rent of 80 seniti per annum on all tax allotments which is payable to the estate holder. Having this rent keeps the interest of the estate holder in the land alive so that when there is no heir to succeed to the allotment it reverts to the estate holder. The small amount has remained the same for many years and has not been strictly enforced by the estate holders. Its importance however is the keeping of the estate holder's link to the land. There were some suggestions from the public to increase this amount but no specific figure was mentioned. There were also suggestions to impose a general land tax on all landholdings as a source of revenue for the Government. The Commission refers this for the consideration of the Government.

3.1.2 PROCESS TO ACQUIRE AND SECURE A RIGHT TO AN ALLOTMENT

The public expressed concern with the land registration process they go through to secure an allotment. All steps of securing an allotment have continuously been long and arduous beginning with making contact with the estate holder, applying for an allotment, and decisions of the estate holder and sometime his personal requirements are some of the matters that the public expressed concern with. The Commission expresses concern that these practices are obstacles to assuring efficient and effective land law practices which it has been required to inquire into under its terms of reference.

(i) **Difficult to secure a time to see a Noble**

Members of the public informed the Commission of difficulty they face firstly in seeking time to see a Noble. In some cases the Noble would be overseas sometimes for an extended period. Even when he was in Tonga, people would find it difficult to confirm a time to meet. This has led to suggestions that every Noble should have an office with specified times he will be available to meet the people of his estate.

Another difficulty that was expressed by the public was when a Noble died and his heir was still a minor. The practice has been to have a Trustee to look after the Noble's interests while he is a minor. The Trustee should be legally appointed and be available to meet with the public to carry out the Noble's duties.

RECOMMENDATION 16: THAT every Noble should make a time and place where he will be available to meet with the public with an interest within his estate each month and this should be made known to the public. In the case of a Noble who is overseas for an extended period, another family member or a Trustee should be appointed to carry out the Noble's duties. In the case of a Noble who is a minor, a Trustee should be appointed and made known to the public. The Trustee should specify a time and place to meet with the public in each month and inform the public accordingly.

(ii) **Delays in a estate holder deciding on an application for grant of an allotment**

Concern was expressed by people because of the time taken by a Noble to give a decision after an application for an allotment has been made. The long delays are unreasonable. A suggestion was made that there should be a specified period of time within which the Noble must give his decision on the application. The same proposal was made regarding Government estates. The Land Act

should expressly state a time period within which the Minister should make a decision regarding an application for grant of an allotment. A lot of applications have been made for allotments, but years have passed and still no decision has been made on whether a grant will be made. The proposal by the Commission is to give the Minister of Lands a set period, which should be the same period proposed for Noble Estate holders.

RECOMMENDATION 17: That a Noble must give his decision regarding an application for an allotment, within 12 months after having received the application, failing which he will be deemed to have approved the application. The same shall apply to Crown Land with a decision by the Minister of Lands.

(iii) **Land occupied for years without registration**

Some people have been given land by the Noble and told to just live on the land without registering it. This can go on for a long time making these people feel insecure because they have not been able to gain the security of a registered title. They live on the land at the mercy of the Noble. This kind of situation should not happen but when it does, the public have proposed that there should be a means of forcing the Noble to allow the registration of such land.

RECOMMENDATION 18: THAT where people have lived on an allotment for a period of one year or more with the approval of the Noble, that allotment upon application from the occupier should be registered and the Noble should facilitate such registration. Failing this, the applicant may seek remedy from the Minister of Lands to carry out the registration using his powers under section 34 of the Land Act, unless for proper reason such registration should not be effected. The same condition shall apply to Crown Land and remedy sought will be through the independent Land Commission and the Land Tribunal.

(iv) Granting the same allotment twice

Concern was expressed by the public at the practice of some Nobles in granting the same allotment twice or more to different people and revoking a signed approval without proper reason. The law on this area is as stated in relevant case law⁴.

RECOMMENDATION 19: THAT a Noble may not grant the same allotment to two or more people and where this has happened then the first grant shall be deemed to be the valid one in time unless there is proper reason for the Minister to exercise his discretion otherwise. Similarly, a Noble may not revoke his signature in granting an allotment unless he has a legally valid reason for doing so. The same shall apply to Crown Land with a decision by the Minister of Lands.

