Royal Commission Of Inquiry  
into the Sinking of the Mv Princess Ashika  

His Majesty King George Tupou V  
The Royal Palace  
NUKU’ALOFA  

Your Majesty,  

We have the honour of submitting the Final Report of the Royal Commission of Inquiry into the sinking of the MV Princess Ashika under the Royal Commissions Act (Cap. 41) in relation to the sinking of MV Princess Ashika.  

Respectfully,  

Commissioner Warwick Andrew C.B.E., C.R.H.  
CHAIRMAN  
Commissioner Richard James  
NAVAL ARCHITECT  
Commissioner Michael Handfield  
MASTER MARINER  

Dated: 31st March 2010
Honourable Tu'ilaakepa
The Speaker
Legislative Assembly of Tonga
NUKU'ALOFA

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EXECUTIVE SUMMARY

Princess Ashika - Japan

The MV Princess Ashika was built in Japan in 1972 as the MV Olive Maru No.1. It was designed as a roll on roll off (RoRo) vehicular and passenger ferry for short sea services on the sheltered waters of the Inland Sea of Japan between Takamatsu and Tosa. It was built to carry 402 passengers with a crew of 15. From June 1983, the vessel serviced the Himeji to Fulsada, and the Marukume to Shimotsui routes with an increase in the number of passengers to a total of 490 and the crew reduced to 10.

Princess Ashika - Fiji

In 1984 the MV Olive Maru No.1 was sold to North West Shipping Lines of Suva and the name changed to the MV Princess Ashika. MV Princess Ashika was registered in Suva on the 5th November 1984 and given a Certificate of British Registry in Suva on 31st December 1984.

As early as March 1985, concerns were raised by the Principal Surveyor on the Fiji Marine Board about the seaworthiness and suitability due to the danger of flooding and the vessel loosing stability. The Fiji Marine Board was of the opinion that the MV Princess Ashika should be enclosed forward to prevent water coming in over the bow. It was also at this time that the Principal Surveyor required “that you seek the services of a fully qualified Naval Architect to examine your vessel, in relation to the sea and trading conditions under which you currently operate” and to “produce clear stability information according to IMO Regulations”.

It was clear that the Fiji Marine Board had serious reservations about a vessel such as MV Princess Ashika operating in Fijian waters with its open design and lack of adequate drainage in the cargo deck. The Fiji Marine Board further required the owners to “advise the Board as to the conversion of the vessel to ensure there can be no danger of the vessel losing stability, flooding of the car deck by heavy seas or trapping of fire fighting water.” The Board gave its opinion that “the vessel should be enclosed to prevent water coming over the bow, at the sides; through the sliding doors, and that there should be much larger (and non-return) clearing drains”. No conversion was ever made.

On 11th January 1988, North West Shipping and Agencies sold the MV Princess Ashika to Patterson Brothers Shipping Company Limited.

In the years leading up to the MV Princess Ashika’s eventual departure from Fiji, the condition of the vessel steadily deteriorated. The owners resisted fulfilling the requirements of the Fiji Marine Board surveyors in regard to repairs and maintenance. Some major repairs, required by the surveyors following the vessel’s dry docking at the end of 2008, were never carried out.
In August 2003, the MV Ovalau II, a vessel of similar design to MV Princess Ashika and also owned and operated by Patterson Brothers Shipping Company Limited, foundered off the Nanu-n-i-Ra Passage in Fiji. A Marine Court of Inquiry in the Fiji High Court in 2005 found a cause to be the poor condition of the vessel.

It was in November 2005 that we found the first mention of a door in the watertight bulkhead between the engine room and the aft void space (also known as the shaft tunnel). It is not known when this door was constructed, but it was not part of the original design. It affected the reserve buoyancy of MV Princess Ashika as it was designed, as was required by regulation, to have sufficient reserve buoyancy to be able to remain afloat with one watertight compartment of the hull open to the sea. Constructing a doorway in the bulkhead between the engine room and the aft void space meant that if one of these spaces was breached and flooded, the other would also be flooded. The vessel would then have inadequate reserve buoyancy to remain afloat. This would have major implications in the eventual foundering of MV Princess Ashika.

