

# **APPENDIX 6**

*(FAKALAH 6)*

**ROYAL LAND COMMISSION**

**SECOND INTERIM REPORT**

**LAND DEALINGS IN VAVA'U AND ELSEWHERE IN TONGA**  
**THROUGH THE INTERNET**

**MEMBERS**

**BARON FIELAKEPA GCQS**

**Chairman**

**LORD TUPOU KC KGCQS**

**Commissioner**

**KAHUNGUNU BARRON-AFEAKI SC CRH**

**Commissioner**

**GLORIA GUTTENBEIL-POLE'O MRH**

**Secretary**

## EXECUTIVE SUMMARY

1. Vava'u holds immense appeal for tourists with its hilly countryside and scattered small sandy beach islands, whale watching and game fishing activities.
2. Vava'u also has great attraction for foreign investors who see the potential in attaining land with sandy beaches, developing the same and selling them to keen foreign buyers who may wish to re-locate from their country to what they see as their 'dream tropical home' away from home. Some foreigners are attracted to these lands for their own personal use in retirement and to set up their own tourist related business.
3. Early this century, a new breed of occupation began in Vava'u. These were Real Estate Agents and Commission Agents introduced by foreigners who advertised various sites and plots of land for sale through the internet. Invariably, these sites were adjoining attractive sandy beaches. On flying into Vava'u one can get a good view of the many scattered islands with beautiful sandy beaches. These are what are being marketed through the internet with the willing approval of the Tongan landowner.
4. The foreign Real Estate Agents and Commission Agents became aware that under Tongan law, there was no freehold land as they may have in their own country and the sale of land was forbidden and unlawful in Tonga. With the help of Tongan lawyers, these Agents introduced a Tenancy Agreement between the foreign buyer and the Tongan landowner under which the buyer agrees to construct buildings on the plot of land which after construction are owned by the Tongan land owner. The buildings are then rented to the foreign buyer for lengthy terms of between 50 and 99 years with an option to renew. There is 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.
5. As these Tenancy Agreements involved only the occupation of a building owned by the Tongan landowner who currently retains the ownership of the land upon which the buildings rests, it is argued that this is purely a commercial contract of tenancy which is outside the strict requirements of Tongan land law, with regard to the duration of occupancy of land and the way under which land can be

occupied or alienated under the provisions of the Land Act. A contrary legal opinion states that what is attempted under these Tenancy Agreements is to circumvent the principles of Tongan land law. This is unlawful under section 13 of the Land Act which provides that any dealings with regard to land that are made outside the provisions in the Act are unlawful unless approved in writing by the Minister of Lands and furthermore is punishable with a fine or imprisonment. The contrary legal opinions can only be resolved by a decision of the Court but no one has taken the matter to the court yet. The alternative is for the Legislative Assembly to legislate to clarify the position relating to such tenancy agreements.

6. There are only a handful of agents advertising land through the internet in Vava'u. The first who began this work was a Mr. Robert Bryce in 2004/2005. He has now re-located his business since 2008 to Fiji. The other main people practicing this trade in Vava'u are Mr. Neshia Rosic, Mr. Gordon Allison, Mr. Hans Schmeiser and Mr. Trevor Jefferson.
7. As might be expected with the little land available for this kind of business, there was great rivalry between these agents where Bryce worked together with Schmeiser and sometimes Jefferson while Rosic worked together with Allison. Various derogatory and defamatory remarks were published through various websites on the internet to dissuade investors from dealing with a particular agent. Some samples were tendered as Exhibits and will form part of this report.
8. In most cases, a Tongan landowner would approach one of these agents offering his land for money. The agent would bring his Tenancy Agreement to the Tongan landowner, have it explained by a Tongan and finally by a Tongan lawyer, agree to the terms and sign. At this stage the Tongan landowner would be made aware of the agreed amount that he would be getting in American currency and any amount over and above this would be for the commission and expenses of the agent. Samples of these Tenancy Agreements were also tendered as Exhibits and will form part of this report.
9. The site would then be advertised on the internet through websites of the agent. Once an interested party is found, the terms are discussed through email and eventually the Tenancy Agreement is sent to the investor for signature. Under the Tenancy Agreement a substantial payment in US dollars is to be made to the bank account of the agent or to an escrow account designated by the agent to be followed by a smaller monthly payment for rent to the bank account of the

Tongan landowner. The Tenancy Agreement is between the Tongan landowner and the foreign buyer who have often neither communicated nor met each other.

10. A form of Lease Agreement was also used by some Real Estate Agents as opposed to the Tenancy Agreement in which not only the buildings would be rented but also the land itself. These lease Agreements were for periods of up to 50 years with an option to renew for periods of up to another 49 years and referred to as "family agreements" by one Real Estate Agent. After these Agreements were signed by the buyer, the parties then proceed to sign an application to lease using form L.9 of the Ministry of Lands for the legal term of 20 years, if the land is part of a tax allotment. The buyer is led to believe by the Real Estate Agent and some Tongan lawyers that the Lease Agreement is valid and binding on the Tongan landowner and his successors so the term of up to 99 years remain valid. Such agreements are unlawful under the Land Act. Sample of these Lease Agreements were tendered as Exhibit and will form part of this report.
11. This kind of land dealing was brought to the attention of Government in 2007. In 2006 Tenancy Agreements over two beach front 2 acre lots of land were entered into by a British and an American national both residing in Hong Kong with the Tongan registered land owner in the island of Nuapapu. Substantial up front money was paid to the landowner and the agent including advance payments in respect of the monthly rent. In 2007 the same land that was subject to the Tenancy Agreements was included in another Lease Agreement made by a different agent with the Tongan landowner and advertised and sold to another party and substantial payments were made to the Tongan landowner. The second Lease Agreement was negotiated by the agent on behalf of the registered landowner. A few months later the son of the landowner signed an L.9 Form application to lease for 20 years as the landowner while his father, who held the registered title, was still alive but died 4 months later. The name of the son was entered in the Land Registration book in Vava'u with the approval of the Acting Governor on the same day as the L.9 application. The application for lease was approved by the Acting Governor of Vava'u and subsequently by Cabinet and registered. The son resides in American Samoa and could not be called to give evidence. Buildings have been constructed and advertised through the internet and already sold as villas to foreigners in pursuance of the 20 years registered lease and the 99 years family Lease Agreement.

12. The problem raised in the preceding paragraph was brought to the notice of Mr. Kahungunu Barron-Afeaki in 2007 by the parties residing in Hong Kong who had the prior Tenancy Agreements in 2006. They retained him as their lawyer. With the agreement of his clients, Mr. Afeaki sought the approval of Government in November 2007 to conduct an investigation in Vava'u with the help of the Ministry of Lands. He did this and provided a report in December 2007 which was given to Government and to his clients. The report was tendered as Exhibit 24.
13. Smaller instances of land dealings through the internet by agents were made with land in Ha'apai and Tongatapu but to a much lesser extent than at Vava'u. Reference will be made to these in the report.
14. Evidence was also given that Government through the Ministry of Labour, Commerce and Industries had put a moratorium on the issuance of Real Estate Licences as from March 2007. This moratorium was communicated verbally to the Officer in Charge in Vava'u in 2007 and she has not issued any Real Estate Licence since that date. In spite of this, Real Estate Agents have continued practicing their trade in Vava'u with impunity.
15. There were allegations of corruption by certain Government officials in relation to land dealings and this report will cover that aspect. At the outset it must be stated that many of these allegations were published through unreliable websites that lack credibility but must be mentioned here. A sample of such a website is shown in Exhibits 127, 128 and 129.
16. There were also allegations of unreliable advice given by agents, Ministry of Lands' officials, lawyers including possible conflict of interests and unprofessional conduct and these will also be covered in this report. This was given in evidence by witnesses and documents produced as exhibits in the hearing.

## TABLE OF CONTENTS

<b>CHAPTER 1 – INTRODUCTION</b>	<b>Page 8</b>
Terms of Reference	8
Public Hearings	8
Witnesses	9
Transcripts	12
Exhibits	12
<b>CHAPTER 2 – REAL ESTATE AGENTS</b>	<b>14</b>
Definition	14
Introduction of Real Estate Agents	14
Means of conducting business	14
Show of interest	14
Means of communication	15
New Real Estate Agents	15
Competition	16
Moratorium on Real Estate Licences	16
Commission Agent	18
Tongatapu Real Estate Agents	20
Ha’apai Land Deals	20
<b>CHAPTER 3 – AGREEMENTS USED BY REAL ESTATE AGENTS</b>	<b>22</b>
Tenancy Agreement	22
Aleapau Ngaue	25
Offer and Counter Offer	25
Lease Agreement	25
Pita Hala’api’api – Toulā, Vava’u	27
<b>CHAPTER 4 – NUAPAPU ISLAND AGREEMENTS</b>	<b>29</b>
Houmatoka and Lolovi	29
Dealings with Houmatoka	30
Caveat	35
Building Permit	35
Findings on the Nuapapu Island land deals	36

CHAPTER 5 – WRITTEN SUBMISSIONS	38
Richard Mortimer and Eric Stark (Hong Kong)	38
Paul Kenneth Dickinson (United Kingdom)	38
Alistair and Lesley Allan (Scotland)	39
Tim Ellis and Teresa James (United Kingdom)	40
Jon Arnott (Tonga)	41
Paul and Brenda Burgoon (Canada/Tonga)	42
Sailosi Hemaloto (Tonga)	43
Felisiano Tolati Fifita (Tonga)	44
Dana Stephenson (Tonga)	44
Trevor Jefferson (Vava'u, Tonga)	45
CHAPTER 6 – CLOSING REMARKS	47
CHAPTER 7 – RECOMMENDATIONS	49



## **CHAPTER 1 – INTRODUCTION**

- 1.1 This Interim Report covers the Second Phase of the work of the Royal Land Commission (“the Commission”). It involves an inquiry into possible unlawful sale and leases of land in Vava’u through the internet contrary to the Act of Constitution and the Land Act. Public notices of the inquiry were made in local newspapers, radio and television. Notice was also published on the website [www.matangitonga.to](http://www.matangitonga.to).
- 1.2 Members of the public were invited to send written submissions. We received written submissions from people residing overseas and in Tonga. Some came from overseas and gave evidence at the hearings. All written submissions were considered together with the oral evidence.

### **Terms of Reference**

- 1.3 The Commission’s Terms of Reference required it “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.” The present inquiry involves both laws and practices in Tonga over land.

