

Chapter 5

THE MINISTRY OF LANDS, SURVEY, NATURAL RESOURCES AND ENVIRONMENT

INTRODUCTION

On 25th February 2010 the Commission presented to His Majesty King George Tupou V, its Phase One Interim Report on findings from Phase One of its inquiry. Phase One took place from January 2009 to January 2010 and consisted of internal inquiries and a performance review of the Ministry of Lands. The inquiry looked at the Ministry's overall structure, functions, services, efficiencies and its general performance in providing essential land related services.

Phase One also focused on identifying issues of concern and problems faced in the delivery of the Ministry's duties and how these may be improved. Crucial consideration was also given to the improvement of the land registration system to produce a user-friendly, speedy and accessible service to the public. There were also visits to New Zealand, Samoa, Cook Islands, Singapore and Australia (New South Wales) to study their respective land registry systems and practices and compare these with Tonga's land registration system and practices with view to adapting aspects that may assist the Ministry.

This chapter will not repeat the full contents of the Phase One Interim Report, which is attached to this Report in Appendix 5. This chapter seeks to summarise, highlight and confirm its findings and recommendations and to discuss these in light of progress that Government has made and relevant proposals received during the public meetings of Phase Three of the Commission's inquiries.

5.1 PERFORMANCE REVIEW OF THE MINISTRY

In Phase One, the Commission conducted an inquiry into the Ministry's functions, structure, practices and performance. The Phase One Interim Report reported a systematic failure across the Ministry and the following key issues were identified:

5.1.1 TOO MANY "CORE FUNCTIONS"

As was identified and discussed in detail in paragraph 2.1.1 of the Phase One Interim Report that the Ministry carried out too many functions to be able to properly cope with the wide range of demands placed upon it. Increased interest from Tongans living abroad, availability of mortgages against land and an increased perceived value of acquiring land by Tongans have amplified the demand for a range of land related registration and transfers of title. While trying to attend to these essential land related services, the Ministry was also engaged in other time consuming functions that should not have been part of its core functions such as dealing with a large number of land related complaints received from the public in a quasi-court manner.

The Ministry's current core functions as identified in the Phase One Interim Report were fivefold:

(i) **Core Function 1 – Administer the Minister's statutory duties**

The administering of the Minister's duties under the Land Act and in the allocation of land, without cost to any Tongan male over the age of 16 years and all other consequences laid out in the Land Act that flow from this key and distinguishing land right. The Minister is duty bound to ensure these unique land rights are properly administered and complied with.

(ii) Core Function 2 - Registration

Administering the registration process of all land transfers and titles – transfer of titles, leases, land exchanges, surrendering of lands, mortgage registrations, heir inheritances, widow inheritances, provision of documentation for applications and conducting title searches.

The above two core functions were predominantly carried out by the Registration and Strategy & Corporate sections of the Ministry in the main office in Tongatapu. The Governors, as Deputy Ministers were responsible for registration in their various Districts, but their performance was prone to problems identified in paragraphs 2.1.5 and 3.1.6 of the Phase One Interim Report.

(iii) Core Function 3 – Survey & Draughting

Survey and Draughting of all land plots in Tonga according to directions from the Minister. This function was carried out by the staff of the Ministry's Draughting, Surveying and GIS Divisions.

(iv) Core Function 4 – Quasi court role

Considers and provides decisions and 'advice' to a large and growing number of public 'enquiries/complaints'. This advisory capacity amounted to playing the role of a quasi-court and quasi-lawyer role.

This function was generally carried out by the Registration Division but, the workload was often spread out amongst almost all other divisions, depending on the nature of the query or complaint. Many of these complaints related to the constant and long delays experienced by the public in all areas of land registration. Other complaints also related to issues of land ownership, succession, claims to rightful ownership and more. Such complaints should

obviously have been dealt with by other lawful avenues and not by the Ministry of Lands.

(v) Core Function 5 – Planning & Urban Management Division

Regulated all town planning related matters in Tonga and had very little to do either with administering the Minister of Lands duties or with registration of all land titles and transfers.

The overloading of so many core functions such as the above, on the Ministry of Lands' portfolio had given rise to much of its plight, inefficiencies, ongoing backlogs and delays.

**5.1.2 PHASE ONE RECOMMENDATIONS REGARDING FUNCTIONS OF THE
MINISTRY**

The Phase One Interim Report proposed the following recommendations regarding the Ministry's core functions. The Ministry responded to the Phase One Interim Report by a letter from the Secretary for Lands, Survey, Natural Resources and Environment dated 26 May 2010. A copy of this letter is attached to this Report in Appendix 18.

(i) Introduce the Ministry's three core functions (Core Functions 1 – 3)

The Phase One Interim Report concluded that of these 5 core functions identified, the Ministry should have only been engaged in core function 1 (the Minister of Lands' duties under the Land Act), core function 2 (registration and land title transfers) and core function 3 (survey and draughting).

The Ministry was of the view that the number of core functions it currently performed had never been a problem for them. The problem was instead limited

resources allocated to the Ministry over the years, which had never been adequate to allow them to effectively and efficiently provide services required¹².

However, the Ministry (like all other Government Ministries) will almost always be required to operate on a limited budget. The Ministry's response to the Phase One Interim Report also shows the Ministry's budget allocations for the financial year 2007/2008 to 2010/2011 where the past year's budget allocation had been reduced to \$1.58m (est)¹³.

A consultant, Dr Ken Lyons¹⁴ compiled a report in the form of a revised proposal to the IFC from the Ministry of Lands to fund a project that would computerise Tonga's land records. A copy of this document is attached to this Report in Appendix 19. Dr Lyons identified about 50 legally allowable land transactions stipulated under the Land Act that the Land Management, Land Information Divisions and Strategy and Corporate Support Divisions were responsible for. These land transactions were categorised generally to cover leases, sub-leases, allocation of tax and town allotments, mortgages, caveats, resumptions and easements and collection of rents. These land transactions comprised the Ministry's three core functions which required a lot of work, commitment and resources.

Hence, there is a need to prioritise services and allocate limited resources accordingly. It is for this reason that the Commission continues to support the Ministry focusing on its three core functions identified in 5.1.1 (i) to (iii) above.

¹² See Appendix 18, Page 7, paragraph 3.1.1

¹³ See Appendix 18, Page 7, paragraph 2.1.1

¹⁴ See Appendix 19, Page 12

RECOMMENDATION 52: THAT the Ministry of Lands focus on performing its core functions namely (i) administration of the Minister's functions under the Land Act, (ii) registration of land titles and interests, transfers thereof and all land transactions, and (iii) survey and draughting.

(ii) The Ministry should not be a Quasi-Court (Core Function 4)

As discussed in 5.1.1 (iv) above (quasi-court role), this was one of the functions being carried out by the Ministry on a daily basis particularly when dealing with members of the public. The Ministry stated¹⁵ that Tonga has the least number of land disputes that reach the Courts in the Pacific. That it was claimed, was a result of services provided by the Ministry to the public in order to resolve contentious land matters through consultation and mediation – or what is referred to in the Phase One Interim Report as its “quasi-court” role.

However, the Commission believes that performing this function consumes a large portion of the Ministry's limited resources and time. The Ministry should no longer perform this function as it takes time and resources away from its true Core Functions 1 to 3. The involvement of staff from the Registration Division in this “mediation” role means that they are for example, neglecting their core duties, which no doubt contributed to the large backlog of files referred to in the Phase One Interim Report¹⁶. Furthermore, the Ministry's staff who dealt with the public on a daily basis also lacked the legal knowledge, training and experience to provide legal advice or provide professional mediation services.

The Ministry can obtain legal advice from the Crown Law Department on any legal issue arising from the exercise of the Minister's powers under the Land Act. Timely legal advice can also be provided in-house by a legal officer employed

¹⁵ See Appendix 18, Page 6, paragraph 2.1.10,

¹⁶ See Appendix 5, paragraph 2.1.12.

within the Ministry, but that advice should not be extended from the Ministry to the public. Legal advice should be properly sought from lawyers or other members of the community. This internal legal advice should be limited to informing an applicant of the Ministry's decision on a particular matter directly concerning them. The public should be encouraged to seek proper legal advice from licensed law practitioners and not rely on the Ministry to perform this task for them.

