



Government of Samoa



SAMOA LAW REFORM COMMISSION

Review of the Property Law Act 1952

Final Report 23/18

November 2018



GOVERNMENT OF SAMOA

OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM COMMISSION

The Honourable Speaker
THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with section 9 (2) of the *Law Reform Commission Act 2008*, I have the honour to submit to you copies of the Report on the Review of the *Property Law Act 1952* as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations on the Review of the *Property Law Act 1952* after stakeholders' consultations and research in accordance with section 4 of the *Law Reform Commission Act 2008*.

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(Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi)
PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM COMMISSION



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(Telei'ai Dr. Lalotoa Mulitalo)

EXECUTIVE DIRECTOR
SAMOA LAW REFORM COMMISSION

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1. INTRODUCTION

I. Terms of Reference

- 1.1. In August 2014, the Samoa Law Reform Commission (“**Commission**”) received a Terms of Reference (“**TOR**”) from the Office of the Attorney General (“**OAG**”) to review the *Property Law Act 1952* (“**Samoa PLA**”). The TOR required the Commission to:
 - a) undertake research and analysis of the Samoa PLA;
 - b) provide a report for recommendations on the review; and
 - c) carry out any other matter necessary to undertake the review.
- 1.2. The Samoa PLA, now 66 years old, is largely based on the old New Zealand *Property Law Act 1952* (“NZ PLA 1952”) which New Zealand has comprehensively reviewed and updated, resulting in the new *Property Law Act 2007* (“NZ PLA 2007”). For Samoa, this is the first comprehensive review to the Samoa PLA since enactment in 1952.

II. Law Reform Process

- 1.3. In the course of preliminary consultations and research, the Commission was fortunate to have consulted with Justice Blanchard (former New Zealand Supreme Court Judge) on 6 November 2014, who was involved with the review of the NZ PLA 1952 which resulted in the updated PLA NZ 2007. The Commission also consulted with Mr Barry Allan in December 2016, a Senior Law Lecturer at the University of Otago. Mr. Allan has extensive knowledge and expertise on property law in New Zealand. Their views have assisted in the development of this Report.
- 1.4. To assist the Commission with this technical and extensive review, a consultant, Mr Graham Powell (Samoa’s former Parliamentary Counsel) was engaged to do the following:
 - a) Reviewing the current NZ PLA 2007 and identifying similar provisions in the Samoa PLA;
 - b) Identifying and analysing relevant provisions under the NZ PLA 2007 that would be applicable to a new Samoa PLA; and
 - c) Amending and updating the Samoa PLA.
- 1.5. Consequently, 4 Discussion Papers were developed:
 - **Discussion Paper 1** - analyses provisions on dispositions, instruments, transactions and property in both the Samoa PLA and NZ PLA 2007 and makes recommendations for reform;
 - **Discussion Paper 2** - analyses provisions on mortgages in both the Samoa PLA and NZ PLA 2007 and makes recommendations for reform;
 - **Discussion Paper 3** - analyses provisions on leases in both the Samoa PLA and NZ PLA and makes recommendations for reform; and
 - **Discussion Paper 4** - examines covenants, easements, profits and access lots, special powers of court and miscellaneous provisions in both the Samoa PLA and NZ PLA and makes recommendations for reform.
- 1.6. The above 4 Discussion Papers were approved by Cabinet for consultations with the relevant stakeholders.¹

¹ Discussion Papers 1 and 2 were endorsed by Cabinet by way of FK (17)06 dated 1 March 2017. Discussion Paper 3 was endorsed by FK (17)25 dated 12 July 2017 and Discussion Paper 4 was endorsed by FK (17)32 dated 30 August 2017.

1.7. Given the nature and scope of this review, the Commission specifically sought written submissions from the following stakeholders on 18 January 2018 on the 4 approved Discussion Papers.

- a) Office of the Attorney General (“OAG”);
- b) Ministry of Natural Resources and Environment (“MNRE”);
- c) Ministry of Commerce, Industry and Labour (“MCIL”);
- d) Ministry of Justice and Courts Administration (“MJCA”);
- e) Samoa Land Corporation (“SLC”);
- f) Samoa Housing Corporation (“SHC”);
- g) Samoa Chamber of Commerce (“SCC”); and
- h) Samoa Law Society (“SLS”).

Submissions were due on 13 April 2018:

- 1.8. On 23 February 2018, the Commission, upon request from the Samoa Law Society (“SLS”), conducted an information/awareness session (hot spot session) with the SLS members on this review and to seek submissions to the 4 approved Discussion Papers. This session was seen as an important opportunity for the members of the SLS to share their experiences in applying the Samoa PLA and provide suggestions on how the Samoa PLA can be reformed to suit their needs. On 26 February 2018, the Commission, upon invitation from the Samoa Chamber of Commerce (“SCC”) also presented on the PLA review at SCC’s annual general meeting. In the same month, Public Notices were circulated/publicised on Television (TV 1) and in the Samoa Observer newspaper inviting written submissions from members of the public. All submissions were due on 13 April 2018.
- 1.9. To date, the Commission has only received 3 written submissions from MNRE, MCIL, and SHC. This is a considerably low number of submissions compared to submissions received on other Commission projects.
- 1.10. The Commission understands that the technical nature of this review, the lack of interest and the amount of time required to peruse volumes of documents and provide constructive and useful submissions, have more or less contributed to the lack of responses from the relevant stakeholders, despite numerous follow ups, requests and reminders by the Commission.
- 1.11. More significantly, perhaps the lack of input is due to the nature of this review which is on modern principles of ‘property’ in the present world. Such ‘property’ as defined in the current Samoa PLA is not widely practiced or common in the Samoan setting, a setting founded and based on communal ownership. Individuality and individual ownership is a feature of the modern era in Samoa, and the application of the modern ‘property’ principles are slowly being introduced and applied in Samoa. It is perhaps also safe to say that in relation to ‘property’ as ‘real property’ i.e. ‘land’, the Samoa PLA largely applies to only about 4 % (freehold) land, and 15% (state) land in Samoa.² As discussed by the relevant literature,³ state laws (especially on introduced principles) are seen as hugely irrelevant to the population living in 80% customary land and in the rural village areas. From research interviews it was evident that the public lacked interest and awareness of the state laws of Samoa and the law reform process. They prioritise village rules and by-laws as these affect them on a daily basis rather than the state laws, which they believe have little to no effect in their daily lives. Accordingly, public awareness on all laws is essential for effective law reform.

² Seumanutafa TLMR, *Law Reform in Plural Societies*, Springer (2018) 26.

³ *Ibid*, at 87.

- 1.12. Referred to as the ‘cornerstone’ of well-informed law reform projects, the consultation stage requires significant funding and resources. In determining the adequacy of consultations, the Supreme Court of Canada has laid out some of the principles of the duty to consult in law making which include that ‘consultation must be meaningful and reasonable and must involve adequate participation and representatives of the people’.⁴ What is ‘adequate consultation’ was held by the Supreme Court of Canada to be ‘where every reasonable effort is made to inform and consult’ on the law reform projects or on new laws impacting on the people.⁵
- 1.13. The challenges faced by the Commission in relation to consultation and lack of submissions are also shared by its neighbouring Islands, as discussed in the Australian Law Reform Agencies Conference in Port Vila Vanuatu in 2008. Some of the challenges include:⁶
- Lack or limitation of resources and funding for law reform, particularly to fund public consultations and to obtain and maintain senior Commission legal staff;
 - Limitation or lack of local expertise to assist law reform;
 - Lack of collaboration and cooperation amongst public institutions.
- 1.14. In spite of these challenges, the Commission has pursued this review with its available resources and funding to respond to the need to review this outdated yet important law. The Commission wishes to acknowledge the assistance of those who have contributed to this review.

III.Outline of Report

- 1.15. This Report is divided into the following 5 Parts:
- **Part A - A Snapshot of the Property Law of Samoa**
 - **Part B - Property Laws in some Pacific Island Countries**
 - **Part C - The Property Law Act 2007 (NZ)**
 - **Part D - Current Samoa Property Law Act 1952 and Issues**
 - **Part E - Conclusion**

IV.A Need for Change

- 1.16. The Endnotes to the Property Law Act 1952 Samoa shows that from the Consolidation of the Laws of Samoa in 2008, the following revisions and amendments were made to the PLA Act 1952 of Samoa.

⁴ See *R v Jack* (1995) 16 BCLR (3d) 201 CA; *R v Noel* (1995) 4 CNLR 78, *R v Nikal* (1996) 1 SCR 1013.

⁵ See Mulitalo Lalotoa, ‘The Practice of Legislative Drafting in Samoa, a Plural Society of the South Pacific’, *The Loophole*, Issue No. 3 of 2012, Commonwealth Association of Legislative Counsels, 28-44, at 32.

⁶ See Alatoi Ishmael Kalsakau, ‘The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu’s Law Reform Commission’ (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 11 September 2008) 3; Frank Kabui and Anna Guthleben, ‘The Establishment of a Commission in the Solomon Islands’ (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 11 September 2008); Alisi Taumoepeau and Guy Powles, ‘Constitutional Change in Tonga’ (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 10-12 September 2008).; Katy Le Roy, ‘Reforming the Architecture of Legal Systems’ (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 10-12 September 2008).

- (a) By the Revision and Consolidation of the Laws of Samoa 2008, editing revisions were made to modernise the language and terminology; sections were divided and re-paragraphed for clarity, the numbering of Parts were changed from Roman to decimal numbers.
- (b) By the *Land Titles Registration Act 2008*, amendments were made to sections 2, 3, and 16(4); a new 52A was inserted, section 54 was repealed, amendments made to sections 79(6) and 87(4); a new section 98A was inserted, amendments were made to sections 101, 102, 126, 127, the 1st Schedule and the 4th Schedule. These amendments to the PLA Act 1952 Samoa were inserted into the PLA Act 1952 Samoa at the 2013 Consolidation of Laws of Samoa.
- (c) By the *Land Titles Registration Amendment Act 2015* which came into effect on 5 November 2015, subsection 76(2) was substituted by the current subsection 76(2).

1.17. Discussions with the Judiciary⁷ show that prior to the amendments made in 2008 and 2015, the Courts of Samoa have referred to and applied the updates made to the NZ PLA 1952 where the Samoa PLA 1952 cannot assist with an issue before the Courts. Given the full adoption by Samoa of the NZ PLA 1952, this appears not unreasonable. This is indeed a challenge to postcolonial societies where legal transplants were transplanted wholly from a former colonial power, and the postcolonial society has not effected updates to the legal transplant although that transplant is updated in the coloniser's jurisdiction. This is especially so where such a legal transplant regulates principles, values and matters that are wholly foreign to the local environment of the postcolonial country (*modern property law principles relating to freehold and state land only and not customary land*), and there is nothing in the local environment or context of the postcolonial country (*capacity, expertise or basis*) to assist the postcolonial country with any updates to that legal transplant. **Therefore, for the purposes of this review, it makes sense that the NZ PLA 2007 (an updated version of NZ's PLA 1952) is to be used as a guide when developing a proposed new Samoa PLA due to the historical connection between the NZ PLA and the Samoa PLA.**

1.18. The aim of this review is to examine the provisions of the Samoa PLA 1952 and update it to ensure it is relevant and can be readily understood by any person that reads and relies on it. The majority of the provisions of the current Samoa PLA have survived for as long as 66 years (since the year of enactment) without substantial amendments. As indicated above, there were only piecemeal amendments made to date. Therefore, this review is necessary and timely to ensure that the Samoa PLA reflects current developments on property law issues in Samoa. This largely involves a consideration of the developments in the NZ PLA 2007 and New Zealand where the Samoa PLA originates from.

V. Way Forward

1.19. Recommendations are made throughout this Report to update the current provisions of the Samoa PLA in a **proposed new Samoa PLA**, relevant to the context of Samoa. As these modern property principles originate from NZ, for the most part, the Commission recommends that where appropriate and as far as they are applicable to Samoa's needs, the provisions of the NZ PLA 2007 are to be adapted and adopted. This is in line with the suggestions from the Samoan Judiciary in past meetings with the Commission.⁸ This view is also supported by the proposals in the approved 4 Discussion Papers. References to other NZ laws in the 4 Discussion Papers, such as the *Companies Act 1993* and the *Public Trust Act 2001*, need to be replaced by the relevant provisions in Samoa's corresponding laws. This is to achieve consistency and uniformity across all laws and matters relating to property law.

⁷ At the Samoa Law Reform Commission's Fabric of Laws Awareness session with members of the Judiciary on 13 June 2018.

⁸ Ibid.

1.20. The Commission also notes that a number of terminologies in the NZ PLA requires careful consideration before they are included in a proposed new Samoa PLA. Having said that, it is envisaged that some definitions used in the NZ PLA 2007 may be replicated in the proposed new Samoa PLA where appropriate. This is further discussed in Chapter 1 of this Report.

2. PART A: A SNAPSHOT OF THE PROPERTY LAW ACT 1952 (SAMOA)

- 2.1. The Samoa PLA originates from the NZ PLA 1952 which has now been replaced by the current NZ PLA 2007, following an extensive review by the NZ Law Commission (“NZLC”) from July 1991 – June 1994.

