

APPENDIX 29

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6 August 2010

Lord Fakafanua
Noble's Representative for Nobles of Ha'apai
Fakafanua Centre
MA'UFANGA

Your Lordship

Legal Advice: Land Reform Issues regarding Hereditary Estates

Further to our meeting of Wednesday 4 August 2010, please find enclosed legal advice from our office concerning the above matter.

Due to the timeframe given to provide this legal advice, we were unable to include discussion in case law and comparison to land tenure systems in other countries similar or closely similar to that of Tonga.

We are available to discuss the matter further at your convenience.

Respectfully


'Aminiasi Kefu
Solicitor General



**LEGAL ADVICE
LAND REFORM FOR HEREDITARY ESTATES**

'Aminiasi Kefu
Solicitor General
6 August 2010

I INTRODUCTION

1 On 3 August 2010 Crown Law received a request from Lord Fakafanua, on behalf of the hereditary estate holders, ('the Nobles') to meet with him, the Secretary for Lands and the Deputy Clerk of the Legislative Assembly, to discuss some land reform issues regarding hereditary estates. This request was endorsed by the Acting Attorney General.

2 The meeting took place on 4 August 2010 in Lord Fakafanua's office at the Fakafanua Centre, Ma'ufanga.

3 At the end of discussions in the meeting, we were requested to provide a concept paper on urgent land reforms for hereditary estates that should be processed before the Legislative Assembly rises in September 2010.

II SUMMARY OF LEGAL ADVICE

4 A summary of this advice is as follows:

- (1) The Nobles have raised valid land reform issues regarding their hereditary estates. Those issues are in relation to land governance and technical land matters;
- (2) These issues should be considered carefully and thoroughly;
- (3) If some of these issues are supported, then they need to be legislated in order to be brought into force;
- (4) Unfortunately the legislative timeframe is limited. The Legislative Assembly will rise in the last half of September 2010. The Nobles therefore have little time to process legislative amendments, in addition to Government's legislative programme;
- (5) Due to the time constraints, the Nobles should consider processing only the reforms related to land governance issues. The technical land matters could then be referred to the land authority chosen to deal with the technical issues;
- (6) The land governance issue arises from the political reform process creating an elected Cabinet by the people and the nobles, rather than appointed Cabinet by the King. The Cabinet is the main authority to approve land matters.

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- (7) The concern is that an elected Cabinet may not have the interests of the nobles in mind, given the possibility there may be no noble in Cabinet or a noble may not be the new Minister for Lands.
- (8) There are three options available:
- (i) Option A: Retain the status quo;
 - (ii) Option B: Assign authority to Estate Holders; or
 - (iii) Option C: Establish an independent lands titles authority.

III BACKGROUND

- 5 On 25 November 2010 Tonga will carry out its first ever national elections under the new electoral system.
- 6 The composition of the Assembly will therefore be 17 members representing the people, and 9 members representing the nobles. The 26 elected members will then select from amongst them a member to be appointed by His Majesty as the Prime Minister. The Prime Minister will then select 10 other members, apart from the Speaker, to be his Cabinet ministers.
- 7 The normal composition of the Assembly will therefore be one Speaker, 11 Cabinet ministers including and headed by the Prime Minister, and 14 members, who will effectively be the opposition.
- 8 If non-elected Cabinet ministers are appointed, then the number of opposition members can vary from 14 to 18, against the 11 Cabinet ministers. This is because the Constitution will seal the number of Cabinet ministers to "fewer than half of elected members, excluding the Speaker (i.e. there will 11 or less, including the Prime Minister).
- 9 Politically the Cabinet will hold all executive power, except a few executive powers retained by His Majesty, such as the appointment of judicial officers.
- 10 Cabinet will also be accountable to the Legislative Assembly, and thus the electors.
- 11 The Prime Minister will therefore select his Minister for Lands to be appointed by His Majesty.
- 12 It should be noted that the political and electoral reform process did not impact on the land tenure system.
- 13 It should also be noted that the issue of land reform has been dealt with by His Majesty through the appointment of a Royal Commission of Inquiry into land usage and customs. That Royal Commission will complete its Commission in 2011. Counsel understands that the Royal Commission has issued an interim report but that report does not impact on hereditary estates.

III HEREDITARY ESTATE ISSUES

14 During the discussion in the meeting of 4 August 2010, there were a number of land issues that were raised which are of concern for the Nobles, particularly as a consequence of an elected-Cabinet holding authority under the Constitution and the Land Act, as opposed to an appointed-Cabinet.

15 Under the Constitution and the Land Act, Cabinet holds the power to:

- grant leases;
- determine terms of leases;
- renew or extend leases;
- renew expired leases without consent of landlord;
- transfer leases;
- grant sub-leases;
- determine terms of sub-leases;
- approve exchange of allotments; and
- approve surrender of allotments.

16 The land issues raised on behalf of the Nobles were as follows:

- (1) Cabinet authority over land matters;
- (2) Consistency of the meaning of "Crown" in the Constitution and Land Act;
- (3) Reclaimed land moving the 'high-water mark' and expanding estates;
- (4) Fanga'uta and Fangakakau lagoons being considered land, and consequences for surrounding hereditary estates;
- (5) Application of consumption tax (15%) on transfer or sale of leases.