### **Public Hearings**

- 1.4 The hearings were open to the public and were held in the Supreme Court in Neiafu, Vava’u. In his opening statement the Chairman made it clear that the Commission were not a court of law. The Commission was to make inquiries into land practices conducted through the internet and report to His Majesty and Privy Council as required by our Terms of Appointment. The Commission cannot make decisions or solve individual problem, these would need to go through the normal processes in a court of law.
- 1.5 The Vava’u hearings were held on the 1<sup>st</sup> to 5<sup>th</sup> February 2010, 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, March 2010. A total of 18 days.
- 1.6 Because some witnesses were in Tongatapu the Commission held hearings in the Commission’s Conference Room on the 23<sup>rd</sup>, 24<sup>th</sup>, 26<sup>th</sup>, February 2010 and 16<sup>th</sup>, April 2010. A total of 4 days.

- 1.7 The final public hearings were held at the Conference Room of the Janful International Dateline Hotel, Nuku'alofa on the 22<sup>nd</sup>, 23<sup>rd</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, April 2010. A total of 6 days.

### Witnesses

- 1.8 The Commission summonsed witnesses and heard their evidence under oath. There were a total of 57 witnesses summonsed and some had to be re-called to give further evidence. The names of witnesses (in alphabetical order) who appeared and their days of appearances are listed in the Schedule below.
- 1.9 Some witnesses were overseas and could not be heard in person. Written questions were made to these witnesses and answers were given. These will be included as part of the Appendices.

### Schedule – Witnesses Summonsed

	NAME & POSITION	PLACE OF RESIDENCE	DATE
1.	<b>'AKOLO, HON. LISIATE</b> (Minister of Labour, Commerce & Industries)	Tongatapu	Friday, 16 April 2010
2.	<b>ALLISON, GORDON</b> (Foreign Investor & Owner of Escape Vava'u Ltd)	Vava'u	Tuesday, 02 March 2010 Wednesday, 03 March 2010 Friday, 12 March 2010
3.	<b>ARNOTT, 'OFA</b>	Vava'u	Monday, 15 March 2010
4.	<b>BING, ROSAMOND</b> (Law Practitioner)	Tongatapu	Wednesday, 28 April 2010
5.	<b>BURGOON, PAUL</b> (Business owner)	Vava'u	Tuesday, 16 March 2010
6.	<b>CORBETT, DAVID</b> (Law Parctitioner)	Tongatapu	Tuesday, 27 April 2010 Friday, 30 April 2010
7.	<b>FALETAU, TANIELA</b> (Deputy Police Commander, Ministry of Police)	Tongatapu	Friday, 23 April 2010
8.	<b>FAU, PAULA PAU'U</b> (ex employee of Hasdra Real Estate)	Tongatapu	Thursday, 22 April 2010

9.	<b>FA'APOI, HASTING</b> (owner of Hadra Real Estate & Capital Realty)	Tongatapu	Tuesday, 27 April 2010 Friday, 30 April 2010
10.	<b>FA'OLIU, RINGO</b> (Officer-in-Charge of Building Control Division, Ministry of Works)	Tongatapu	Tuesday, 27 April 2010 Friday, 30 April 2010
11.	<b>FE'AOMOEAATA, HEILALA</b>	Tongatapu	Thursday, 22 April 2010
12.	<b>FIFITA, FELISIANO TOLATI</b> (Land Owner)	Tongatapu	Wednesday, 24 February 2010
13.	<b>FOTU, SALESI</b> (Deputy Secretary, Ministry of Lands, Survey & Natural Resources)	Tongatapu	Friday, 23 April 2010 Friday, 30 April 2010
14.	<b>FUNAKI, HON. FINEASI</b> (Minister of Tourism)	Tongatapu	Friday, 16 April 2010
15.	<b>FUSIMALOHI, VIKA</b> (ex Deputy Secretary of the Ministry of Labour, Commerce & Industries)	Tongatapu	Friday, 23 April 2010
16.	<b>HALAHINGANO, PEAU</b>	Vava'u	Saturday, 13 March 2010
17.	<b>HALATANU, FATAUA</b> (Land Registration Officer, Ministry of Lands, Survey & Natural Resources)	Tongatapu	Tuesday, 02 February 2010 Tuesday, 23 February 2010
18.	<b>HALATUITUIA, DR NAILASIKAU</b> (CEO - Ministry of Lands, Survey & Natural Resources)	Tongatapu	Friday, 26 February 2010
19.	<b>HALA'API'API, PITA VI</b> (Land Developer – Vava'u)	Vava'u	Tuesday, 16 March 2010 Friday, 19 March 2010
20.	<b>HANSEN, SINALI</b>	Vava'u	Friday, 05 February 2010
21.	<b>HEMALOTO, SAILOSI</b> (Land owner – Vava'u)	Vava'u	Tuesday, 16 March 2010
22.	<b>JAMES, TERESA</b> (Owner of Reef Resort, 'Otea, Vava'u)	UK/Vava'u	Monday, 15 March 2010
23.	<b>JEFFERSON, TREVOR</b> (Land Agent – Vava'u)	Vava'u	Thursday, 18 March 2010
24.	<b>KAVA, VAO'ESE</b> (Land Agent – Tongatapu – Market Tonga)	Tongatapu	Thursday, 22 April 2010 Wednesday, 28 April 2010
25.	<b>KELLEY, ALEXANDER CHRISTOPHER</b> (Police Commander, Ministry of Police)	Tongatapu	Friday, 23 April 2010
26.	<b>KIVALU, SATEKI</b> (Town officer – Nuapapu, Vava'u)	Vava'u	Friday, 12 March 2010

27.	<b>LATU, FOLOKE</b> (ANZ Employee, Vava'u Branch)	Vava'u	Friday, 19 March 2010
28.	<b>LAVAKEI'AHO, PENI</b> (Building Control Division, Ministry of Works)	Tongatapu	Friday, 30 March 2010
29.	<b>LO'AMANU, PAULA MOA</b> (Surveyor, Ministry of Lands, Survey & Natural Resources, Vava'u)	Vava'u	Friday, 12 March 2010
30.	<b>MAFI, MAKAFILIA</b> (ex Land Registration Officer, Ministry of Lands, Survey & Natural Resources, Vava'u)	Vava'u	Wednesday, 03 February 2010 Thursday, 04 February 2010 Saturday, 13 March 2010
31.	<b>MOALA, SEMISI</b> (Land Registration Officer, Ministry of Lands, Survey & Natural Resources)	Tongatapu	Friday, 23 April 2010
32.	<b>MOEAKI, TATAFU</b> (Secretary, Ministry of Labour, Commerce & Industries)	Tongatapu	Friday, 16 April 2010
33.	<b>MORTIMER, RICHARD</b> (Land investor – Nuapapu, Vava'u)	Hong Kong	Monday, 01 February 2010 Wednesday, 03 February 2010
34.	<b>NIU, LAKI</b> (Law Practitioner)	Tongatapu	Thursday, 29 April 2010
35.	<b>PAEA, YVETTE</b> (Branch Manager, ANZ Bank, Vava'u Branch)	Vava'u	Monday, 01 March 2010
36.	<b>PALU, MONALISA</b> (Mana'ia Real Estate)	Tongatapu	Thursday, 22 April 2010 Friday, 23 April 2010
37.	<b>PIUKALA, KELEPI</b> (Law Practitioner)	Tongatapu	Friday, 30 April 2010
38.	<b>ROSIC, NESHA</b> (Land Agent – Vava'u – Island Real Estate Ltd)	Vava'u	Tuesday, 09 March 2010 Wednesday, 10 March 2010 Friday, 19 March 2010
39.	<b>SCHMEISER, HANS</b> (Land Agent)	Vava'u	Thursday, 04 February 2010 Friday, 05 February 2010 Monday, 01 March 2010 Wednesday, 17 March 2010
40.	<b>SCHMEISER, MELE</b>	Vava'u	Wednesday, 17 March 2010
41.	<b>STARK, ERIC</b> (Land investor – Nuapapu, Vava'u)	Hong Kong	Tuesday, 02 February 2010
42.	<b>SPROULE, DENNIS</b> (Land investor – Nuapapu, Vava'u)	Australia	Tuesday, 09 March 2010
43.	<b>STEPHENSON, DANA</b> (Law Practitioner)	Tongatapu	Friday, 26 February 2010 Tuesday, 27 April 2010
44.	<b>TANGI, SEFITA</b>	Tongatapu	Tuesday, 23 February 2010

	(Commissioner of Revenues)		
45.	<b>TAUFATEAU, SIONE TO'IMOANA</b> (Law Practitioner)	Vava'u	Wednesday, 17 March 2010 Thursday, 18 March 2010
46.	<b>TOKE, BRUNO</b> (Officer-in Charge, Ministry of Tourism, Vava'u)	Vava'u	Wednesday, 03 February 2010 Monday, 01 March 2010
47.	<b>TOKE, SAPATE</b> (Officer-in-Charge, Ministry of Labour, Commerce & Industries, Vava'u)	Vava'u	Thursday, 11 March 2010
48.	<b>TONGA, CIP SISI</b> (Officer-in-Charge, Ministry of Police, Vava'u)	Vava'u	Thursday, 11 March 2010 Monday, 15 March 2010
49.	<b>TU'IPULOTU, MANU</b>	Vava'u	Wednesday, 03 February 2010
50.	<b>TU'ITUPOU, MASINA</b> (Secretary, Governor's Office, Vava'u)	Vava'u	Thursday, 11 March 2010
51.	<b>'UTA'ATU, CHRISTINE MARIE</b> (Land Agent – Tongatapu – Pacific Property Development Ltd)	Tongatapu	Thursday, 22 April 2010
52.	<b>VAEA, SIONE MAHE</b> (Land owner – Tu'anuku, Vava'u)	Vava'u	Thursday, 04 February 2010
53.	<b>VAHA'I, 'IOANE</b> (Land owner – Tu'anuku, Vava'u)	Vava'u	Monday, 15 March 2010 Tuesday, 16 March 2010
54.	<b>VAILANU, SIONE</b> (Deputy Secretary, Ministry of Labour, Commerce & Industries)	Tongatapu	Thursday, 22 April 2010 Tuesday, 27 April 2010
55.	<b>VAILEA, LATA</b>	Tongatapu	Thursday, 22 April 2010
56.	<b>VAILEA, SANITU</b> (Land owner – 'Otea, Vava'u)	Tongatapu	Friday, 23 April 2010
57.	<b>VAIPULU, HON. SAMIU</b> (Law Practitioner & Minister of Justice)	Tongatapu	Thursday, 29 April 2010

### Transcripts

1.10 All hearings were recorded on audio. Transcripts of these audio recordings are available from the Commission office upon request.