I. History of the Samoa Property Law Act 1952

- 2.2. To gain some understanding of the background to the current Samoa PLA 1952, it is necessary to first understand its origins. On the review of the NZ PLA 1952, the NZLC summarised the NZ PLA 1952 in its Preliminary Paper published in 1991 as follows:

‘The Property Law Act 1952 contains a collection of miscellaneous rules relating to property of all kinds, including land. It is not a code, more a repository for legislative supplements to or corrections of judge-made law (emphasis is ours). Where it has been thought that the rules of common law or equity have fallen short of producing a sensible solution to a problem concerning the creation, disposition or control of property interests, legislative attention has been given to the problem by way of a section in the Property Law Act or one of its predecessors.’⁹

- 2.3. The NZ PLA 1952 was a product of many amendments and consolidation to rules relating to property including land, which occurred in 1883, 1905 and 1952.¹⁰ It was noted that prior to the 1991-1994 NZLC review, there has been no general review, overhaul and reformulation of the property law in NZ since the original *Conveyancing Ordinance of 1842* (England).¹¹ The 1842 Ordinance laid down the rules concerning the formalities and operation of deeds.¹² It sets out forms of covenants to be implied in deeds, including leases which were contained in the NZ PLA 1952. Since 1842, several changes occurred along the way prompting the need to amend the 1842 Ordinance.¹³ For example, the laws on apportionment and implied covenants in mortgages.¹⁴ The *Property Law Act 1905* was another consolidating statute which inserted a number of new provisions which include easements in gross, obligation of mortgagee.¹⁵ There were further reforms between 1905 and 1952, which paved the way for the NZ PLA 1952.
- 2.4. The NZ PLA 1952 was, for the most part, a consolidation of numerous reforms briefly stated above. Whilst many of the reforms made prior to 1952 were important at the time, many old rules had not been reviewed since the *Original Conveyancing Ordinance 1842*.¹⁶ That was why the NZ PLA 1952 was drafted in a variety of styles, none of which would evoke much enthusiasm in a modern drafter and contains much that is obscure in its language or can be justified, if at all only by its historical origin.¹⁷

⁹ New Zealand Law Commission, *The Property Law Act 1952 A Discussion Paper*, Preliminary Paper No 16 (1991) 29.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ New Zealand Law Commission, above note 9, 30.

¹⁶ *Ibid.*, at 32.

¹⁷ *Ibid.*

II. Current Framework- Samoa PLA

- 2.5. The NZ PLA 1952 in its entirety was adopted by Samoa before independence in 1962, while Samoa was under NZ trusteeship. In the Commission’s Fabric of Laws Final Report,¹⁸ the Commission considered the need to review outdated legislation in Samoa, specifically those that were enacted at pre-independence times including the Samoa PLA 1952.
- 2.6. The Samoa PLA defines ‘property’ to include real and personal property, and an estate or interest in a property real or personal, and a debt, and a thing in action and any other right or interest. Real property refers to and includes land and any house/buildings attached to such land (immovable property). Personal property refers to all of someone’s property except land, or simply any property that is movable or assets that are not fixed permanently to a location (moveable property). Estate refers to all assets that a person possesses or is beneficially entitled to while an interest in a property refers to the extent of a person’s right in a property. A thing in action is property that is theoretically owed to someone by virtue of a legal sue (often money).
- 2.7. The Samoa PLA 1952 is divided into 18 Parts, 155 sections and 7 Schedules summarised in the table below:

‘PART’ OF SAMOA PLA 1952	DESCRIPTION (It is important to note at the outset that the PLA in itself does not apply to customary land)
PART 1 Preliminary Matters	Provides the short title, commencement date as well as the definitions of relevant terms used throughout the Act. It also provides briefly the application of the PLA 1952 to other legislation, such as the <i>Land Titles Registration Act 2008</i> .
PART 1A Deeds and Other Instruments	Provides for the formalities of a deed and the manner in which a deed is executed by either the individuals or Corporations.
PART 2 General Rules affecting Property	Sets out the general rules that apply to and affect property. These rules are often applied to dealings in property. It also abolishes some of the general rules relating to property. For example, Estates tail abolished (section 16) and Estates by wrong abolished (section 17).
PART 3 Assurances of Real and Personal Property	Deals with matters relating to conveyance of land: (i) from one individual to another; (ii) via trust; and (iii) by an individual to himself/herself. A conveyance of land includes all rights, easements and appurtenances belonging/attached to the land, unless there is a contrary intention expressed. It also provides that 2 or more persons may declare by deed that they are joint tenants of a property, and such property will vest in them accordingly.
PART 4 Powers and Conditions of Sale and Protection of Purchasers	Provides for powers and conditions of sale and protection of the rights of purchasers and creditors.

¹⁸ Samoa Law Reform Commission, *Review of the Fabric of Laws of Samoa Project*, Final Report No 22 (2017) 22.

	Also provides that section 57 of <i>the Sale of Goods Act 1975</i> (Samoa) applies, with all necessary modifications, to sales by auction of any kind of property. It also contains the rules to regulate obligations and rights of a vendor and a purchaser, and restrictions against alienation of land with intent to defraud purchasers/creditors.
PART 5 Covenants and Powers	Contains a series of provisions dealing with covenants and powers. It provides for benefits, burdens and the effect of covenants relating to land. A covenant/agreement may be made by a person with himself/herself or/and with others. It expressly provides that a power/right to re-enter is not to be implied.
PART 6 Covenants implied in Conveyance Generally	Sets out a series of implied covenants in conveyances and leases. These implied covenants include: <ul style="list-style-type: none"> (i) that the conveying party has good right and full power to convey an estate free and clear from all encumbrances other than those that may be mentioned in the conveyance; (ii) the recipient of the conveyed estate/property will quietly enjoy the conveyed estate/property without disturbance; (iii) the conveyor (and all executors/administrators) will do all that is required to enable the conveyance; and (iv) the conveying party will produce all registered deed/instruments or evidence of title to recipient. Also provides for covenants implied in conveyance subject to encumbrance, conveyance of term of years and conveyance by trustees.
PART 7 Mortgages	Sets out provisions that govern mortgages and related matters such as: <ul style="list-style-type: none"> (i) the formalities for the execution of a mortgage; (ii) equity of redemption; (iii) rights of mortgagor in possession; and (iv) powers and rights of mortgagee and restrictions.
PART 8 Leases and Tenancies	Sets out provisions governing leases and tenancies. It provides for the implied covenants of a lessee to: <ul style="list-style-type: none"> (i) pay rent (except when the leased premises is damaged and rent may be recovered or proportioned or suspended until the premises is rebuilt/made fit for occupation); (ii) keep/yield up the premises at end of lease period in good and tenantable repair. It also provides for the implied powers of a lessor to: <ul style="list-style-type: none"> (i) enter premises for viewing and repair and to notify tenants of any defects; (ii) levy rent in arrears by distress;

	(iii) re-enter premises whenever the rent is in arrear for a space of 1 month of the lessee fails to perform any covenants, conditions or stipulations contained or implied in lease.
PART 9 Easements, Restrictive Stipulations and Encroachments	Deals with matters relating to easements, restrictive stipulations and encroachments. Matters provided for include access or use of light or air and the conditions to granting such right. The provisions on easements and restrictive stipulations provided for the registration of restrictions of user of land and the power of the court to modify or extinguish the same. In relation to encroachments, this Part provides for the power of the District Court to grant entry to an adjoining land to make repairs on any part of land/structure on the applicant's land as well as the power of the Court to grant special relief in encroachment cases.
PART 10 Assignment of Debt and Things in Action	This Part provides for the assignment/transfer of the legal and equitable right to a debt or thing in action.
PART 11 Marriage Settlements	Provides for the implied powers of trustees of marriage settlements in the conveyance of land in such marriage settlements. These implied powers include the powers to lease any land comprised in a settlement at a reasonable yearly rent, or to dispose of any land comprised in a settlement by way of sale or in exchange for other land, or parties may agree to the partition of such land. It also provides that a minor or a guardian may apply for a sanction of the Court for a minor to validly settle his or her property upon or in contemplation of his or her marriage.
PART 12 Powers of Attorney	Sets out the rules governing the use of powers of attorney by individuals and in the cases of corporations. It provides that any execution or action by a donee of a power of attorney in his or her own name/signature will have effect as if it had been done by the donee in the name and signature of the donor of such power. Any power of attorney so created shall have effect and remain in force until notice of death of the donor or until such power is revoked. A power of attorney may be given for valuable consideration and expressed in the creating instrument to be irrevocable.
PART 13 Partition of Land and Division of Chattels	Concerned with property owned in a joint tenancy or a tenancy in common. It provides for the rights of parties interested in a certain land to request the Court to either sell the land and distribute proceeds or divide the chattels accordingly. It briefly provides for the application of proceeds of sale and the division of chattels depending on the value of such chattels concerned.
PART 14 Apportionment	Provides for accrual and apportionment of rents, annuities, dividends and other periodical payments from day to day. It also provides for the time when such apportioned part is payable, how such apportioned part may be recovered.

	Apportionment under this Part does not apply where it is expressly stated to not apply.
PART 15 Debts charged on Real Property	Provides for how to deal with a debt charged on a real estate. It provides that a person to whom freehold land is devised cannot discharge a mortgage debt out of the personal estate of a testator.
PART 16 Rents Charges and other Annual sums	Provides for matters relating to the recovery of annual sums charged on land and the discretion of the Court to allow annual sums and capital money charged on the land to be paid into Court.
PART 17 Services of Notices	Provides for the manner in which notices are required or authorised to be made and served.
PART 18 Miscellaneous	Provides for incidental matters such as the operation of instruments executed before 4 August 1908 (commencement date of the then <i>Property Law Act 1908</i> , NZ), protection of solicitors and trustees acting under the Act and repeal and savings provisions.

III. Case Law

2.8. A review of the case laws of Samoa available to date (November 2018) on the relevant website (paclii.org) reveal that there are some 30 recorded case laws which have applied the provisions of the Samoa PLA.¹⁹ The first cases noted were in 1977 and 1988.²⁰ The years that followed have seen an increase in the number of cases which have applied the Samoa PLA. They can be categorised in the following order, following the order of the Parts of the Samoa PLA they fall under:

- Part 1A – **3 cases** on formalities of a deed;
- Part 4 – **2 cases** on powers and conditions of sale and purchase of property;
- Part 7 – **3 cases** on mortgages;
- Part 8 – **11 cases** were on Leases and Tenancies;
- Part 9 – **3 cases** on encroachments and the division of properties among co-owners; and
- Part 11 – **1 case** on division of matrimonial property;
- Part 13 – **2 cases** on the partition of land and dealing with tenancy in common between co-owners of land;
- **2 cases** refer to provisions/matters under multiple parts of the Act; and
- **3 cases** make general references to the Samoa PLA without much detailed discussion.

Out of the 30 cases, about 5 cases make discussion on the exercise of some of the different powers of the Court.

¹⁹ See Pacific Islands Legal Information Institute, www.paclii.org; Samoa Legal Information Institute, www.samlii.org.

²⁰ See *ET Oldehaver & Co Ltd v Attorney General* [1977] SamoaLawRp 1; [1970 – 1979] WSLR 159 (27 October 1977), <http://www.paclii.org/cgi-bin/sinodisp/ws/cases/SamoaLawRp/1977/1.html?stem=&synonyms=&query=ET%20Oldehaver>. See also *Brown v Bank of Western Samoa* [1986] SamoaLawRp 2; [1980 – 1993] WSLR 174 (3 July 1986), [http://www.paclii.org/cgi-bin/sinodisp/ws/cases/SamoaLawRp/1986/2.html?stem=&synonyms=&query=title\(Brown%20and%20Bank%20of%20Western%20Samoa%20\)](http://www.paclii.org/cgi-bin/sinodisp/ws/cases/SamoaLawRp/1986/2.html?stem=&synonyms=&query=title(Brown%20and%20Bank%20of%20Western%20Samoa%20)).

- 2.9. The above figures show that the majority of property law cases were on leases and tenancies. This is followed by a lesser number of cases on encroachments, division of properties and powers of Courts. A few cases relate to the formalities of a deed, mortgages and the sale and purchase of property.
- 2.10. As stated earlier, the analysis of case laws is based on the record available on the legal databases such as Paclii and Samlii. The Commission acknowledges that the record is inconclusive as there may be cases that have not been recorded or made available on these legal database. Nevertheless, the case laws available may indicate that the PLA is an area of law that is not fully utilised and developed in Samoa, perhaps due to what was stated above, the recent application of modern principles of ‘property’ in the modern sense, in Samoa where communal ownership is more commonly seen/recognized. Moreover, perhaps the above short analysis of the case law could be a starting point of priority issues for the review of the Samoa PLA, particularly provisions on the leases and tenancies upon which the highest number of case law has applied.

IV. Application of PLA (Samoa) to other Legislation

Land Titles Registration Act 2008

- 2.11. The LTRA is an Act that provides for the registration of freehold land and state land, and for the registration of leases and licences on customary land. On the other hand, the Samoa PLA provides not only for matters to do with (freehold and state) land but also personal property, e.g. chattels and personal assets.
- 2.12. Section 3 of the Samoa PLA provides that this Act must be read and interpreted so as not to conflict the provisions relating to land under the LTRA 2008. As made clear in the definition of ‘land’ in the LTRA, the LTRA only applies to freehold and state land and does not include customary land. **Thus, there is no connection between the Samoa PLA and customary land.** The only minor relationship is that references are made to leases or licenses on customary land which are registered under the LTRA. Otherwise, the Samoa PLA does not apply to customary land. In a proposed new Samoa PLA, this position should be made clear to avoid any misconception.