Where a member of the public is not satisfied with a decision made by the Minister or one of the Ministry's staff, he can lodge an appeal for review of that decision with the proposed independent Land Commission instead of repeatedly returning to the Ministry with their complaint or dissatisfaction. As proposed in Chapter 7, an independent Land Commission would be established and one of its functions would be to receive appeals for review of the exercise of powers under the Land Act by the Ministry. Appeals may be made to the Land Tribunal on a point of law and whether the Minister has acted properly in law but not on the merit of the case except where the Minister has made his decision without the advice of the independent Land Commission. The Tribunal would be independent of the independent Land Commission. The decision of the Land Tribunal can be reviewed by the Land Court on a point of law on application subject to leave granted by the judge of the Land Court.

In other words, a dissatisfied person could bring an action against the Minister in the Land Court for matters of an administrative nature. However, as discussed in Chapter 7 of this Report, the intention of establishing the Land Tribunal is to ease the workload from the Land Court and the quasi-court role of the Ministry of Lands by providing a new and more appropriate means to resolving disputes on administrative decisions and therefore free up the Land Court's time to deal with the large range of disputes already allocated to it.

RECOMMENDATION 53: That Core function 4 should no longer be performed by the Ministry and all complaints are to be directed to the Land Tribunal through the independent Land Commission.

(iii) The Minister's other legal functions (Core function 5 and others)

As discussed in 5.1.1 (v) above, the Ministry through their Minister is responsible for the Planning & Urban Management Division although the functions performed by that Division have very little to do with the Ministry's three core functions.

Similarly, the Minister is also responsible for Natural Resources by law, which also has very little to do with its three core functions identified above. Other Divisions include the Energy Division (Core Function 6), Geology Division (Core Function 7) and the Environment Department (Core Function 8).

The Commission acknowledges the important and essential functions performed by the Energy Division, Geology Division and the Department of Environment. Although the functions they perform are part of the overall functions of the Ministry by law or policy, no specific reference was made to them in the Phase One Interim Report because these tasks were considered outside the Commission's terms of reference. The Commission's work was limited only to matters concerning "land" which excluded the work of these Divisions and Department despite their being under the umbrella of the same Ministry.

When the Commission conducted its inquiry in Phase One, these Divisions and Departments were included in the inquiry in order to consider the impact of assigning too many functions to the Ministry of Lands on performance of its core functions prescribed under the Land Act.

The Commission's inquiry into the Ministry in Phase One was completed in January 2010 when all the above functions and Division were all under the Ministry. The Commission notes from the Ministry's current organisational structure provided to the Commission in March 2012 as in Figure 1 (see below) that Energy is no longer part of the Ministry's organisational structure. This matter should be taken into account in the relevant recommendations and discussions below.

RECOMMENDATION 54: THAT Core functions 5 to 8 should be divested away from the Ministry of Lands to other Ministries that Government considers appropriate.

The Commission is aware that this recommendation will impact the Planning & Urban Management Division, Energy Division, Geology Division and the Department of Environment. Government should consider how best to deal with this at a policy level if it is to accept the Commission's recommendation.

The Ministry's response to the Phase One Interim Report (see Appendix 18) in May 2010 provided reasons why the Ministry had taken on all the core functions referred to in the Phase One Interim Report. It cited 'statutory functions assigned to the Ministry' and that these five core functions and others not mentioned in the Phase One Interim Report were considered critical and necessary areas of the Ministry's responsibilities. The Minister of Lands is also responsible for the administration of various statutes including the Parks and Reserves Act (Cap. 89), the Minerals Act (Cap. 133), the Petroleum Mining Act (Cap. 134) and the Environment Impact Assessment Act 2003. Likewise, Government should consider whether the Minister of Lands should continue to be responsible for exercise of these powers at a policy level before any legislative amendments can be proposed.

Since the Phase One Interim Report in February 2010, the Commission had received a range of proposals from the Public during Phase Three of the inquiry and reports (from the Ministry in reply to the Phase One Interim Report and Dr Ken Lyons) that are relevant to the Ministry's overall performance.

Firstly, in reply to the Phase One Interim Report (see Appendix 18), the Ministry stated that the number of core functions it currently performed were not the problem, but rather their insufficient budget allocation given all the services they provided and were required to provide by law. As such, the Departments and Divisions that performed Core Functions 5 and the other functions not mentioned in the Phase One Interim Report as identified above, could operate with minimal involvement from the Minister and CEO of Lands. Because of this, it was reasoned that their being under the same Ministry should not heavily impact the performance of the Ministry's three core functions.

The Ministry's current organisational structure (as at March 2012) is provided in Figure 1¹⁷ below.

¹⁷ Ministry of Lands, Survey, Natural Resources and Environment Corporate Plan 2011/2012

Figure 1 – Current organisational structure of the MLSNRE

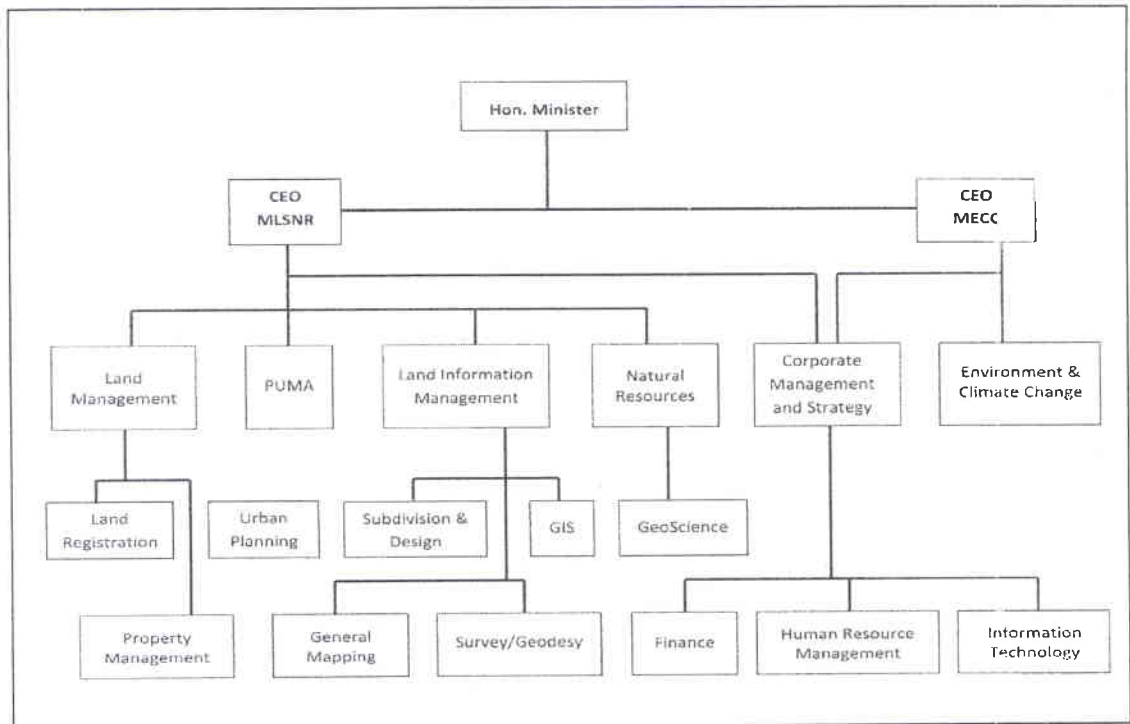


Figure 1 show that the main Divisions in the Ministry are under two CEOs, one being a CEO for Lands, Survey, Natural Resources and another for Environment and Climate Change. When the Commission attended site visits to these various Divisions during its inquiry in 2010, it was clear that the Divisions that are not directly involved in the performance of core functions identified above such as Environment and Natural Resources could operate independently. For example, the Environment Department was housed in separate buildings and operated within their own resources, including computers, specialised equipment and vehicles. Their respective heads oversaw the administration of each Department without much interference from the CEO of Lands and the Minister, but they did report to and advise them on operational and related matters that required approval at that level.

Secondly, the Ministry would cease performing Core Function 4 which is to be handled by the independent Land Commission and the Land Tribunal. Time and

resources which were otherwise engaged in this Core Function would be diverted to performance of the Ministry's main three core functions. This would also free up the Ministry staff, the CEO of Lands and the Minister's time so that they would be able to adequately tend to these three core functions.

Having considered the above, the Commission maintains that Core Function 4 should no longer be performed by the Ministry. However, it now offers an alternative to Recommendation 54 where it was proposed that the Ministry should divest of Core Function 5 and its other functions that were not mentioned in the Phase One Interim Report including the responsibility for the Natural Resources, Energy, Geology and Environment.