### Exhibits

1.11 There were a total of 391 Exhibits produced. A list of the Exhibits appears in **Appendix 1**. The documents exhibited are all available at the office of the

Commission but for ease of reference some of these documents will be attached where particular matters are referred to in this report. In addition some documents and correspondences were sent from overseas but the sender did not appear. Also because some witnesses were overseas we found it more convenient that the questions and answers be made in writing. All these documents appear in **Appendix 2** and **3**. These include correspondences with the former Acting Governor of Vava'u, Tu'a Taumoepeau, (**Appendix 2**) and correspondences with the Hon. Minister of Lands, Lord Tuita and his CEO Dr Nailasikau Halatuituia (**Appendix 3**).

## CHAPTER 2 - REAL ESTATE AGENTS

### Definition

- 2.1 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 gets a commission or fee for the services he renders. As such, the Agent is a type of middleman who connects the landowner and the buyer/tenant.

### Introduction of Real Estate Agents

- 2.2 The business of Real Estate Agents was first introduced to Vava'u by a person named Robert Bryce in 2004/2005. Unfortunately Mr. Bryce relocated his business to Fiji in 2008 and the Commission was not able to have him give evidence. However, the Commission considered evidence about his work in Vava'u through clients and people who had worked with him who gave evidence. He still conducts his real estate business in respect of land in Vava'u from Fiji.

### Means of conducting business

- 2.3 Robert Bryce conducted his business through advertisements on a website in the internet. The website he used was [www.southpacificrealestate.to](http://www.southpacificrealestate.to). The website would give a description of the land, its location, pictures, term available in years and the price payable. A sample of information and listings in this website is shown in Exhibit 311.

### Show of interest

- 2.4 The advertisements on the internet were aimed at and drew interests from foreigners most of whom had never visited Tonga. These people had money which they wished to invest for their future or simply to relocate to a place which they would feel their "dream home" away from home. Most saw this as an opportunity to begin a business relating mainly to tourism through which they would get a fair return and hopefully a profit for their investment.

- 2.5 The advertisements also drew interests from persons who had aspirations of setting up their own Real Estate Agent businesses.

#### Means of Communication

- 2.6 All initial 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 Tongan land owner was almost never involved with the client and his interest would only be in the receipt of the upfront money due to him under the Agreement and the monthly payment for rent. Sometimes a client would visit Tonga and would meet the landowner but this was not essential for the purpose of the agreement.

#### New Real Estate Agents

- 2.7 All the new Real Estate Agents were initially attracted to Vava'u through the website advertisements made by Robert Bryce. Their initial contacts were to show interest in a particular site advertised and either took it or decided to do their own business after getting some contacts and advice in Tonga.
- 2.8 The first new Real Estate Agent to set up business in Vava'u was Mr. Neshia Rosic in 2005. He made an application and was issued a Professional Services Licence by the Vava'u office of the Ministry of Labour, Commerce and Industries. This Licence indicated that it allowed Rosic to conduct the business of a Real Estate Agent. Mr. Rosic is married to a Tongan woman and continues his real estate business in Vava'u up to now. He advertises under the website [www.vavaurealestate.com](http://www.vavaurealestate.com) and a sample of his listings (advertisements) is attached as **Appendix 4**.
- 2.9 The second new Real Estate Agent who came to Vava'u was Mr. Trevor Jefferson from Missouri, U.S.A. He arrived in Vava'u in January 2005 as a pastor, freelance writer and a Real Estate Agent. He was first attracted by the website of Robert Bryce. He set up his own website, [www.investintonga.com](http://www.investintonga.com), and carried on his business as a Real Estate Agent. There is no evidence that he got a Real Estate Agent Licence to practice that trade and all that he had was a Business Visa. He worked more with Robert Bryce and showed dislike and animosity towards Neshia Rosic.



2.10 The third new Real Estate Agent to set up business in Vava'u was Mr. Gordon Allison. He was attracted by the website advertisements of both Mr. Bryce and Mr. Rosic. He came to Vava'u in December 2006 initially as a buyer/investor but developed into a Real Estate Agent through his sales of sites on lease which he advertises. A sample of his advertisements is attached as **Appendix 5**. Ultimately Mr. Rosic and Mr. Allison worked together in the promotion and development of their Real Estate business in opposition to those of Mr. Bryce. Mr. Allison continues his Real Estate business in Vava'u up to now.

### **Competition**

2.11 The available land for the Vava'u market is limited. Invariably the Real Estate Agents found themselves involved in the same piece 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. A sample is shown in Exhibit 127, 128 and 129. Derogatory and defamatory emails were sent from various sources alleging fraud and illegal activities by one or the other of these Agents. Land officials in the Vava'u office and Tongan lawyers were dragged into these allegations. Robert Bryce made allegations of property damage and threats of physical violence to him and his family by Nesha Rosic that finally made up his mind to leave Tonga in fear for their safety and relocated his business in Fiji. Prior to doing so however, he was sued by Gordon Allison for defamation which the police prosecuted as a criminal defamation. The case was dismissed because of the lack of evidence and the key witness who was alleged to have received the defamatory email did not appear. Trevor Jefferson also alleged in evidence that Nesha Rosic threatened him physically in a Chinese shop in Neiafu.

### **Moratorium on Real Estate Licences**

2.12 Evidence was received from the Officer in Charge in Vava'u of the office of the Ministry of Labour, Commerce and Industries, Ms 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 has abided by it and has not issued any Real Estate Licence. The current Business Licences Act came into effect

in 2007 and provides for all the businesses that can be practiced in Tonga and which require a licence to be issued under that Act and kept current annually before a person can carry out that business. Real Estate Service Licence is one of the businesses covered by that Act that require a licence after application and on the payment of a fee and renewed annually to allow anyone to practice that trade in Tonga. 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. This was confirmed by the Officer in Charge. She also issued a letter with respect to Nesha Rosic at the request of the Governor of Vava'u and a copy is shown as Exhibit 96. In spite of having no Real Estate Agent Licence as required by the Business Licences Act, all persons practicing as real estate agents have 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 is aware of the moratorium and the unlawful practice of the real estate agents in Vava'u but has failed to instigate prosecution for the offence as directed by the Act.

- 2.13 As a matter of courtesy a letter was written to the Minister of Labour, Commerce and Industries informing him of what was happening in Vava'u (**Appendix 6**).
- 2.14 In his evidence, the Minister for Labour Commerce and Industries, Hon. Lisiate 'Akolo confirmed that he had issued the direction to stop the issuance of Real Estate Licences as from March 2007 and that this direction was still effective up to now. In a letter of complaint to the Minister from a person named Graham Gibson dated 4 March 2009 Mr. Gibson said that he was aware "that Mr Rosic did not have a current Real Estate Licence" and that "the Ministry should be actively investigating Mr. Rosic's activities in order to protect the interests of the public and prosecuting him in accordance with the provisions of the Business Licence Act for carrying on a business without a business licence." When this was put to the Minister and why no action was taken on what appeared to be a breach of the law that he was responsible to enforce his answer was that it was *mo'u ngaloo* – just forgotten. The letter from Mr Gibson is found in Exhibit 56B.
- 2.15 The Minister for Labour Commerce and Industries was also shown a copy of a Real Estate Licence that was issued to Mana'ia Real Estate on the 1<sup>st</sup> February 2010 expiring on the 31<sup>st</sup> December 2010 (Exhibit 314). This was issued in Tongatapu from the Minister's office. This was obviously issued contrary to the moratorium that the Minister issued in March 2007 but the Minister did not know that his own

office was still issuing such licences. The Minister undertook to check this matter and also the moratorium itself and its relevance now.

- 2.16 The owner of Mana'ia Real Estate, Ms Monalisa Palu in evidence revealed that her business started in 2007 and her licence has been renewed every year since. A copy of the Real Estate Services Licence issued to Mana'ia Real Estate are shown for 2007 (Exhibit 330), 2008 (Exhibit 332) and 2009 (Exhibit 340).
- 2.17 In 2008 Ms Christine 'Uta'atu applied for a Real Estate Services Licence on behalf of her company, Pacific Property Development Company Limited to the Ministry of Labour Commerce and Industries. The licence was denied because of the direction that been issued by the Minister in 2007. In a letter dated 15 April 2008 to the Secretary of the Ministry, Exhibit 333, Ms 'Uta'atu pointed out that denying her company the licence was contrary to the provisions of the Business Licence Act 2002 and Regulations. A licence was subsequently issued to Pacific Property Development Co. Ltd for 2008 and it is shown in Exhibit 325. This licence was renewed in 2009 and 2010.
- 2.18 In his evidence, Sione Vailanu, Deputy Secretary of the Ministry of Labour, Commerce and Industries said that the moratorium on the issue of Real Estate Services 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 the Minister. This is evident from the licence issued in 2009 and 2010 to Pacific Property Development Co. Ltd (Exhibit 325) where the words "House Rental" are inserted under the business activity of Real Estate Services. The owner of the licence simply ignored this purported restriction as she was of the opinion that there was no authority for it in the Business Licences Act.
- 2.19 While the Ministry 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.
- 2.20 The Commission recommends that the Minister for Labour, Commerce and Industries reconsider the reason, justification and usefulness of the moratorium he issued effective from March 2007 stopping the issuance of Real Estate Services Licences. He 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. Something needs to be done immediately to ensure that both Tongatapu and Vava'u are given and act within the same directions from Head Office. 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.

### **Commission Agent**

- 2.21 Another person involved in the real estate business in Vava'u but from a perceived different angle is Mr. Hans Schmeiser. He is of Austrian origin and came to Tonga in 1982, operated a number of tourist businesses including the Hilltop Hotel, married a Tongan lady, became naturalized as a Tongan in 1994 and has lived in Vava'u up to now.
- 2.22 Hans Schmeiser operates under a Commission Agent Licence which gives him a commission on every business related deal that he is involved in. He quickly teamed up with Robert Bryce in the Real Estate business. Schmeiser worked with a Tongan, Peau Halahingano who was responsible for acting as an interpreter to the Tongan landowner. Schmeiser's work and reputation became known in Vava'u. Tongan landowners who wanted money for their land approached him to find a client who is willing to take the land for the payment of money. Schmeiser would inform the landowner to retain a part of his land for his own use and give up only a part on the coast for the money payment. The sum that the landowner would get is agreed and the remainder would go to Schmeiser for his commission and other expenses.
- 2.23 Schmeiser operated two forms of agreement. One was the "Aleapau Ngaue" in the Tongan language setting out the description of the land, the amount of money that the landowner would get, the monthly rental, and the amount of the commission payable to Schmeiser. This agreement was made between Schmeiser and the landowner and was explained to the landowner by Peau Halahingano and later by a Tongan lawyer and was signed by the landowner and Schmeiser. The other agreement was a Tenancy Agreement in the English language between the landowner and yet to be found tenant reflecting the terms of the Aleapau Ngaue. The Tenancy Agreement is then taken to a Tongan lawyer who explains the terms to the Tongan landowner who then signs the agreement in the presence of the lawyer. Sometimes the wife of the landowner and their eldest son also sign the

agreement as possible future successors. Both these agreements will be discussed in more detail and examples given in the next chapter of this report.