3. PART B: PROPERTY LAWS IN OTHER PACIFIC ISLAND COUNTRIES

3.1. The Pacific Island Countries (PICs) have their own laws to govern property. Some of the countries have specific property law legislation (Fiji) while others (Tonga and Vanuatu) have their own unique set up to deal with lease of real property (land) only. It is important to note that 'property' in Samoa's PLA under review refers not only to land but also personal chattels and assets. For the purpose of this review, the Commission has chosen the following 3 PICs for a comparable analysis:

I. Tonga

3.2. In the Constitution of Tonga, all land in Tonga is the property of the King or the Crown.²¹ Tonga does not have a specific legislation that governs 'property', but in the case of real property i.e. 'land', any lease of crown land is determined by Cabinet (i.e the lease term), before the lease is granted. Any such lease is for a term not exceeding 99 years. Cabinet also determines the amount of rent for all such leases. The Constitution of Tonga expressly prohibits the selling of Tonga land, which again, belongs to the Crown.²²

3.3. Under its constitutional monarchy form of government, the King of Tonga, the royal family, nobles and chiefs have certain privileges and responsibilities pertaining to land.²³ Tonga's *Land Act 1903* recognizes other types of land tenure such as hereditary estate, town or tax allotment to name a few.

II. Vanuatu

3.4. Vanuatu does not have a standalone Property legislation. The closest Vanuatu legislation with corresponding provisions to the Samoa PLA is the *Land Leases Act [Cap 163]*. Like Tonga, this is in relation to 'real property' or 'land' only. The long title of the Land Leases Act of Vanuatu provides that it is a law 'to provide for the creation and disposition of leases of land, for their registration and for matters connected therewith'. Although the provisions of the Vanuatu legislation have corresponding parts in the Samoa PLA (e.g. Leases and Mortgages), they only apply to real property or land but not personal property (i.e. Vanuatu's law focuses specifically on real property such as land whilst Samoa's PLA applies to both real and personal property).

3.5. Chapter 12 of the Constitution of the Republic of Vanuatu provides for the types of land, basis of ownership and use of land in Vanuatu. Article 73 provides that all land in Vanuatu belongs to the indigenous custom owners and their descendants. Article 74 provides that the rules of custom shall form the basis of ownership and use of land in Vanuatu. Noticeably, Article 76 provides that Parliament, after consultation with the National Council of Chiefs, shall provide for the implementation of Articles 73 and 74 in a national law and may make different provisions for the different categories of land, one of which shall be urban land. Despite Articles 73 and 74, Government may also own land acquired by it in the public interest (Article 80), similar to the *Taking of Lands Act of Samoa 1964*.

²¹ *Constitution of Tonga 1875* (Tonga) art 104.

²² *Constitution of Tonga 1875* (Tonga) art 104.

²³ International Federation of Red Cross and Red Crescent Societies, 'Housing, Land and Property Law in Tonga' *Shelter Cluster* (2018).

III. Fiji

- 3.6. Fiji has a *Property Law Act 1978* (“Fiji PLA 1978”) which provides a similar ‘property law’ framework to Samoa’s PLA. There are provisions which are found in both Fiji and Samoa which regulate deeds and other instruments, general rules affecting property, covenants and powers, mortgages, leases and tenancies, powers of attorney and apportionment.
- 3.7. However, there are some parts and provisions in the Samoa PLA that are absent in the Fiji PLA 1978. For example, Marriage Settlement, Debts charged on Real Estate, Rent Charges and Annual Sums. As earlier stated, these are part and parcel of the framework of the NZ’s repealed PLA 1952, which Samoa adopted 66 years ago in 1952.

Analysis

- 3.8. Some stakeholders during consultations have queried why the Commission has proposed in the 4 Discussion Papers that Samoa adopts the provisions of the NZ PLA instead of the relevant laws of neighbouring Pacific Island countries. The Commission notes that there are vast differences in the property law systems of Tonga and Vanuatu, which only have legislation relating to ‘real property’ and **not both real and personal property, as in the case of the Samoa PLA. Fiji’s property law framework does not have all matters on ‘real and personal property’ that Samoa’s current PLA provides for.** For the purpose of this review, **the most practical and convenient guidance for Samoa is the NZ PLA due to their historical connections.** More importantly, according to Samoa’s Judiciary, in the absence of any provisions in the current Samoa PLA 1952, the Samoan courts have referred to the NZ PLA 2007 for guidance.²⁴
- 3.9. Given that New Zealand’s Property Law Act 2007 is the most practical model for Samoa for the reasons above, to allow for a better appreciation of its totality, a brief of the NZ PLA 2007 is discussed next.

²⁴ In the case of *Apia Quality Meats Ltd v Westfield Holdings Ltd [2009]*, His Honour Chief Justice Sapolu referred to the *Property Law Act 2007* of NZ as having retained section 2 of New Zealand’s repealed *Contracts Enforcement Act 1956* requiring contracts for the disposition of land to be made in writing. See *Apia Quality Meats Ltd v Westfield Holdings Ltd [2009] WSSC1 (7 January 2009)*, <http://www.pacii.org/cgibin/sinodisp/ws/cases/WSSC/2009/1.html?stem=&synonyms=&query=Property%20Law%20Act%202007>.

4. PART C: THE PROPERTY LAW ACT 2007 (NEW ZEALAND)

- 4.1. The NZ PLA 2007 is divided into 7 Parts and has 371 provisions and 7 Schedules. It came into force on 1 January 2008. The following provides the outline of its context with brief descriptions of the Parts of the Act:

I. Part 1: Preliminary Provisions

- 4.2. This Part contains the short title, long title, interpretation sections, the application of the Act to land, other property and instruments in NZ and relationship with other laws.

II. Part 2: General Rules Relating to Dispositions, Instruments, Transaction and Property

- 4.3. This part of the NZ PLA 2007 provides for the formalities of a deed and specifies the types of contracts that are required to be in writing. It provides for agreements for sale and purchase of land, the making of payments between vendors and purchasers and the apportionment of such payment. Other matters set out include how an agreement for sale and purchase may be cancelled as a result of a breach and the involvement of the Court, the assignment of things in action, tenants in common and a provision that a person may dispose property to himself or herself.
- 4.4. This subpart, provides for common law rules that have been abolished such as obsolete estates and rules, permissive waste, doctrine of *interesse* and feudal incidents of estate in fees simple, and some rules of common law which have been modified such as contingent remainders and interests and release of part of land from rent charge.

III. Part 3: Mortgages

- 4.5. At the outset, Part 3 clarifies the NZ's PLA 2007 retrospective application to mortgages coming into operation before or after January 2008. In addition, Part 3 clarifies its relationship with other laws in the event of an inconsistency that may arise. i.e. the *Personal Securities Act 2013* of NZ prevails if there are any inconsistencies with the mortgage provisions in the PLA NZ.
- 4.6. Other matters provided for include detailed provisions on the formalities of a mortgage, extensive powers of the mortgagee which include entering into possession of a mortgaged property, sale of a mortgage property which may be made by adopting an agreement for sale and purchase with another purchaser or through the court of registrar and redemption of mortgaged property in the process of sale, subject to payment of a nominated discharge amount.
- 4.7. In these situations, a notice is required to be given before a property is possessed or when a mortgagee withdraws possession. Also provided for are the liabilities to a mortgagee of a person who accepts transfer, assignment or transmission of land subject to mortgage.

IV. Part 4: Leases of Land

- 4.8. Matters provided under this part include the particulars of the form, creation, duration and effect of leases created such as a short-term lease and its effect.²⁵ Also provided are the

²⁵ *Property Law Act 2007* (New Zealand) ss 208 - 209.

implied terms of a lease, ways of terminating leases, methods of giving notices in different circumstances and the creation of subleases subject to a superior lease. Other matters covered include covenants, conditions and powers implied in leases.²⁶Such powers include the assignment of leases, payment for rent, alteration of buildings, entitlement of lessee to quiet enjoyment of premises leased, reasonable use of premises and the recovery of damages.²⁷

- 4.9. There are also provisions on the effect of transactions concerning reversion on leases, the transfer or assignment of any leases and the effect of such transfer and assignment.²⁸ Interestingly, a person who accepts a transfer of a lease becomes a lessee of that land without the need for such person to acknowledge it or take possession of land and a transferor remains liable for the payment of rent payable under the lease.²⁹ There are also provisions on remedies and relief when a lease is cancelled and the different reasons why a lease may be cancelled, requirement to remove fixtures by lessee, effect of an unlawful eviction, insurance matters and the effect of a waiver of any benefit under any lease. There is an express provision exempting an administrator from liability to pay rent under a lease, but may only pay rent, to the extent that assets of the estate are available in the administrator's hands for such purpose.³⁰
- 4.10. The right to distrain for rent is abolished under this part.

V. Part 5: Covenants, Easements, Profits and Access Lots

- 4.11. "Covenant" is a promise expressed or implied either in an instrument or a short-term lease not made in writing. A number of covenants that may be in operation include (i) covenants benefitting the land of the covenantee; (ii) covenants burdening land of the covenantor.
- 4.12. Provided also under this Part are types of implied covenants – implied covenants creating, transferring or assigning estates or interest in land; implied covenants transferring or assigning lease of land; implied covenants instruments by fiduciary or mortgagee; covenants implied in encumbrances of property; and covenants implied in transfers or assignments of land subject to encumbrance. This Part also provides the circumstances which can render a covenant void – covenants that prohibit the land being used for housing for (i) people with low incomes; (ii) people with special housing needs; and (iii) people with disabilities.
- 4.13. There are also provisions on Easements, profits and access lots. An easement is a legal right to use another's land for a specific limited purpose while the title remains with its owner. Easements under this subpart includes a *profit a prendre* (right to take from another person's land something that is part of the soil or is on the soil and is the property of the landowner), rights to pass and re-pass an access lot, and right to the access of light or air.
- 4.14. This Part ends with provisions on the enforcement, modification and extinguishment of easements, covenants and access lots.

²⁶Property Law Act 2007 (New Zealand) pt 4 (sub-pt 3).

²⁷Property Law Act 2007 (New Zealand) pt 4 (sub-pt 3), sch 3.

²⁸See Property Law Act 2007 (New Zealand) pt 4.

²⁹Property Law Act 2007 (New Zealand) ss 240 - 241.

³⁰Property Law Act 2007 (New Zealand) s 274.

VI. Part 6: Special Powers of Court

- 4.15. This part provides specifically for the special powers of the court to make orders and decide on matters relating to land/property.
- 4.16. The Court is given the power to make an order authorising a person to enter onto or over a neighbouring land belonging to someone else for specific purposes such as to erect, demolish or alter any part of structure belonging to a person for whom an order is made. The Courts however, will not act on its own initiative; an affected landowner makes an application to invoke the powers of the Court.³¹
- 4.17. The Courts are also given power to deal with wrongly placed structures.³² This Part sets out the matters to be considered such as the conduct of the parties and the extent to which a person is unjustifiably enriched at the expense of an applicant seeking relief.³³ Section 327 states that the owner or occupier of landlocked land may apply to court and that the Court may grant reasonable access to landlocked land (section 328). Section 329 states the matters that the court must consider in determining application for order of reasonable access and the Court may impose conditions in making order for reasonable access (section 330).
- 4.18. In addition, the Courts have the authority to:
- (i) order the removal, trimming or alteration of structures;
 - (ii) deal with property owned by multiple persons either by way of sale, division of proceeds, division of property or the purchase of shares of 1 or more owners by other owners at reasonable price;
 - (iii) order that a property acquired or received under or through certain prejudicial dispositions be restored for benefit of creditors.

VII. Part 7: Miscellaneous

- 4.19. This Part discusses miscellaneous matters. It provides for 'notices' and the manner of serving such notices. There are also provisions on the jurisdiction of the District Court, and the regulation making powers of the Governor General.

VIII. Schedules

- 4.20. The NZ PLA 2007 has 7 schedules.
- **Schedule 1** sets out the certificate of non-revocation of the power of attorney.
 - **Schedule 2** provides for the implied covenants, conditions and powers included/attached to mortgages over land and goods. (i.e implied covenant that the mortgagor will pay to the mortgagee the principal amount secured by the mortgage at the time and in the manner specified in the mortgage)
 - **Schedule 3** sets out (i) covenants, conditions and powers implied in all leases of land; (ii) covenant implied in all leases of land (except for short-term leases); and (iii) covenant implied in short-term leases.
 - **Schedule 4** provides for the covenants implied in certain instruments.
 - **Schedule 5** provides for the covenants implied in the grant of vehicular right of way which includes (i) the right to pass and re-pass the land over which the right of way is

³¹ *Property Law Act 2007* (New Zealand) ss 319 - 320.

³² *Property Law Act 2007* (New Zealand) subpt 2.

³³ *Property Law Act 2007* (New Zealand) s 324.

granted, (ii) the right to establish and maintain the driveway; and (iii) the right to have land restored after the completion of work

- **Schedule 6** sets out the provisions which apply to land not owned by the Crown and also not affected under the Land Transfer Act 1952.
- **Schedule 7** lists out all the Acts consequentially amended by the NZ PLA 2007.

5. Part D: CURRENT PROPERTY LAW ACT 1952 SAMOA AND ISSUES

- 5.1. The Chapters (1-7) under this Part are discussed in the following structure:
- a) General background
 - b) Recommendations from the Discussion Papers
 - c) Submissions
 - d) Commission's views
 - e) Recommendations
- 5.2. The submissions provided by the relevant stakeholders have helped inform the recommendations in the relevant chapters. In the absence of submissions, recommendations have been informed by the Commission's analysis of the Samoa PLA and NZ PLA 2007. For reasons discussed above, in the most parts, the corresponding provisions of the NZ PLA 2007 are recommended to be adopted in a proposed new Samoa PLA, consistent with the recommendations in the 4 Discussion Papers.

I. Chapter 1 Preliminary

General Background

Short title, long title and commencement

- 5.3. The preliminary provisions of the Samoa PLA contains the following:
- the short title, long title and commencement (section 1);
 - long title, interpretation section (section 2); and
 - the application to LTRA 2008 (section 3).
- 5.4. The short titles for property law legislation are the same in property legislation in countries like Fiji and NZ. The long titles are closely similar- enacted to consolidate and amend certain enactments relating to property.

