Chapter 4

LAND DISTRIBUTION AND BEST USE OF LAND

INTRODUCTION

Tonga is a small island nation in the South Pacific region surrounded by vast tracts of the Pacific Ocean. Tonga has a very limited amount of land being 718 square kilometres coupled with a growing population of about 103,036. There are also more than 100,000 Tongans residing overseas. Given the very limited amount of land available, the way land is distributed as well as best uses for land are very important factors that must be maximised. There will come a day when all land has been distributed while increased pressure on land availability continues.

This chapter examines the public's views, concerns and proposals with respect to land distribution and best use of land. Recommendations are provided where appropriate with the overall objective of providing an effective and efficient system of land distribution and best uses of land.

Essential to such a system and consideration of proposals for best use of land, was the availability of information on what land is available for distribution in each estate. The Ministry of Lands does not have this information readily available. In collaboration with the Commission and upon its request, an employee of the Ministry was assigned the task of collating data to help identify information on land available in each of the estates listed in Schedule I of the Land Act. The results of this task did not allow for a full land distribution analysis, which is discussed in this chapter together with further problems identified in the records on land registers.

All the land in Tonga is the property of the King who may, at His pleasure grant to the nobles and titular chiefs one or more estates to become their hereditary estates. Land is distributed to the people from estates by the King, Nobles (as holders of hereditary estates) and the Crown (Government). Every Tongan male subject upon attaining the age of 16 years is entitled to apply for grant of a town and a tax allotment from the estate that he resides in. This land distribution system under the Land Act has been the basic framework for allocation of land in Tonga. However, this system would be more effective in the face of limited land available for distribution if there was accurate information of land already distributed in each estate.

4.1 LAND AVAILABLE FOR DISTRIBUTION

This chapter discusses improved ways of land distribution and use of land, which was identified as a pressing issue throughout the Commission's public meetings in light of a growing population and increasing demands for land in Tonga. The public and special interest groups who met with the Commission highlighted problems they encountered because they had no access to land as well as the lack of information on what land was available for distribution. Proposals of how best to deal with these problems were submitted for the Commission to consider.

In order to put these proposals in context, the Commission wanted to conduct an analysis of how land was currently being distributed by estate holders in both hereditary and Crown estates. Such an analysis could show how much land had been *allocated* through registered allotments (tax and town), leases (including leases to charitable institutions) and permits. Once the total portion of allocated lands could be determined, the same could be used to determine how much land was left *unallocated* and available for distribution in each estate.

These vital statistics would give the Commission a reasonable idea of how much land was available and may be subject to any new laws regarding distribution of land. Any new laws relating to distributing of land shall not apply retrospectively to land that has been allocated. Being basic land distribution information, these statistics should have already been readily available from the Ministry that could be utilised to assist the Ministry and the public in understanding the overall position of the country's land distribution at a numerical level. The insights gained would enable all interested parties to understand and create realistic administrative measures and solutions for the future.

In particular, this information would be of use to hereditary estate holders as distribution of land in their estates is subject to statutory limitations. For example, section 33(2) of the Land Act provides that a hereditary estate holder can only lease up to five percent of his total estate (not including leases to religious bodies and charitable institutions). Hence, the hereditary estate holder should know at all times, whether or not he stays within the 5 percent limit and in compliance with the law.

The public were also keen for confirmation of what land was available in each estate as this would assist estate holders in their consideration of applications for grant of an allotment. They further proposed that once available land was identified, it should be mandatory for an estate holder to approve a grant out of such land upon application for a grant from an eligible Tongan subject, instead of holding onto it or using it for their own benefit.

Some members of the public believe that there are a lot of estates where unallocated land was still held by the estate holder and if such land was allocated it may be enough to form another township in areas with existing land shortage issues. However, it was important to clarify what land was available in each estate.

The Commission does not support removing the discretion of estate holders to consider whether or not to approve an application for grant of an allotment in his estate. That discretion is necessary as estate holders have to take all factors relevant to his estate into consideration before making a grant. It would be sufficient that guidelines are created to assist estate holders as is recommended in Chapter 3 of this Report. Those guidelines are comprised of matters that the

public have expressed for the estate holders to take into account when considering a grant of land.

A written submission from the public also called for policies of land distribution, registration and productivity to determine:

1. whether all lands that were meant to be distributed to the people under the provisions of the Land Act and the Constitution - have in fact been made available for distribution and surveyed?
2. whether registration of allotments are carried out effectively and with reasonable progress?
3. whether the powers under the Land Act are being used to properly promote and assist positive and productive use of land?

It was however, unfortunate that the Ministry did not have the information required by the Commission. There was little information available relating to allocated and unallocated land in each estate. Even the total area of each estate was unquantified. Lack of such vital information is a major deficiency in the Ministry's duties to the Government and the public. This lack of key information has also hindered the Commission's efforts to assess land distribution as a matter of necessity.