(v) Guideline to Estate Holders

Because of the difficulties and concerns expressed above it was suggested by the public that a set of written guidelines should be drafted to guide estate holders in the exercise of their powers. This will assist the estate holder but he would still make his decision independently.

Developing this guideline policy can also provide an informative and educational aspect to the ongoing relationship between the Nobles and their people. Application of such guidelines would also go a long way to allaying public discontent and distrust of some Nobles who apply these guidelines when distributing lands to their people.

⁴ Malupo v Havili (TLR, Vol IIM 1923-1962, p.30), Hafo'ou v Fotu ((TLR, Vol IIM 1923-1962, p.60), Tu'ipulotu v Minister of Lands (TLR, Vol IIM 1923-1962, p.102/p.151) & Afu v Lebas (TLR, Vol IIM 1923-1962, p.167)

RECOMMENDATION 20: THAT a set of Guidelines be drafted to assist the Estate Holder in the exercise of his functions and powers under the Land Act. Government should consider this in consultation with the Nobles.

(vi) Demand for money before registration

Concern was also publicly expressed at the demand of money by some estate holders before allowing an allotment to be registered. Such demands can be made directly and also indirectly. Some people had suggested that such demands be prohibited as being tantamount to the sale of land.

RECOMMENDATION 21: THAT practice of demand for money by some estate holders for the grant of land, whether directly or indirectly, should be prohibited and made an offence. The same shall apply to the Minister of Lands in respect of Crown Land.

3.1.3 DEALINGS WITH AN ALLOTMENT THAT CONCERN SOME PEOPLE

The landholder can deal with his allotment in a number of ways. He can lease or mortgage it and this will be covered in a separate part of this chapter. He can also subdivide it, surrender it and exchange it but he cannot sell it. Some concerns were expressed by the people about some of these dealings.

(i) Allocating plots from a tax allotment that has been subdivided

The practice of subdividing a tax allotment is becoming common in Tonga. Invariably the subdivided pieces of land are given to people who are not related to the landholder in exchange for cash or sometimes to family as a 'gift' or sometimes for cash also. This is perceived by the public as a form of sale of land which is forbidden in the law. The concern was raised mostly by relatives of landholder who had not been given a piece of their family land in a subdivision.

RECOMMENDATION 22: THAT when a tax allotment is subdivided by the holder, he must offer a plot of land to each of his sons, daughters, brothers and sisters before giving to others.

(ii) Surrender of land in exchange for money is not “sale” of land

The public have expressed the view that the practice of surrendering an allotment in exchange for money has also become more common. When an allotment is surrendered it automatically devolves to the heir. The practice however is for the holder to subdivide his tax allotment into small allotments of the minimum size of a town allotment (30 perches) and purport to give these to nominated people. In practice the small allotments are given on the payment of money and would appear to amount to a sale of land. The argument against this is that the money was given for the surrender of the right of the holder to the land because the land goes to the heir and eventually the estate holder and these are the parties who are giving (or selling) the land. Applicable case law on the issue is considered in *Finau v 'Alofaki & Others*⁵ where it was held that selling of land meant the permanent selling of land and not the allotment of land.

In light of the unclear standing of a range of land related money transactions occurring in the Kingdom, it was proposed that there is a clear need to clarify these transactions under the Land Act to ensure all parties are clear as to what is lawful and unlawful. A series of land transactions and related fees need to be defined under the Land Act that account for the various land transactions taking place. It is important to acknowledge that in these modern times it is very common to exchange money for many services and products. However, Tonga's land system is unique and this needs to be carefully protected. Having no freehold land here, the sale of land is strictly prohibited. Land is therefore, in the common (but technically incorrect use of the word) effectively 'sold' in the

⁵ TLR 1989, p.66

following manners; i) the land holder surrenders his land in exchange for money, or ii) tenancy agreements that are yet to be clarified by the Courts or legislation as discussed in Chapter 6. These kinds of 'land transactions' can be defined and accounted for within the Land Act to enable such commercial activity to occur but, with strict adherence to prescribed procedures. This would allow the parties to lawfully negotiate such transfers of land that could be described, once authorized by the Ministry of Lands as 'authorized land transactions'. These authorized land transactions would also be subject to a land transaction fee collected by the Ministry of Lands. Any other land transactions outside the prescribed land transactions would hence be unlawful and attract a penalty.