The alternative is that the Minister of Lands would continue to be responsible for these Divisions as long as their operations did not impact on the performance of the Ministry's three core functions. Each Division and Department had a Head Officer who carried out a majority of the work including supervising staff and providing reports/advice to the CEO and the Minister when required.

RECOMMENDATION 55: THAT the Ministry should continue to perform core functions 5 to 8 (Planning & Urban Management Division, Energy Division, Geology Division and the Environment Department) within the framework in Recommendation 56.

The Commission offers two different options in Recommendations 54 and 55, but prefers Recommendation 55.

5.1.3 OTHER FACTORS THAT AFFECT THE MINISTRY'S PERFORMANCE

The Phase One Interim Report identified other problems that affected the Ministry's overall performance, which included deficiencies in staffing,

management and leadership issues, lack of funding and a lack of computerisation.

In its response to the Phase One Interim Report in May 2010 (see Appendix 18), the Ministry provided reasons why it was overstaffed and under skilled. One of the main causes for this was the Government redundancy rounds in 2006 and the abolishing of various mid-management level staff. The Ministry also confirmed that there was a lack of training opportunities, a shortage of land professionals in the Pacific Island countries, difficulties in recruiting skilled staff, a lack of funding and other staff related constraints. The Ministry agrees that a Human Resource Development Plan with greater emphasis on the Ministry's priorities should be reflected in the National Plan.

The changes proposed in 5.1.1 to 5.1.2 above and 5.2 to 5.3 below, if implemented should alleviate if not eliminate much of these problems and its negative effect on the overall performance of the Ministry.

5.2 RESTRUCTURE THE MINISTRY TO SUPPORT ITS CORE FUNCTIONS

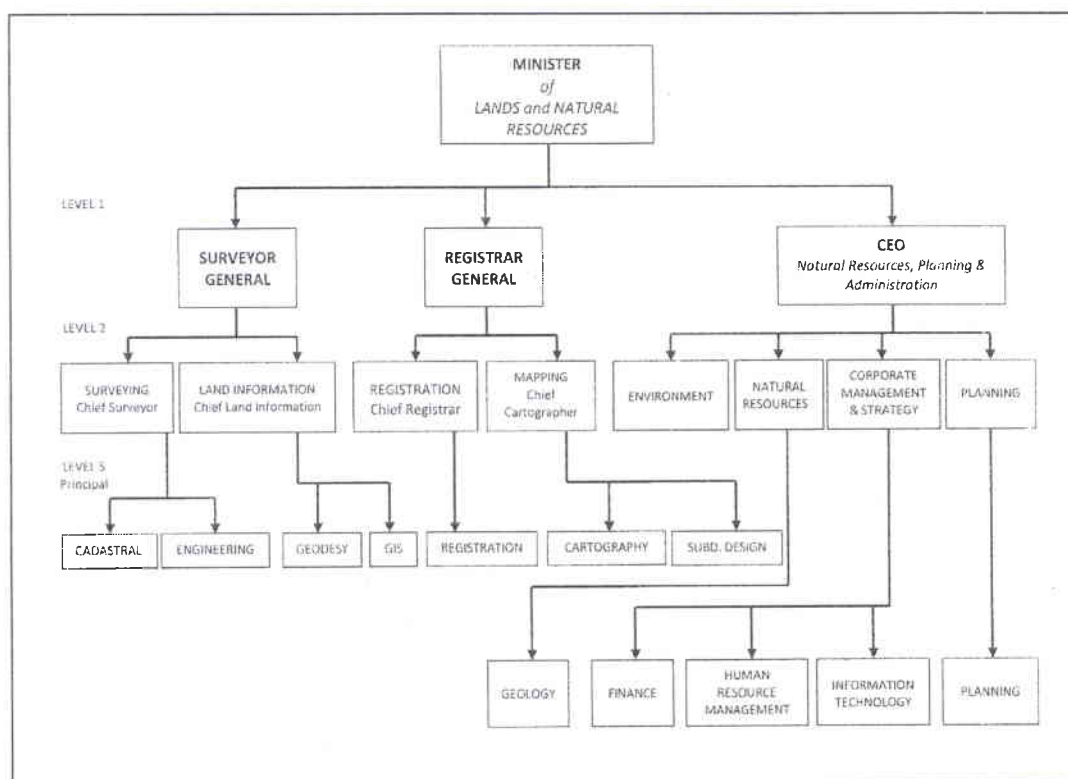
The Ministry's current organisational structure is as provided in Figure 1 above. In order for the Ministry to focus on and efficiently perform its three core functions as recommended 5.1 above, additional changes to the Ministry's structure are required to build capacity and divert resources to where it is most needed. This restructure includes privatisation and creation of new posts within the Ministry. Further changes to the office of the Minister of Lands which were proposed by the public are also considered.

Various components of the restructure were discussed in the Phase One Interim Report. This restructure adopts certain aspects of the regulatory framework of the New Zealand land title registration system. When the Commission completed a comparative study of the New Zealand land registry system in Phase One of its inquiry in 2009, it was obvious that their system was too advanced for Tonga particularly the online services provided via 'Landonline'. The whole New Zealand regulatory framework is designed to support a broader customer base and a Torrens system of registration whereas Tonga is a smaller nation with less land and follows a deeds system. However, the Commission identified certain aspects of the regulatory framework of the New Zealand land registration system that could be adapted as appropriate to improve the structure of Tonga's Ministry of Lands.

This restructure aims to build capacity where it is needed within the Ministry in order to support Recommendation 55 above. It will also factor in proposed changes to the office of the Minister of Lands including new powers to be assumed by the Minister and the supporting roles to be performed by the new independent Land Commission.

The new structure proposed is shown in Figure 2 and adopts certain aspects of the LINZ framework with adaptations and variations to reflect the need for the Ministry to concentrate on its core functions under the Land Act.

Figure 2 – New proposed organisational structure for the MLSNRE



RECOMMENDATION 56: THAT the Ministry of Lands is restructured according to the new proposed framework in Figure 2.

5.2.1 THE MINISTER OF LANDS

(i) New powers

When the Commission completed a comparative study of the New Zealand land registry system in 2009 during in Phase One of its inquiry, of particular interest was the complete separation of Cabinet and separation of any Minister in New

Zealand from any daily operations concerning the registration of land titles. Although land title registration is the responsibility of the New Zealand Government, the operational functions are carried out by the Customer Services Group (via Landonline) and the regulatory functions are carried out by the Registrar-General of Land who occupies a tier 3 post in the overall LINZ organisational structure. A similar framework would be suitable in Tonga particularly as Cabinet and the Minister of Lands is often cited because of public dissatisfaction with the processing of land transactions, which rarely happens in New Zealand due to the severance of the responsible Minister from daily operations. In Tonga, the operational and regulatory functions of land registration are the both the responsibility of the Minister who is also the Registrar of Lands by law.

Cabinet is also involved to some extent in land transactions such as in the approval of leases etc. The involvement of both Cabinet and the Minister was identified in the Phase One Interim Report as one of the contributing factors that caused delays in the processing of land registration transactions. Furthermore, during the public meeting inquiries of Phase Three, businesses and barks proposed that the power to approve certain land transactions that are currently vested in Cabinet, particularly leases and mortgage sales, should be given to the Minister or the Registrar General (of titles). The main concern was unreasonable "delay" that hindered completion of other transactions (such as mortgages) and this led others to propose imposing a time limit within which the Minister must make a decision on land matters referred to him.

The Nobles on the other hand, through their Land (Amendment) Bill 2010, proposed that Cabinet's powers are removed and given to each hereditary estate holder (and the Minister of Lands in respect of Crown Lands). The public did not support this proposal as they feared it would give more power to

hereditary holders and would aggravate problems they currently face as discussed in Chapter 3 of this Report. The public resisted the idea as they favoured having a “check” on those who exercises these powers.

In light of these findings and concerns from the public and banks, it is time to separate Cabinet from involvement in land matters which could easily be handled by the Ministry of Lands. In Chapter 7 of this Report, the Commission recommends that the Minister should take over all of the powers (relating to land matters) of Privy Council and Cabinet and he shall exercise those powers on the advice of the independent Land Commission¹⁸.

The Minister could not be entirely separated from exercise of these powers (like in the New Zealand framework) as those powers are vested on him by law, but a clear delegation of powers would leave most of the work to be handled by staff of the Ministry. A “check” or “watchdog” on the exercise of those powers would be provided through the associated roles of the independent Land Commission and the Land Tribunal as discussed in 5.2.7 below and in Chapter 7. The appropriate recommendation for transfer of Cabinet and Privy Council’s powers to the Minister is made in Chapter 7 of this Report.