By the beginning of 2009, after a less than satisfactory dry docking, restrictions were placed on MV Princess Ashika with regard to the area in which it could operate; the speed at which it could travel; and the amount of cargo and the number of passengers it could carry. Survey Certificates were only issued for a maximum of one month. The vessel was clearly in a sad state of disrepair.

**Princess Ashika - Tonga**

In early June 2009, the sale of MV Princess Ashika to the Government of Tonga was completed. The vessel departed Suva for Nuku’alofa on 10th June 2009 with a mixed crew of Fijians and Tongans. Adverse weather on this passage resulted in deformation of the bow ramp, the collapse of the stern ramp, and the breaching in several places of the ship’s sides. The Fijian Master returned MV Princess Ashika to Suva for repairs. Once these were completed, MV Princess Ashika made a successful passage to Nuku’alofa in fair weather, arriving on 1st July 2009.

MV Princess Ashika commenced service in Tonga on 3rd July 2009, operated by the Shipping Corporation of Polynesia Limited, on the first of four complete voyages. On each of these voyages, for reasons fully described later in this Report, MV Princess Ashika was seriously overloaded with cargo. Occasionally, the permitted number of passengers was exceeded.

During every one of the first four voyages in Tonga the MV Princess Ashika’s sides were breached by the sea and required steel plates welded on to replace the highly corroded and holed plating. Despite the regular damage to the ship and the regular ingress of sea water onto the cargo deck with the resulting damage to cargo, it appears that this did not cause any concern with the operator’s management.
The fatal final voyage commenced and ended tragically on 5th August 2009. MV Princess Ashika departed Nuku'alofa at about 16:35 hrs with 96 passengers, 32 crew and 110 tonnes of cargo. As the vessel cleared the shelter of the land, water started to enter the cargo deck around the bow ramp and via holes in the deck of the crew mess room. The water continued to build up as the evening progressed due to the poor drainage in the cargo deck. The crew on watch made regular safety rounds of the vessel and reported to the officer on navigation watch. This is fully described later in the Report but suffice to say here, the accumulation of sea water on the cargo deck was not prevented by the crew, nor was any serious action taken to remove the water.

Long before 23:30 hrs the vessel was in serious peril, but it was only then that the officer on watch awoke the Master. At this time there was little or nothing the Master could do to save the vessel. If action had been commenced about 22:00 hrs to alert the passengers and crew to the danger of sinking, to issue lifejackets, and to prepare life rafts, it is most likely that all aboard could have survived, even if the sinking was inevitable by that time.

We found that MV Princess Ashika had no operating alarm bells or whistle. These are the prime means of alerting all aboard of danger. The public address system did work, but the Master’s announcement that everyone should go to muster stations was heard by few and not comprehended by any. These vital means of communication were lost to the Master. He managed to successfully transmit a MAYDAY message to say that Princess Ashika was sinking. This was received by Nuku’alofa Radio and the Maritime Radio in New Zealand and a search and rescue operation was commenced.

MV Princess Ashika had developed a list to port by about 22:00 hrs. This slowly increased during the next ninety minutes. Around 23:00 hrs, water was entering the engine room from the cargo deck and gradually items of machinery were being immersed making them unusable. About 23:45 hrs the water had reached the port main engine and this had to be stopped. Shortly afterwards the list to port increased rapidly with sea water starting to pour at an ever increasing rate over the port erection deck into the cargo hold and from there into the engine room, shaft tunnel and crew accommodation.

At 23:50 hrs the Princess Ashika capsized rapidly to port, trapping those in the passenger lounge and throwing anyone on deck into the sea. At this time the ship’s Emergency Position Indicating Radio Beacon (EPIRB) activated and the hydrostatic releases on most of the life rafts, released the life rafts from their racks.

**The reasons why the loss of lives attained such magnitude**

The high loss of life was due to a number of factors, but mainly the following. Firstly, the crew failed to appreciate the danger and take actions to prepare to abandon ship such as sending a PAN urgency message to summon assistance, issue lifejackets, and prepare life
rafts. Secondly, the design of the passenger lounge did not allow easy egress, trapping most inside. Thirdly, the rapid rate of the final capsize.