Nevertheless, the Commission obtained what data and information could be compiled within the timeframe of its appointment in order to get some idea of the current land distribution amongst the various estates. More importantly, this exercise did assist in identifying the reasons and the extent of the absence of accurate data – in effect a gaps analysis. The Ministry, it was hoped would be able to use this information toward rectifying the poor state of its land registry and records for the future.

4.1.1 INFORMATION ON LAND DISTRIBUTION FROM THE MINISTRY OF LANDS

The Commission sought the assistance of the Ministry in collating the necessary data and information to assist it in conducting a land distribution analysis. This was a difficult task particularly because some crucial information that should have been readily available at the Ministry was either incomplete or non-existent.

A land officer from the Ministry was assigned the task of identifying and collating the distribution of lands in Tonga into three key categories for every Noble Estate and all Crown Lands being:

1. The percentage of the total land area that has been registered as tax and town allotments;
2. The percentage of the total land area that has been leased (differentiating leases to charitable bodies);
3. The percentage of the total land area that remains unallocated (not registered nor leased).

The report from the Ministry dated 30 September 2011 on its findings is attached to this Report in Appendix 17. Findings were provided in Attachment 2 to that report and the results were summarized for hereditary estates and Crown Estates as follows:

TABLE 1 - Hereditary Estates:

TAX ALLOTMENT		TOWN ALLOTMENT		INDIVIDUAL LEASES		CHARITABLE LEASES	
Total No. Registered	Total area (acres)	Total No. Registered	Total area (acres)	Total No. Registered	Total area (acres)	Total No. Registered	Total area (acres)
3710	21639	5109	1189.67	454	1693.29	354	1870.22
TOTAL AREA REGISTERED: 26392.18acreas							

TABLE 2 - Crown Estates (Tongatapu Only):

TAX ALLOTMENT		TOWN ALLOTMENT		INDIVIDUAL LEASES		CHARITABLE LEASES	
Total No. Registered	Total area	Total No. Registered	Total area	Total No. Registered	Total area	Total No. Registered	Total area
				741	1076.66	235	393.36
TOTAL AREA REGISTERED: (Not available)							

The Ministry's report did not provide the information requested by the Commission, which were the percentages of registered allotments, leases and unallocated land for each hereditary estate and Crown estates.

Instead, the report provided the total registers for all hereditary estates with no details for each hereditary estate in what the Ministry described as a "snapshot" of records held in its various registers. The results of this report were disappointing and were not helpful to the Commission in assessing the state of land distribution in Tonga. This highlights the state of uncertainty with which the distribution of lands in Tonga have been documented. The Ministry does not therefore, understand to any reasonable level of certainty and accuracy, the overall state of lands distributed in Tonga.

The Ministry advised that they could not provide the information as requested by the Commission due to the following problems identified in the Ministry's registers:

(i) Estate boundaries and total areas

Any attempt to calculate the total area of estates would also be hindered by the uncertainty of estate boundaries (vaha'a tofi'a). The estate boundaries of all

estates (Royal, hereditary and Crown) have not been confirmed and are not legally defined under the Act.

In the Commission's public meeting in Niuatoputapu, it learnt that the state of uncertainty of estate boundaries was becoming an issue for residents of the two main hereditary estates in Niuatoputapu. The Commission was told that the boundary of one hereditary estate holder over time had moved inward into and increasingly encroached on the neighbouring estate. Residents were not happy that they have had to change allegiance from one hereditary estate holder to the other. Although they have historically been considered as residents of one hereditary estate, subsequent surveys of their allotments provided deeds which showed them belonging to the neighbouring estate with which they held no tradition of allegiance to. Town officers also faced difficulty when residents around the boundary of the two hereditary estates avoided "fatongia" by claiming they belong to the neighbouring estate holder's territory. The uncertainty of these boundaries has led to more discontent amongst the public but also potentially amongst Nobles who may misunderstand where their actual boundaries are. This doubt may lead to further difficulty within the land distribution process.

In the absence of clearly defined estate boundaries by proper surveying, identification of boundaries predominantly relies upon traditional and customary land descriptions.

The Ministry does not have any record of the total area for each estate. A process of surveying and draughting of estate deeds for each estate holder which the Ministry began in the mid 1970's and was not completed. This process if completed would have shown the total area of each estate. No estate deeds have been issued to date and the total area of estates has been left unknown.

Although the Ministry stated that the above process was not completed and estate deeds were never officially issued, estate deeds were indeed prepared from the results of the 1970's surveys showing the total area of each estate. However, the deeds were never signed by the then Minister of Lands for reasons unknown to the Commission. This is significant because the 1983 Royal Land Commission provided an analysis of land distribution that included the total area of estates. These were basically the same figures, as those provided in the estate deeds that were prepared from the 1970's surveys as is discussed below.