Recommendations from the Discussion Paper

- 5.5. In Discussion Paper 1, the Commission suggested that the short title and the long title of the Samoa PLA are appropriate and should be retained. In regards to the commencement date, the Commission noted in Discussion Paper 1 that a proposed new Samoa PLA should either take effect upon assent, or on a nominated date. Also, there needs to be consideration of how much a proposed new Samoa PLA will apply to documents and transactions created and made before the commencement date.

Submissions

- 5.6. There were no submissions to this chapter.

Interpretation

General Background

- 5.7. Section 2 of Samoa PLA defines 18 terms which include bankruptcy, conveyance, Court, encumbrance, income, instrument, land and mortgage. The relevant provisions are recommended to be defined here.

Recommendations from the Discussion Paper

- 5.8. Discussion Paper 1 proposed that the definitions used in the NZ PLA 2007 be replicated in a proposed new Samoa PLA where appropriate. The full range of definitions should be determined after the provisions of the Samoa PLA have been fully assessed and reviewed. However, it was proposed that the following definitions in the NZ PLA 2007 do not apply to Samoa:
- Registrar General;
 - Territorial authority; and
 - References to various public holidays in the definition of ‘working day’.
- 5.9. Moreover, the following definitions in the NZ PLA will need further considerations
- Access lot
 - Registrar
 - Restrictive covenant
 - Working day
- 5.10. Discussion Paper 1 further suggested that other definitions of terms (about 21 terms) need to adopt the equivalent Samoan legislation, for example, account receivable, administrator, at risk, bankrupt, company, consumer goods, creditor, deed, goods, instrument, inventory, land under the *Land Transfer Act 1952 (NZ)*, land not under the *Land Transfer Act 1952 (NZ)*, official assignee, owner, public trust, purchase money security interest, registered, registrar, security interest, territorial authority, vehicular right of way.

Submissions

- 5.11. MNRE submitted that the terms already defined under the LTRA 2008, should apply in a proposed new Samoa PLA. For example, the terms ‘*deed*’ and ‘*instrument*’, with some guidance from the NZ PLA 2007 as well as considering the Samoan context within which these terms will be used and applied. In regards to ‘*access lot*’, MNRE expressed the view to assess the context in which these terms will be relevant to Samoa.
- 5.12. MCIL submitted that the 10 additional terms defined in the NZ PLA 2007 should be defined in a proposed new Samoa PLA. For example, ‘*account receivable*’, ‘*at risk*’, ‘*consumer goods*’, ‘*goods*’, ‘*inventory*’, ‘*security interest*’, ‘*purchase money security interest*’. Also, such terms are to be assessed to ensure that they are clear to meet the intention of a proposed new Samoa PLA. Also, to be consistent with the definitions in other related legislation. For example, the definitions of ‘*company*’ and ‘*creditor*’ should consider the *Personal Property Securities Act 2013 (Samoa)* and *Companies Act 2001 (Samoa)*.

Commission’s view

- 5.13. The short title and long title of the Samoa PLA should be retained in a proposed new Samoa PLA. This is also consistent with the Commission’s recommendation in Discussion paper 1.
- 5.14. In relation to the interpretation section, the relevant provisions or terms, determined upon finalisation of a proposed new Samoa PLA, are recommended to be defined here. In adopting the any definitions in the NZ PLA, the Commission is of the view that some of the definitions, which refers to the NZ laws, must consider the equivalent Samoan legislation.
- 5.15. MNRE submitted that some terms in the LTRA 2008 should be included in the definition sections of a proposed new Samoa PLA. For example, deed and instrument. The Commission

does not agree with this suggestion given that both terms are already defined in both the Samoa PLA and NZ PLA. Thus, there is no need to adopt the definition in the LTRA 2008.

- 5.16. MCIL submitted to use the definitions in the NZ PLA 2007 as guidance for Samoa in developing its interpretation section. It added that such terms, for example, company and creditor, should be consistent with the definitions in other related legislation such as the *Personal Property Securities Act 2013* and *Companies Act 2000*. The Commission agrees with MCIL's view.

RECOMMENDATION 1:

- (1) The short title and long title of the Samoa PLA should be retained, to be incorporated in a proposed new PLA for Samoa.
- (2) The relevant provisions or terms, determined upon finalisation of a proposed new Samoa PLA, should be defined in the interpretation section. The NZ PLA 2007 can be used as a guide when developing the Interpretation section.
- (3) Any proposed definitions should consider related definitions in other legislation in Samoa such as the *Personal Property Securities Act 2013* and the *Companies Act 2000*. It is not necessary to re-define 'deed' and 'instrument' as these terms are already defined in both the Samoa PLA and NZ PLA 2007.

Application to Land Titles Registration Act 2008 (LTRA)

General Background

- 5.17. To reiterate the relevant discussion in Part A above, it is clear that the relationship between these two Acts (Samoa PLA and LTRA) attempt to ensure there is no repetition of the law and the compatibility of one to the other. The Samoa PLA clearly sets out its provisions that have no application to the LTRA 2008. Again, it is worth emphasizing that in a proposed new Samoa PLA, the provisions of the LTRA 2008 do not apply to customary land.

Recommendations from the Discussion Paper

- 5.18. In Discussion Paper 1, it was proposed that some aspects of the application section in the NZ PLA (section 8) should apply to Samoa. There is reference to Maori customary land in the NZ PLA 2007, however, this has no direct relevance to Samoa. The reference to the NZ laws such as the *Land Transfer Act 1952* (now replaced by the *Land Transfer Act 2017*) should be omitted and replaced with the equivalent law of Samoa (LTRA 2008).

Submissions

- 5.19. MNRE submitted that to address the concerns associated with the belief that certain or some aspects of the Samoa PLA 1952 apply to customary land (e.g. its provisions relating to mortgage, etc), Samoa PLA should follow the relevant provisions of the NZ PLA 2007 which will then specifically provide that the Samoa PLA does not apply to Samoan customary land (*similar to NZ provisions regarding Maori customary land within the meaning of Te Ture Whenua Maori Act 1993*).

Commission's view

- 5.20. The Commission reiterates its view that the proposed new Samoa PLA should set out clearly in section 3 that its provisions do not apply to customary land. In relation to the issue of mortgage raised by MNRE, the Commission understands that there is an *Alienation of*

Customary Land Amendment Bill 2018 that, if passed by Parliament, would address mortgage provisions (new Part 3) on leases of customary land.

RECOMMENDATION 2:

- (1) The Samoa PLA clearly sets out its provisions that have no application to the LTRA 2008. Again, it is worth emphasizing that in a proposed new PLA for Samoa, it must make very clear that the provisions of the LTRA 2008 do not apply to customary land.
- (2) There is no need to have mortgage provisions in a proposed new Samoa PLA to address mortgages on lease/license of customary land. There is an *Alienation of Customary Land Amendment Bill 2018* that, if passed by Parliament, would address mortgage provisions on leases of customary land.

Other considerations:

General Background

- 5.21. There are other provisions under preliminary part in NZ PLA that are not found in Samoa PLA which merit consideration, such as:
- Meaning of certain references (section 5 NZ PLA);
 - Attorney or agent may act;
 - Act binds the crown.

Recommendations from the Discussion Paper

- 5.22. Discussion Paper 1 suggested that the provisions relating to ‘meaning of certain references’ under the NZ PLA 2007 seem relevant and appropriate to Samoa. However, reference to provisions of the *Land Transfers Act 1952* (NZ) should refer to the relevant provisions of the LTRA 2008 of Samoa. The provisions on ‘attorney or agent may act’ seem relevant and appropriate to Samoa. Similarly, the provision on ‘Act binds the Crown’, is appropriate to be stated in a proposed new Samoa PLA to apply to Government, though it is not necessary to be repeated as the *Act Interpretation Act 2015* of Samoa already states it.
- 5.23. Also, in relation to section 8A of NZ PLA (Act subject to application of *Cape Town Convention and Aircraft Protocol*), the Commission in its Discussion Paper 1 stated that Samoa is not a party to the *Cape Town Convention and Aircraft Protocol*, and therefore the provisions of this section should not be applied in the proposed new PLA Samoa.

Submissions

- 5.24. There were no submissions to this issue.

Commission’s view

- 5.25. The provisions on ‘meaning of certain references’ and ‘attorney or agent may act’ should be adopted in a proposed new Samoa PLA with the correct reference to LTRA 2008 of Samoa instead of the *Land Transfers Act of NZ*. The Commission is of the view that it is not necessary to state that the ‘Act binds the Crown’ as this is already provided in the *Acts Interpretation Act 2015* of Samoa. Also, the provisions that the Act is subject to the Cape Town Convention and Aircraft Protocol is not applicable to Samoa as Samoa is not a party to such Conventions.

RECOMMENDATION 3:

- (1) Where the terms ‘meaning of certain references’ and ‘attorney or agent may act’ are used in a new Samoa PLA, the relevant provisions of the NZ PLA 2007 may be adopted in a proposed new Samoa PLA.
- (2) It is not necessary to state that the ‘Act binds the Crown’ in a proposed new Samoa PLA, as this is already stated in the *Acts Interpretation Act of Samoa 2015*.

II. Chapter 2: General Rules Relating To Dispositions, Instruments, Transactions and Property

General Background

- 5.26. There are several rules which regulate how property is dealt with and they exist to ensure that the relevant transactions are valid and enforceable in the Court of law. For example, the rules around the execution of a deed in relation to the transfer of property, rules on powers of attorney, rules surrounding the sale of property, apportionment and abolition and modification of common law rules relating to property. Such rules are scattered throughout the Samoa PLA in 6 different Parts. Due to its origin, many sections on the different rules are expressed in ancient terminologies.³⁴
- 5.27. The NZLC review only made minor adjustments to the rules contained in the NZ PLA 1952.³⁵ According to the NZLC review, there was still a residue of situations in which the use of a formal document is required and it is necessary either to preserve the concept of a deed or instead, define the ingredients of an equivalent document. Also, the removal of the distinction between formal and informal documents could make serious, perhaps unintended, inroads into the law of contract.³⁶ The use of a deed was also seen as a protective measure: a lay person will usually resort to a lawyer for its preparation and will therefore have the opportunity of taking advice on the contemplated transaction.³⁷
- 5.28. Other notable adjustments made to the requirements for the creation and delivery of a deed include clarifying the law relating to delivery of deed and confirms that a witness to the signature of a deed must not be a party to the deed.³⁸ Also, the manner in which a body corporate may enter into a deed, they are now required to have and use common seals.
- 5.29. In addition, there are many rules that were contained in the NZ PLA 1952 which were amended based on the rule of common law. The NZLC review noted that unless the reader has knowledge of the underlying rule, it can be difficult to make sense of the amendments.
- 5.30. In the NZ PLA 2007, most of the rules have been updated and consolidated in Part 2, which comprise of 75 sections divided in 7 different subparts, as stated in Part C above. This was to ensure that such rules are more accessible and easier to understand.

Recommendations from the Discussion Paper

- 5.31. The Commission proposed in Discussion Paper 1 that the provisions under Part 2 of the NZ PLA 2007 be replicated in the Samoa PLA but references to the NZ legislation must be replaced with the equivalent Samoan laws. For example, references to the *Administration*

³⁴ New Zealand Law Commission, above note 9, 34.

³⁵ *Ibid*, at 45.

³⁶ New Zealand Law Commission, above note 9, 47.

³⁷ *Ibid*.

³⁸ New Zealand Law Commission, *A new Property Law Act*, Report No 29 (1994) 19.

Act 1969 and Companies Act 1993 of NZ. In addition, other provisions proposed in Discussion Paper 2 to be replicated in a proposed new Samoa PLA, include:

- Rules relating to deeds and other Instruments

To clarify that a deed must be in writing, executed and delivered in order for it to be binding on the parties involved. The execution of a deed either by an individual or a body corporate, must be witnessed by someone who is not a party to the deed. Also an attorney executing a deed must also be appointed by a deed.

- Powers of Attorney

The NZ PLA 2007 has simply laid out provisions on powers of attorney. For instance, when a power of attorney takes effect (section 19) and when that power is deemed revoked (section 20). There is also a provision in the NZ PLA 2007 on the imposition of a fine of \$5,000 on a person who knowingly gives a false certificate (certificate of non-revocation of the power of attorney) in the event that the power of attorney has in fact been revoked.

- Sales and other similar transactions

A significant development in the NZ PLA 2007 on the relationship between the purchaser and vendor in the sale and purchase of land, is the requirement that a vendor may only exercise the right to cancel an agreement for the sale and purchase of land only if a notice has been served on the purchaser informing him or her of the matters relating to the remedying of the breach.

- Apportionment

Part 2, Subpart 4 of the NZ PLA 2007 has substantial provisions on apportionment of periodical payments between vendors and purchasers.

- Assignment of things in action

Part 2 subpart 5 of the NZ PLA 2007 provides similar provisions on the assignment of things in action.

- 5.32. As proposed by the Commission in Discussion Paper 1, careful consideration should be given to provisions that provide specific timeframes of when it should take effect (whether before, on or after the commencement date of the Act). The Commission therefore proposed that the NZ PLA 2007 be used as a guide in respect of the retrospective application of the relevant provisions under this chapter.

Submissions

- 5.33. There are no substantial submissions to the issues above except for the submissions from MNRE to consider the term 'deed' referred to under the LTRA 2008. In section 46(3) of LTRA, the term 'deed' is referred to as 'including any instrument registered under LTRA'.

Commission's view

- 5.34. Earlier discussions have briefly discussed the background of the NZLC review on the general rules relating to deed, instruments and the modification of common law rules. The justifications used by the NZLC in its review is relevant to be considered in this chapter given the historical similarities in both Acts. In the absence of substantive submissions to this issue, the Commission is of the view that the provisions under Part 2 of the NZ PLA 2007 be fully adapted and adopted in a proposed new Samoa PLA. However, references to the NZ legislation must be replaced with the equivalent laws of Samoa.