However, the problem here is the giving under Tongan custom of a gift to a Noble when requesting an allotment. This gift has grown to be a sizeable amount of money that is expected by the Noble. The case of *Tu'ifua v Tui and ors*⁶ is precedent for these gifts not amounting to a sale of land as there is no permanent parting with the land. The reasoning is difficult to understand as under Tongan land law there can never be a permanent parting with land. There is always the right of reversion in both the granting of an allotment and leasing land. Not until we have freehold land can we talk about permanent parting with land as held in this case.

(iii) One year before a surrender of land is effective is too long

A concern brought up by Church leaders was the requirement after a surrender to wait for one year before the surrender becomes effective, in order to allow anyone the opportunity to make a claim as heir. This is a long wait before you can use the land that has been surrendered, particularly when the heir is known and consents to the surrender.

⁶ (1974-80), TLR 99, 100

RECOMMENDATION 23: *THAT where the heir is identified to the satisfaction of the Minister of Lands, it is not necessary to wait for the end of one year before such surrender is made effective.*

(iv) Landholder should be able to surrender land directly to whom it is intended for

With the practice of surrender of land outlined above proposals were received to amend section 54 of the Land Act to by-pass the heir and the estate holder and have the allotment go directly to the person named by the allotment holder. This would amount to a person 'willing' his land to whoever he considered appropriate. This is not consistent with the principles of land inheritance under the Land Act and is a concept closely related to freehold land in foreign jurisdictions.

(v) Is a widow a "holder" of land?

It was proposed that section 54 of the Land Act should be made clear to put beyond doubt that the widow is a "holder" of land who can surrender her rights as a widow over the land which would then go to the heir. The Commission is of the opinion that a widow is clearly a landholder according to the definition of "landholder" under section 2 of the Land Act.

(vi) Exchange of allotments

Public concern was expressed with the practice of exchange of land that is allowed under the current law. People in the outer islands like Vava'u and Ha'apai who migrated to Tongatapu to work, educate their children and settle, would like to exchange their land in those islands for land in Tongatapu. This would leave their land available for people residing in those islands. This is a matter that can be considered by the Government bearing in mind the growing population of Tongatapu and the availability of land.

RECOMMENDATION 24: *THAT where the exchange involves land on different estates then the approval of each estate holder is required.*

3.1.4 LOSING THE RIGHT TO A REGISTERED ALLOTMENT

Section 84 of the Land Act requires the heir or the widow to lodge a claim to a town or tax allotment within 12 months of the death of the last landholder. Failing to do this will result in the allotment reverting to the estate holder or the Crown depending on where the allotment is situated.

(i) Longer period for lodging an heir's claim

Some people advocated a longer period for the lodgment of the claim even up to five years. Others favored a shorter period or even an unprescribed period of "a reasonable period of time". The main reason for seeking a longer period is to facilitate heirs and widows who live overseas coming to Tonga to make their claim. New methods to facilitate the lodgment of a claim from overseas without the need to be physically present in Tonga were proposed and are referred to in (ii) below.

RECOMMENDATION 25: *THAT the period of 12 months be retained for the lodging of the claim by the heir or the widow provided the process proposed for Tongans residing overseas are satisfied.*

(ii) Lodging an heir's claim by Tongan subjects who live overseas

Concerns were expressed by Tongans living overseas for an easier and less costly method through which they could lodge their claim so that an heir or a widow did not have to travel to Tonga for this purpose. They would like to be able to lodge their claim with the consular offices and embassies of Tonga in the countries they reside in. Using the internet was another method proposed. This would make it easier and save the expense of travelling to Tonga to lodge their claim.

RECOMMENDATION 26: THAT claims by the heir and the widow can be made through the Consular Office and Embassies of Tonga in a foreign country. Process for the lodgment of these claims through the internet should also be considered.

(iii) Widow's involvement in lodging an heir's claim

The involvement of the widow in lodging the claim within the 12 month time period was also raised as a public concern. Sometimes it was just overlooked or not known by the widow that she had to lodge a claim. It was also alleged that in the case of a particular widow who was the second or subsequent wife of the landholder, who may have purposely not lodged a claim so that the land would revert to the estate holder and her own children could then apply for the allotment and thereby oust the rightful heir, the eldest legitimate of a son of the first marriage. The Commission's view is that is a matter for the eldest son of the first marriage to be aware of and to check with the Ministry of Lands in a timely manner to avoid losing his right to the allotment.