At law, these estates therefore do not appear to legally exist under the Land Act as there was no defined boundary. This proposes a rather serious threat to the current legal standing and ownership of these lands under the Land Act. Although traditionally understood to be 'owned' by a particular Noble those same lands appear to be unlawful as they are not legally defined as required by the Land Act to be carried out by the Minister of Lands.

The Ministry identified other reasons why the total area of estates could not be determined. Firstly, Schedule I of the Land Act does not clearly set out the area and boundaries of each estate. Secondly, some hereditary estate holders hold additional estates. Thirdly, a substantial proportion of hereditary estates are also comprised of land that is deemed Crown land which is land being used for public purposes (roads, reserves, cemeteries and coastal areas affected by the high water mark). Therefore, the Ministry was of the opinion that without the expressed consent of hereditary estate-holders they could not provide any information on the total area of hereditary estates.

***RECOMMENDATION 45**: THAT the Ministry completes the process of surveying and draughting which began in the 1970's to confirm estate boundaries and all information required that would facilitate the Minister of Lands in issuing estate deeds for each estate.*

(ii) Area of some registered allotments are not recorded

When a piece of land is registered as a town or tax allotment, its total area is recorded in the Ministry's registers. However, the Ministry admits that some registered allotments do not contain the total area for that same allotment in the registry book – either the area was not recorded or it's recorded as "zero". The only information available on these registered allotments was the name of the landholder and the date of registration. As these allotments devolve through the line of heirs, the Ministry may be able to identify the total area of these allotments when they're re-registered and the heir is able to identify this particular allotment from the map. This is particularly common in Crown lands and is partly the reason why the Ministry could not complete the information provided in Table 2 above. The analysis in the 1983 Royal Land Commission noted that the allotments registered with no specified area were mostly from registrations pre-1927.

***RECOMMENDATION 46**: THAT the Ministry identify all registered allotments in the registry that have no total area and do all that is necessary to confirm those areas and update the registry.*

(iii) Deregistration of previous landholders

The registry does not always hold proper record of a landholder losing his interest to registered land through death or surrender. A person's land may be transferred and re-registered under someone else's name, but the previous landholder's name would remain on the register. For example, a landowner

passes away and this event is not recorded on the registry book. When the same land is subsequently re-registered, both the old and the new registrations would still appear on the registry so that same piece of land would be counted as two separate registrations – a classic double registration error. This error is further amplified particularly when the location number of the two registrations differs. For example, the first registration for a parcel of land can be found on Lot 200 Block XIX with an area of 8a 1r 00p and that same allotment upon second registration would be recorded as Lot 19 Block 79/93 with an area of 3.339ha. So the same piece of registered land would then be counted as two separate registered allotments because the Ministry has no way of knowing that the subsequent and new registration is of the same allotment.

Consequently, the information provided in Tables 1 and 2 above may be inaccurate as more land may have been recorded as registered than is actually the case. This problem can be markedly improved with computerization of the Ministry's land records so that all land information can be updated when an interest in land passes from one holder to the other. Chapter 5 of this Report further discusses land records and computerization.

Apart from the reasons identified by the Ministry and discussed in (i) to (iii) above, the Commission was also made aware, through its Phase One inquiries and during its extensive Phase Three public meetings, of the following problems which have contributed to the deficiencies within the Ministry's registry system:

(iv) Allocated land which has not been registered

The Ministry has had a large backlog of files mainly in its Survey, Draughting and Registration Divisions with some files dating back to the 1960's and 1970's as discussed later in Chapter 5. These include allotments which have been granted or allocated by estate holders to prospective landholders, but registration of those allotments have not been completed as the process has been held up in

the Ministry's backlog files. The information provided by the Ministry in Tables 1 and 2 above does not record land that have been allocated and awaiting registration because those allotments have not been registered. They are not counted as part of registered land until they have been registered and a deed issued. So it may appear that these lands are available (as part of unallocated land) but they have in fact been allocated and await registration. If these "granted" allotments were accounted for, it would have provided a more accurate figure of the total area of registered allotments.

There is an urgent need to address the problems identified in (i) to (iv) above and other problems in the land registers that the Ministry may already be aware of so that vital land information statistics can be collated with accuracy. The "snap-shot" report of landholdings provided by the Ministry and data gathered in conducting this exercise is an initial attempt by the Ministry to collate this crucial information for the country.

***RECOMMENDATION 47**: THAT the Ministry continues to re-build its registers and collate required data in order to provide, for each hereditary estate, Royal estates and all Crown estate lands accurate information on the total area of each estate and accurately determine what percentages of each estate has been allocated through registration (as tax and town allotments), leases (individual and religious/charitable) and permits, and what land is left unallocated and available for distribution.*

Overall, the poor availability of basic land information reflects the unfortunate administrative capacity of the Ministry. The current findings further support the Commission's views discussed in Chapter 5 that there is a dire need to revamp and modernize the Ministry in almost every capacity.