Should the recommendation to transfer all approval powers from Cabinet to the Minister be implemented by Government then, a time limit of three months should be imposed on the Minister to make a decision, upon advice on any application put before it. Should the above recommendation to transfer all approval powers from Cabinet not be implemented then, time limits still need to be imposed upon Cabinet.

¹⁸ See further discussion in Chapter 7.

A maximum period of three months should be imposed on whoever will be vested with these powers, whether it the Minister of Lands or Cabinet. Land matters should be completed within three months with the exception being one month for mortgage applications.

Setting time limits for the Minister's new powers or Cabinet would provide all interested parties with set time frames to work toward and deadlines to meet. Establishing these time limits is in accordance with principles of fairness, transparency and accountability.

RECOMMENDATION 57: THAT a time limit of three months is imposed on Minister of Lands or Cabinet, as the case may be, to complete land matters referred to them, with the exception of mortgage applications, which shall be completed within one month.

(ii) The Minister of Lands should not be a Noble

Some members of the public proposed that the Minister of Lands should not be a Noble. The Minister should exercise his powers independently and this independence would be difficult to achieve if the Minister of Lands was also a Noble. Public discussions also took place expressing concern where the Minister of Lands, also being a noble had conflicting interests in dealing with matters relating to his own Noble Estate. What was the practice when this occurred and should the Minister disqualify himself and authorise another person to deal with such land matters?

The Legislative Assembly has made a binding decision to appoint a Noble as the Minister of Lands for the remaining duration of the current Government. This decision appears to have partly been a reaction to concerns that the new and more democratic changes to Government could usurp some of their traditional

authority over Estate lands. The decision also appears to have been partly made as a continuance of a long standing tradition that the Minister of Lands was almost always a Noble. From the next democratically elected Government in 2014 there is no reason why the Minister of Lands must be a Noble.

From the commencement of a newly democratically elected Government in 2014, the Minister of Lands should not necessarily be a Noble and the appointment should be made to the individual most suitable to that Ministerial position. The newly elected Prime Minister of the day would make this appointment accordingly. Whether the Minister of Lands is a Noble or not should not be the basis upon which he is appointed. With the establishment of the independent Land Commission, all hereditary estate holders will be represented so that their views are taken into account when advice is provided to the Minister in the exercise of his powers.

RECOMMENDATION 58: THAT the Minister of Lands should be the person most suitable for the post but need not be a Noble of the realm. If a Noble, then decisions concerning his estate will be made by the independent Land Commission.

5.2.2 THE GOVERNORS' ROLES

The Governors of Vava'u and Ha'apai, as Deputy Land Ministers, have important duties and roles in the completion of land transactions in their various districts as the law¹⁹ provides that they are authorised to exercise the powers of Minister in those districts. They need to be present in their respective territories to serve and engage the public and effectively perform their functions as Deputies of the Minister of Lands.

¹⁹ Section 21, Land Act

RECOMMENDATION 59: THAT the Governors of Vava'u and Ha'apai should be present in their various districts for at least six months in a year in order to properly serve and engage the public.

However, as identified in the Phase One Interim Report, there are no permanent land registration officers in the Governor's offices in Vava'u and Ha'apai to support the Governors. Consequently, the public either wait until a land officer from the office in Tongatapu visits their districts or they are forced to travel to Tongatapu for urgent matters.

RECOMMENDATION 60: THAT one permanent land registration officer is assigned to each of the Governor's offices in Vava'u and Ha'apai.

Furthermore, the registry book recording allotment registrations in Vava'u and Ha'apai are not kept in those offices, but in the main office in Tongatapu. Consistent with the findings in the Phase One Interim Report, the public proposed that the Ministry of Lands should have readily available information on allotments relating to Ha'apai and Vava'u in the respective Governor's offices. People residing in these districts have informed the Commission that when they go to search for land information they are usually told that they would have to go to Tongatapu to get the information required or if they need to look at the survey maps. People in the outer islands cannot afford to travel to Tongatapu and the Governor's offices should be able to perform these functions in these two island groups. Land information would also be more accessible and readily available in these districts with computerization as discussed in 5.3 below.

RECOMMENDATION 61: THAT land information on allotments in Vava'u and Ha'apai is made readily available for access by the public in those island groups.

If land information was computerised then access to such information would be made easier and readily available to everyone including those in the outer islands.

5.2.3 REGISTRAR-GENERAL OF LANDS & SURVEYOR-GENERAL OF LANDS

The Minister's role as Registrar General of all land titles and Surveyor General remain essential to the completion of all land transactions throughout Tonga. However, it is evident that the Ministry cannot cope with the increasing demand for land information and the land related services it provides.

In the Phase One Interim Report, the Commission supported the creation of separate offices for a Registrar-General of Lands and a Surveyor-General of Lands to oversee the performance of Core functions 1 to 3. The Minister would still be the Registrar-General and Surveyor-General of Lands, but the operations of these tasks would be delegated under clear authority to the new posts. As in the LINZ organisational framework referred to above, the posts of Registrar-General of Lands and Surveyor-General of Lands are tier 3 posts. However, in Tonga, these posts can be created at level 1 of the Public Service structure so that they operate directly under the Minister.

As in Figure 2 above, the Registrar-General of Lands would head Land Management and he would be responsible for the Land Registration Section and the Land and Property Valuation Section. The Urban Planning & Enforcement Section which is currently under the Land Management Division would be segregated from that Division and report directly to the CEO instead, together with the other Divisions that do not contribute to performance of the Ministry's three core functions.

The Surveyor-General of Lands would head Land Information and he would be responsible for the Draughting & Computing Section, Land & Geographic Information Systems Section and the Survey & Geodetic Section.

RECOMMENDATION 62: THAT new posts of Registrar-General and Surveyor-General of Lands are created at level 1 of the Public Service structure to perform the Minister's functions through clear delegation.

5.2.4 LEGAL ADVISER

The public proposed that a post for a legal advisor should be provided within the Ministry so that they can provide daily, internal legal advice to the Minister and Ministry employees in the performance of their duties in accordance with the provisions of the Land Act. This legal advisor should be knowledgeable, experienced and have expertise in the land laws of Tonga.

The public also expressed a particular and important function that should be carried out by the in-house lawyer to supervise and ensure high level compliance by registry staff in all matters relating to hereditary rights and succession, for example – that the right person was identified in terms of succession rights. The public also expressed concern that legal advice provided from registry staff from the Ministry was not always accurate due to their lack of legal knowledge and that this has given rise to distrust and causes for more delays in service delivery to the public.

The public's suggestion in context with the overall findings and recommendations of the Commission in the Phase One Interim Report support the placement of a fulltime, internal legal advisor within the Ministry.

RECOMMENDATION 63: THAT a fulltime post for an in-house legal counsel to provide legal advice to the Ministry is established.

5.2.5 PRIVATISATION

As identified in paragraph 2.1.16 of the Phase One Interim Report, work efficiency within the Survey and Draughting sections have been constantly hampered by a serious lack of operational funds to purchase the necessary equipment. This has contributed to the build up of backlogs discussed in 5.3 below.

All surveying, draughting and legal processing of land transactions (conveyancing by legal counsel) were privatized in most of the countries the Commission studied. This has taken a very large and burdensome work load off the study countries Land Registration process and has empowered the free market (private sector) forces of competition to actively engage in providing these vital strategic services. Privatizing the survey and draughting has consistently succeeded in all the study countries over long periods of time, improving overall efficiency.

In the Phase One Interim Report, the Commission supported privatisation of services provided by the Surveying and Draughting Divisions to allow the private sector to take over this ill equipped, time consuming and poorly managed service. The Ministry no longer needs to hold on to the surveying and draughting divisions. Privatizing of these services will create a new and strategic relationship between the public and private sectors that has been a continuing success in other countries. Surveyors from study countries have clearly indicated that all qualified surveyors are now able to undertake short term computer programme courses and are then able to use basic survey equipment with the assistance of basic surveyor computer programmes (very reasonably priced) which would also automatically print out survey maps thereby doing away with the need for the traditional, manually drawn survey maps Tonga has grown so used to. These new private sector industries would also provide new and vital resource and energy to the currently cumbersome and inefficient survey and draughting system – this

privatising could therefore dramatically increase the efficiency of the Ministry's registration system by minimizing traditional delays in this area. Historically, the Ministry providing all survey and draughting services, as well as core function registration processing and approvals has constantly burdened and hindered its overall performance.