The Search and Rescue

The search and rescue operation was competently run by the Rescue Co-ordination Centre in New Zealand (RCCNZ), Nuku’alofa Radio, and the Tongan Police Force which were ably assisted by the Tonga Defence Services. Nuku’alofa Radio was able to contact the MV Pulupaki which was following MV Princess Ashika, but some two and a half hours astern, to request her assistance. A Tongan Defence Force patrol boat was underway for the disaster scene by 01:30 hrs 6th August. At 02:31 hrs on 6th August 2009, the MV Pulupaki reached the disaster scene and commenced rescuing survivors. By 04:50 hrs on 6th August 2009 all who survived the sinking had been rescued by the MV Pulupaki. The search and rescue operation was eventually terminated by the Commander of Police, at 12:00 hrs on 21st August 2009. The search for survivors had involved three aircraft and nine surface crafts.

Causes of the Disaster

There were many causes of the disaster. The tragedy is that they were all easily preventable and the deaths were completely senseless. It was scandalous that such a maritime disaster could ever have been allowed to occur. It was a result of systemic and individual failures.

Broadly put, the causes were:

- Purchasing the MV Princess Ashika, even though its design was totally unsuited for service in the open seas of Tonga.
- Purchasing the vessel, even though it was clearly in an unseaworthy and unsafe condition.
- Allowing the vessel to be sent to sea, even though its design was totally unsuited for service in the open seas of Tonga.
- Sending the vessel to sea, even though it was clearly in an unseaworthy and unsafe condition.

At the heart of the above causes was:

- The failure to have independent due diligence conducted prior to both the purchase of the vessel and its operation in Tonga.
- The failure of those in authority, when exercising their powers or performing their duties, to do so properly and adequately.

Design of the MV Princess Ashika

In 1972, the MV Princess Ashika was built in Japan for service in the Inland Sea of Japan as a short range, smooth water, passenger and vehicle carrier. Even if the vessel had been new, the design was totally unsuited for service in the open seas in Tonga, because of its “open”
construction. It had inadequate bow design, absence of freeing ports to allow drainage of water from the vessel and no enclosed cargo area.

The carrying capacity was so small that if fuel and water tanks were filled on the MV Princess Ashika, it would have been overloaded without any passengers or cargo. The MV Princess Ashika was significantly and dangerously overloaded on the 5th August 2009 by over 150 tonnes.

**Seaworthiness of MV Princess Ashika**

The evidence before the Commission as to the seaworthiness and condition of MV Princess Ashika from well before the time it arrived in Tonga on 1st July 2009, until it sank on 5th August 2009, is clear. The MV Princess Ashika was unquestionably unseaworthy and in an appalling condition. It should never have been allowed to sail in Tonga under any conditions. Any suggestion to the contrary, including by Mr. John Jonesse (the CEO of Shipping Corporation of Polynesia Limited until he was suspended by the Board of Shipping Corporation on 6th November 2009) and Mr. Paul David Karalus (the former Minister for Transport), to the effect that the vessel was in good condition or well maintained is not only patently absurd, but dishonest. The evidence as to the unseaworthiness and appalling state of the vessel is overwhelming and compelling. Mr. Sione Mafi Kavaliku, a Marine Officer in the employ of the Ministry of Transport, when asked by the Acting Director of Marine and Ports as to his opinion about the vessel aptly responded by advising that “any fool (could) tell how bad the ship was”. (T 1378 F)

We have had the benefit of viewing over 100 photographs taken of the vessel from when it first arrived in Tonga on 1st July 2009 until the day it tragically sank on 5th August 2009. We have also viewed a video of the MV Princess Ashika taken on 18th August 2009 resting on the sea bed. The photographs and video graphically reinforce and support the documentary and oral evidence as to the horrendous and frightening condition of the MV Princess Ashika. The vessel was demonstrably and unequivocally unseaworthy and unsafe. Even a person with no shipping experience could tell from the briefest inspection of the vessel that it was in appalling condition.

On 2nd and 3rd July 2009 a deficiencies list (Exhibits 17 and 19) was prepared by the three surveyors in the Marine Division of the Ministry of Transport and signed by Mr. Tu’ipulotu (the Acting Director of Marine and Ports). It contained a long list of deficiencies which were required to be rectified. Clearly, many needed to be rectified before the vessel could safely sail. Few, if any, of the deficiencies were properly rectified by the time the vessel sank on 5th August 2009.