The Commission received advice from the Ministry[11] that major achievements in revamping the Ministry will be achieved through the Land Administration Project which is due to be completed by June 2012. The Ministry claimed the completion of this Project would generate the first ever Database of Land Registers for the Ministry comprising of a Town Allotment Register, Tax Allotment Register, Mortgage Register and Lease Register. There was no indication however, on whether the new Database will have addressed the issues discussed and recommendations made above. The Commission strongly urges the Ministry to do so; otherwise the Database will be inaccurate.

4.1.2 ANALYSIS BY THE 1983 ROYAL LAND COMMISSION REPORT

The Commission considered an analysis of land distribution provided in the report of the 1983 Royal Land Commission. This analysis was based on data and figures provided to them by the Ministry. The Commission now recognise from information received from the Ministry that if those figures were based on the estate deeds, those deeds were not entirely correct and certainly not signed and confirmed by the Minister, as required by the Land Act.

[11] See Appendix 21

4.2 IMPROVED WAYS OF LAND DISTRIBUTION AND USE OF LAND

Land is an essential component in the development process of any economy and it has grown more valuable as Tonga's population has increased. More Tongans have lived overseas and they have realised the value of owning land in Tonga. Tonga has also become increasingly dependent on its agricultural and tourism sectors. Some landholders have now realised that their land is a source of personal wealth and an attractive source of long term investment. Government needs to closely monitor the distribution and use of land in Tonga in order to stimulate and facilitate the economic growth process and provide an enhanced and enabling environment for that growth.

The Commission considered many interesting proposals not only from the public, but also from banks, businesses, women's groups and others with a common interest of ensuring access to land for all and sustainable land use.

4.2.1 A NATIONAL LAND USE POLICY FOR TONGA

The Commission received written submissions as well as proposals during its public meetings calling for and justifying the need for a national land use policy for Tonga.

Distribution and use of land in Tonga should be subject to such a policy. Formulation of Tonga's national land use policy should take into account the following matters:

(i) Sustainable resource base

To ensure a sustainable resource base to help build sustainable development of the agriculture sector and govern use of land and related activities including the following:

(a) adoption of sustainable farming practices to ensure that land are used wisely to avoid land degradation;

(b) protect land through investing to ensure it will remain in good farming condition for future generations by replanting and other positive farming techniques. Government can help by providing seedlings for replanting or the people in the community can be trained to grow their own seedlings;

(c) to restrict bulldozing or dramatic altering of large tracts of land (including quarries) from allotments which have been leased, particularly commercial leases. Although this is done for short term economic gain, it could possibly have long term detrimental effect on land;

(d) to restrict or prohibit the removal or cutting of trees in the coastal areas (selective or no cutting).

(ii) Proper planning

Ensure proper planning of urban development.

(iii) Zoning

Identify land that is suitable for tourism and developments projects and reserve such land for those purposes (zoning).

The Commission agrees that land use and development in Tonga should be subject to the guidance of a national land policy, which takes into account the matters referred to above. However, instead of recommending the formulation of a national land policy, the Commission was made aware of the Spatial Planning and Management Bill 2010.

(iv) Spatial Planning and Management Bill 2010

This Bill, if enacted, would effectively establish a National Planning Authority and provide a framework for planning the use, development, management and protection of land in Tonga.

The Bill proposed to establish a National Planning Authority to pursue objectives including provide for the fair, orderly, economic and sustainable use, development and management of land including the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity; enable land use, development planning and policy to be integrated with environmental, social, economic, conservation and resource management policies at national, regional, district, village and site specific levels; create an appropriate urban structure and form for the development of the Kingdom so as to provide equitable and orderly access to transportation, recreational, employment and other opportunities; secure a pleasant, efficient and safe working, living and recreational environment for people in the Kingdom; protect public utilities and other assets and enable the orderly provision and coordination of public utilities and other facilities for the benefit of the community; balance the present and future interests of all Tongans; and provide increased opportunity for public participation in planning and assessment.

The provisions of the Bill provided for the creation of spatial plans, which could be either a national, regional, district, village or specific plan. All development and use of land in areas covered by a spatial plan may be carried out only with a development consent issued by the Authority. The process of applying for a development consent provide checks to ensure compliance with the relevant spatial plans in the area where the land to be used or developed is located.

The scope of the Bill would require that the activities and concerns referred to above which are proposed as the basis for the formulation of the national land policy and many other relevant factors be taken into account by the Authority (and the Agency), both in the devise of spatial plans and issuance of development consents.