- 5.35. As discussed above, the Commission agrees that the following provisions should be replicated in a proposed new Samoa PLA:
- Rules relating to deeds and other instruments
 - Powers of attorney
 - Sales and other similar transactions
 - Apportionment
 - Assignment of things in action
- 5.36. In addition, careful consideration should be given to provisions that may apply retrospectively in this chapter. Thus, the Commission considers that the NZ PLA 2007 is to be used as a guide in respect of the retrospective application of several rules in a proposed new Samoa PLA.

RECOMMENDATION 4:

- (1)** The provisions under Part 2 of the NZ PLA (General rules relating to dispositions, instruments, transaction and property) should be replicated in a proposed new Samoa PLA. However, references to NZ legislation such as the *Administration Act 1969* and the *Companies Act 1993* must be substituted with reference to the equivalent laws of Samoa.
- (2)** The provisions on general rules relating to property should be encapsulated under a single Part for clarity, similar to the structure in the NZ PLA 2007.
- (3)** The NZ PLA is to be used as a guide in respect of the retrospective application of several rules in a proposed new Samoa PLA.

III. Chapter 3 Mortgages

General Background

- 5.37. Similar to the NZ PLA 1952, the Samoa PLA lacks a coherent pattern in its treatment of mortgages.³⁹ The relevant sections need clarification and some amplification, particularly in relation to the rights and obligations of a mortgagee in possession.⁴⁰ The restrictions on a mortgagee's powers of sale and entry into possession and upon the use of acceleration clauses (the right to call up the principal in the event of default) require restatement in clear language. Any person reading such restriction provision for the first time is likely to struggle to ascertain quickly what it is that is prohibited before the expiry of a notice to the mortgagor.⁴¹
- 5.38. The Samoa PLA has 31 provisions on mortgages and it is divided into 6 parts or divisions, as stated in Part A of this Report. Part 3 of the NZ PLA 2007 stipulates the mortgage provisions and it is divided into 8 subparts, as stated in Part C of this Report.

Recommendations from the Discussion Paper

- 5.39. Discussion Paper 2 suggested that the following mortgage provisions in Part 3 of the NZ PLA 2007 should be replicated in a proposed new Samoa PLA where applicable.

a) General Provisions

³⁹ New Zealand Law Commission, above note 9, 34.

⁴⁰ Ibid.

⁴¹ New Zealand Law Commission, above note 9, 35.

5.40. The Commission proposed that each of the provisions will need to be carefully considered on whether it should apply retrospectively in a proposed new Samoa PLA. Furthermore, in a proposed general provision, exceptions in the NZ PLA should be considered for Samoa and the application of the relevant laws in Samoa, for example, the *Personal Property Securities Act 2013* on mortgages.

b) Form and effect of mortgages

5.41. The provisions are substantially similar in both Acts, with some provisions being modified and updated in the NZ PLA 2007. Accordingly, Discussion Paper 2 recommended to replicate the modified and updated provisions in a proposed new Samoa PLA. On the other hand, there are a few provisions which needs further consideration. For example, priority for further advances. Some of the provisions such as variation of mortgages and effect of mortgage variation instrument are contained in the LTRA 2008 of Samoa. There was a suggestion to transfer 'variation of mortgages' provisions from LTRA 2008 to the proposed new Samoa PLA. This will ensure that the LTRA 2008 focuses on registration of mortgages instruments.

5.42. Discussion Paper 2 suggested that section 79 (Mortgage over land to take effect as charge) of the NZ PLA 2007 should retrospectively apply in a proposed new Samoa PLA.

c) Covenants, conditions and powers implied

5.43. The provisions are currently contained in the Fourth Schedule of the Samoa PLA, as stated in section 78. Similar provisions are found in Sub part 3 of the NZ PLA 2007. Discussion Paper 2 suggested to revise the Fourth Schedule in the Samoa PLA to capture other important scenarios in which this provision may apply, such as power of sale, observance of other covenants, production of instruments of titles, mortgagor's liability for costs and buildings and improvements which must not be removed, dismantled, or structurally altered without consent. Discussion Paper 2 also proposed to refer to the equivalent law in Samoa in relation to the registration of mortgage i.e. LTRA, and to consider the retrospective application of the provisions of this Part.

d) Redemption of mortgages

5.44. The provisions are substantially similar in both Samoa PLA and NZ PLA 2007 with suggestions in Discussion Paper 2 to update the Samoan provisions following the NZ provisions. The following provisions in the NZ PLA 2007 were suggested to be replicated in a proposed new Samoa PLA:

- Amounts secured include interest for unexpired portion of term (s 98)
- Requirement to pay interest subject to credit contract legislation (s 100)
- Terms in instrument of no effect if less favourable (s 101)
- Instruments have no effect so far as they conflict with sections 102, 103, 104 or 105 (s 106)
- Court may order discharge of mortgages if periodical payments secured are otherwise provided for (s 115)
- Certificate operates as discharge of mortgage (s 116)

e) Restrictions on exercise of mortgagees' powers

5.45. The provisions are substantially similar in both the Samoa PLA and NZ PLA 2007. Discussion Paper 2 suggested to update the Samoa PLA to follow the provisions in the NZ

PLA, where applicable. The following are some of the provisions contained in the NZ PLA 2007 which merits consideration in a proposed new Samoa PLA:

- Notice not required before exercising certain powers under the mortgage debenture (s 125)
- Transitional provisions for notices given or served before commencement of Act (s 127)
- Notice must be given to current mortgagor of mortgaged goods of exercise of powers (s 128)
- Notices provisions (s 129 and s 130)
- Instruments have no effect so far as they conflict with sections 128, 129 and 30 (s 131)
- Notice of Intention to recover deficiency in relation to mortgages over goods (s 132)
- Instruments have no effect so far as they conflict with section 132 (s 133)
- Conditional sale of goods permitted before expiry of notice (s 134)
- Notice concerning goods not required in certain cases (s 135)
- Court may grant leave to exercise power of sale of goods or to claim deficiency (s 136)

f) Mortgagee in possession

5.46. The provisions in both the Samoa PLA and NZ PLA 2007 are substantially similar with suggestions in Discussion Paper 2 to replicate the provisions in the NZ PLA in the Samoa PLA. However, there are a number of provisions (s148- s 175)) in the NZ PLA, not found in the Samoa PLA, which merits consideration:

- Mortgagees in possession of accounts receivable
- Mortgagee in possession may manage land, goods or accounts receivable
- Mortgagee in possession may protect or repair mortgaged land or goods
- Mortgagee in possession of land viable for waste
- Application of income received by mortgagee in possession
- Preferential claims and transitional provisions
- Notices required (s 155- 157)
- Public notice (s 158- 159)
- Application of various provisions to mortgagees who entered into possession before commencement of Act (s 175)

g) Mortgagee power of sale

5.47. The provisions in both the Samoa PLA and NZ PLA 2007 are substantially similar with suggestions to replicate the provisions in the NZ PLA. There are a number of provisions in the NZ which was suggested to be applied in a proposed new Samoa PLA, such as:

- No defence of indemnity
- Mortgagee may adopt agreement for sale and purchase
- Application of proceeds of sale of mortgaged property
- Payment if surplus to the State if current mortgagor cannot be found
- Registrar may consent to correction of defect or error
- Withdrawal of land from sale
- Applications for sale of mortgaged land by Registrar made before commencement of Act (s 199)
- Application for assistance must be served on certain persons

h) Liability to Mortgagee

5.48. Both the Samoa PLA and NZ PLA 2007 have similar provisions. However, there were suggestions in Discussion Paper 2 to divide this part into sections following the NZ PLA example and replicate the relevant provisions in a proposed new Samoa PLA. For example:

- Person who accepts transfer, assignment, or transmission of land personally liable to mortgagee
- Liability of former mortgagor not extinguished
- Administrator or trustee liable only to extent of assets or estate or trust

Submissions

- 5.49. MNRE submitted that the Samoa PLA should not apply to mortgages on leases of customary lands. For example, sections 93 and 95 of the PLA which provides for rights of a mortgagee in possession to exploit minerals and timber when a mortgagee's power of sale has been exercised. This provision should have no application in the context of mortgages over customary land leases. Also, there should be no concept of mortgage by conveyance that can apply to mortgages of customary land leases (see section 76). MNRE submitted that such legal issues should be provided for under an amended LTRA 2008. In addition, MNRE referred to section 78 of the NZ PLA 2007 which provides that mortgages over personal property are subject to the *Personal Property Securities Act 1999 of NZ*.
- 5.50. MCIL submitted that section 78 of NZ PLA 2007 makes the 'mortgage over personal property' provisions subservient to provisions of the Personal Property Securities Act 1999 (NZ). Although Samoa has in place a *Personal Property Securities Act 2013 (Samoa)*, more in depth analysis of relevant laws relating to chattel securities need to be considered, particularly in regards to potential issues that may arise by replicating this provision in its current form in a proposed new Samoa PLA.
- 5.51. MCIL also submitted that section 89 of the NZ PLA should be generally applied in a proposed new PLA for Samoa. However, the reference in section 89 (4) to the *Personal Property Securities Act 1999 (NZ)* needs to be considered in light of equivalent laws of Samoa relating to chattel securities, which is the *Personal Property Securities Act 2013 (Samoa)*.
- 5.52. MCIL further submitted that section 149 of the NZ PLA 2007 should be applied in the new PLA for Samoa, but section 149 (3), which refers to the *Personal Securities Act 1999 (NZ)*, needs consideration.
- 5.53. Sections 100 and 101 of the *Personal Securities Act 1999* of NZ refers to the priority of personal property security interests in crops. The relevant sections can be found in sections 26(3) and 26(4) of the *Personal Property Securities Act 2013 (Samoa)*. Therefore, it is appropriate to consider this provision in a proposed new Samoa PLA.
- 5.54. One of the lawyers during the hot spot session with the Samoa Law Society raised the issue on the impact of the Samoa PLA on customary land particularly when there are mortgage dealings involved. The Commission notes that the *Alienation of Customary Land Amendment Bill 2018*, if passed by Parliament, will allow for the **mortgage of leases/licenses** of customary land. However, it will not impact on customary land except only for leases and licenses of customary land registered under the LTRA (mortgage in such forms would take the form of an agreement between the lessee/licensee and the Bank).

Commission's view

- 5.55. A general analysis of both the Samoa PLA and NZ PLA 2007 finds that the general provisions (subpart 1) of the NZ PLA 2007 (application of certain sections to other provisions of the Act) are not found in the Samoa PLA. Thus, the Commission is of the view that the 'general provisions' in the NZ PLA 2007 should be replicated in a proposed new Samoa PLA to clarify the application of other relevant laws on mortgages.

- 5.56. The provisions under subpart 2 (form and effects of mortgages) of the NZ PLA 2007 are substantially similar to the relevant provisions in the Samoa PLA, with some provisions being updated for clarity purposes. The Commission proposes to replicate the updated provisions in the NZ PLA 2007 for clarity. However, there are a few provisions which needs further consideration such as priority for further advances.
- 5.57. There was a submission to carve out ‘variation of mortgages’ provisions from LTRA 2008 to be incorporated in a proposed new Samoa PLA. Such a suggestion lacks proper basis, as the mortgage provisions (including variation of mortgages) under the Samoa PLA already apply to mortgages registered under the LTRA. If there is any inconsistency between the mortgage provisions of the Samoa PLA and LTRA 2008, the provisions in the LTRA prevails. However, it may be more practical to have all the mortgage provisions contained in 1 legislation for ease of reference. The mortgage provisions in the Samoa PLA are extensive enough to cover such situations.
- 5.58. Sub part 3 (covenants, conditions, and powers implied in mortgages) of the NZ PLA is currently contained in the Fourth Schedule of the Samoa PLA. However, there are other important provisions in the PLA NZ 2007 which merit consideration. For example, power of sale, observance of other covenants and production of instruments of titles, as proposed in Discussion Paper 2. The Commission agrees that such provisions should be replicated in a proposed new Samoa PLA.
- 5.59. Sub part 4 (redemption of mortgages) of the NZ PLA 2007 is substantially similar to the provisions of the Samoa PLA with a few provisions absent in the Samoa PLA, such as the provision that states that the Court may order discharge of mortgage if periodical payments secured are otherwise provided for. As proposed in Discussion Paper 2, the Commission agrees that the relevant provisions in the NZ PLA should be replicated in a proposed new Samoa PLA.
- 5.60. Subpart 5 (restrictions on exercise of mortgagees’ powers) of the NZ PLA 2007 is also similar to those of the Samoa PLA with a few new provisions such as provisions requiring the mortgagee to give notice to mortgagor in certain situations. As proposed by Discussion Paper 2, the Commission agrees that the updated provisions in the NZ PLA 2007 should be replicated in a proposed new Samoa PLA. Provisions such as section 127 of the NZ PLA 2007 should be included in Samoa’s new PLA, as it provides for transitional provisions for notices given or served before commencement of the Act. This is in scenarios where the mortgagee is required to give notice to compel payment from the mortgagor when they default in payment of the principal sum at the expiry term of the mortgage.⁴²
- 5.61. Subpart 6 (mortgagees in possession) of the NZ PLA 2007 is substantially similar to Samoa with a number of provisions which have been updated in the NZ PLA, As proposed by Discussion Paper 2, the Commission agrees that such provisions (ss 148- 175 of NZ PLA) should be replicated in a proposed new Samoa PLA.
- 5.62. Subpart 7 (mortgagees’ power of sale) is also substantially similar to Samoa PLA with a few new provisions such as the application of proceeds of sale of mortgaged property and withdrawal of land from sale. As proposed by Discussion Paper 2, the Commission agrees that the updated provisions in the PLA NZ 2007 should be replicated in a proposed new Samoa PLA.