The MV Princess Ashika was regularly inspected, for many years, by surveyors and officers of the Fiji Islands Maritime Safety Administration (FIMSA). The FIMSA files demonstrate that the vessel was in a terrible state of disrepair and had been deteriorating rapidly over a
number of years. We adopt, as an accurate opinion and assessment of MV Princes Ashika, the remarks made by a FIMSA surveyor involved in the annual survey of the vessel on 16th December 2008, where he said:

“The vessel is now 36 years old and the condition it is now in if it is allowed to trade will cause a Maritime Disaster and will be the cause of pollution. It is about time the vessel be condemned for good since its condition will continue to deteriorate further. The vessel is beyond repair and is no longer fit for sea services of any nature. We cannot ignore the fact that she is truly unseaworthy.” (Exhibit 44 page 1221) (Appendix 10)

The Circumstances Leading to the Purchase of the MV Princess Ashika

Shipping Corporation of Polynesia (SCP) is a company incorporated in the Kingdom of Tonga. The Company has been conducting shipping operations in Tonga for many years. The sole shareholder is the Government of Tonga.

SCP had operated the MV Olovaha for a number of years as its main inter-island ferry (cargo and passengers), principally between Tongatapu, Ha’apai, Vava’u and the Niuas. This is an essential service between the islands for the people and for the economy. Consequently, there was much concern for the deteriorating state of the MV Olovaha, not least due to its age but also exacerbated by the lack of maintenance. In particular, the MV Olovaha suffered from serious mechanical and electrical problems. It was known to be unsafe and unseaworthy by late 2008, even by the Prime Minister and other Cabinet Ministers.

Shipping Corporation of Polynesia had proposed that the MV Olovaha be replaced by a new vessel under Japan’s grant aid programme and originally this vessel (which would also be called MV Olovaha) was proposed to be delivered by 2009. Shipping Corporation of Polynesia was charged with the setting up of a team to commence the pre-design scoping for the new vessel as early as 2006. There were then delays in the design process and building of the new ship and it was not expected that it would be ready for service until late 2010. It was resolved that it was not financially viable or technically feasible to keep the MV Olovaha in operation until that time. It was estimated that the cost to do so was over TOP$800,000.

The Prime Minister, Dr. Sevele, was so concerned about the delays in the arrival of the vessel from Japan that he wrote, on 17th December 2008, a letter to the Ambassador of Japan expressing “extreme concern and disappointment.”

SCP was strongly encouraged to search for a short term vessel to fill the gap until the arrival of the new Japanese vessel.

On 17th March 2009, the Board of Shipping Corporation and Lord Dalgety QC considered, at a formal Board meeting, an option paper with costings. The meeting was Chaired by Hon.
‘Alisi Taumoepeau. Mr. Jonesse as Managing Director was present, as was Rev. Tevita Haukinima (as a Director) and Lord Dalgety QC (as Company Secretary). It was clear to all at the meeting that realistically there were only two options in relation to the MV Olovaha. That is, either maintaining the MV Olovaha in service or replacing the vessel without delay.

The Directors unanimously resolved to:

1. Recommend to His Majesty’s Government that the MV Olovaha be replaced without delay;
2. Authorise the Managing Director to explore funding opportunities and report back thereon to the Board; and
3. Authorise the Managing Director to sign (and deliver to the Minister of Finance) a letter finalised at the meeting.” (Appendix 75) (Exhibit 307)

On 16th April 2009, Cabinet decided, in a meeting Chaired by the Prime Minister, to approve a recommendation that the Minister for Transport (Mr. Karalus) “submit to Cabinet the plan for the replacement of the MV Olovaha”. There was no paper presented in relation to the Cabinet decision on 16th April 2009, although that was contrary to the normal practice.

Mr. Karalus persuaded the Minister for Finance (Hon. ‘Otenifi Afu’alo Matoto) to sign a Memorandum to Cabinet dated 20th April 2009 in relation to the purchase of the MV Princess Ashika. It recommended that the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika. The Memorandum stated that “while the vessel is older than the MV Olovaha it has been very well maintained”. This was untrue, as would have been apparent from even a very cursory inspection of the vessel.