- 2.24 Schmeiser would then take the Tenancy Agreement to Robert Bryce to look for a tenant through advertising in his website. Once a tenant is found, an unsigned copy of the Tenancy Agreement is sent by Schmeiser to the tenant and if he agrees to the terms and pays the upfront money required by the agreement, Schmeiser then sends two copies of the Tenancy Agreement that was signed by the landlord to the tenant for signing and returning one copy to Schmeiser. Under the agreement the payment of the upfront money is to be made to an account name Island Escrow with the ANZ Bank which is operated by Schmeiser while the monthly rent is payable to an account of the landlord. The commission for Robert Bryce is also payable from the upfront money.
- 2.25 Schmeiser does not have a website like Bryce and the other Real Estate Agents. However, from the description of the work done by him with the two agreements with the landowner, the contract made with the tenant and the receipt of the money to the Escrow Account operated by him, he would appear to be carrying out the function of a Real Estate Agent as well as that of a Commission Agent. The Ministry of Labour, Commerce and Industries would need to look at this carefully to see that appropriate licences are applied for and given to cover these separate occupations under the Business Licences Act 2002.

#### Tongatapu Real Estate Agents

- 2.26 A few real estate agents conducted business in Tongatapu. They were mainly Tongan nationals and they were summonsed and gave evidence in Nuku'alofa. The earliest, Hasdra Real Estate began in 2004.
- 2.27 Those who carried on real estate business in Tongatapu and who gave evidence were, Hasdra Real Estate (Mr. Hasting Fa'apoi), Pacific Property Development Co. Ltd (Ms Christine 'Uta'atu), Mana'ia Real Estate (Ms Monalisa Palu), Market Tonga Real Estate (Ms Vao'ese Kava) and Niu Real Estate (Ms Dana Stephenson). Hasdra Real Estate closed its operation in 2009 and was replaced by Capital Realty operated by the same owner, Hasting Fa'apoi. Ms Dana Stephenson ended her involvement with Niu Real Estate in 2009.

- 2.28 From the evidence received, it appeared that the Tongatapu Real Estate Agents did not have the same problems that involved 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. There was no long term tenancy agreement or lease agreement like those used in Vava'u.
- 2.29 As noticed above when discussing the moratorium on the issuance of real estate licences they continued to be issued to Real Estate Agents in Tongatapu on the basis that it was only for house rental. Vava'u was not informed of this so the officer in charge continued the moratorium up to now. As we have seen however, Real Estate Agents in Vava'u continue their business without a licence.

#### **Ha'apai Land Deals**

- 2.30 There were only two land deals in Ha'apai that came to our notice. One was included in the advertisements by Neshia Rosic that was downloaded from the website [www.vavaurealestate.com](http://www.vavaurealestate.com) in Uonuku Island (Exhibit 242) that included two properties. When Rosic gave evidence these properties had not yet been leased. Presumably, when a tenant is found, the lease agreement Rosic used in the Vava'u deals would be used. The other was in relation to a property in Ha'apai that was brought to our notice by David Corbett in his evidence where he provided an email exchange with a client, Vera Velanova (Exhibit 387). This was in relation to a property in Ha'apai marketed by a real estate agent in Vava'u where a sum of money was paid as deposit to the Ha'apai land owner Mr Peleketi. Apparently, a higher offer was made by the Tongatapu real estate agent Market Tonga and advertised in their website listing No. L525.

### **CHAPTER 3 - AGREEMENTS USED BY REAL ESTATE AGENTS**

- 3.1 It quickly became apparent to the Real Estate Agents in Vava'u that the land law of Tonga has many aspects that are different from those that they are used to in their own respective countries. Tonga does not have freehold land. The sale of land is forbidden under the Constitution and the Land Act. Leasehold may be sold but that is only for the remaining term of years of that lease. There is also a limitation on the number of years that land may be leased, and in respect of a Tax Allotment, this is only 20 years with an option of renewal for another 10 years. There are also strict rules of succession to land.
- 3.2 Real Estate Agents became quite knowledgeable with Tongan land law. This was apparent in their evidence when they confidently referred to land law and case law on Tongan land in their answers to questions. It also became apparent that Real Estate Agents were giving advice on Tongan land law when answering queries from clients with or without the help of Tongan lawyers.
- 3.3 The result of this knowledge of land law was seen and expressed in the agreements used by Real Estate Agents in their endeavour to comply with or circumvent the strict requirements of Tongan land law. The first of these agreements was the Tenancy Agreement used by Hans Schmeiser and Gordon Bryce with the help of Laki Niu. Others followed with some variations.

#### **Tenancy Agreement**

- 3.4 The Tenancy Agreement drafted by Laki Niu and used by Robert Bryce had the following features:
- a) It was an agreement between the landowner, his wife and eldest son, and the tenant;
  - b) The tenant agrees to construct buildings on an identified part of the property of the landowner;
  - c) Upon construction of the buildings, they become owned by the landlord;
  - d) The landlord then rents these buildings to the tenant under the Tenancy Agreement;
  - e) A substantial upfront amount of money in US dollars is paid by the tenant on signing the Tenancy Agreement to a bank account nominated by the agent;

- f) The upfront payment includes the money agreed to be paid to the landowner and the commission of the agent;
- g) A smaller monthly payment in US dollars is payable to the bank account of the landlord;
- h) 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.

A sample of this Tenancy Agreement is shown in Exhibit 44.

- 3.5 It was noted that the first Tenancy Agreement used by Robert Bryce and Hans Schmeiser was worded that the "premises" that were the subject of the agreement were "the buildings etc which were to be constructed and the land upon which the buildings are constructed". A sample of this agreement is found in Exhibit 33. The agreement has the seal and signature of Laki Niu indicating that it was drafted by him. Laki Niu confirmed this in his evidence.
- 3.6 A later version changed this to what is seen in Exhibit 44 to say that the "premises" that are the subject of the agreement are "the buildings etc which were to be constructed upon the land" which is then identified. The subtle difference in the wording is important and obviously recognized as such by the drafter because of the interpretation that was given to the Tenancy Agreement as outlined in the next paragraph. Although not carrying the seal and signature of Laki Niu, he produced a template that was the same thus indicating that he was also responsible for the drafting of this agreement.
- 3.7 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 to 20 years. It is argued that the Tenancy Agreement outlined above is not an agreement for the lease of land as the land remains the property of the landowner. The buildings on the land are also owned by the landowner. What the landowner has agreed to under the Tenancy Agreement is 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 is argued therefore that the land law of Tonga does not apply to the Tenancy Agreement so the restrictions under the Tongan land law do not apply. This meant that the 20 years restriction on leasing of a tax allotment or part thereof does 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 Exhibit 37.

- 3.8 In his evidence, Laki Niu also expressed the view that the Tenancy Agreement is binding on all who sign it. In the case of Exhibit 44 this would mean the registered owner, his wife and their eldest son. This is 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 to the life of those who signed the agreement instead of the term of years indicated in the Tenancy Agreement. Such an important term should be clearly stated in the agreement to inform the tenant who in most cases was residing in a foreign country.
- 3.9 A contrary view and interpretation says that the Tenancy Agreement is void and illegal. This is based on the general principles and meaning of Tongan land and of the protections it is aimed to afford to Tongans. The strict requirements of Section 13 of the Land Act are raised. This forbids any dealing with land outside the provisions of the Land Act, unless approved in writing by the Minister of Lands, and deems such dealings as illegal and subject to a monetary fine penalty. This view is fully expressed by Kahungunu Barron-Afeaki, in his capacity as a legal counsel at the time in his report that was made in December 2007 for his clients and given to Government. A copy of this report is found in Exhibit 24.
- 3.10 The different interpretations and contrary views expressed on the validity of the Tenancy Agreement can only be solved by a court of law or by legislation. No one has taken this matter to the courts yet.
- 3.11 The CEO of the Ministry of Lands informed the Commission of the Ministry's position and that it recognizes the 5-year agreement for farming purposes as has been done for decades, but it does not recognize tenancy agreements. He suggests that the legality and validity of tenancy agreements need to be clearly defined (refer to Letter dated 24 May 2010 in **Appendix 3**).
- 3.12 The Commission consider it necessary that Government provide legislation to cover tenancy agreements and for their registration. 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 will also serve to protect the interests of the parties as recorded in any such agreement. Government may also consider the length of the term of tenancy agreements and perhaps remove the restriction of the 20 years term that a tax allotment to allow a longer term that would encourage land developers to construct tourist facilities that would help develop the economy of Tonga.

### Aleapau Ngaue

- 3.13 In conjunction with the Tenancy Agreement, Hans Schmeiser had an agreement in Tongan called "Aleapau Ngaue". A sample is found in Exhibit 79. This is the first agreement that the Tongan landholder commits himself to and it is between Hans Schmeiser and the landlord. Basically what this agreement does is to commit the land to Schmeiser to find a tenant in advance of the Tenancy Agreement. It also states the amount of money that the landlord will get upfront and the monthly rental and the commission of Hans Schmeiser. Once the Tenancy Agreement is signed then this Aleapau Ngaue ceases. This Aleapau Ngaue is explained to the landowner by the Tongan helper of Schmeiser who was usually Peau Halahingano and was drafted with the help of a Tongan lawyer, To'imoana Taufateau.

### Offer and Counter Offer

- 3.14 This is another form of agreement that was used by Nesha Rosic. It is peculiar in that Nesha Rosic represents both the landlord and the tenant. The offer is made from the tenant to the landlord where Rosic represents the tenant. This offer sets out the price and other monetary considerations for the use of the land under a Tenancy Agreement. The counter offer is from the landlord to the tenant where Rosic represents the landlord. It is not certain why the offer and acceptance were made but we can only assume that it was a way of committing the landlord to an agreement which would later be firmed up with the Tenancy Agreement. A sample of the Offer and Counter Offer is attached as **Appendix 7**.

### Lease Agreement

- 3.15 Nesha Rosic and Gordon Allison used a lease agreement with their clients that was signed by the landholder, his wife and eldest son. This agreement usually

gave the tenant/lessee a term of 50 years with an option to renew for another 49 years. It also had a substantial upfront payment, commission for the agent plus a monthly rental payable to the landowner. Gordon Allison referred to this agreement in evidence as a "family agreement" meaning that it was an agreement that was binding on the family in spite of it being for a term that is beyond that allowed by law of 20 years for a tax allotment.