17 According to the Nobles their main objective in raising these issues are to:

- (1) Increase public access to land through the Nobles;
- (2) Retain land among the nobles after the political reform; and
- (3) Separate and protect the current land system from political pressures

IV GENERAL ADVICE

18 Crown Law has the following views regarding this matter:

- (1) It should be understood that the Tongan land tenure system is embedded in not only the Constitution, but also in Tongan customs and culture. It is a fundamental cornerstone of Tonga;

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- (2) Any attempt to change the Tongan land tenure system is simply not a cosmetic exercise. Land reform will change the Constitution, the Land Act and particularly Tongan customs and culture regarding usage of the land.
- (3) The current time available to process legislative amendments is limited. Government is currently trying to process about 13 Bills to be passed by the Assembly before mid or end of September.
- (4) The issues raised by the Nobles are to do with land governance and technical land matters.
- (5) The land governance issue only relates to Cabinet holding authority regarding approval of land matters.
- (6) The technical land matters are more complex. They would need more time to consider what reforms should be made, and the consequences of such reform. They require more time for consideration.
- (7) Due to the time available, we are of the view that the Nobles should consider only processing the reform to the Constitution and the Land Act with regards to the authority that will approve land matters. That is, whether it should be Cabinet or another competent authority.

V POSSIBLE OPTIONS FOR AUTHORITY OVER LAND MATTERS

19 There are three options:

- (1) Option A: Retain the Status Quo;
- (2) Option B: Assign Authority to Estate Holders; or
- (3) Option C: Establish an independent Lands Titles Authority

A Option A: Retain the Status Quo

20 This option means that Cabinet will continue to hold the main authority under the Constitution and the Land Act.

21 The positive and negative aspects of this option are set out in this table:

Table 1:

POSITIVE	NEGATIVE
<ul style="list-style-type: none">• The Nobles can use their 9 seats to influence who is effectively appointed Prime Minister, and thus have influence on who is in Cabinet• It is unlikely that Cabinet will not include a noble's representative	<ul style="list-style-type: none">• Possible lack of consideration of interests of hereditary estates• Minister for Lands may not be a noble – and so may be unaware or inexperienced with dealing with hereditary estates

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<ul style="list-style-type: none"> • Land matters accountable to the Assembly • Consistent with original set up by Tupou I – i.e. Cabinet has authority • Checks and balance in current process 	<ul style="list-style-type: none"> • Minister’s current obligation is only to consult hereditary estate holders when granting land
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22 This option will not require any amendment to the Constitution or the Land Act.

B Option B: Assign Authority to Estate Holders

23 This option means that all land matters will be approved by the estate holder – whether it is the hereditary estate holder or the Crown.

24 The positive and negative aspects of this option are set out in this table:

Table 2:

POSITIVE	NEGATIVE
<ul style="list-style-type: none"> • Quicker decision process • Certainty in knowing or being able to predict a decision from one person • Nobles have hands on decision making of hereditary estates • Nobles have more control over development and layout of hereditary estate 	<ul style="list-style-type: none"> • There is likely to be inconsistency • Too much power for an estate holder • More risks of corruption • More risks of abuse of power • Lack of checks and balances • People may move away from hereditary estates • Nobles have to set up office support – secretariat etc • Nobles become more susceptible to legal challenge in Land Court • Highly controversial – people oppose on basis of non-support that nobles have so much power over their land

C Option C: Establishment an independent Lands Titles Authority

25 This options means that a new independent office is set up to make determinations on land matters, based on published criteria and standards, and land matters are decided in the public’s interest. This could be known as the Lands Titles Authority.

26 The positive and negative aspects of this option are as follows:

Table 3:

POSITIVE	NEGATIVE
<ul style="list-style-type: none"> • Transparency • Independence • Land Processing could be improved – timely and efficient • Accountable to either Privy Council, Cabinet or estate holders • Existing staff under Registrar General of land 	<ul style="list-style-type: none"> • More resources required – new office space etc • Still have red tape administration • Increase in fees to support independent authority

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<p>titles</p> <ul style="list-style-type: none">• Experts as Land Titles Board – estate holders, prominent persons, etc• May be more responsive to changing regulations and rules	
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27 This option will include amendments to the Constitution and the Land Act, and also a separate Bill setting up the new land authority. The new Bill can be drafted after this session of the Assembly due to the time constraints.

VI OTHER LAND REFORM MATTERS REGARDING HEREDITARY ESTATES

28 We are of the view that the other land reform matters, which are at a technical level, should be deferred to the authority decided to look after land matters after the election.

29 This is because further consideration on the impacts and consequences of reform to such issues should be made.

30 Such reform could have impact on Government revenue; the environment; land and fisheries resources and other issues.

VII CONCLUSION

31 We again wish to highlight that time is of great importance. Furthermore, the proposed reform is highly controversial, and so a strategy should be considered to ensure a quick and smooth processing of any reforms decided. Another important issue to consider is that His Majesty has preferred to deal with land reform through the Land Royal Commission, and so His Majesty may refer this reform to them.



Aminiasi Kefu
Solicitor General

6 August 2010