On 21st April 2009 the Board of Directors of SCP and the Company Secretary considered a report of the Managing Director, Mr. John Owen Jonesse, relating to the replacement of the MV Olovaha. The report stated that the MV Princess Ashika had been identified and independently surveyed. It was false to report that it had been independently surveyed and no documents were provided to the Board to support this. Mr. Jonesse is said to have reported that the vessel was suitable for SCP purposes.

The Directors resolved unanimously, with the support of the Company Secretary:

(1) to recommend to His Majesty’s Government that they purchase the MV Princess Ashika.

(2) to remit to the Managing Director to negotiate with His Majesty’s Government (for submission to the Board for approval) terms for a time charter by service of the new vessel to Shipping Corporation of Polynesia, preferably in NYPE (New York Produce Exchange) format.
(3) to authorize the Managing Director to travel to Fiji as required to assist with survey, inspection and acquisition of the new vessel.” (Exhibit 507)

On 23rd April 2009, Cabinet, Chaired by the Prime Minister, considered the Memorandum to Cabinet from Mr. Karalus and the Hon. ‘Otenifi Afu’alo Matoto (Minister for Finance) in relation to the purchase of the MV Princess Ashika dated 20th April 2009.

The Cabinet resolved by Resolution No. 2:

“2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposit and other financial agreements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet”.

On 24th April 2009, the Minister for Finance had a meeting with the former Attorney General (who was also the Chairperson for SCP), the Secretary for Finance and Mr. Jonesse. The meeting was called by Mr. Karalus to discuss the Cabinet decision of the 23rd April 2009. Mr. Karalus indicated that all necessary documentation, particularly in relation to the seaworthiness of the vessel would be obtained.

On 6th May 2009, Mr. Karalus sent an urgently marked Savingram to the Solicitor General in relation to the draft contract for the purchase of the vessel. The Solicitor General responded by Savingram of 7th May 2009 expressing concerns that the Marine and Ports Division of the Ministry of Transport had not conducted the auditing of the vessel, and as the Government’s shipping experts, they should at least endorse the audit conducted by consultants.

By Savingram of 7th May 2009, Mr. Karalus advised the Minister for Finance and the Solicitor General that “we have carried out due diligence on the survey documents supplied from the Fiji Ministry...we are satisfied that the vessel meets our seaworthiness and mechanical requirements”. There was absolutely no basis to suggest that the vessel was seaworthy. There had been no due diligence conducted in relation to the vessel and no recent survey.

Notwithstanding the advice of the Solicitor General, Mr. Karalus proceeded to sign a cash unconditional contract for the purchase of the MV Princess Ashika, on behalf of the Government, from Patterson Brothers Shipping Company Limited. The contract was signed in Mr. Karalus’s office on 8th May 2009. He asked for Ms. Mone, the CEO and Secretary for Transport, to also sign it. He organised for it to be witnessed by Mr. Jonesse. The purchase price pursuant to the contract was FJD$600,000. It effectively provided, as signed, for the
entire purchase price, represented by a deposit of FJD$90,000 and the balance FJD$510,000 to be paid by 8th May 2009. The contract provided that the Government of the Kingdom of Tonga was required to pay the entire purchase price irrespective of the condition, merchantability and fitness for purpose of the vessel.

Mr. Karalus arranged for his Personal Assistant to fax the contract to Patterson Brothers in Fiji. This was done and the signed contract was faxed back to Mr. Karalus by Patterson Brothers on the 8th May 2009. The Minister for Transport arranged for the FJD$90,000 deposit to be paid that day by telegraphic transfer to Fiji by the Ministry of Finance.

Mr. George Patterson and Mr. Jonesse arranged to “alter” the contract of 8th May 2009 by noting the settlement date as 5th June 2009. Mr. Karalus arranged, after receiving a facsimile from Mr. Jonesse suggesting that he had sighted documents in relation to the vessel, for the Ministry of Finance to pay the balance purchase price on 5th June 2009. Mr. Jonesse was in Fiji at the time, as Mr. Karalus well knew.