- 3.16 In a letter to Hans Schmeiser dated 20 June 2007 Laki Niu gave the opinion that this lease agreement was illegal and void. The basis for this opinion was that the Land Act prohibited the lease of a tax allotment or part thereof for more than 20 years with an option to renew for another 10 years. In addition under section 13 of the Land Act it was illegal to deal with land in any manner contrary to that provided in the Act. A copy of this letter and opinion is found in Exhibit 37A.
- 3.17 Dana Stephenson held similar views with Laki Niu on the illegality of the lease/family agreement. She advised a client of this and took the matter up with the New Zealand Estate Agents Authority as advertisements were made in a NZ Real Estate circular offering these properties for the term of 50 plus 49 years. A copy of Ms Stephenson's letter to the NZ Estates Agent Authority and the response are found in Exhibits 56G and 56H respectively. The decision of the NZ Estates Agent Authority on the complaint dated the 23<sup>rd</sup> March 2010 is found in Exhibit 371. Although Ms. Stephenson does not agree with the decision she had formed the view that it was not worthwhile appealing.
- 3.18 In evidence Trevor Jefferson claimed that he also operated a lease agreement for over 20 years of tax allotments but it provided that when an L.9 form application is made for 20 years and registered, his lease agreement becomes void. It is difficult to see how a tenant who takes a lease for 50 years can agree to the reduction of that term to 20 years by the use of the L.9 form. A sample of the Jefferson lease agreement is found in Exhibit 227 but it does not contain any provision to terminate in the event of a successful L9 application for a lease.
- 3.19 In addition to the lease agreement/family agreement Allison and Rosic required the landowner and his family to sign an application for a lease in Government L.9 form of the same property for the legal term of 20 years. The idea was that a legal lease would be granted over the property for the term of 20 years while at the same time the family would be bound by the lease/family agreement for the term stated therein so that the lease would in effect run for 50 plus 49 years.

Allison in evidence said that he was given advice that because of the drive to encourage more tourists to Tonga, once tourist facilities and buildings were constructed, Government would allow the terms of the lease/family agreement to continue. Both Nesha Rosic and Gordon Allison may have been encouraged along this line of thinking by the advice Rosic received from Ms Rosamond Bing (email dated 13 July 2007 Exhibit 103). A sample copy of the L9 lease application form is found in Exhibit 30.

- 3.20 It is noted that the difference between the lease/family agreement and the Tenancy Agreement is that the lease/family agreement is over land while the Tenancy Agreement is over buildings built on land which become owned by the landowner who does not part with his land ownership. In his evidence however, Laki Niu said that the Tenancy Agreement he drafted included the land upon which the building rests. It must also include access to the building through the land of the owner.

#### **Pita Hala'api'api-Toula, Vava'u**

- 3.21 Pita Hala'api'api worked closely with Robert Bryce since 2004. Even when Bryce departed Tonga in 2008 to set up his business in Fiji, they continued working together in that Pita's properties and those of other people were marketed by Bryce through his website.
- 3.22 Pita had his own property in Toula which he subdivided and marketed using Lafi Moetala Development which became the development body (landowner) who made the Tenancy Agreement with the investor/tenant.
- 3.23 The first agreement is the Agreement for Services and Participation in Lafi Moetala Development between the landholder and Pita and Bryce (Agent) (Exhibit 169). This agreement gives the land to the Agent to find an investor for 99 years with an up-front payment of not less than TOP\$3000 and also says that the landowner will receive in Pa'anga the same numeral as the price in US Dollar from each investor. The difference is kept by the agent for commission and expenses.
- 3.24 The next stage is when an investor is found. A Landholder and Investor/Plot-Holder Agreement is made (Exhibit 250). This is the tenancy agreement which sets out the term of 99 years and a monthly rental of US\$88, the one-time fee

having already been paid. The monthly rent is reviewed every 15 years and a fee of US\$120 is payable on the transfer of the agreement.

- 3.25 The Lafi Moetala Development project was set up by Pita Hala'api'api and Robert Bryce to market Pita's land and also the land of those living in Toula. It was a type of co-operative help for the community in finance and development. Other villages like Tu'anuku followed suit with their own Development projects (Exhibit 273).

## CHAPTER 4 - NUAPAPU ISLAND AGREEMENTS

- 4.1 The inevitable conflict between the Tenancy Agreement of Bryce and Schmeiser and the Lease Agreement of Rosic and Allison came to a head over land in the island of Nuapapu.

### Houmatoka and Lolovi

- 4.2 There were two tax allotments in Nuapapu Island, one Houmatoka registered by Moleni Fe'aomoeata ("Moleni") and the other Lolovi registered by his son Moleni Fonokalafi Fe'aomoeata ("Fonokalafi"). Moleni died in 1999 and his son Fonokalafi as heir elected under section 84 of the Land Act to take his father's tax allotment – Houmatoka – and give his tax allotment – Lolovi – to his son Piea. This election was registered with the Governor's office and is found in Exhibit 15. It took sometimes for this choice to be effected but in 2005 the Deed of Title of Houmatoka was endorsed and signed by the Acting Governor showing Moleni Fonokalafi as the registered holder. This Deed with the endorsement made by the Acting Governor on the 7<sup>th</sup> December 2005 is found in Exhibit 12. The Registration Book did not record this and he was still recorded as the owner of Lolovi. To complicate matters more, the Acting Governor had endorsed the Deed of Lolovi to Moleni Fonokalafi on the 29<sup>th</sup> November 2005 when it should have been given to Piea because of the election made by Moleni Fonokalafi. This Deed of Lolovi including the endorsement of the Acting Governor dated the 29<sup>th</sup> November 2005 is found in Exhibit 21. On the 29<sup>th</sup> June 2007 Piea Fe'aomoeata is entered in the Registration Book as the owner of Houmatoka while his father Moleni Fonokalafi, the registered owner of the allotment was still alive. This was done by the Land Registration Officer Makafilia Mafi on instruction from the Acting Governor. In November 2007 an entry made by Land Registration Officer Fataua Halatanu in the book recording matters over land and directions by the Acting Governor stated that the Acting Governor wanted the question over Piea's name in the Registration Book to be clarified with Makafilia Mafi before any further deals are made with regard to this land.
- 4.3 Both the Acting Governor Tu'a Taumoepeau and the Land Registration Officer Makafilia Mafi have a lot of explaining to give over the registration of Houmatoka and Lolovi. Makafilia was dismissed from his job before our inquiry and Tu'a is in New York. We got some answers from Makafilia in his evidence but he puts the

ball back with the Governor claiming he was only doing what the Governor had directed. We have asked questions by email to Tu'a but it is difficult to get reliable evidence by this means. A copy of the email correspondences with Tu'a are attached as **Appendix 2**. It appears from this correspondence that the Governor relied heavily on the advice of his Land Registration Officer, Makafilia Mafi.

4.4 As a result of correspondence with the former Acting Governor of Vava'u, Tu'a Taumoepeau (**Appendix 2**), the Commission received a copy of an Internal Memorandum dated 15 May 2007 (**Appendix 8**) from Makafilia Mafi to the Governor. This Memorandum stated that –

- a) Houmatoka was registered by Moleni Fe'aomoeata in 1930;
- b) Moleni Fe'aomoeata died in 1999 and his son Moleni Fonokalafi Fe'aomoeata claimed this property as heir;
- c) In 2005, Moleni Fe'aomoeata had an agreement with Richard Mortimer and Eric Stark in relation to Houmatoka instead of Lolovi which was registered under his name;
- d) The deed of grant of Houmatoka showed that this property was inherited by Moleni Fonokalafi Fe'aomoeata as heir in 2005, but this was wrong because it was not entered in the Registration Book;
- e) Houmatoka should have first been transferred to Moleni Fonokalafi Fe'aomoeata or Piea Fe'aomoeata as the heir before the agreements with Mortimer and Stark.

4.5 A note from the Governor dated 12 June 2007 said to "Transfer Land in Question to Piea Fe'aomoeata (Legal Heir)".

4.6 What is missing from the Memorandum by Makafilia is that Moleni Fonokalafi Fe'aomoeata had made the election allowed to him by the Land Act to inherit his father's allotment (Houmatoka) and give his allotment (Lolovi) to his son Piea.

#### **Dealings with Houmatoka**

4.7 In 2005 the registered owner of a tax allotment (Houmatoka) in Nuapapu Island, Moleni Fonokalafi Fe'aomoeata contacted Hans Schmeiser seeking a tenant for his allotment. On the 13<sup>th</sup> December 2005 an agreement in the form of the Aleapau Ngaue was entered into between Moleni Fonokalafi Fe'aomoeata and Hans Schmeiser in respect of 4 acres of the allotment. This agreement gave

Schmeiser the right to seek a tenant for the land within 24 months. The term of years was 60 years and the landowner Moleni Fonokalafi Fe'aomoeata was to receive US\$35,000 plus US\$300 per month. We received only the first page of this Aleapau Ngaue from Schmeiser a copy of which is found in Exhibit 78.

- 4.8 On the 16<sup>th</sup> February 2006 a Tenancy Agreement was made between Moleni, his wife Tupou and son Piea as Landlord and Richard Mortimer of Hong Kong as Tenant for the "buildings, fences and structures, which exist or are to be built in pursuance of this Agreement and upon the land which is described on the map or description page attached hereto". The land is then described with an area of 2 acres of the allotment. The term is for 60 years and the rent is stated to be US\$28,965 payable upon signing plus a monthly rent of US\$70. A copy of this Tenancy Agreement is found in Exhibit 44.
- 4.9 On the 1<sup>st</sup> December 2006 Moleni, his wife Tupou and son Piea entered into another Tenancy Agreement with Eric Stark of Hong Kong (a friend of Richard Mortimer) over the "buildings, fences and structures" etc as in the Mortimer agreement. The land involved has an area of 2 acres adjoining that in the agreement with Mortimer. The term is 60 years and the rent is US\$27,200 payable upon signing plus a monthly rent of US\$70. A copy of this Tenancy Agreement is found in Exhibit 35.
- 4.10 Both 2 acre allotments were believed to be on the coast of the 7 acre allotment of Moleni Fonokalafi Fe'aomoeata. There is also evidence of this in the maps and plans produced. A copy of a plan signed by Moleni and the tenant is found in Exhibit 45.
- 4.11 We received evidence that all money due under both Tenancy Agreements were paid in accordance with the terms of the agreement and some of the monthly rent were paid in advance (Exhibits 1, 2, 5, 57A, 57B, 78 and 305).
- 4.12 In January 2007 Moleni Fe'aomoeata went to the surveyor Paula Moa Lo'amanu to cancel the scheme plan of his allotment which showed that the allotments concerned with the Tenancy Agreements with Mortimer and Stark were on the coast. He wanted to cancel this scheme plan. Paula took the matter up with Hans Schmeiser and cancelled the scheme plan as requested by Moleni and re-drew a new scheme plan that showed the 4 acres that were for Mortimer and Stark had only one 2 acre coastal area. Paula Moa in evidence claim that he did not know



about the Tenancy Agreements with Mortimer and Stark - if he did, he would not have altered the scheme plan as requested by Moleni. A copy of the scheme plan with the entry signed by Moleni to cancel is found in Exhibit 132.