Accordingly, the Survey and Draughting Divisions of the Ministry should be closed down with only a few surveyors and draughtsman retained with the office of the Surveyor General providing all regulating and checking systems for validation of all privately conducted surveys. Final authority to sanction and approve would rest with the Surveyor General under a new and specific Surveyor General statute that would protect and enshrine all aspects of this new office.

RECOMMENDATION 64: THAT survey and draughting services are privatised and the Surveyor General is authorised to check and endorse all surveys in the Kingdom.

A new Surveyor and Draughting Society should also be created that would require the full support and approval from the office of the Surveyor General. This society would contribute to assuring compliance, quality assurance and providing internal sanctions where necessary. The Society should be governed by a board whose members are comprised of surveyors and draughtsman elected from the member surveyors registered to the Association. It shall be compulsory for all surveyors and draughtsman to be approved and registered with the Association (including the new Ministry Surveyor General and his staff). The Association would provide guidelines (templated from suitable overseas Surveyors and Draughtsman Associations) that would determine and assess all requirements for compliance. All approved surveyors and draughtsman shall be issued with an annual license, and should be open to application for member by

any qualified surveyor regardless of nationality. Foreigners may apply for member and are approved subject to criteria determined by the Association.

RECOMMENDATION 65: THAT a Surveyor and Draughting Society is established to regulate the operation of all private surveyors and draughtsmen.

During the public meetings, a representative of the Public Service Association expressed concern with the recommendation to privatise survey and draughting as public servants currently employed in these Divisions would become unemployed. However, the overall efficiency with which these services are provided for the interests of the public by far outweighs the risk of unemployment. The purpose of privatisation is to move these employees from the public to the private sector. The private sector would theoretically pay higher incomes to the best providers of survey and drafting services.

Despite Recommendations 64 and 65 above, the Commission realises that a surveyor may find it difficult to move from the public to the private sector due to lack of resources required to start up as a private surveyor. It may also take time and resources for Government to implement these relevant recommendations. The Commission, therefore, supports having transitional arrangements which will allow Recommendations 64 and 65 above to be implemented in phases. To make the transition easier for surveyors and draughtsman, instead of full privatisation, they may slowly be introduced to the private sector by allowing them to work in the private sector outside working hrs like doctors currently do. This would allow them to get accommodated and familiarise themselves with operating demands and benefits they would reap working privately and would make them more comfortable to make take this leap. Leaving the security of the public service can be a difficult decision particularly when they do not have enough funds to start a private business. The Ministry may rent out their equipment for use outside working hours. This will generate more income for

the Ministry, meet the demands of those who are able and willing to pay the costs of a private survey reducing the build up of backlogs and familiarise surveyors with the private sector. This will also allow surveyors to study the demand in the private sector to see whether it is enough to warrant a close down of the division of the Ministry as we would not want to do this then later find out that there is not enough demand in the private sector to accommodate all surveyors and draughtsman of the Ministry. A majority of the public may prefer the Ministry provide these services as it is cheaper, but would take longer.

RECOMMENDATION 66: THAT Recommendation 64 is implemented in phases to ease transition of public surveyors and draughtsmen to the private sector by allowing them to remain in the public service and provide services as private surveyors and draughtsmen outside working hrs. The Ministry of Lands' equipment may be rented for use outside working hours subject to a fee.

5.2.6 COMMERCIAL DIVISION

The public proposed that a Commercial Division of the Ministry of Lands should be established to look after any potential sources of revenue that Government can collect from leases, sub-leases and possibly tenancy agreements. The Commission suggests that the Ministry consider reinforcing the existing Accounts Division to also take on the function of revenue collection.

The public views expressed herein are consistent and support the Commission's views and recommendations contained in the Phase One Interim Report that there were possible revenue streams that had the potential to substantially improve the Ministry's internal funding capabilities. This potential also required a review of all the Ministry's fees charged and the creation of a range of new fees. Improved revenue streams discussed in 5.3.4 below also depended on improvements to the overall performance of the Ministry's services and products to the public. Revenues from a range of land titles, services and

products are identified as having potential to generate reasonable levels of revenue however, these funds have yet to be realised.

Although it was proposed from the public that such a function should be allocated to a new commerce division of the Ministry, the Commission believes that this function is currently allocated to the Corporate Division of the Ministry. They are tasked with identifying and the collection of current and outstanding lease fees.

5.2.7 LAND TRIBUNAL

In relation to the powers of the Minister of Lands and Cabinet, a surge of public support has been forthcoming to establish a new and independent Land Tribunal. Strong public sentiment has also been expressed about the lack of proper attention being paid to the ongoing public queries, complaints and the right to be fairly heard in relation to a wide range of land disputes.

The public had proposed that a land dispute body (tribunal) should be established. It should be independent from the Courts and deal only with land disputes.

The introduction of a Land Tribunal is a possible solution to the large gap that exists between the day-to-day land disputes and those more serious land matters that justify costly proceedings to the Land Court. From the Phase One Ministry and Phase Three public inquiries, it was clear to the Commission that there was a need to establish a separate body to process and adjudicate much of the less serious land related disputes and complaints.

The Commission supports the establishment of a Land Tribunal, within the framework of the new independent Land Commission that has jurisdiction to

consider matters discussed in Chapter 7 of this Report. The decision of the Land Tribunal can be reviewed by the Land Court on a point of law on application subject to leave granted by the judge of the Land Court.

5.3 THE LAND RECORDS AND REGISTRATION SYSTEM

The Phase One Interim Report identified issues of concern and problems faced in the execution of the Ministry's duties and how these may be improved. One of the major deficiencies in the Ministry's operations was its reliance on a deeds system registration where all land records are kept manually on paper. Land records including the majority of all of Tonga's original hard copy land records of the past 135 years could easily be destroyed by water or fire and to this date continue to be stored in this vulnerable state with no reliable backup. This system is outdated and searching for land records can be cumbersome, time consuming and easily open to malpractice.

During the Commission's study visits to learn from the land systems in New Zealand, Samoa, Cook Islands, Singapore and Australia (NSW), there was specific focus on their respective land registration systems with a view to adopting aspects that would be appropriate to Tonga. The findings from these studies and other problems identified in the Phase One Interim Report indicated that there was a clear need to reform, refurbish and transform Tonga's land registration system. In particular, land records should be computerised to make it more modern, efficient, user-friendly, speedy and accessible to the public and businesses. This will in turn promote the overall development process of Tonga.

During the Phase One inquiry, the Commission had considered a large quantity of evidence drawn together from inquiries into a total of 17 separate 'departments' that make up the Ministry (five Divisions and twelve Sections), examined 61 witnesses at hearings and considered 101 documentary exhibits.

Problems with the current system of maintaining land records were obvious. Sometimes it was impossible to locate files resulting in delays in obtaining

information. Procedures were opaque and officials of the Land Registration Division (of the Ministry) experienced continual frustration attempting to locate files. The paper system was replete with tedious official processes, which led to poor service delivery where customers expressed continual dissatisfaction.

5.3.1 DOCUMENT STORAGE, SAFETY & SECURITY

The Ministry has very poor document storage facilities in Nuku'alofa (known as the 'strong room') that *stores the majority of all of Tonga's original hard copy land records of the past 135 years*. Amongst these land records are some priceless and historical documents that should in fact be housed separately in very strict environmental control conditions to ensure their survival for future generations.

These critical land records are constantly at severe risk in the 'strong room' from a range of catastrophes such as fire, flood, earthquake, tsunami and human intervention (arson, theft, vandalism, forgery and fraud). The 'strong room' has *no fire alarm, no sprinkler system, no smoke detectors, no humidity control, inadequate air conditioning, poor file storage facilities and an inadequately administered index reference system*. The 'strong room' floor does not have any water pumping facility in the event of a flood and there are no apparent drain holes for water to drain toward. The 'strong room' floor level of the room also sits at ground level – some 1.5 meters above sea level. Poor humidity control has led to many documents displaying significant deterioration from fungus and other climate/humidity related conditions. Improper storage placement and sub-standard shelving/storage facilities has led to many documents displaying significant damage from bent pages resulting in cracks, upturned corners of documents and fraying. The 'strong room' also has a sub-standard security system that immediately compromises most international document security

standards for documents of such vital strategic importance to a nation such as original land title and ownership records.