(iv) Public awareness programmes

The public proposed that Government should consider organizing education programmes throughout villages to raise awareness of land laws and particularly the basic land rights of individual landholders.

Some requirements under the Land Act may appear simple enough to understand, but it became clear throughout the public meetings that many people were still not aware of many important provisions such as how the line of succession to land was assessed and the requirement to lodge an heir's claim within one year after the death of the landholder. Some people only learnt these important aspects from the Commission's public meetings. Some people were under the impression that allotments devolved automatically to the heir and this

sometimes caused dissatisfaction when the allotment reverted to the estate holder who in turn granted it to someone else. The estate holder was then accused of corruption as he is perceived to have granted the same allotment twice, but that was not the case.

Ongoing educational initiatives are required to assist and promote awareness of basic and very important rights that directly affect the day-to-day living of every Tongan subject. Educational programmes would assist in improving the overall outlook of the public toward land laws, promote better relations with the Ministry of Lands and improve the efficiency of land distribution by applying these preventative measures. An informed Tongan subject is less likely to make errors in judgment or out of ignorance in matters of land law that can sometimes have long term and devastating effects on themselves and their families for generations. Ensuring the public are better informed also provides an important and stable starting point for all Tongans to make better and wiser decisions relating to land.

The Commission supports the proposal to promote public awareness and the matter is referred to Government for consideration. It is a matter for the Ministry of Lands to consider in light of financial and resource constraints and initiate an ongoing public education programme accordingly that can be sustained long term. This programme could include a mix of forums such as seminars, posters, brochures, radio, newspaper, email and the internet.

It was also suggested by the public that all basic land rights should be included in the syllabus for all primary and secondary education to assist with public awareness and education of land rights.

The Commission supports the inclusion of basic land rights in the syllabus for primary and secondary education to assist with public awareness and education of land rights and refers this matter to the Government for consideration.

3.1.5 SITUATIONS WHERE A HOLDER'S RIGHT IS NOT CERTAIN

Questions were asked on situations where it appeared that the landholder's rights were not certain.

(i) Rights of a son born before his parents were married

Some members of the public asked for clarification of land rights of a son who was born before the marriage of his parents, and was subsequently legitimized through marriage. Where does he stand in relation to succession to the allotment of his father? Section 82(b) of the Land Act states that "only persons born in wedlock may inherit". This means that children born during the marriage are the only ones who can inherit their father's allotment. However, the Legitimacy Act (Cap. 32) provides that children born before the marriage become legitimized from the date of marriage provided that the parents were free to marry when the child was born. Section 4 of the Legitimacy Act gives such legitimated child the right of succession to his father's allotment in priority to another child born after the marriage. This view is supported by the Court of Appeal decision in *Maliepo v Faka'osilea and Minister of Lands*⁷.

(ii) What was the position of Tongans residing overseas and Tongans who have acquired a foreign citizenship?

A Tongan citizen who had a registered allotment does not lose his land because he resides overseas for whatever length of time. In the 1970s a law was passed in the Legislative Assembly which would have taken away the land of a Tongan if he had resided overseas for over five years. His Majesty King Taufa'ahau Tupou

⁷ TLR, 1995, p.53

IV refused to give His assent to this law and therefore put an end to it. The basis for the refusal of the Royal Assent was that these people living overseas were still Tongans and they were of great help to the country through their remittances to their family, church and friends. There has not been any attempt to re-introduce such a law since.

The position is slightly different with a Tongan who has changed nationality before 2007. The position before the coming into force of the Nationality (Amendment) Act 2007 on the 14 August 2007 was that a Tongan who acquired a foreign citizenship would automatically lose his Tongan citizenship. The 2007 Act allowed a Tongan who had changed citizenship to also retain his Tongan citizenship and for those who lost their Tongan citizenship before this Act to apply for re-admission to Tongan citizenship. The question then was what was the effect of a Tongan losing his Tongan citizenship before 14 August 2007 on his right as the holder of a registered allotment? Under the Land Act, only a Tongan citizen can hold a town or tax allotment. This person was no longer a Tongan subject. Did he lose his land that he held as a Tongan?

Of interest was that no one informed the Commission that they had actually lost their land because of his change of citizenship before 2007, but the public widely sought clarification on the issue. If one did lose his land, then to whom would it devolve to - through succession or does it revert to the estate holder? The law on this area is considered in *Pahulu v Mottini & Another*⁸, where it was held that a Tongan subject who acquires foreign citizenship loses his right to hold registered land as only Tongan subjects can hold tax and town allotments.