⁴² *Property Law Act 2007* (New Zealand) s 127.

- 5.63. Sub part 8 (liability to mortgagee) is also similar to the relevant provisions of Samoa PLA. Discussion Paper 2 suggested to break down this part into sections similar to the NZ PLA 2007 and replicate the provisions accordingly. The Commission agrees with this proposal.
- 5.64. Furthermore, the Commission notes the submission from MNRE stating that the Samoa PLA should not apply to mortgages of leases of customary land particularly the mortgagee's power of sale (sections 93 and 95). The Commission notes that the *Alienation of Customary Land Amendment Bill 2018*, if passed by Parliament, will stipulate provisions on Mortgages of leases/licenses of customary land.
- 5.65. The Commission also notes MCIL's submissions on relevant laws relating to chattel securities such as the PPSA of Samoa. It stated that section 78 of the NZ PLA 2007 provides that its mortgage provisions are subservient to provisions of the *Personal Property Securities Act 1999* of NZ. The Commission is of the view that both the Samoa PLA and the PPSA of Samoa have provisions on mortgages over 'personal property' or 'movable property'. However, PPSA of Samoa is the overarching legislation on 'security interest' in personal or movable property. Therefore, it makes sense that any provisions on mortgages over personal property (including those in the Samoa PLA) should be subject to the provisions of the PPSA of Samoa given its specific focus on personal securities/chattels.

RECOMMENDATION 5:

(1) The following mortgage provisions in the NZ PLA 2007 should be replicated in a proposed new Samoa PLA:

- (a)** Subpart 1 General Provisions;
- (b)** Subpart 2 Form and Effects of Mortgages;
- (c)** Subpart 3 Covenants, conditions, and powers implied in mortgages – (this part is currently contained in the Fourth Schedule of the Samoa PLA 1952);
- (d)** Subpart 4 Redemption of Mortgages – (Also for this part section 99-103 of Samoa's PLA 1952, should also be carried forward to the proposed new Samoa PLA.);
- (e)** Subpart 5 Restrictions on exercise of Mortgagees' powers;
- (f)** Subpart 7 Mortgagees' Power of Sale;
- (g)** Subpart 8 Liability to Mortgagee.

(2) In relation to the retrospective application of certain mortgages provisions in a proposed new Samoa PLA, the NZ PLA 2007 should be used as a guide.

(3) A proposed new Samoa PLA should not apply to mortgages of leases/licenses of customary land, particularly the mortgagee's power of sale. The *Alienation of Customary Land Amendment Bill 2018*, if passed by Parliament, will stipulate provisions on Mortgages of leases/licenses of customary land.

(4) The relevant provisions on mortgages over 'personal property' in a proposed new Samoa PLA should be consistent with the PPSA 2013 of Samoa.

IV. Chapter 4: Leases of Land

General Background

- 5.66. Arguably, the most deficient area of the NZ PLA 1952 relates to the law of landlord and tenant. The layout of Part 8 of the NZ PLA 1952, since the insertion of sections dealing with dwelling house leases in 1975, is very disordered.⁴³

⁴³ New Zealand Law Commission, above note 9, 35.

- 5.67. One of the present difficulties identified in the NZLC review was that the definition of ‘lease’ appears not to include an oral lease (which at the time of the NZLC review can be created for a term of up to 3 years as a legal lease) or a statutory tenancy under section 105 of the NZ PLA 1952.⁴⁴ The NZLC noted in its review that perhaps it was better to have the term defined in a manner which encompasses all leases, stating any exception in particular sections. The NZLC in its review proposed that the exception for an oral lease be reduced to a lease of one year or less, including periodic tenancies. The NZ PLA 2007 now provides that a lease may be made orally or in writing (section 208) and the term statutory tenancy is defined (section 207) following the NZLC review.
- 5.68. The lease and tenancy provisions of the Samoa PLA are divided into 3 divisions, as stated in Part A of this Report. The NZ PLA 2007 provides for similar provisions in Part 4 and it is divided into 6 Subparts.

Recommendations from the Discussion Paper

- 5.69. Discussion paper 3 suggested that the following lease provisions in Part 4 of the NZ PLA 2007 should be replicated in a proposed new Samoa PLA:

a) General provisions

- 5.70. These provisions are extensive and cover a wide scope of instances that may arise in leases. For example, implied terms of leases, powers of lessor, reversion and its application, personal liability of an administrator and executor and assignment of leases and licenses. Transitional provisions such as section 206 of the NZ PLA 2007 also need to be adapted in a proposed new Samoa PLA as it provides for specific dates which certain provisions of this Part must take effect, whether it applies before, on or after the commencement date of the Act.⁴⁵

b) Relief Against Forfeiture

- 5.71. The provisions are more detailed which set out clearly the right to cancel a lease, the relief against cancellation of lease as well as the necessary steps and procedures, terms and conditions which allow or prohibit the exercise of such right. A proposed new Samoa PLA may also consider adopting the term “*cancellation of lease*” rather than ‘forfeiture of lease’ for clarity purposes.

c) Relief Against Refusal to Grant Renewal

- 5.72. The NZ PLA 2007 is more detailed compared to the Samoa PLA. It expressly states its application to situations where there is a *written* agreement between the parties that the lease will be renewed upon expiry of its term and also subject to fulfilment of certain conditions. There is merit in having a ‘written agreement’ to remove all doubts as to the intentions of the parties on renewal at the expiry of a lease. Discussion Paper 3 suggested to adopt the NZ PLA 2007 provisions.
- 5.73. Other matters covered and provided for in the NZ PLA 2007 that may be worth considering in a proposed new Samoa PLA include the following:

⁴⁴ Ibid.

⁴⁵ *Property Law Act 2007* (New Zealand) s 206.

a) Abolition of right to distrain

- 5.74. This is the right given to a lessor to sell property belonging to a lessee who has defaulted in payment of rent. As this rule is now abolished in NZ, it is a matter for further consideration in Samoa, whether it will abolish or retain this provision. Discussion Paper 3 proposed to consider the relevance of taking action to distrain for rent.
- 5.75. A member of the Samoa Law Society raised the issue during the hot spot session to consider retaining the 'right to distrain' rule in that it may still be relevant in Samoa's context. Another member of the Law Society expressed the view that perhaps the reason why NZ has abolished this rule is because of the strong movement advocating for and protecting the rights of individuals that are renting or leasing properties in NZ. Nevertheless, the NZ PLA is clear under section 265 that the right to distrain is abolished in NZ and this is echoed and supported expressly under section 362 of the *Samoa Act 1921* and section 16 of the *Alienation of Customary Land Act 1965*.

b) Short-term leases

- 5.76. There are no provisions on short-term leases in the Samoa PLA. Discussion Paper 3 proposed that Samoa consider incorporating provisions to provide for short-term leases and to allow such to be made orally or in writing.

c) Removal of fixtures:

- 5.77. Sets out in detail that a lessee may remove fixtures that the lessor affixed to premises, but subject to certain terms and conditions. For example, the lessee would have to be in lawful possession of the premises or removal may only be done during a reasonable time after the lessee ceases to be in lawful possession of the premises.

d) Unlawful eviction:

- 5.78. Sets out the rights of a lessee and responsibilities if a lessee is unlawfully evicted.

e) Subleasing:

- 5.79. The NZ PLA 2007 expressly provides for the requirement that a sublease must not be for a longer period than the superior lease, and in the event that a sublease expires after the term of a superior lease, then the sublease term is reduced to expire when the superior lease expires. Similar provisions in a proposed new Samoa PLA may assist in events where a lessee subleases premises to avoid the expiry of the superior lease, then leaving the sublessee hanging with uncertainty of process if the superior/principal lease expires first. This was also noted in the Commission's Discussion Paper 3 which suggested to adopt similar provisions in the NZ PLA 2007 to clarify the term of a sublease in the event a sublease is for a longer period than a principal lease.

f) Obligations of lessor and lessee in regards to insurance of property/premises leased

- 5.80. The NZ PLA 2007 sets out in detail the obligations and responsibilities of the lessor to meet costs of insuring a leased premises and any costs carried/covered by a lessee to restore any insured damages will be indemnified by the lessor. There is also explanation of instances where lessee's negligence affected an insurance of a premises and the rights of the lessor in such instance.

- 5.81. In addition, Discussion Paper 3 proposed to break down lease provisions in a proposed new Samoa PLA in the following order (similar to the NZ PLA 2007):
- Division 1 – Formalities of Leases
This part may be drafted to clearly identify requirements when creating a lease and the necessary steps that a person may follow in order to create and develop a clear and valid lease/license agreement.
 - Division 2 – Covenants, conditions and powers
Where possible, all covenants, conditions and powers will be set out and discussed under this Division. It includes expressed and implied terms that will apply to all (with some exceptions where appropriate) leases or licenses created in relation to any property.
 - Division 3 – Remedies and Relief
For any or all agreements, it is important to ensure that remedies and reliefs are in place for the protection of parties subjected to and prone to breach of agreement by other parties. Under this Division, it may set out what specific parties are entitled to under the Act if another party conducts themselves contrary to the terms of agreement agreed to.
 - Division 4 – Miscellaneous
This Division provides for any other lease/license related matter not already covered in the other Divisions above. These may include any rules that are in the current Samoa PLA that may require repeal or abolishment and which would continue in a proposed new Samoa PLA. For example, a provision that will clarify the continuance or abolishment of the rule of distraint for rent.
- 5.82. Under these proposed new Divisions, there may be subdivisions to provide for specific matters that need to be addressed specifically. i.e: Division 2 may be divided into Subdivisions – (i) Transactions concerning reversions and (ii) Transfer and Assignment of Lease etc to be added on as necessary).

Submissions

- 5.83. During the hot-spot session with the members of the Samoa Law Society, the Commission noted some suggestions for a better and more effective Samoa PLA. There were views expressed on the need to clarify procedures and systems of registering leases in a proposed new Samoa PLA. These views were based on the concerns that the current process has posed more difficulties for persons seeking to register leases/licenses, where there has been uncertainty as to the proper process to follow, what documents are needed and the relevant Office/Ministry to go for these registrations. It was further expressed that there will be no use of having in place systems and structures, if the users do not understand proper process of using these systems.

Commission's views

- 5.84. A general analysis of both the Samoa PLA and NZ PLA 2007 finds that whilst the general provisions under Leases (Part 8) of the Samoa PLA are scattered in different subparts, the NZ provisions are more organised and wide in scope.
- 5.85. Discussion Paper 3 proposed that the lease provisions in Part 4 of the NZ PLA 2007 should be replicated in a proposed new Samoa PLA. These include the general provisions which is not found in the current Samoa PLA, detailed relief against forfeiture provisions, relief

against refusal to grant renewal, abolition of right to restrain, short term leases, sub leasing and many other provisions discussed above. There is also suggestion to break down the lease provisions in the proposed new Samoa PLA into 4 divisions as discussed above, for clarity.

- 5.86. The Commission is of the view that replicating more informative and updated lease provisions of the NZ PLA 2007 in a proposed new Samoa PLA would provide certainty and clarity on procedures and systems on leases.
- 5.87. The right to restrain has been abolished in NZ under the NZ PLA 2007. This is still law in Samoa as provided in section 107 (b) of the Samoa PLA, which provides that the lessor, his or her executors, administrators, may levy by distress any rent that is in arrears. Distrain or distress is 'the seizure of someone's property in order to obtain payment of rent or other money owed'.⁴⁶
- 5.88. Other legislation in Samoa provides that it shall not be lawful for any person to distrain rent. For example, section 362 of the *Samoa Act 1921* provides that: 'Despite anything to the contrary in any Act or in any rule of law or in any lease, it shall not be lawful for any person to distrain for rent.
- 5.89. Section 16 of the *Alienation of Customary Land Act 1965* also provides that 'no lease or license granted under the Act shall contain a power to distrain for rent, and it shall not be lawful for any person to distrain for rent thereunder.
- 5.90. In light of the above discussions and in the absence of submissions to this issue, the Commission is of the view that the law on distrain of rent should be abolished. This is supported by section 362 of the *Samoa Act 1921* and section 16 of the *Alienation of Customary Land Act 1965*.

RECOMMENDATION 6:

- (1) Part 4 of the NZ PLA 2007 on Leases should be replicated in a proposed new Samoa PLA, where applicable. The breakdown of provisions, as proposed in Discussion Paper 3, should follow the outline in the NZ PLA.
- (2) Distrain of rent should be abolished. This is supported by section 362 the *Samoa Act 1921* and section 16 of the *Alienation of Customary Land Act 1965*.

V. Chapter 5: Covenants, Easements, Profits, And Access Lots

General Background

- 5.91. In the NZLC review, it noted that Part 5 of the NZ PLA 2007 contains sections which are, in very large measure, a re-write of the NZ PLA 1952.⁴⁷ There are relatively few changes in substance but the sections have been re-written in more modern style and are placed in what is thought to be a logical order, as currently provided in the NZ PLA 2007.⁴⁸

⁴⁶ New Zealand Law Commission, above note 38, 175.

⁴⁷ New Zealand Law Commission, above note 9.

⁴⁸ *Ibid*.