A manual search for a file in the 'strong room', with its poorly administered index reference system can take a staff member between a half hour to one and half hours, sometimes more. So, a staff conducting only five file searches a week – will lose between 2 ½ to 7 ½ hours weekly on conducting manual searching alone. This is an extremely inefficient use of staff resource and time. Ongoing delays have therefore accumulated over time due to this cumbersome and poorly administered manual file search system. This regular and time consuming manual search for files has also added to the serious back log of incomplete files that have plagued the Ministry.

There is an urgent need of national strategic interest to immediately construct (or upgrade or re-locate) the Nuku'alofa 'strong room' that stores all original hard copies of most of Tonga's land records. Sub-standard electrical work caused a fire in the strong room in the past – this was fortunately extinguished at an early stage however, an overall safety check of all electrical wiring is now essential.

There are *no* other separate hard copies, *nor* digital copies of all these critical land records in existence stored on-location. There are also *no* copies (hard copy nor electronic copies) stored off-location – as back-up copies, in the event of a catastrophe. There are also no proper and secure document storage facilities ('strong rooms') in Ha'apai, Vava'u, Niuatoputapu, Niuafu'ou nor the 'Eua islands – storage rooms do exist however, fall well below any reasonable safety and security standards outlined. All other Tongan island groups require a quality 'strong room' to ensure document safety and security when in possession of such critical documents as land records.

The implications of not immediately improving storage safety and security of the Nuku'alofa 'strong room' would be devastating upon the public and the interests of the nation. Should a catastrophe take place and these original land records are lost – there are no back-up records available to validate most of Tonga's land record.

RECOMMENDATION 67: THAT the Ministry as a matter of priority refurbish high safety level storage facilities (strong room) for all original hard copies of land records in Tonga and maintain full back-up copies of all land records both on-site and off-site.

In spite of the revelation and recommendation for immediate urgent action because of the inadequacies of the strong room made in the Phase One Interim Report and given to Government in March 2010 there appears to have been no evidence of any work to upgrade the strong room in Tongatapu nor provide such facilities in the outer islands. There has however, been some action toward computerizing records which is encouraging.

5.3.2 LARGE BACK-LOG OF INCOMPLETE FILES

A serious back-log of Ministry work files exists. A special internal Ministry report provided by an employee of the Ministry found that back-log figures as at 22 October 2009 were:

- (i) 6195 outstanding assignments with the Draughting Division;
- (ii) 893 outstanding assignments with the Survey Division;
- (iii) over 10,000 outstanding assignments with the Registration Division.

Backlog files in the Registration Division date back as far as 1964. These files have accumulated over time, which have become very difficult for the staff to reduce. Included in this growing back-log are crucial registrations of bank mortgages against land titles. A common excuse provided to the banks that the

'Minister was overseas' or otherwise unavailable had added fuel to an already frustrated and vital commercial mechanism to serving the economy - the banks. These constant and undue delays have continued to hamper the public and commercial industry and have further eroded public confidence.

Poor administrative systems, manual processing and a lack of rapid, efficient computerized data processing contributed to the large and growing back-log. Attending to this growing back-log, takes staff focus from their essential core duties of assisting the Minister of Lands in his duties and processing all land registration and title related matters.

In its response to the Phase One Interim Report in May 2010, the CEO of the Ministry stated that the Ministry believed that the number of backlog items has been misrepresented due to the lack of cross referencing of items to clearly reflect the actual number of backlog files.

A further letter from the Ministry to the Commission in July 2011 is attached to this report in Appendix 20. The Ministry advised that the Land Administration Project was initiated in response to the Phase One Interim Report. The update was positive although general in its contents. In that letter the Ministry had outlined its Government initiated and funded project with a broad mandate of (i) reviewing and clearing the backlog of land applications in the Ministry of Lands; (ii) providing executive and legal assistance to the Ministry with the engagement of a Legal Administrator; (iii) improving work flow and procedures; (iv) drafting of a Land Practices and Procedures Manual.

A request for updated figures of backlog files was repeatedly made by the Commission to the Ministry's CEO in 2011 to no avail. However, according to a report by Dr. Ken Lyons (a consultant engaged by the International Finance

Corporation) in March 2011, a backlog of 10,500 pieces of work as at August 2010, had been reduced by 51 percent as at January 2011. He states that the banks have indicated that the number of outstanding mortgages had been reduced considerably, which they see as very positive. When the Commission met with the commercial banks in May 2011, they confirmed that the backlog of mortgage transactions had improved for some time but backlogs were building up again.

RECOMMENDATION 68: THAT the Ministry continues working to reduce backlog files and Government consider providing sufficient funds for continuation of the Land Administration Project.

The final update from the Ministry was by letter dated 6 March 2012, which is attached to this Report in Appendix 21.

5.3.3 COMPUTERISATION AND ADMINISTRATION

The Ministry seriously lacks in a single national, centralized computer database that reliably monitors and controls all land records for Tonga. The absence of a national, centralized computer database system gives rise to very poor document security and ultimately unreliable and vulnerable land records and titles. The Ministry therefore directly suffers from an ongoing negative reputation for unreliable land record keeping, coupled with undue (sometimes excessive) time delays in processing many land transactions. It continues to persist with an inefficient administrative and information system that is archaic and cumbersome, contributing to the buildup of back-log files.

The Ministry is backward in its use of basic computer systems, databases, recording technology and modern communication such as internet and email. Some staff have generally poor or limited computer literacy skills. There was a weak computer culture and reasonable staff resistance to computerizing. There was also a heavy reliance on manual filing and processing.

RECOMMENDATION 69: THAT the Ministry establish a central computerized database system for all land registrations and titles and a high level document security system that strictly controls access, compliance and validity of all land records.

Of particular interest, in Dr. Ken Lyons' report (see Appendix 19), was his identification of major building blocks that the Ministry must have in place before full computerization of its records and a fully computerized land registry can be established. These building blocks were aimed at improving the overall efficiency and integrity of processing of "legally allowable land transactions" and better customer service delivery. Establishing these building blocks is something that the Ministry can do without technical assistance, but would surely improve its records and file management system.

Dr Lyons also distinguished full computerization from "computer assisted". The former involved a computer system with specialized software that was central to the whole operation where the identified building blocks must be in place before full computerization can be achieved. The latter process involved the use of computers to support processing of land applications.

During its site visits to various departments of the Ministry in Phase One of its inquiries, the Commission noticed that a small number of the Ministry's staff who were computer literate, who appreciated the efficiency of using land records that are stored electronically on computers. This led one staff in the Registry Division to, of his own initiative and in his own time, input manually stored land records to a computer database. This has assisted his daily search for land records and this is what the Commission understands Dr Lyons was referring to as "computer assisted". Such simple tasks can see big improvements in service delivery.

RECOMMENDATION 70: THAT the Ministry consider the report by Dr. Ken Lyons and establish the pre-requisite building blocks toward full computerization and in the meantime (before full computerization) identify ways their processing of land transactions can be “computer assisted”.

The Phase One Interim Report was copied to some donor agencies including AusAid, NZAid and the International Finance Corporation (IFC), in the hope that they might be interested in funding computerization of Tonga’s land records and transforming land registration to a computerized system. There is an urgent and valid need to reform Tonga’s land registry, including upgrading the system so that it is computerized. Unfortunately, due to severe budget constraints it is unlikely that any development work would be undertaken without the assistance from an external impetus from overseas donors like the IFC, who have recently completed similar work in Tonga with the Government’s Company Registry.

The IFC’s representative to Tonga, indicated interest in 2010. This led to the Commission, with permission from the then Minister of Lands, Lord. Tuita, submitting a project proposal to the IFC for consideration. Upon receipt of the proposal, the IFC engaged Dr. Ken Lyons to provide a report on the feasibility of the proposed project. Dr Lyons travelled to Tonga in January 2011 and met with senior officials of the Ministry and his report was later submitted to the IFC. Unfortunately, the IFC could not fund the project.

The Commission however, believes that other donor agencies may be interested in funding this project.

RECOMMENDATION 71: THAT Government approach donor agencies to gauge interest in funding a project that would enable full computerisation of Tonga’s land records and land registration system. This is urgent and of high priority.

The Commission notes from the latest update from the Ministry (see Appendix 21) that progress is underway with regards to funding such a project.

5.3.4 BENEFITS OF A COMPUTERISED SYSTEM

A computerised land records and land registry system will reap many benefits for Tonga, including the following:

(i) Better access to land information

Access by the public to land information and titles is difficult under the present system, particularly as a large portion of the inquiries made to the Registration Division counter are with regard to the title of particular allotments. It is envisaged that with the introduction of the computerization of land titles, service to the public will be made easier and quicker. Accurate and complete land records will boost business confidence and facilitate efforts to attract foreign investment.