⁸ TLR, 1996, p.253

The Commission is however aware of a recent Registrar General ruling in the Schaumkel case⁹ relating to Tongan nationality, but it is important to note this decision does not appear to affect land rights acquired before then due to clause 20 of the Constitution with regards to retrospective application of laws. The Commission is also aware that this matter is currently subject to an appeal to the Court of Appeal, therefore, the final position of the Court is not yet determined.

(iii) Abandoned or unused land

A big part of the vision of King George Tupou I in granting land to Tongans was that they would use it to grow crops to provide food for their families. It was not to just leave it vacant and unused. One of the issues of strong concern to the public was land in Tonga which was not being used and in some cases abandoned. There are many reasons for land being unused or abandoned and many problems have arisen because of it. In some instances, the owner of the land lives overseas, but in other instances he lives in Tonga. There are many people without land who could work these abandoned land parcels and make them productive. In some cases a town allotment and its empty house has been abandoned and has become an eye sore for the community. There were various public suggestions to deal with abandoned land but all with the intention of making use of the land.

It was suggested by the public:

- (i) That the landholder should appoint someone to work his land or approve its use by others.
- (ii) To leave such land with the Town Officer who will give it to others to use.
- (iii) That an independent body should be established for the purpose of identifying abandoned allotments, become custodian of such allotments if

⁹ In the Matter of Peter Denzel Paul Schaumkel, RG 259/2011

the owner agrees, then elect (from interested parties) who will work and develop the land.

- (iv) In each of these cases the land will still be retained by the landholder.
- (v) That abandoned allotments should revert to Government and become Crown land.
- (vi) That abandoned land should be forfeited.
- (vii) That a monetary penalty should be levied on the owners of abandoned land.

Section 44(2) of the Land Act provides that any person, who has been granted an allotment and abandons that allotment for more than two years, shall forfeit that allotment to the hereditary estate holder or the Crown depending on where the land is situated. Although many abandoned allotments can be observed throughout Tonga, the Commission was not notified during the public meetings of any such case of forfeiture.

The Commission favours giving the landholder an opportunity to make provision for use of his land in his absence instead of forfeiture. Instead of losing one's right to a registered allotment, penalties should be imposed on a landholder who fails to make such provisions so that landholders are motivated to work their land and not leave it unattended. Should the landholder, continue to abandon his land, after being given reasonable opportunity to have his land utilized then the powers within section 44 (2) of the Land Act could then be relied upon.

RECOMMENDATION 27: THAT rules including penalties be made concerning land which is abandoned so that it is used but the ownership is still retained by the registered holder. Section 44(2) should be amended accordingly.

(iv) Adverse possession

The legal position of the registered holder in relation to an occupier of the land needs to be clarified. In some instances the occupier has been living on the land with the permission of the holder. In other instances the occupier has been living on or using the land unknown to the holder. Even if occupation of the land was unlawful, with no deeds or documents supporting the occupancy, as against registered title, that is all irrelevant if the occupation of the land is adverse for over 10 years before it is challenged¹⁰. Section 170 of the Land Act is very clear that the date from which the limitation period starts to run is the date from which the right to bring the action first accrued, and does not depend on whether or not the landholder had actual knowledge of the adverse possession.

Bearing in mind the 10 year limitation on taking legal action under the Land Act, the position of the holder and the occupier needs to be made clear.

RECOMMENDATION 28: THAT the legal position of the registered holder of an allotment against that of an occupier be made clear by legislation bearing in mind the ten-year limitation and relevant case law.

(v) New settlement in Niuatoputapu post-tsunami

In September 2009 a tsunami hit Niuatoputapu causing the tragic loss of life, damage to some coastal areas and people losing their home and land. The Government resettled these people in parts of the estates, including the estate of Noble Ma'atu. Issues relating to unclear border lines between estates (Ma'atu and Tangipa) and also with Government lands were expressed by the people of Niuatoputapu. These people wanted to know who their landlord was - the Government or Noble Ma'atu? The Commission leaves this matter for further consideration and clarification by Government.

¹⁰ Tu'ifua v Tui & Ors [1974-80] Tonga LR 99,100 (PC)