Recommendations from the Discussion Paper

5.92. Discussion Paper 4 suggested that Part 5 of the NZ PLA on covenants, easements, profits, and access lots, should be replicated in the Samoa PLA where applicable. For example:

a) Covenants: nature and effect

5.93. A substantial addition in the NZ PLA 2007 is the insertion of a provision confirming that a covenant is deemed void if its principal purpose is to prevent the land being used for housing for people with disabilities, special needs or low incomes (s.277A). This provision was inserted in 2010 by the NZ's *Affordable Housing: Enabling Territorial Authorities Act Repeal Act 2010*. Reference to the NZ Housing Corporation under s.277A may be adapted to refer to the corresponding Housing Corporation in Samoa. As raised in the Discussion Paper, the Commission also needs to consider provisions which provide certain specific dates of when they take effect, such as section 281 and 282 of the NZ PLA 2007 which applies to an instrument or lease coming into operation after the commencement date of the NZ PLA 2007.⁴⁹

b) Covenants implied in certain instruments

5.94. Subpart 2 of the NZ PLA 2007 substantially addresses matters which are currently under Part 6 of the Samoa PLA. For instance, for implied covenants in conveyance by way of sale captured under section 72 of the Samoa PLA, the NZ PLA 2007 now makes reference to the same implied covenants but are now listed in the form of a Schedule (s.284). Samoa may consider whether to retain such provisions in its present form or list them in the form of a Schedule, as in the NZ PLA 2007.

c) Easements, profits and access lots

5.95. These are new provisions under Subpart 3 of the NZ PLA 2007. For example, defining easement to include *profit a prendre* (s.292), provisions clarifying the benefits which arise from the grant of an easement (s.293), provisions clarifying the burdens which arise from the grant of an easement for a fixed term (s.294), provisions clarifying the effect of a division of the land over which an easement is granted or where an easement terminates for part only of the land over which it was granted (s.295) and provisions confirming that easements can no longer be acquired by continuous use or enjoyment of the land for any period (s.296). Section 296(4) of the NZ PLA 2007 provides that despite the *Limitation Act 2010* a claim may be made at any time, and relief may be granted in respect of a claim made at any time, for the possession of land free of an easement, if the purported easement was used in circumstances amounting to trespass.

5.96. Also, the recognition and enforcement of easements relating to air and light in NZ are based on historical law reform in NZ which does not have any application in Samoa. Thus it was proposed to restate the grant of right of light or air in the current sections 123-127 of the Samoa PLA and consider simplifying these provisions for clarity.

d) Covenants: operation

5.97. These additional provisions states:- covenant which applies to the land and is binding upon all subsequent owners of the land (s.303), provisions clarifying the extent to which, and the circumstances in which, a covenant is binding upon an administrator of a person's estate bound by the covenant (s.304), provisions clarifying the ranking of covenants as against

⁴⁹ *Property Law Act 2007* (New Zealand) ss 281- 282.

unregistered interests in the land (s.305), provisions clarifying the limitation of s. 303 (s.306), and provisions providing for the registration of restrictive and positive easements s.307).

e) Easements, covenants and access lots: enforcement, modification and extinguishment

- 5.98. The new provisions in the NZ PLA 2007 proposed to be replicated in the Samoa PLA include:
- the service of notice on a person bound by a covenant to notify such person of work required to be done and for such person to comply with the covenants itself;
 - clarifying the nature and content of a notice served to the person bound by the covenant;
 - allowing the person who has been served with a notice to respond by way of cross-notice;
 - the power of the court to enforce, modify or extinguish easements and covenants; and
 - registration of orders made by the Court in relation to easements and covenants.

Submissions

- 5.99. MNRE submitted that it would be interested to find out the Commissions' definition given to the term 'profit a prendre' whether it will have any effect on the registered titles under the LTRA 2008.
- 5.100. A member of the Samoa Law Society during the hot spot session expressed the view that the law is clear in that caveats and easements do not apply to customary lands. However some lawyers are still pushing for such applications (i.e. application to Court for caveats and easements on Customary Land) which are a waste of Court's time.

Commission's view

- 5.101. The provisions on covenants, easement, profits and access lots in the Samoa PLA are scattered throughout the Act, particularly under the following Parts 5, 6 and 9, as stated in Part A of this Report. In contrast, the NZ PLA 2007 has captured all provisions relating to covenants, easement, profits and access lots under a single Part (Part 5) which comprises of 45 sections under 5 different Subparts, as provided in Part C of this Report.
- 5.102. In addition to the above provisions, covenants implied in mortgages and leases are addressed under their relevant Parts 7 and 8 of the Samoa PLA (Mortgages and Leases). Similarly, NZ PLA 2008 has done the same by addressing covenants implied in mortgages and leases under their relevant Parts 3 and 4 on mortgages and leases.
- 5.103. Discussion Paper 4 suggested that the relevant provisions in the NZ PLA 2007 be replicated in a proposed new Samoa PLA. Specific provisions highlighted in the Discussion Paper include covenants (nature and effect), covenants implied in certain instruments, easements, profits and access lots and covenants (operation).
- 5.104. The reference to the NZ Housing Corporation under s277A may not be relevant to Samoa given that the current *Housing Corporation Act 2010* has no corresponding provision on covenants which is deemed void under section 277A of the NZ PLA 2007. The provisions relating to 'land' under the Housing Corporation 2010 of Samoa only relates to mortgage and recovery of monies owed to the Corporation through the sale of land or other property held as security. Thus, section 277A of the NZ PLA does not apply to Samoa.

- 5.105. The implied covenants in the NZ PLA 2007 are now listed in the form of a Schedule. Section 72 of the Samoa PLA addresses similar provisions. The issue of whether the new proposed Samoa PLA should retain such provisions in the current form is a matter of drafting preference and structure. Thus, there is no issue with the current form and the Commission suggests to retain it.
- 5.106. The provisions on easements, profits and access in the NZ PLA 2007 are applicable to Samoa given that they are a replication of the current Samoa PLA with minor update and modifications. There are also a number of new provisions under subpart 4 of the NZ PLA 2007 that merit consideration for Samoa such as those relating to defining easement to include *profit a prendre*, covenants and access lots. The Commission agrees that they should be replicated in a proposed new Samoa PLA.

RECOMMENDATION 7:

The provisions relating to covenants, easement, profits and access lots should be encapsulated in a single Part similar to the structure of the NZ PLA 2007. The reference to NZ Housing Corporation in s277A of the NZ PLA 2007 does not apply to Samoa. The implied covenants in its current form, as provided in section 72 of the Samoa PLA, should be retained.

VI. Chapter 6: Special Powers of the Court

General Background

- 5.107. The special powers of the Court are scattered in various provisions in the Samoa PLA which include Part 4, Part 7, Part 9, Part 13 and Part 16. The NZ PLA have all provisions relating to the special powers of the Court in Part 6 and it is divided into 6 subparts.
- 5.108. The NZ PLA 2007 has a specific Part (Part 6 – *Special Powers of Court*) divided into 6 subparts containing most (if not all) provisions on the powers and authorities of the courts to make decisions and issue orders on property cases. These subparts are divided as follows:
- Subpart 1 – Entry onto neighbouring land
 - Subpart 2 – Wrongly placed structures
 - Subpart 3 – Landlocked land
 - Subpart 4 – Trees and unauthorised improvements on neighbouring land
 - Subpart 5 – Division of property among co-owners
 - Subpart 6 – Setting aside of dispositions that prejudice creditors

Recommendations from the Discussion Paper

- 5.109. A general analysis of the Samoa PLA and NZ PLA 2007 shows that the two Acts give the relevant courts similar powers.
- 5.110. It was proposed that the current provisions of the Samoa PLA be revised and re-drafted to follow provisions of the NZ PLA 2007. Some provisions were proposed to be expanded to include more details on the necessary powers of the Court and how they may be applied for, imposed, as far as they are applicable to the context of Samoa. For example:

a) Entry onto neighboring land

5.111. The provisions on “entry onto neighboring land” in the Samoa PLA and the NZ PLA 2007 are substantially similar. Discussion Paper 4 suggested that the provisions in the Samoa PLA be further expanded and clarified. For example, permit granted under these provisions should be clarified that “such a permit authorising entry onto neighbouring land will not apply to customary land”. Such a provision acknowledges the Samoan cultural values that must not be compromised in the introduction and implementation of proposed new Samoa PLA. This also further confirms the absence of any connection of the Samoa PLA to the customary lands of Samoa. In addition, it was suggested that the revised provisions clarify that the authorisation to enter onto neighbouring land, should not be an absolute access, rather to also protect the owner of the neighbouring land by incorporating a condition, that such permit may be subject to consent of that owner, or as the Court may see fit.

b) Wrongly placed structure

5.112. The provisions are substantially similar in the two Acts. Discussion Paper 4 suggested to include an interpretation clause under this part, to clarify and define relevant terms used in the NZ PLA 2007.

5.113. In addition, it was proposed to clarify the following in a proposed new Samoa PLA:

i) Who can seek/apply for relief in relation to wrongly placed structures?

In the current Samoa PLA, it is only the owners (encroachment owners) of the land affected by wrongly placed structures/encroachment who can apply (section 129). It was proposed that perhaps Samoa may consider extending this, to include other people who may have specific interest in the land affected (i.e occupiers/lessors that are not the owners of the affected land), as stated in section 322 of the NZ PLA 2007.

ii) Matters for the Court to consider:

The provisions of the NZ PLA 2007 setting out the different matters that the Court considers in deciding on ‘wrongly-placed-structures-cases’.

iii) Kind and nature of orders to be made

The provisions in a proposed new Samoa PLA should set out the kind/nature of orders that the Court may issue in cases of wrongly placed structures/encroachments.

c) Landlocked land

5.114. Similar to provisions on wrongly placed structures, it was proposed that a subpart on the powers of Court in relation to landlocked lands in the NZ PLA 2007, be replicated in a proposed new Samoa PLA. Matters proposed include an interpretation clause to clarify the relevant terms and to clarify how an application for this relief can be made (by owners/occupiers). Also, it was suggested that a proposed new Samoa PLA clarifies:

- the power of the Court to grant such orders/relief;
- the factors it takes into account in making its decisions;
- the Court’s power to impose conditions for such orders issued; and
- that an applicant must meet the consequential costs to enable access to landlocked land.

d) Trees and unauthorised improvements on neighbouring land

5.115. The provisions under this subpart of the NZ PLA 2007 were proposed to be replicated in a proposed new Samoa PLA, giving the Court the power to order the owners/occupiers of

lands on which a structure or tree is planted to alter/remove a structure or trim trees that may be interfering with the applicant's land. These provisions are similar to those on encroachments (section 129) in the current Samoa PLA, but it was suggested that the power of the Court be extended in this situation, as provided in the NZ PLA 2007. Furthermore, it was proposed to set out in these situations who can apply for this relief, what the court may consider in making an order and the power of the Court to impose conditions and set timeframes for work to be completed. Interesting to note is that another old law transplanted in Samoa from New Zealand is the *General Laws (No.2) Ordinance 1932*. This law also makes some provisions on the powers of the court to make orders on 'encroachment upon land' and 'overhanging coconut trees'. Given the out datedness of this Ordinance (*General Laws (No.2) Ordinance 1932*), it has been recommended (and endorsed by the Office of the Attorney General) in the Commission's Fabric of Laws Review that this law be removed from the laws of Samoa.

e) Division of property among co-owners

5.116. In Discussion Paper 2, it was proposed that a new Samoa PLA should clarify the extent in which the power of the Court can make orders to divide co-owned property as well as the effect of these orders made. It should also provide clearly who can make an application for division of property, and matters that the Court will take into account in making these orders.

f) Setting aside of dispositions that prejudice creditors

5.117. Discussion Paper 4 suggested that these provisions be applied in a proposed new Samoa PLA. For example:

- the purpose of these provisions – to provide for the relief of creditors in dealings that prejudice their rights over the property;
- interpretation/definitions of relevant terms used and referred to under this part;
- the application of these provisions -
 - only to dispositions of property made after the commencement of these provisions;
 - who can apply for order to set aside a disposition,
- to whom a property vests in/compensation is paid to where an order under this part is made;
- that apart from an application, the Court has the power to set aside dispositions that prejudice the rights of applicants.

5.118. Further to the protection of creditors prejudiced, it is also recommended that provisions be included to provide for protection of bona fide purchasers of property who had no knowledge of any prejudice to the creditor's interest.

Submissions

5.119. There were no submissions to this issue.

Commission's view

- 5.120. A number of provisions in the current NZ PLA 2007 re-enacts the substance of the NZ PLA 1952 but contains considerably more detail.⁵⁰ Thus, it is recommended that the relevant provisions of the Samoa PLA be updated to follow similar provisions in the NZ PLA 2007. The provisions include the entry onto neighbouring land, which the Commission agrees should not affect customary land. This should be clarified in a proposed new Samoa PLA.
- 5.121. The Commission also agrees that provisions on 'relief sought in relation to wrongly placed structures' should be extended to include other people who may have specific interest in the land affected, following section 322 of the NZ PLA 2007. The NZLC Report notes that this part confers a discretionary jurisdiction upon the court to make orders for restitutionary relief when the expectations of an applicant in relation to the sitting of a structure have been defeated in whole or in part and the land owner has been unjustifiably enriched. Such provisions should be included in a proposed new Samoa PLA.
- 5.122. In relation to landlocked land, the Commission agrees that the updated provisions on the power of the court relating to landlocked land in the NZ PLA 2007, be replicated in a proposed new Samoa PLA. It is important to note that the new section in the NZ PLA 2007 is not restricted to a situation in which the applicant's land is residential in character. However, the new section applies to all land although orders cannot be made for preservation of a view unless the applicant's land is or can be used for residential purposes.⁵¹
- 5.123. The provisions on encroachment in the Samoa PLA are similar to the provisions on 'Trees and unauthorised improvements on neighbouring land' in the NZ PLA 2007. The NZ provisions gives power to the court to order removal or trimming of trees, or removal or alteration of structures injuriously affecting a neighbour's land. The Commission agrees that such provisions should be replicated in a proposed new Samoa PLA.