- 4.13 On the 16<sup>th</sup> January 2007 an application for a lease in the L.9 Government form was signed by Moleni Fonokalafi Fe'aomoeata in favour of a company named Escape Tonga Limited whose principals were Gordon Allison and Peter Glover over a 3 acre area that included the 2 acre land that were already subject to the Tenancy Agreement with Richard Mortimer. A copy of this application is found in Exhibit 83.
- 4.14 On the 1<sup>st</sup> February 2007 Moleni, his wife Tupou and son Piea entered into a Lease Agreement (Exhibit 80) with Gordon Allison and Peter Glover for the 3 acre plot of land referred to in the previous paragraph of which 2 acres were the subject of the Tenancy Agreement with Richard Mortimer. This lease is for 50 years with an option to renew for another 49 years. The total rent is US\$125,000 with a down payment of US\$35,000 upon Cabinet approval of the lease and yearly payments of US\$2,000 for 50 years. This is the agreement that Gordon Allison referred to as the "Family Agreement" in his evidence as opposed to the Government approved lease.
- 4.15 In his evidence, Heilala Fe'aomoeata who is a younger brother of Piea Fe'aomoeata, produced an agreement dated 21 July 2007 (Exhibit 324) which was given to him by Nesha Rosic. This agreement was the same as Exhibit 80 but the lessor party was shown as Piea Fe'aomoeata instead of his father Moleni who was still alive at the time. This would coincide with the fact that Piea's name was entered in the Registration book as the owner of Houmatoka on the 29<sup>th</sup> June 2007 (Exhibit 14).
- 4.16 A similar agreement was entered into by the Moleni family and Nesha Rosic on the 1<sup>st</sup> February 2007 over the remaining 4 acres that included the 2 acres which was the subject of the Tenancy Agreement with Eric Stark. A copy of this agreement is found in Exhibit 109.
- 4.17 Correspondences were exchanged between Robert Bryce and Nesha Rosic over the double dealing with the same land. Rosic's answer was basically that the Tenancy Agreement had lapsed because of the non-payment of rent and that Allison's lease agreement and his were valid as the land was vacant. There was no

record of the Tenancy Agreement in the Land office as there was no requirement to register such agreements with the Ministry of Land. An email to this effect dated 29 September 2007 was sent by Samiu Vaipulu to Eric Stark and Richard Mortimer (Exhibit 106).

- 4.18 On the 29<sup>th</sup> June 2007 both Gordon Allison and Nesha Rosic signed two separate L.9 lease applications on behalf of their respective company, Escape Tonga Ltd and Island Real Estate Ltd, for 20 years over the 3 acres and 4 acres land in Nuapapu of Moleni's family the subject of the present discussion. This was signed by Piea Fe'aomoeata as the landowner and his name was entered in the Land Registration Book as the holder on the same day. Piea's father who held the Deed of Title for this land was still alive at the time. A copy of the death certificate of Moleni Fonokalafi Fe'aomoeata who died on the 28<sup>th</sup> October 2008 is found in Exhibit 19. There is a cloud hanging over the entry of Piea in the Registration Book by the Registration Officer Makafilia Mafi and approved by the Acting Governor Tu'a Taumoepeau. Some explanation is seen in the Internal Memorandum dated 15 May 2007 from Makafilia Mafi to the Governor (**Appendix 8**) but the cloud still hangs. A copy of the L.9 application for lease by Gordon Allison and Nesha Rosic are found in Exhibits 30 and 31 respectively.
- 4.19 On advice from Robert Bryce to show his right to the land, Richard Mortimer arranged for the construction of a water tank in September 2007 on the land over which he had a Tenancy Agreement with the Moleni family. As soon as it was constructed, Nesha Rosic arranged for some Tongans to destroy the water tank and this was done. Richard Mortimer made a written complaint to the police which was given to the OIC in Vava'u CIP Sisi Tonga who passed it on to the Falevai branch to see if it was an offence that should involve the police (Exhibit 120).
- 4.20 The Falevai Police Station Diary (Exhibit 391) shows that the complaint for the destruction of the water tank was made by the builder, Manu Tu'itupou on the 21<sup>st</sup> September 2007. The diary records police investigation and a charge being made against Kineleti Taufa on the 19<sup>th</sup> November 2007 in respect of the destruction of the water tank. The Diary also shows that on the 30<sup>th</sup> April 2008 a Case Disposition Notice was signed by the complainant Manu Tu'itupou withdrawing his complaint because a civil case had been taken out. The Diary also shows an entry made on the 16<sup>th</sup> December 2008 recording a direction from the Officer in Charge of Police Station No. 5 to re-open the case. There was a change

of OIC in Falevai Station and the file was handed over to LCPL Latu. No further entry was recorded in the Diary for 2009 and the only work recorded in 2010 was in respect of the production of the Station Diary to the Commission.

- 4.21 On advice from a Tonga lawyer, Kelepi Piukala, a court proceeding was brought by the person who constructed the water tank against Rosic and those who destroyed the water tank. The Magistrate gave judgment for the plaintiff tank builder (Exhibit 6) but on appeal, the Supreme Court gave judgment for the defendants who were responsible for the destruction on the basis that the proper party was the owner of the tank Richard Mortimer and that the case was brought by the wrong party, namely the builder. As seen from the judgment of Andrew J in the Supreme Court (Exhibit 7) the Judge said that another ground for the success of the appeal was that the property was the subject of a registered lease to Escape Tonga Ltd, the company of Gordon Allison. No mention was made of the prior Tenancy Agreement of Richard Mortimer over the same land. No mention was made also of the fact that when the water tank was destroyed there was no lease registered over the land. In his evidence, Kelepi Piukala failed to satisfy us that he had produced the Tenancy Agreement as evidence in the appeal. If he had, the Judge would have commented on it and given a ruling on its validity. The chance for an interpretation by the court of the Tenancy Agreement was lost.
- 4.22 On the 21<sup>st</sup> January 2008 the Acting Governor of Vava'u, Tu'a Taumoepau, acting on the L.9 application that was lodged by Gordon Allison on the 29<sup>th</sup> June 2007, wrote a Savingram to the Minister of Lands recommending the grant of the lease to Escape Tonga Ltd, the company of Gordon Allison for a term of 20 years (Exhibit 85). Cabinet approved this application on the 26<sup>th</sup> March 2008 (Exhibit 9) and the lease was registered on the 16<sup>th</sup> December 2008 (Exhibit 16). The lease application from Nesha Rosic and Island Real Estate Ltd was approved by Cabinet on the 23<sup>rd</sup> April 2008 (Exhibit 10) for a term of 20 years and registered on the 14<sup>th</sup> January 2009 (Exhibit 17).
- 4.23 Relying on the rights that he has been given under the Government approved lease and the "family lease" Gordon Allison has subdivided and constructed a number of buildings on the 3 acre plot of land in Nuapapu Island. He markets these as villas through the internet and so far has sold 8. A copy of the marketing advertisement is attached as **Appendix 5** and a copy of one of the agreements is

found in Exhibit 98. Nesha Rosic has not constructed any building on his 4 acre leased land yet.

### Caveat

- 4.24 Acting on instructions received from Robert Bryce on behalf of Richard Mortimer, Law Practitioner David Corbett lodged a caveat with the Ministry of Land dated 9<sup>th</sup> May 2007 to prohibit any dealings with that part of the land which was subject to the Tenancy Agreement because of the "tenancy interest" of Richard Mortimer. Corbett was verbally informed by an officer of the Ministry that the caveat could not be made as the Land Act provides for caveats to be lodged only against leaseholds. No lease had yet been granted in respect of this property.
- 4.25 A Deed of Lease was granted to the company of Gordon Allison, Escape Tonga Ltd on the 16<sup>th</sup> December 2008 (Exhibit 16). This was over a 3 acres area that included the 2 acres over which Richard Mortimer had his prior Tenancy Agreement. On the 14<sup>th</sup> January 2009 another Deed of Lease was registered by the company of Nesha Rosic, Island Real Estate Ltd (Exhibit 17) over the remaining 4 acres that included the 2 acres over which Eric Stark had his prior Tenancy Agreement.
- 4.26 On the 23<sup>rd</sup> June 2009 David Corbett lodged a caveat on behalf of Richard Mortimer (Exhibit 1 Tab AH) and Eric Stark (Exhibit 1 Tab AN) in respect of their interests in their 2 acres that were included in the leases of Escape Tonga Ltd and Island Real Estate Ltd. On the 9<sup>th</sup> October 2009 Corbett lodged another caveat on behalf of Mortimer over the same 2 acres lot (Exhibit 20).
- 4.27 In spite of the caveats lodged by David Corbett, construction work on the land concerned have been continued by Gordon Allison who has subdivided the 3 acres lot and advertised and sold these with Villas to foreigners.
- 4.28 The Commission has been informed by the Secretary of the Ministry of Lands that once the caveat has been registered they stop all dealings and applications in connection with the land, but they have no control over buildings or works or structures on the land. This is covered in the next section.

### Building Permit

4.29 On the 7<sup>th</sup> October 2008, Siaosi Moala who was in charge of the Building Control Division of the Ministry of Works dealing with the issuance of permits for new buildings under the Buildings Act 2002 wrote to Gordon Allison advising him that he did not have a permit to build houses on Nuapapu and to cease such activities until a permit is issued (Exhibits 348 and 348A). In his evidence, Ringo Fa'oliu who is now in charge of this division said that Gordon Allison still does not have a building permit as referred to by Siaosi Moala. When told that in spite of this, Gordon Allison has been and still is constructing buildings without a building licence, Ringo undertook to look into this matter and may require police help to prevent this unlawful activity. When re-called a few days later, Ringo said that he had communicated with Gordon Allison who asked that he be given the opportunity to complete the 8<sup>th</sup> villa before taking up the permit issue again with the Ministry of Works.

#### **Findings on the Nuapapu Island land deals**

- 4.30 From the facts as related above on the Tenancy Agreements made by Mortimer and Stark in 2006 and the lease Agreements made by Allison and Rosic over the same allotment in Nuapapu Island in 2007 it is very apparent that the situation is in a mess. To complicate matters, Allison has built and sold some of these buildings to foreign clients for substantial money.
- 4.31 Mortimer and Stark have given substantial amounts of money to the Moleni family in pursuance of the Tenancy Agreements. Allison and Rosic have also given substantial amounts of money to the Moleni family in pursuance of their Lease Agreements.
- 4.32 The Moleni family knew they had a prior agreement made in 2006 over the land and received substantial money in respect of that agreement but still entered into another agreement in 2007 over the same land and received money in respect of that agreement.
- 4.33 The justification for the second agreement as claimed by the Moleni family with the support of Rosic and Allison is that there was a default in the payments by Mortimer and Stark which resulted in the termination of their Tenancy Agreements. This was supported by their Lawyer Samiu Vaipulu as seen from his email in Exhibit 106.