(ii) Boost the development process

Land is a central issue in the development process and secure land rights underpin sustainable development by making it possible and attractive to undertake long-term investment. Security of title and interests in land increases the possibility of it being used as collateral for mortgage purposes contributing to the economic growth process and the alleviation of poverty. In order to enable and stimulate the growth process Government needs to monitor and manage the ownership and value of land. It is for this reason that the Ministry's land registration and land records play an important part in the economic development process of Tonga.

The Commission heard evidence from bank officials particularly on their relationship with the Ministry on the processing of mortgage applications. Delays

were imminent in the registration of bank mortgages against land titles. Without a doubt this kind of poor service delivery hinders investment and destroys business confidence in the public sector. The Commission also noted that Tonga ranked poorly in the World Bank “Doing Business rankings” in terms of registering property ranking 117th in 2009 and dropping further to 121st in 2010 in the world. The Doing Business ranking also indicated that it took an average of 108 days to secure rights to property in Tonga in comparison to the OECD average of 25 days. In the course of its inquiry, the Commission’s findings are supported by the low World Bank Doing Business rankings. It can take between three weeks to three years to complete one land transaction. Inefficiency was largely due to the burden of working in an outdated and manual-based land registry system. A computerized land registry system would substantially reduce waiting time for registration, improve accuracy and bring Tonga closer to the OECD average.

(iii) Improved revenue streams for the Ministry

With full computerization, a review of service and product fees could follow with a subsequent increase in revenue fees for the Ministry to match the improved service delivery provided. The public requests for basic title searches, copies of survey maps and all other land records can be rapidly and efficiently retrieved and copies produced. New fee structures should reflect these new standards of service and product delivery. Retrieval and production of copies can be made available to the customer within an hour of making a request and payment of the appropriate fee. A satisfied customer would be willing to pay a higher fee for efficient service. This would be in direct contrast with the Ministry’s current regime, where requests for copies of land records, as already mentioned could take between three weeks to three years.

These revised fees could be set with a view to enabling the restructured Ministry, to receive sufficient revenue to either reach, self funding status or to at least reasonably off-set the Government's set annual budget for the restructured Ministry. Such fees could also be considered in assisting the funding of the Commission's recommended State guarantee of land titles discussed below.

However, as stated above, a new fee schedule should be imposed only after full computerization that would ensure effective, efficient and reliable service. To review and set new fees at present, would be unrealistic and would also serve to bring an already highly inefficient and cumbersome Ministry to bear further criticism and unnecessary pressure.

Full computerization would also assist revenue collection by the Ministry. Approximately \$700,000 was the estimated revenue to be collected by the Ministry in the 2008/2009 financial year from annual lease rentals and other land related revenues for Tonga. It appears the collection of annual lease fees and other land revenues are inefficient and that a large number of outstanding lease fees remain unpaid. Although individually, annual lease fees amount to relatively minimal amounts, collectively it is envisaged that large amounts of land lease revenue are not being paid to the Ministry. The absence of this revenue hinders the overall maintenance, up keep and development of the Ministry and the proposed new Registry and Surveyor Generals Offices.

Estimates are not available of exactly how much revenue should be collected from annual lease rentals and this is partly due to the overall poor state of all land information affairs. It is however envisaged that upon computerization of the Ministry, such figures can more easily be obtained to assist more effective revenue collection systems.

(iv) State Guarantee of Titles

Full computerisation would enable Government to provide a guarantee of all land title registrations to enable ongoing stability, reliability and confidence in land title ownership in the Kingdom of Tonga. This guarantee provides a fundamentally stable and reliable bond and platform for all land ownership; upon which all other essential services and practices within a nation can properly function.

The State guarantee can be funded by a proposed 10 percent deduction from all land related revenues to the Ministry and the newly proposed Land Registry. All funds would be deposited into a strictly controlled 'National Land Guarantee Trust Fund' that would act as security for all land registrations issued by the Land Registration Office. Similar approaches have been adopted in New Zealand, Samoa, Singapore and Australia. Any possible compensation payment from this trust fund would have to be on the basis of current market value of land leases and any commercial losses involved. Such trust fund payments would only be effected by an Order of the Land Court.

The basic Deeds land system of the Kingdom of Tonga would be changed with the introduction of the Torrens system based State Guarantee of Title. This is the basis of the Torrens system - that the title ownership is correct as recorded in the title deed. The guarantee only confirms this. Therefore, the basic deeds land system of Tonga would be changed to the Torrens system of guaranteeing certainty of title. The proposed state guarantee would not change the basic land tenure system of Tonga but, would strengthen it.

International confidence in the current land registration system due to the uncertainty of title has also consequently deterred numerous major foreign investments – much to the demise of Tonga. Public confidence and economic

growth would be greatly encouraged upon the creation of a basic, reliable and stable land registration of titles that is guaranteed by the State.

***RECOMMENDATION 72:** THAT after full computerization is in effect, Government will guarantee that all information on the deeds of title are correct. An appropriate fee to fund this guaranteed will be imposed on all payments for land transactions made through the Ministry.*

5.4 IMPROVE SERVICE DELIVERY

The following matters were raised by the public during the public meetings to be considered in improving the Ministry's service delivery.

5.4.1 SURVEYS

(i) Quality of surveys

A general concern expressed by the public was that the quality of surveys conducted by the Ministry has been inconsistent giving rise to a raft of public complaints expressed at the Commission's public meetings. Complaints included survey errors leading to overlaps in survey boundaries or even an example where a land boundary actually ran right through a kitchen floor of an existing house. As often as has been the case, many land allotments have been occupied for long periods of time and yet, have not been registered with the Ministry. Instances of occupiers of properties for more than 20 years have then discovered their survey maps were inaccurate and did not reflect the correct boundaries. Apart from the oral evidence at public meetings, no documentary evidence in support of these kinds of complaints was forthcoming. However, the regular and consistent nature of this issue being raised at public meetings has given rise to sufficient concern by the Commission. The Commission advised the public that these concerns should be directed to the Minister of Lands. Also, as previously discussed the privatisation of the survey section is likely to result of improved quality and service to the public.

(ii) Survey fees for renewal of a lease

The public informed the Commission that when a lease was renewed at its expiry date, a survey fee was still charged although no further survey was conducted and a simple renewal of the lease and its terms was undertaken. It was proposed

that this “survey fee” should not be charged because it was simply a lease renewal process that has taken place. However, the Ministry charges this survey fee, despite no survey being conducted.

RECOMMENDATION 73: THAT should a survey be conducted at the expiry of a lease, with view to renewing the lease a survey fee should be charged. Should a lease renewal process be undertaken, without any survey being conducted then a new ‘lease renewal fee’ should be defined and charged but not a survey fee.

(iii) Payment for surveys

The public proposed that the Ministry of Lands should cover all expenses for surveyors coming out to their allotments to conduct a survey including fuel, cement for pegs, food etc. This was particularly a problem for residents in the outer islands where they also have to pay for boats to transport surveyors to the islands. If these additional costs are not met, their surveys are not likely to be completed.

RECOMMENDATION 74: THAT the Ministry should not impose additional costs not prescribed by law on members of the public who require a survey.

5.4.2 CANCELLING A LEASE

In view of handling queries and complaints to the Ministry, the issue of fair and reasonable notification to all interested parties to land was raised by the public as a concern. The public proposed that a review of procedures for cancelling leases and subleases was needed. The Commission was informed that it was usual practice for the Ministry to submit a cancellation of a lease or sub-lease to Cabinet for approval without prior notification to all interested parties, particularly the lessee. The grounds under which a lease can be cancelled should be clearly stated in the law together with the requirement that both parties should be reasonably notified before a cancellation of a lease is submitted to Cabinet.

Some leases were cancelled before they were registered and the lessee was usually left not being given any reason or not understanding why a cancellation took place. A lessee was also not notified before the cancellation is submitted to Cabinet.

RECOMMENDATION 75: THAT before a lease or sub-lease is cancelled (or submitted to Cabinet for cancellation), the Minister shall inform all parties to the lease or sub-lease giving parties one month to respond with any objections, which shall be considered by the Minister, before the proposal to cancel the lease is made.

5.4.3 TIME FOR COMPLETION OF LAND TRANSACTIONS

This suggestion from the public in the Phase Three public meetings was not specifically considered in the Phase One Interim Report. However, many complaints in general were made by the public regarding the constant delays in almost all services and products of the Ministry. Public feedback to the Commission has supported this view indicating delays from three months up to over ten years for a range of land related transactions and applications.