The Commission believes that the Spatial Planning and Management Bill 2010 would not affect the rights of a landholder or estate holder afforded under the Land Act and the Constitution. They will continue to enjoy those rights and interests, but they will be subject to the requirements of the Bill should they decide to use or develop that land. The effect of the Bill is no different from those imposed by earlier laws including the Building Controls and Standards Act 2002, Building Code Regulations and the Environment Impact Assessment Act 2003.

The Commission supports the Spatial Planning and Management Bill 2010, which would address the concerns for better management and planning of use of land.

4.2.2 FACILITATE LAND DISTRIBUTION THROUGH SUPPORT MECHANISMS

The public proposed the establishment of the following mechanisms to support land distribution:

(i) Land Bank

Some of the public and the Tonga Chamber of Commerce and Industries proposed the establishment of a "Land Bank" in Tonga. The sole purpose of this Land Bank would be to provide information to the public on what land was available in Tonga for use for various purposes including leases, farming or commercial activities. It would be easier and more efficient for people to go to

the Land Bank and obtain information for land that would suit their purpose. The publication and ready access to this information would become vital so all Tongans in Tonga and overseas could readily access website information on the land bank to consider their interests in land related development in Tonga.

A Land Bank relies on the assumption that all land information is accessible and well administered. However, much land in Tonga remains allocated but, not registered for a range of reasons. Once a range of improvements have been achieved at the Ministry, a Land Bank would become a very useful means of land distribution. A land Bank is effectively an administrative tool that would assist the better use, coordination and distribution of lands within Tonga.

There were other proposals for establishment of an independent body to provide functions similar to the proposed Land Bank concept. The Commission suggests that once the Ministry's records are complete as recommended earlier in this chapter, the Ministry itself can provide this function efficiently as part of its provision of essential land records to the public.

(ii) Town Land Council

The public proposed that each town should have a Town Land Council to advise the estate holder in performing his functions. People of each town would know a lot about the history of family allotments, who contributes to town activities, families in desperate need of land and related matters. Each town could establish a Council where their concerns could be voiced and advice provided to the estate holder to assist with his decision-making. Most Nobles have long standing associations and relationships with key community leaders and heads of families. What has been proposed is a formalising of traditional relationships that have been well established for generations.

The Commission believes that estate holders are well aware of key people in each estate that they can seek advice from if required. Some estate holders rely on town officers in his estate or their "matapule" to provide any information he may require or to ascertain information relating to a particular piece of land. Each estate holder can use councils if they wish and when it is required without the need to specify this in legislation.

4.2.3 IDENTIFY NEW LAND FOR DISTRIBUTION – FANGA'UTA

Some members of the public proposed that town and tax allotments be granted from Fanga'uta Lagoon, Tongatapu. This proposal was common in the Commission's meetings in town areas that surrounded the lagoon shores such as Veitongo and Havelu. Residents believe that this would make more land available for residential purposes as villages were becoming overcrowded. This idea was also brought up in one of the public meetings in the United States of America as this may make it possible to grant allotments to Tongans living overseas who would like an allotment in Tonga.

However, other members of the public did not support this proposal because it would affect their livelihood from the lagoon and may cause flooding in their villages and other environmental effects. There was also opposition to a lease over part of land in Fanga'uta to a private development company (Lomipeau Project) for the same reasons.

The Government currently hold the view that the Fanga'uta lagoon area are internal waters under international conventions as defined under Article 9 of the United Nations Convention of the Law of the Sea (UNCLOS) as waters landward of the baseline. However, under the Tongan land tenure system another view was that it was difficult to accept that land under the lagoon water can be treated the same as normal land on shore which could be allocated as town and

tax allotments. There is also the protection provided for the lagoon area under the Birds and Fish Preservation Act (Cap. 125) and the Environment Impact Assessment Act 2003.

The Commission, therefore, cannot consider this issue further until the above concerns are clarified.

4.2.4 EXPLORE NEW WAYS OF LAND OWNERSHIP – STRATA TITLES

The Commission considered proposals for introducing strata titles which are commonly used overseas where residential accommodation is built within multi-story, high rise buildings and the public are free to purchase and own a part (normally part of a floor level) of that building. A strata title holder also collectively owns a part of the land upon which the building sits. His ownership rights would be limited to the part/floor level of the building that he owns and subject to a range of corporate rights and duties. This type of interest is very common overseas and it is a good solution to the problem of land shortage. The Tonga Chamber of Commerce and Industries supported this proposal for Tonga in the future if there will be a need for further allocation of land.

The lands available for distribution in Tonga in the foreseeable future will run out. Strata title provides a very effective corridor to property ownership in Tonga when, all the available land will have been distributed. The strata title concept of ownership heavily relies upon the development of multi-storey buildings within which ownership of residential spaces within a building are purchased and owned. This purchase covers the costs of this commercial development. In some instances a Government has funded a development to provide for accommodation of large numbers of people in countries where there are serious shortages of living quarters for its citizens. The Commission observed high levels

of successful land reclaiming and strata titles in Singapore during a country visit. Singapore has a total land mass similar to that of Tonga.