RECOMMENDATION 8:

- (1)** The relevant provisions on the 'Special powers of the Courts' should be replicated in a proposed new Samoa PLA, where applicable.
- (2)** To clarify in a proposed new Samoa PLA that the provisions such as 'entry onto neighbouring land' should not affect customary land in Samoa.
- (3)** The provisions on 'relief sought in relation to wrongly placed structures' should be extended to include other people who may have a specific interest in the land affected, as stated in section 322 of the NZ PLA 2007.
- (4)** The provisions on landlocked land in the NZ PLA should be replicated in a proposed new Samoa PLA, where applicable.
- (5)** The relevant provisions on encroachment in the NZ PLA 2007 (Trees and unauthorised improvements on neighbouring land) should be replicated in a proposed new Samoa PLA, where applicable.

⁵⁰ New Zealand Law Commission, above note 38.

⁵¹ *Ibid*, at 35.

VII. Chapter 7: Miscellaneous Provisions

General Background

- 5.124. Part 18 of the Samoa PLA discusses the miscellaneous matters. It has 3 sections discussing the following:
- restriction on validation of instruments (section 153);
 - protection of solicitors and trustees acting under the Act (section 154);
 - repeals and savings provision (section 155); and
 - Schedules (First Schedule-Seventh Schedule).
- 5.125. The NZ PLA 2007 discusses miscellaneous matters under Part 7 which contain the following:
- service of notices and other documents (section 352-361);
 - jurisdiction of District Courts (section 362);
 - Regulations (section 363);
 - Consequential amendments (section 364);
 - Repeals, savings and transitional provisions (section 365-371);
 - Schedules (Schedules 1-7).

Recommendations from the Discussion Paper

- 5.126. Discussion Paper 4 suggested that the miscellaneous provisions in Part 7 of the NZ PLA 2007 be replicated in a proposed new Samoa PLA where applicable. Some examples worth highlighting are as follows:

a) Service of notices and other documents

- 5.127. The NZ PLA 2007 has expanded its provisions on the service of notices required or authorized under the Act (sections 352-361). It clarifies how service of specific documents referred to in the Act are to be effected. For example a comprehensive list of people to whom notices are to be served is provided for under section 355. The manner and means in which notices are to be served are now more specific in sections 353, 354 and 359 of the NZ PLA 2007. There is also a provision on how served documents are deemed to be received.

b) Jurisdictions of the Court

- 5.128. The NZ PLA 2007 has a standalone provision on the Jurisdiction of the District Court to hear and determine certain matters as listed in section 362.⁵² There is no corresponding provision in the Samoa PLA. However, the current Samoa PLA vests jurisdiction in the District Court in relation to the following matters:
- Authorising entry to land for erecting or repairing buildings (section 128);
 - Granting special relief in cases of encroachment if the value of land is within the District Court's jurisdiction (which is not likely) (section 129);
 - Ordering the division of jointly held chattels with a value of up to \$10,000 (section 143(2)); and
 - Making orders relating to the service of documents if the property involved has a value of up to \$10,000 (section 152(6)).

⁵² *Property Law Act 2007* (New Zealand) s 362 provides that the District Court has jurisdiction to hear and determine the following matters or make the following orders: (a) a question or dispute concerning the existence or effect of an easement or a covenant; (b) an order modifying or extinguishing an easement or covenant; (c) an order authorising entry onto or over neighbouring land; (d) an order granting relief in respect of a wrongly placed structure situated on a single piece, or on 2 or more pieces of land; (e) an order for the removal or trimming of a tree or the removal or alteration of a structure; and (f) an order dispensing with, or directing the manner of service.

5.129. Discussion Paper 4 noted that the extent of the powers to be vested in the District Court of Samoa needs careful consideration and warrants consultations with the judiciary. Any proposed changes should be in line with the *District Courts Act 2016* of Samoa.

c) Regulations

5.130. The NZ PLA 2007 has a standalone regulation making provision (section 363). This provision empowers the Governor-General of New Zealand to make regulations to provide for matters necessary for the administration of the Act and also giving the Act full effect. Discussion Paper 4 suggested careful consideration needs to be given to the power to make Regulations under a proposed new Samoa PLA and to consider the types of matters that will be in the form of regulations. It was suggested to either provide in a proposed new Samoa PLA, the power for the Head of State to make regulations (acting on advice of Cabinet) or specify matters that are to be in the form of regulations.

d) Repeals, savings and transitional provisions

5.131. The NZ PLA 2007 has comprehensively listed out in Schedule 7 the enactments which are consequentially amended by the NZ PLA 2007 as well as providing for the repeal, savings and transitional provisions to effect the smooth operation of the new NZ PLA 2007. The scope of necessary consequential amendments, repeals, savings and transitional provisions also needs to be considered in a proposed Samoa PLA.

Submission's view

5.132. A member of the Samoa Law Society during consultations suggested to include a Regulation making provision in the new PLA Samoa which could set out matters necessary for the full administration of the Act.

Commission's view

5.133. The miscellaneous provisions usually contain other matters which do fall under the substantive provisions of any legislation. The NZ PLA 2007 include service of notices and other documents, jurisdiction of the District Courts, regulations, consequential amendments, repeals, savings and transitional provisions and Schedules.

5.134. In relation to the service of notices and documents, the Commission agrees that the relevant provisions in the NZ PLA 2007 should be replicated in a proposed new Samoa PLA. For example, a list of people to whom notices is provided, the manner and means in which notices are to be served and how served documents are deemed to be received.

5.135. Also, the Commission agrees that the jurisdiction of District Courts in the NZ PLA needs carefully consideration. Currently, the Samoa PLA only has provisions which vest jurisdiction in the District Court in relation to matters which include authorising entry to land for erecting or repairing buildings and granting special relief in cases of encroachment if the value of land is within the District Court's jurisdiction (which is unlikely). The Commission is of the view that perhaps further consultations with members of the judiciary is required to ensure that any proposed changes is in line with the *District Court Act 2016* of Samoa.

5.136. In addition, the Commission is of the view that the approaches suggested in relation to the regulation making provisions is a policy decision. What is important is that regulation making powers are specifically stipulated in a proposed new Samoa PLA.

RECOMMENDATION 9:

(1) The relevant provisions on service of notices and documents in the NZ PLA 2007 should be replicated in a proposed new Samoa PLA where applicable.

(2) Further consultations with the Judiciary on the jurisdiction of the District Court on matters to be included in a proposed new Samoa PLA is required to ensure any changes are in line with the current practice and the *District Court Act 2016* of Samoa. Perhaps this proposed consultation can happen in the development of a proposed new Property Law Bill of Samoa.

(3) Regulation making powers should be stipulated in a proposed new Samoa PLA.

VIII. Retrospective application

5.137. Although it appears preferable to make a new proposed Samoa PLA apply to all relevant documents and transactions regardless of when they were made or when they took effect, in reality this is not practical and may consequently result in breaching existing rights. For practicality purposes, transitional provisions will be necessary in some circumstances. The Commission considers that the approach by New Zealand may be used as a guide, however each proposed section in a proposed new PLA for Samoa will need to be carefully considered whether it should apply retrospectively.

6. PART E: CONCLUSION

In developing this Report, it is evident that there is a great need to update the 66-years-old Samoa PLA. Times have changed significantly and old provisions need to be updated.

A lot of procedures and processes have changed since the Samoa PLA was drafted in 1952. The Commission's recommendations in this Report propose that Samoa develops an entire new Samoa PLA updating the current provisions and adopting NZ's PLA as a model.

The Commission proposes that further targeted consultations on this review may be required with members of the Judiciary and the Samoa Law Society to ensure that any proposed PLA for Samoa is practical and meets the needs of Samoa. Such targeted consultations should occur in the development stage of a proposed Property Law Bill for Samoa.

LIST OF RECOMMENDATIONS

CHAPTER 1 - PRELIMINARY

RECOMMENDATION 1:

(1) The short title and long title of the Samoa PLA should be retained, to be incorporated in a proposed new PLA for Samoa.

(2) The relevant provisions or terms, determined upon finalisation of a proposed new Samoa PLA, should be defined in the interpretation section. The NZ PLA 2007 can be used as a guide when developing the Interpretation section.

(3) Any proposed definitions should consider related definitions in other legislation in Samoa such as the *Personal Property Securities Act 2013* and the *Companies Act 2000*. It is not necessary to re-define 'deed' and 'instrument' as these terms are already defined in both the Samoa PLA and NZ PLA 2007.

RECOMMENDATION 2:

(1) The Samoa PLA clearly sets out its provisions that have no application to the LTRA 2008. Again, it is worth emphasizing that in a proposed new PLA for Samoa, it must make very clear that the provisions of the LTRA 2008 do not apply to customary land.

(2) There is no need to have mortgage provisions in a proposed new Samoa PLA to address mortgages on lease/license of customary land. There is an *Alienation of Customary Land Amendment Bill 2018* that, if passed by Parliament, would address mortgage provisions on leases of customary land.

RECOMMENDATION 3:

(1) Where the terms 'meaning of certain references' and 'attorney or agent may act' are used in a new Samoa PLA, the relevant provisions of the NZ PLA 2007 may be adopted in a proposed new Samoa PLA.

(2) It is not necessary to state that the 'Act binds the Crown' in a proposed new Samoa PLA, as this is already stated in the *Acts Interpretation Act of Samoa 2015*.

CHAPTER 2- GENERAL RULES RELATING TO DISPOSITIONS, INSTRUMENTS, TRANSACTIONS AND PROPERTY

RECOMMENDATION 4:

(1) The provisions under Part 2 of the NZ PLA (General rules relating to dispositions, instruments, transaction and property) should be replicated in a proposed new Samoa PLA. However, references to NZ legislation such as the *Administration Act 1969* and the *Companies Act 1993* must be substituted with reference to the equivalent laws of Samoa.

(2) The provisions on general rules relating to property should be encapsulated under a single Part for clarity, similar to the structure in the NZ PLA 2007.

(3) The NZ PLA is to be used as a guide in respect of the retrospective application of several rules in a proposed new Samoa PLA.

CHAPTER 3- MORTGAGES

RECOMMENDATION 5:

(1) The following mortgage provisions in the NZ PLA 2007 should be replicated in a proposed new Samoa PLA:

- a)** Subpart 1 General Provisions;
- b)** Subpart 2 Form and Effects of Mortgages;
- c)** Subpart 3 Covenants, conditions, and powers implied in mortgages – (this part is currently contained in the Fourth Schedule of the Samoa PLA 1952);
- d)** Subpart 4 Redemption of Mortgages – (Also for this part section 99-103 of Samoa’s PLA 1952, should also be carried forward to the proposed new Samoa PLA.);
- e)** Subpart 5 Restrictions on exercise of Mortgagees’ powers;
- f)** Subpart 7 Mortgagees’ Power of Sale;
- g)** Subpart 8 Liability to Mortgagee.

(2) In relation to the retrospective application of certain mortgages provisions in a proposed new Samoa PLA, the NZ PLA 2007 should be used as a guide.

(3) A proposed new Samoa PLA should not apply to mortgages of leases/licenses of customary land, particularly the mortgagee’s power of sale. The *Alienation of Customary Land Amendment Bill 2018*, if passed by Parliament, will stipulate provisions on Mortgages of leases/licenses of customary land.

(4) The relevant provisions on mortgages over ‘personal property’ in a proposed new Samoa PLA should be consistent with the PPSA 2013 of Samoa.

CHAPTER 4- LEASES OF LAND

RECOMMENDATION 6:

(1) Part 4 of the NZ PLA 2007 on Leases should be replicated in a proposed new Samoa PLA, where applicable. The breakdown of provisions, as proposed in Discussion Paper 3, should follow the outline in the NZ PLA.

(3) Distraint of rent should be abolished. This is supported by section 362 the *Samoa Act 1921* and *section 16 of the Alienation of Customary Land*.

CHAPTER 5- COVENANTS, EASEMENT, PROFITS, AND ACCESS LOTS

RECOMMENDATION 7:

The provisions relating to covenants, easement, profits and access lots should be encapsulated in a single Part similar to the structure of the NZ PLA 2007. The reference to NZ Housing Corporation in s277A of the NZ PLA 2007 does not apply to Samoa. The implied covenants in its current form, as provided in section 72 of the Samoa PLA, should be retained.

CHAPTER 6- SPECIAL POWERS OF THE COURTS

RECOMMENDATION 8:

(1) The relevant provisions on the 'Special powers of the Courts' should be replicated in a proposed new Samoa PLA, where applicable.

(2) To clarify in a proposed new Samoa PLA that the provisions such as 'entry onto neighbouring land' should not affect customary land in Samoa.

(3) The provisions on 'relief sought in relation to wrongly placed structures' should be extended to include other people who may have a specific interest in the land affected, as stated in section 322 of the NZ PLA 2007.

(4) The provisions on landlocked land in the NZ PLA should be replicated in a proposed new Samoa PLA, where applicable.

(5) The relevant provisions on encroachment in the NZ PLA 2007 (Trees and unauthorised improvements on neighbouring land) should be replicated in a proposed new Samoa PLA, where applicable.

CHAPTER 7- MISCELLANEOUS PROVISIONS

RECOMMENDATION 9:

(1) The relevant provisions on service of notices and documents in the NZ PLA 2007 should be replicated in a proposed new Samoa PLA where applicable.

(2) Further consultations with the Judiciary on the jurisdiction of the District Court on matters to be included in a proposed new Samoa PLA is required to ensure any changes are in line with the current practice and the *District Court Act 2016* of Samoa. Perhaps this proposed consultation can happen in the development of a proposed new Property Law Bill of Samoa.

(3) Regulation making powers should be stipulated in a proposed new Samoa PLA.