Strict time frame restrictions should be imposed on the Ministry, for all land registration processes. Setting time frames for the Ministry to complete land registration transactions is conceptually attractive to all interested parties. However, realistically achieving such an objective would depend very much on dramatic improvements in many other interconnected sections of the Ministry such as computerisation, administration, staff restructuring, re-training staff, staff morale, funding and resource issues, clearance of the current back-log of applications, severance of surveying and drafting sectors from the Ministry and others. Once these improvements can be made, more realistic time limitations can be imposed on the delivery of the Ministry's registration services. To impose international standard time limitations on various land registration processes at

present, would be unrealistic and would also serve to bring an already highly inefficient and cumbersome Ministry to bear further and unnecessary pressure.

The Ministry should provide a clear schedule of all services and products, fees and time frames. This very basic land transfer/registrations information should then undergo a long term education programme to ensure the public are well informed of the Ministry's services and products and to set time frames they are obliged to complete various land registration processes within. The Ministry has operated to date with some measure of mystery in the public's eye and this must stop. All services and products the Ministry provides must be offered with full transparency.

RECOMMENDATION 76: THAT the Ministry provide a clear schedule of all services and products, fees and time frames. This very basic land transfer/registrations information should then undergo a long term education programme to ensure the public are well informed of the Ministry's services and products. This recommendation should be considered together with Recommendation 57.

5.4.4 FACILITATE LAND NEEDS OF TONGAN LIVING OVERSEAS AND PUBLIC AWARENESS

Further to discussion in Chapter 3 of this Report, Tongans living overseas hope to see a simplified procedure to facilitate conveying their land queries and needs from overseas to Tonga. Many expressions of concern were made by the public at the poor standard of service provided by the Ministry to Tongans. Many overseas Tongans complained about being given poorer service than their resident and local counterparts (Tongan residents), when making queries within the Ministry in Tonga.

The overseas Tongans expect the Government to cater for their land-related needs, as well as those of Tongans residing in Tonga. Tongans residing overseas hope for a simplified land system so that they can easily communicate their land-related transactions or queries to Tonga. Such services include their payment of rent on leases directly to the Ministry of Lands office instead of sending payments through their families and the Ministry providing information on any amendments to land laws that have been enacted. Dissemination of information to Tongans living overseas should be done through the Tongan consular and embassy Offices, websites, email groups, radios and newspapers. The Ministry should not limit publication of land notices to the Tonga Chronicles and local newspapers, but they should use more extensive electronic methods that would rapidly send the same information to Tongans abroad.

Government should consider arranging a trust account under the control of the overseas Consular and Embassies that would collect payments for all land related matters by overseas Tongans. This account is managed by the Consulate or Embassies and undergoes standard audit processes and reports back to the Ministry (or Foreign Affairs) on a regular basis. That monies collected are ultimately transferred to the Ministry on a quarterly basis.

The Ministry should also consider how to effectively disseminate any relevant information to all land holders both in Tonga and overseas. The CEO of the Ministry informed the Commission in a meeting in October 2011 that the Ministry is considering options to cater for land needs of Tongans living overseas. They are currently looking into ways to facilitate payments over the internet.

It was clear from the public proposals that raising public awareness should not be limited only to Tongans living overseas, but should be provided also for

Tongans living in Tonga. The public are hungry for information on land rights and laws and the Ministry should take this into consideration.

5.4.5 LEGAL AID PROGRAMME

The public proposed that a legal aid programme should be established to assist people in knowing their rights and also seeking enforcement of their rights to land. A common public concern was that many land owners, who were aware of some of their basic land rights, were not able to afford legal fees for disputes that should be dealt with in the Land Court.

It was a common complaint by the public that they were not able to pay for legal fees and this problem should be given high priority especially in light of those lands where the heir to succeed to family allotments have been questioned, challenged or threatened. Lack of proper legal representation has an ongoing prejudice and negative impact particularly in cases of succession for generations to come. The importance of proper legal representation for land cases is of high priority to the public when shed in this light.

Instances of complaints of loss of hereditary land were constant throughout the Commission's public meetings and of cases where these losses were not only current but had occurred over a decade ago. Some of the public who raised these matters at public meetings were descendants that should have inherited family land but, according to family stories they had wrongly lost land by dishonesty and/or through no fault of their own.

It was also a common concern expressed that land disputes had been ongoing for many years. It was commonly understood that it is the Land Court which has jurisdiction to determine these disputes. However, when people were asked why

they had not taken the matter to Court their answer was again they had no money to pay for a lawyer to prepare the legal action.

It was also of particular concern that the majority of the public were not aware of the statutory limitation to initiate legal proceedings under the Land Act was 10 years from the date of the disputed land issue.

The Commission is now acutely aware of the general public's lack of basic knowledge about their land rights and duties. An ongoing public legal advisory scheme would be very important to initiate together with some form of ongoing public education campaign to ensure the public are consistently and properly informed of their basic land rights and duties.

Limitations to the legal service would need to be clearly set out to enable fair and even access by the public in general to these services. An important limitation would for example be that a maximum of one hours advice could be given to any member of the public thereby placing a finite time and space to allow advice to take place. Sound legal advice, insight and assistance with the decision making process could be gained by the public, by spending one hour with an experienced and informed land law practitioner. The aim of the scheme would not be to enable law practitioners to take on full cases but, to at least provide sound and initial legal advice to the public within a clear time frame limit of say one hour. From this point onward, members of the public could instruct legal counsel should they decide to do so.

These legal services could be provided through a daily rotating roster of approved law practitioners on a weekly/monthly roster depending on the number of law practitioners available to the roster. Such an ongoing and long term legal aid advisory role would serve to educate and enlighten the public and

alleviate some of the public's dissatisfaction and complaints about the Ministry and the Land Court system.

Law practitioners would be paid on a set hourly rate by Government via possible aid funding or from improved Ministry revenues, as projected upon implementing the Commission's recommendations. It is timely to seek international aid for the development of law and justice in developing nations such as Tonga.

Time limitations are important because funding for such an untried and untested project would be carefully monitored by any funding agency via the Government. Should such pilot scheme be successful then, a funding agency would consider extending funding to larger levels of approved hours to assist the public in land cases.

RECOMMENDATION 77: THAT Government in consultation with the Tonga Law Society establish a duty lawyer legal service that provides initial and basic legal advice to the public for all land matters and consider how best to fund this scheme.

5.4.6 STAFF OF THE MINISTRY REGISTER ALLOTMENTS IN THE NAME OF THEIR RELATIVES AND FRIENDS

This concern from the public has been a recurring common thread expressed across a range of the public meetings. This concern was also not specifically considered in the Phase One Interim Report. Although a reasonably common complaint, there were oral complaints expressed at public meetings, the same concerns expressed on written submissions but no solid evidence to support these claims. The oral submissions amount to anecdotal evidence.

The consistency however of this concern being raised by the public has given cause for concern to the Commission that this issue should be further inquired into by the Ministry and the results publicised.

In light of the Commission's current time and resource constraints, it is unfortunately not able to continue to inquire into this issue.

5.4.7 IDENTITY DOCUMENTS

It was proposed that the Ministry of Lands should create strict and clear identity requirements to ensure the identity of parties making claim as heir, the holder of an allotment, a leasor/lessee or any party claiming any land rights whatsoever. Instances of fraud and forgeries by individuals that have unlawfully benefitted or who have enabled parties to register more than one allotment have been numerous throughout the Commission's inquiries.

The reduction in fraudulent land related activity would be a direct correlation from the creation of this simple and basic identification procedure that would be carried out in Tonga and overseas. The production of two officially recognised identity documents would be more than sufficient such as a current passport, birth certificate, national Identity Card or drivers licence would be sufficient. Photo identity checks by land officers in sighting the individual party making application would also lend to improved security.

Further to this and consistent with Tonga's unique land laws and culture, not only should the identity of an interested party be verified but, the genealogical history of the interested party also needs to be verified particularly in cases of claims by heirs and widows.

Public concerns have been expressed that it is too easy to purport to be an interested party without any identification process taking place at all. Further, the genealogy of the interested party should also be carefully verified before application processes are initiated especially in the cases of applicants claiming the rights of an heir or widow. The Ministry should seek specialist advice when verifying genealogies.

RECOMMENDATION 78: THAT an identity verification process is established that requires the production of two officially recognised identity documents. That applicants for heir to land also need to have their genealogies verified.