The introduction of strata title in Tonga is most likely to be funded by private commercial development and would therefore require payment of private sector valued fees to purchase a strata title property. Being so, this solution can be viewed as being well within the auspices of land being distributed to the people under the Land Act. Once registered, a land owner (strata title property) is free to develop and use his land as he wishes within the law.

Strata title can provide an achievable solution for future property ownership in Tonga. Given Tongatapu in particular is a raised coral atoll and its rock base is soft coral rock; the maximum weight that can be placed upon this land surface is limited. Therefore, the height of any multi-storey buildings would also be restricted thereby providing some limit to the number of strata title ownerships that could take place. Strata titles would improve best use practices to the limited land available in Tonga and also create an additional facility for the public to own property.

As discussed in the Phase One Interim Report, all study countries have implemented key land ownership developments that have anticipated increased pressure on limited land availability – an issue Tonga is vulnerable to in the future. Developed countries like Singapore, New Zealand and Australia have enabled strata title ownership of floor levels (or part thereof) within multi-story buildings and shares in a relatively small land area upon which the building sits, with shared cooperative costs to maintain all commonly shared facilities (car parking, driveways, caretakers, lifts etc). Smaller countries of Samoa and Cook Islands have also embraced strata titles particularly to encourage foreign

investment, but have been developed to a lower scale than most developed countries.

It is possible that strata title could be a Tongan version being derived from land under the Land Act that creates a Strata Title for the maximum duration of either the lease negotiated or if its town or tax allotment, in perpetuity subject to the laws of succession. The alternative is to consider freehold style strata ownership but, this could only be registered over 'new freehold land' reclaimed on the foreshores or lagoon area.

***RECOMMENDATION 48**: THAT consideration is given to strata title ownership and its introduction to Tonga.*

4.2.5 LAND FOR PUBLIC USE

(i) Each estate should have a "reserve"

The public proposed that in each estate there should be land designated as reserves. Land can be allocated from the reserve for various community purposes such as for sport or for general community purposes. New cemeteries could also be allocated from these reserves and could even be divided into town allotments when required.

The public also proposed that it would be best to designate these reserves from tax allotments which are close to residential areas (matakolo) which can be exchanged with land further out from the town centre. This could cause the town's development projects to move further away from the limits that it is currently restricted to due to unavailability of land.

Church leaders also put forward a proposal, that land should be made available or set aside in each estate for sporting and recreational activities for the people and children of the town.

There are a lack of recreational and community areas in many townships throughout Tonga. Land related planning for the future should become a priority for all Tongans and lands should be set aside from estates toward community services such as parks, recreational areas, cemeteries and community halls available for public use.

The Spatial Planning Bill intended to tackle a range of planning issues and needs across Tonga. A proposed new authority is to be set up oversee such planning issues will be the National Planning Authority. The Minister of Lands as a member of the Authority would play a crucial role.

There are already sufficient provisions under Part IX of the Land Act that empowers the Minister of Lands to declare reserve Crown lands for public purposes when the need arises. Land in hereditary estates could also be declared as reserves with the consent of the hereditary estate holder. Exercise of the Minister's discretion would depend on what land may be available and suitable for the purpose sought.

(ii) Cemeteries

The public expressed concern with the current status of cemeteries. The current cemeteries in each town were overcrowded and this problem should be given special attention as the people's need for cemeteries should be met.

Town officers of Kolomotu'a, Kolofo'ou and Ma'ufanga, during their interviews in Phase One of the Commission's inquiries, identified the following problems faced in the allocation of plots from the cemeteries in these villages:

(a) increasing demand for cemetery plots due to rising population, but there is not enough land left in cemeteries from which new plots can be allocated;

(b) cemeteries are usually divided into plots that are recorded by family name. The permission of these families are usually sought before burial in their plot;

(c) all cemeteries had been surveyed, but some pegs had disappeared or sunk, making surveyed boundaries unclear. This usually resulted in burials in another family's allocated plot due to an honest mistake of the exact surveyed boundaries as it is not clearly marked;

(d) fences are usually erected to mark plots and this causes difficulty where it is built wrongly over another allocated plot's boundary;

(e) flooding and bad weather cause damage to cemeteries, particularly where remains can be exposed by the environmental forces;

(f) families who had been allocated plots have disputes with others for knowingly using their allocated plot without their knowledge or permission and sometimes disputes even arose amongst family members over their family plot where some in the family do not want those who married into the family to be buried in the family plot.