- 4.34 As seen from the evidence, Mortimer and Stark had paid all that were due under their Tenancy Agreements and some monthly rental payments in advance. Rosic and Allison were aware of the Tenancy Agreements but pursued their own Lease Agreements with the Moleni family on the basis that the Tenancy Agreements had lapsed for default in payments and that in any case they were unlawful and therefore void and not registered in the Land Registry.
- 4.35 The validity of the Tenancy Agreement is based on it not being an agreement over land but an agreement over the use of buildings that are owned by the landowner. They are purely commercial agreements governed by the laws of contract and not subject to the Land Laws of Tonga.
- 4.36 It is clear that the Moleni family have received substantial money from two sources over the same land. At the end of the day after the mess over these deals are resolved, the Moleni family must be responsible for refunding the money of the party that does not end up with the use of the land. This situation can only be resolved through a decision of the court and we urge the parties to take their dispute to the court for a final resolution.
- 4.37 The involvement of Government through the Acting Governor and his officers in these land deals will be made part of the court proceedings. The involvement of Government in the Real Estate business and the moratorium placed by the Minister of Labour Commerce and Industries in March 2007 on the issuance of Real Estate Agency Licences will also be part of such court proceedings. We suggest that Government should on its own accord make its own internal inquiry of the involvement of its officers in the Tenancy Agreement and the Lease Agreement over Houmatoka with a view to appropriate disciplinary actions.
- 4.38 The involvement of the Ministry of Works with regard to the permit for the buildings constructed by Gordon Allison need to be rectified.

## **CHAPTER 5 – WRITTEN SUBMISSIONS**

- 5.1 In response to the public notices we received letters and submissions mainly from people mostly residing overseas complaining about land deal experiences they had through real estate agents in Vava'u. Richard Mortimer and Eric Stark came from Hong Kong to give evidence in person. Some who resided in Tonga also gave evidence. All letters and submissions were considered by the Commission and appropriate responses were directed to be made by the Secretary.
- 5.2 It is not the function of the Commission to solve the problems indicated in the submissions. Our function is to investigate the land practices involved and report to His Majesty and Privy Council with recommendations. The aggrieved parties have their proper avenue to seek redress which is ultimately through the Courts of law.

### **Richard Mortimer and Eric Stark (Hong Kong)**

- 5.3 The submissions of Richard Mortimer are found in Exhibits 1, 2, 3 and 4. The submissions of Eric Stark are found in Exhibits 22, 25, 26 and 27.
- 5.4 The land deal involving Mortimer and Stark revolve around Nuapapu Island and in particular the allotment called Houmatoka owned by the Fe'aomoeata family. This has been fully discussed in Chapter 4 and need not be gone into further detail here. We will refer to the problem posed by the double deal in this allotment in our recommendations at the end of this report. Suffice for us to say that if the parties are not able to settle their dispute, the only solution would be through a properly instigated legal action through the Court.

### **Paul Kenneth Dickinson (United Kingdom) (Appendix 9)**

- 5.5 Mr. Dickinson is a resident of the United Kingdom. He saw in 2008 a property advertised in the website [www.investintonga.com](http://www.investintonga.com) and was interested. The property was in the island of Fofoa in Vava'u and the website belonged to Trevor Jefferson. The total land area is about 16.5 acres and for a term of 80 years. Total cost was US\$145,000 plus US\$99 per month rent.

- 5.6 The deal was brokered by Trevor Jefferson by means of a loan to Paul Dickinson of the agreed purchase price of US\$145,000 (Exhibit 229). This meant that Jefferson would pay the purchase price to the landowner and Dickinson would repay with monthly instalments of 2000 pounds sterling to Jefferson.
- 5.7 In pursuance of the loan agreement, Dickinson paid a total of 10,000 pounds sterling. In April 2009 Mr. Dickinson came to Vava'u and met Trevor Jefferson. He did not see the property, but for a number of reasons, including finding out that Jefferson paid only between US\$75,000 and US\$100,000 to the landowner, he wished to withdraw from the deal and asked for the return of his money on the 4<sup>th</sup> May 2009. Mr. Jefferson refused saying that Dickinson was suffering from a "buyer's remorse" but as a gesture of goodwill he offered US\$9,100 to Dickinson. This would be about US\$5000 short of the 10,000 pounds sterling paid by Dickinson. This offer was not accepted by Mr. Dickinson as he wants the whole of the money paid i.e. 10,000 pounds sterling. We feel that this is a matter which Mr. Dickinson can solve only through a private court action.

**Alistair and Lesley Allan (Scotland) (Appendix 10)**

- 5.8 This Scottish couple became interested in a property advertised in the [www.investintonga.com](http://www.investintonga.com) website of Trevor Jefferson in 2008. The property was Oceanview in Neiafu, Vava'u and consisted of 3/2 homes with 2 stylish rental apartments. The asking price was US\$78,700 with a term of 7 years lease which was negotiable. A 10% deposit was required to hold the property.
- 5.9 Mr. & Mrs. Allan paid the deposit of US\$7,870 plus US\$250 as escrow fee. The escrow account was held by Hans Schmeiser, the owner of the property. They came to Vava'u in October 2008, felt that there was something wrong with the deal and decided not to go through with it. They asked for the return of their deposit. After some hassle with both Jefferson and Schmeiser, the deposit was returned to Mr. & Mrs. Allan.
- 5.10 In a letter to their fellow countryman Lord Dalgety, received on the 8<sup>th</sup> December 2009 it is interesting to note the following comments from Mr. & Mrs. Allan:

"We feel that Mr. Jefferson and other ex-patriates are ruining the real estate market in Tonga and cannot understand why these nefarious practices are



allowed to continue, but are astonished to see that if you go into the [www.investintonga.com](http://www.investintonga.com) website that the entire waterfront in Vava'u appears to be for lease/sale and hope that no one else falls into the same trap as ourselves."

5.11 Mr. Jefferson gave us a different version of what happened (Exhibit 213) indicating that the deposit of US\$7,870 paid into the Island Escrow account was not refundable if the buyer does not go through with the purchase. This is shown in the receipt that is part of Exhibit 213. He ends his letter to us under cover dated 18 March 2010 (Exhibit 213) by saying-

"I am actually quite shocked they would have anything against me, as stated above, Hans gave them full refund of their deposit even though they did not deserve it, and I never received one seniti of the deposit."

**Tim Ellis and Teresa James (United Kingdom) (Appendix 11)**

5.12 This English couple was attracted in 2005 to a property in the village of Otea, Kapa Island, Vava'u that was advertised in the website of Robert Bryce. They signed a tenancy agreement (Exhibit 136) with the owners of the land Siokivaha and Lata Vailea on 30 August 2005 for a term of 80 years and paid the sum of US\$38,500 plus a monthly rent of US\$125.

5.13 At the request of the land owners an amendment was made to the tenancy agreement on the 10<sup>th</sup> April 2006 (Exhibit 139) whereby the monthly rent was paid 10 years in advance. Again at the request of the Land owners additional voluntary payments were made under an agreement dated 3 April 2008 (Exhibit 141).

5.14 Siokivaha Vailea died in 2008. In October 2009 Tim Ellis and Teresa James were visited by Four Hundred Vailea, a brother of Siokivaha, who claimed that he was the rightful owner of the land.

5.15 Teresa James gave evidence on the 15<sup>th</sup> March 2010 and confirmed everything said in their letter dated 4 February 2010 to our Secretary (Exhibit 138). In that letter they end with the following:

“We like Vava’u and intend to stay here but have decided we would like to sell the resort and run a smaller less demanding business here. In our agreement with Lata and Siokivaha Vailea we made provision for a bonus to be paid to them if we sold the premises, and we will happily extend this to Four Hundred but in order for us to do this we would ask your help in obtaining the correct land agreement document.”

- 5.16 When giving evidence Teresa James tendered the Deed of Grant for this allotment (Exhibit 143). This clearly shows that the owner of the property is Siokivaha Vailea.
- 5.17 The help requested is “in obtaining the correct land agreement document”. The key document here is the Tenancy Agreement dated 30<sup>th</sup> August 2005 (Exhibit 136) of buildings on part of a tax allotment for 80 years. Like other tenancy agreements mentioned in this report there is a question over the validity of such agreements which has not been brought to the court for a decision.

**Mr. Jon Arnott (Tonga) (Appendix 12)**

- 5.18 Mr. Arnott married a Tongan lady, ‘Ofa, in 2001 and they have been living in Toulā, Vava’u since. In July 2002 ‘Ofa’s parents were offered a piece of land near their home in Toulā by ‘loane Vaha’i for TOP\$5000. The understanding was that the allotment would be surrendered to Government and then registered by ‘Ofa’s brother. The TOP\$5000 was paid to ‘loane and Mr. Arnott and ‘Ofa started building on the land.
- 5.19 In 2003 the adjoining piece of land was offered by ‘loane for TOP\$7000 and the initial payment of TOP\$5000 was made (Exhibit 145).
- 5.20 The land was at the time still held by the mother of ‘loane as the widow who lived in New Zealand. ‘loane was acting on his mother’s behalf and had kept his mother informed on the land deals.
- 5.21 Subsequently, a subdivision of the whole tax allotment was made with the help of Robert Bryce for marketing. It became evident to ‘loane that the land was being offered for a greater price than what he agreed to with Jon Arnott. Through his lawyer he demanded rent of TOP\$15,000 per year for each

allotment in a letter dated 7 January 2008 (Exhibit 149) for the past two years totaling TOP\$60,000. The basis for this demand was that the first agreement was with the widow (his mother) but this ended when the allotment was transferred to 'loane in 2005. 'loane also stated in evidenced that the payments made by Mr. Arnott were only gifts and not in relation to any agreement.

5.22 The lawyer for Jon Arnott responded pointing to the original agreements for which money was paid and if 'loane insisted on taking the land, then he would have to pay for all the buildings and improvements made by Jon Arnott plus the money he paid in pursuance of the agreement totaling about TOP\$450,000.

5.23 'Ofa Arnott gave evidence at the Inquiry. She confirmed the agreements for the two allotments and the payments of the agreed amounts of TOP\$5000 and TOP\$7000 respectively for each. She also confirmed their understanding that the land would be surrendered to Government to allow her brother to make application for registration.

5.24 'loane Vaha'i also gave evidence at the Inquiry. He said that the agreement with his mother as widow ended when he succeeded to the land in 2005. He demanded the lease payments stated in the letter from his lawyer (Exhibit 149) of TOP\$15,000 per lot per year from 2005.