Existing laws regulating cemeteries do not provide solutions for these problems. The Land Act empowers the Minister of Lands to declare a reserve or resume an area of land for cemeteries by virtue of section 138(2). It also imposes offences for using a cemetery for any purpose other than the burial of bodies or concealing or burying a body of a deceased in any place other than a cemetery. The Public Health Act requires that cemeteries declared after the commencement of the Public Health Act also require a certificate from the

Minister of Health to confirm the suitability of identified land for that purpose. It also provides authority to place restrictions on use of such land to ensure public health is not compromised and control other methods of burial.

There is no clear authority to clarify how plots within cemeteries are to be allocated or how disputes arising from allocation of burial plots should be resolved. People usually seek directions from the estate holder, a "matapule", town officers or head of families ("'ulumotu'a"). The town officers interviewed by the Commission in Phase One usually assumed the role of directing burial locations in cemeteries in their villages. However, they believe that there should be a single Government authority for cemeteries and there should be clear policies or regulations to address the problems identified above in (a) to (f).

RECOMMENDATION 49: THAT (i) regulations are made to allocate clear authority for control of the allocation of plots for burials in cemeteries and resolving disputes that may arise from such allocation; (ii) the Minister of Lands work together with hereditary estate holders to identify appropriate land to be declared as cemeteries in estates where cemeteries are overcrowded.

Tongans have very set traditions for funerals and burial and deviations from the normal practice of a sand filled grave with a reasonable large area space surrounding it is common. This practice takes up much valuable land and needs to be reviewed. There is not enough land to accommodate the growth rate of burial grounds using this traditional method. Accommodating this community need is an essential service that must be met. Consideration of new and more land space efficient ways of burial need to taken into account. In a small island nation with very limited land availability land is premium.

Options proposed to the Commission to alleviate some of the cemetery problems included encouragement of the practise of "faifunga" and the

possibility of adopting the practise of creating family tombs which were common in European countries.

In the Commission's public meetings the idea of cremation was also brought up for consideration whether it is time for Tonga to use this method of disposing of bodies due to the lack of available land for cemeteries. This idea was not supported and many believe that it is not time yet to introduce this method in Tonga as it would clash with Tongan traditions and customs. Cremation is common in many countries where land space is very limited and populations are very high. Cremation minimizes health risks and alleviates many other social pressures that are placed on land use and availability. Should members of the public wish to cremate a deceased, this method can be used, but section 163 of the Public Health Act provide that such arrangements should be approved by the Minister of Health.

Government should consider these options with view to providing for more land use efficient methods of burial that are acceptable to Tongans.

(iii) Village allotment ('api fakakolo)

The public proposed that both Government and Noble Estate holders should be able to allow land from their various estates to be registered under a Town Committee or Council if required. Some people preferred not to lease these allotments because lease rentals were subject to change and could be increased in future. This proposal suggested registration of these allotments or another form of landholding to ensure that the land would be used for that purpose indefinitely. An allotment for the town is vital for performance of town based social functions.

The Commission notes that an estate holder can at his pleasure designate land for this purpose if he sees fit. There is no need to create a separate kind of landholding for this purpose.

4.2.6 DISTRIBUTION OF PRIVATE ALLOTMENTS

(i) Legal size of registered allotments

A major problem that the public face today is that there are still many Tongans who do not own any land and this was a constant topic raised at the Commission's public meetings. Despite this it is fact that whilst the population is growing the limited land area of Tonga will not. Therefore, the public have been searching for new ways of land distribution to enable the public to obtain an allotment.

The Commission was informed by villagers in one of its meetings in Western Tongatapu that they believed that only 30 percent of the people in their town owned land and the remaining 70 percent (including women) do not own any land. It is important that the intentions of King George Tupou I are honoured including that land was distributed to the people to ensure prosperity, happiness and the provisions of food and other necessaries of life.

A powerful emotional aspect also pervades all Tongans and that is to own a piece of land in Tonga so that one may then call himself or herself a Tongan. Many people expressed that sentiment that they would be happy to receive a piece of land.

The public proposed that the legal size for a town or tax allotment should be reduced to allow more people access to registered allotments. The public proposed that the minimum size for a town allotment can be reduced from 30

perches to say 25, 20 or 15 perches. Tax allotments should also be granted in one acre plots. Not only would more people be able to hold registered allotments, these reduced land areas would also allow for registration of allotments which are already occupied but remain unregistered because it does not meet the minimum size for a town or tax allotment. This would also facilitate registration of land left over from subdivisions which may be less than 30 perches, but is sufficient in size for residential purposes. Some people believe that had the legal size of land allotments been reduced years ago, that more people would be land holders today.

However, the Commission notes section 7 of the Land Act which provides that grants of a tax or town allotment shall not exceed 3.3387 hectares (approximately 8¼ acres) and 1618.7 square metres (64 perches/1 rood 24 perches) respectively. As such, grants in smaller portions can be made, subject to the provisions in the same section that the Minister may subsequently grant more land to the same holder until the maximum size is reached.

Others believe that instead of prescribing the maximum size for an allotment, the Land Act should prescribe the legal size so that land is granted in that size - not less or more. This would avoid large grants of land.

Despite this proposal to reduce the legal size for town and tax allotments, the People's Representatives expressed concerns. There were some allotments which do not reach the minimum existing legal size prescribed by law and they are therefore leased out as they cannot be registered. But it appears that smaller plots result in homes crowding together and being located too close to one another and this created other problems including health, sanitation and social issues such as increased neighbourly quarrels. The same problem would arise if the legal size of registered allotments were reduced. This same problem is

evident in new urban settlements on tax allotments which have been sub-divided where a lack of planning has led to access roads being too narrow for vehicles and related safety issues. It was also proposed that the legal size for registered allotments should also apply to leases to avoid the same kind of problems.

The Commission believes that the problems of overcrowding and poorly planned internal roads on subdivided tax allotments can be better allayed under the proposed Spatial Planning and Management Bill discussed above. The Bill, amongst other objectives, aimed to provide clear planning requirements to allow order and fluidity of all matters surrounding new residential settlements such as roads, water, power supply and other basic infrastructural requirements.

Reduction of the existing minimum size of town and tax allotments is achievable. It is for example plausible to set a new minimum land area for town allotments of between 20-25 perches and a new minimum land area for tax allotments of two acres but still allowing for the current maximum land area of 64 perches/1 rood 24 perches and 8 ¼ acres respectively.

RECOMMENDATION 50: THAT the minimum size of a registered allotment be reduced to 20 perches for a town allotment.

(ii) Landholders should share their land

The public also proposed that people who held a lot of land should share their land. There are some people who hold substantial amounts of land whilst there are still many people who do not have any land. These larger plots of land could be subdivided and distributed to others starting with their own relatives and those closest to them. However, once land was registered to an individual he had ownership rights protected under the Constitution and Land Act. The

Commission's view is that infringement of these fundamental rights is not acceptable.

The public also proposed that where areas of allotments exceeded the current legal limits that the excess land should be distributed to others who did not own any land. The landholder who had excess land could be given the option of electing who his excess land would go to such as his brother or sister, son or his other children. A procedure for distributing such excess land would require the landholder to submit an application to the proposed independent Land Commission proposed in Chapter 7 to carry out this work. The Commission could specify what the legal size of an allotment should be and the legal size may vary with each estate. It was also proposed that excess land shall not be leased out by the family unless approved by the Commission. It was also proposed that a reasonable time period should be given to landholders or families whose land exceeds the legal size within which to complete the task of surveying and reallocating excess land. If this work is not completed with the specified time period then the land would revert to Government.

However, the Commission believes that a holder of registered land should not be forced to share his land. If legislation is passed to legally force a holder to give up his interests/rights for the benefit of others, it would be ultra vires under clause 20 of the Constitution, which prohibits the passing of retrospective laws. The holder may, at his own discretion subdivide his land should he wish to surrender his interest or part thereof for the benefit of others.

(iii) Notice of unregistered land to be given when heir make a claims

Some members of the public told the Commission that there are landholders with a registered town or tax allotment who also held other unregistered land. It was proposed that the law should be amended to require someone who claims

as heir to registered land to give notice in the claim of any unregistered land which they currently occupy. Such unregistered land often informally 'devolves' through the family line of succession despite the fact that it is not registered.

These unregistered allotments should be made available for distribution to others, especially because land available for distribution is scarce. Upon receiving notice that a landholder is also the holder of unregistered land, the staff of the Ministry of Lands should then inform the Minister so that they could follow up on why such land has remained unregistered. This would also help clarify the Ministry's records of unregistered land.

RECOMMENDATION 51: THAT a person who makes a claim as heir to a deceased person's registered land shall also notify the Ministry of any unregistered land that he currently occupies.

The serious lack of accurate information available on the state of land distribution in Tonga leaves all interested parties 'in the dark' and uninformed. This is much to the detriment of the Government, public and the Ministry itself. Such gaps in crucial land registration information can and are hindering the development and economy of Tonga. The absence of this basic and vital information hinders any potential purchaser or investor from being able to rely upon and commit to land transactions or investment with confidence. Much foreign investment into Tonga has been thwarted by the Government's inability to provide a sure and reliable platform of information on land titles and registration in Tonga. Unlawful land related activity has also occurred much to the detriment of Tongan land owners and unsuspecting foreign buyers.

This Report again confirms the Commission's views that land information is at best generally unreliable and difficult to access and the Ministry does really need to embrace substantial and positive change for the betterment of all of Tonga.

The overall objective of providing a smooth and efficient system for the distribution of land is dependent upon many of the Commission's recommendations being implemented by the Ministry.

Best or improved distribution and use of the precious little land available in Tonga must become a highest priority when awareness is made of the fact that the land is running out. A number of proposals have been made that now require urgent attention from Government.