5.25 As stated by Jon Arnott in his covering letter dated 28 January 2010 to our Secretary-

"It should have been a simple case of surrendering land to the government in our favour. Unfortunately one of the land agents here got involved and 8 years later it still hasn't been resolved".

5.26 This is obviously a matter that can only be resolved through a court action.

**Paul and Brenda Burgoon (Canada) (Appendix 13)**

5.27 This Canadian couple had an agreement with Hans Schmeiser to take over his company Island Explorer Ltd and the lease agreement with Obey Samate of a property in Neiafutahi. The lease agreement dated 19<sup>th</sup> April 2006 was for 10

years from 2004 with an option to renew for another 5 years. The rent was TOP\$600 per month.

5.28 It would appear that the concern is in the use of the word "rent" as opposed to "lease" because if the landowner, Obey Samate has a mortgage over his land then there cannot be a lease of that land without the approval of the mortgagee.

5.29 The letter to our Secretary dated 15 January 2010 (Exhibit 158) ended by saying-

"If we have been defrauded in any way, we would like the commission to help us seek some of our money back from Otto Hans Schmeiser."

5.30 This is another case where the remedy lies with the court.

#### **Sailosi Hemaloto (Tonga) (Appendix 14)**

5.31 Sailosi Hemaloto looked after the town allotment of his brother Paula Hemaloto in 'Utungake, Vava'u (Exhibit 167). Paula resided in New Zealand.

5.32 In July 2006 Sailosi was approached by Richard Prestage of New Zealand with a request to lease part of the town allotment. Sailosi informed his brother Paula who agreed to rent the property. A Tenancy Agreement dated 21 August 2006 was signed by the landowner, Hala'api'api Tuituiohu Hemaloto (Paula) and Richard Prestage and his wife Maree for a term of 30 years for a total rent of TOP\$20,000 with a right of renewal for a further 30 years at a monthly rental to be agreed (Exhibit 166).

5.33 Sailosi wrote to our Secretary (Exhibit 165) and gave evidence at the Inquiry hearing. He said that he wanted to renegotiate the agreement because the tenant has carried on business activities and given use of the property to another person. Sailosi also said that he had an agreement with the tenant to look after the property while they were out of the country for which he would be paid TOP\$50 per month. He entered the property to carry out his caretaking duties and was sued by the occupier for trespass. He was found guilty and ordered not to enter the property again.

- 5.34 The tenancy Agreement (Exhibit 166) clearly state that the premises may be used for residential and/or commercial purposes in connection with tourism. The agreement also allows subletting and assignment. So it would appear that Sailosi will be fighting an uphill battle should he wish to renegotiate the agreement.
- 5.35 This is however, another case where the remedy lies with the court should the parties wish to pursue such.

**Felisiano Tolati Fifita (Tonga) (Appendix 15)**

- 5.36 Felisiano Fifita held a tax allotment in Fofoa Island, Vava'u. He wrote to our Secretary on the 14<sup>th</sup> January 2009 complaining about a land deal he made with Hans Schmeiser (Exhibit 55).
- 5.37 In 2005 a part of the allotment was given to Olle Ottebu of Zambia under a Tenancy Agreement dated 26 August 2005 (Exhibit 204). The agreement was for a term of 50 years for the payment of US\$35,000 plus a monthly rent of US\$120. Felisiano says that he received the upfront payment totaling US\$25,030 plus US\$720 representing 6 month rent in advance on the 6<sup>th</sup> September 2005. US\$10,000 would have been taken by Schmeiser as his commission and expenses in line with the Aleapau Ngaue dated 2 November 2005 with Felisiano (Exhibit 202).
- 5.38 Schmeiser approached Felisiano again requesting the remaining 4 acres for marketing for a term of 50 years for the payment of TOP\$30,000 plus a monthly rent of TOP\$120. Payment was made in accordance with an offer and acceptance by Feliciano dated 20<sup>th</sup> March 2006 (Exhibit 53). The payment was to be made in 3 instalments of TOP\$9000 each on 6 March 2006, 9 June 2006 and 9 August 2006 making a total of TOP\$27,000.
- 5.39 He also says that he has not received any of rent of TOP\$120 per month. He now wants Schmeiser to vacate his land and seeks the help of the Commission.
- 5.40 The request for help is outside our terms of reference and Felisiano needs to seek satisfaction through other means possibly through a court action.

**Dana Stephenson (Tonga) (Appendix 16)**

- 5.41 Ms Dana Stephenson, Law Practitioner, wrote to our Secretary on the 1<sup>st</sup> February 2010 in response to the public notice for information in relation to possible unlawful land dealings in Vava'u (Exhibit 56A). She referred us to three cases where clients had contacted her for advice. These were in relation to properties in Olo'ua Island, Vaka'eitu Island and Nuapapu Island all in Vava'u. All dealings were made by Nesha Rosic.
- 5.42 Ms Stephenson advised her clients that Nesha Rosic did not have a real estate licence (Olo'ua Island) thus persuading the client to deal directly with the landowner; the lease agreement (Vaka'eitu Island) "was invalid and of no legal effect on the basis that it appeared to be a sale of a tax allotment in excess of the 20 year term allowed by law" and that "it was my opinion that Nesha Rosic was trying to get a quick commission out of my client for a lease application that clearly could not, in terms of the law, be approved by Cabinet"; the lease agreement (Nuapapu Island) "provided was contrary to law and that they would not receive a separate and indefeasible registerable lease for the property as had been explained to them they would in consideration of the AUD\$170,000 they were being asked to pay" by Nesha Rosic and Gordon Allison.
- 5.43 Ms Stephenson found that the Nuapapu Island deal was advertised in the Bayleys Real Estate circular in New Zealand. She accordingly lodged a formal complaint with the Real Estate Agents Authority in December 2009 (Exhibit 56G). The decision of the Authority made on the 23<sup>rd</sup> March 2010 is in Exhibit 371. Ms Stephenson does not agree with the decision but does not think it worthwhile appealing.
- 5.44 Ms Stephenson gave some useful suggestions regarding matters that should be considered and conditions before a real estate licence is issued (Exhibit 373). She has also drawn the attention of the authorities to the unlawful practice of real estate agents in drafting legal documents (Exhibit 374).

**Trevor Jefferson (Vava'u) (Appendix 17)**

- 5.45 Trevor Jefferson gave a written report to the Commission dated 13 March 2010 (Exhibit 224) on Tongan Real Estate Problems, Plans and Solutions. The Commission wishes to thank him for taking time to make this report. It has some

good suggestions which the Commission will take into consideration in making its recommendations.

## CHAPTER 6 – CLOSING REMARKS

- 6.1 This phase of our work involved the investigation into the possible unlawful dealing with land through the internet. Primarily this concerned land deals in Vava'u which we have referred to in detail in the previous chapters.
- 6.2 It is always difficult to deal with any contract through the internet. Advertisements are made through the internet may not reflect the true situation here in Tonga. This is more so where transaction with land is concerned where Tongan land law is unusual in the sense that it does not have freehold titles and the internationally recognized concept of sale of land is forbidden by law. Leaseholds are allowed but they have certain restrictions depending on the type of holding involved.
- 6.3 The Commission has observed real estate agents trying to get around the strict requirements of Tongan land law with long term tenancy agreements over buildings on the land and those to be constructed. The real estate agents say that these are private contracts between the parties that do not affect the ownership of the land and buildings. That the land and buildings are retained and owned by the landowner and therefore the contract is not bound by the Tongan Land Act and is not restricted nor need to go through the process required by that Act.
- 6.4 The Commission have also observed other real estate Agents using a long term lease agreement with the family (land owner, wife (widow rights) and heir) with the understanding that this binds the family even though such are not allowed by law in respect of land that are held as tax allotments with which most of the Vava'u land deals were involved.
- 6.5 There is no law or procedure for the registration of Tenancy Agreements in Tonga. So a search of the Lands Office and its Registry will not show whether a particular piece of land is 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.
- 6.6 The biggest problem the Commission encountered was the land deal in respect of the property Houmatoka in the island of Nuapapu. This has been fully



discussed in the previous chapters and the Commission suggestion is that the problem can only be solved through a properly conducted court action. Legislation by the Legislative Assembly 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 the Houmatoka issue. Therefore, in the absence of any clear law on these points, a final court decision will have to be made on the agreement made, 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. It is best left for the jurisdiction of the court.

- 6.7 The possible unlawful land dealings in Vava'u revolve around the agreements that grant a greater term of years than that allowed by law. By law, a tax allotment can be leased for only 20 years plus an option for another 10 years. The validity of the tenancy agreement or a lease agreement for 50 to 99 years will determine whether these were unlawful dealings in land.
- 6.8 The Commission wishes to thank all those who took time to write in with their views and submissions. The Commission also want to thank also all those who were summonsed and gave evidence at our Inquiry. The Commission's work and report is subject to our terms of reference. Our Inquiry has revealed many matters that need to be resolved. In all cases, if the matters cannot be settled amicably, then we suggest that the proper avenue is through the court system and further clarifying legislation.

## CHAPTER 7 – RECOMMENDATIONS

7.1 Following our inquiry into possible unlawful land dealings through the internet, the Royal Land Commission makes the following recommendations:

- a) That legislation is enacted on a priority basis for the clarification, registration and control of all Tenancy Agreements;
- b) That the majority of the existing land related matters considered by the Commission can be processed with in court to determine their legal standing. In doing so, the lawfulness of a range of long term Tenancy Agreements discussed herein, can be finally and properly determined by the court;
- c) That greater control is placed on the issuance of a Real Estate License and that greater restrictions and qualification requirements be put in place regarding academic qualification, experience, credit ratings and financial viability;
- d) That a National Real Estate Authority be established to govern, control and discipline those carrying on the business of real estate agents;
- e) That the National Real Estate Authority monitors, control and discipline the use of the internet for land deals by Real Estate Agents licensed in Tonga;
- f) Part of the work of the National Real Estate Authority is to 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;
- g) That there is an ongoing and timely cooperation between the National Real Estate Authority and 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;
- h) 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 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;

- i) That the Ministry of Labour, Commerce and Industries 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 has been treated differently from Tongatapu;
- j) That the Ministry of Works follows up and explain why it has allowed the construction of buildings in Nuapapu Island by Gordon Allison to continue without a building permit as required by law;
- k) That consideration be given to increasing the existing number of years that a tax allotment may be leased;
- l) That the Ministry of Lands' duties regarding the registration and enforcement of caveats be strengthened and put into effect;
- m) That the above recommendations are pursued in conjunction with the Commission's recommendations in its Interim Phase One Report to improve the overall efficiency and performance of the Ministry of Lands.