Failure to conduct Due Diligence by Shipping Corporation of Polynesia Limited

It was always the intention for SCP to operate the temporary replacement vessel for the MV Olovaha. The sole shareholder in SCP was the Government. SCP had never conducted any independent due diligence in relation to the MV Princess Ashika, whether before the purchase, or after the purchase but before sinking on 5th August 2009.

The Company Secretary for SCP, Lord Dalgety QC, appreciated that he had been appointed the Company Secretary because of his knowledge of shipping law. He was aware that one of his key duties was to advise the Board of SCP so as to enable them to make rational and sensible decisions in the best interests of the company. He and the Board of SCP never considered that due diligence should be conducted in relation to the MV Princess Ashika and no advice was given by Lord Dalgety QC that it was required. The reason he gave for not so advising was that the Government was purchasing the vessel and not SCP. Lord Dalgety QC nevertheless rightly accepted:

- Before a prospective owner of a vessel, such as MV Princess Ashika, was going to purchase the vessel, proper due diligence needed to be conducted.
- He knew that the Government of Tonga was the proposed purchaser.
- The single shareholder of the SCP was the Government of Tonga.
- Proper due diligence would include an independent survey conducted by a person of appropriate qualifications and experience; an independent valuation and checking and verifying documents in relation to the vessel.
- The Ministry of Transport would not be independent for the purposes of conducting any survey.
- The failure to carry out independent due diligence prior to the purchase was a major contributing factor to the disaster.
• The MV Princess Ashika was clearly unseaworthy and unsafe prior to its purchase and continuously until it sank on 5th August 2009.
• The purchase price of FJD$600,000 (plus 15% tax) was a significant investment on behalf of the Government.
• There were serious question marks raised at SCP Board meetings about the reliability and seaworthiness of the MV Olovaha, which needed to be replaced.
• The main source of income of SCP was dependent upon the successful operation of a single ferry, which was temporarily intended to be the MV Princess Ashika.
• SCP was always intended to be the operator of the replacement vessel.
• He was aware that there were numerous offences if owners or operators failed to protect the safety of life at sea.
• He “overlooked” that the definition of “owner” under the Shipping Act effectively covered an “operator” such as SCP.
• SCP had an obligation to ensure that it did not send a ship to sea which was unseaworthy and, in his words, it would be “a stupid thing to do”. (T 6222 – 6227)

Lord Dalgety QC was of the opinion that if SCP were proposing to purchase the vessel, there were four fundamental things that he would have been interested in. They were:

• Is the vessel seaworthy?
• If the vessel suitable for use in Tonga waters?
• Is the vessel insurable?
• Can the vessel be used for 2 years without the necessity of having to slip it? (as it was needed for 2 years) (T 3166)

The four fundamental matters referred to by Lord Dalgety QC were matters which were applicable to SCP, not just the Government. SCP was proposing to operate the vessel and make a recommendation to its sole shareholder to purchase it. Lord Dalgety QC should have so advised the Board, but failed to do so. Lord Dalgety QC described the MV Princess Ashika as a “rust bucket”, from information he says that he became aware of after the sinking. If these four fundamental matters had been attended to, the disaster would have been avoided.

The Company Secretary rightly accepted, as did Board members of SCP, that the Board should not make a decision unless they had sufficient information before them to make an informed decision. Clearly, the Board of SCP did not have sufficient information to enable them to make a recommendation to His Majesty’s Government that the Government purchase the MV Princess Ashika. They also had insufficient information before them to determine that the vessel should be operated by SCP.

In fact, no independent due diligence was conducted on behalf of SCP even to the time of the sinking of the vessel on 5th August 2009.
Mr. Jonesse, the CEO and Managing Director of SCP, clearly misled the Board and Company Secretary of SCP as to the condition of the MV Princess Ashika, as he did others. His conduct and actions were deplorable. The members of the Board and Company Secretary of SCP well knew that the papers he regularly presented to the Board were “terse” and did not contain sufficient information to make an informed decision. The Board and Company Secretary should have insisted that independent due diligence be conducted to avoid, as occurred, being misled at the time that the recommendation was made on 21st April 2009 for the Government to purchase the vessel. Even without having independent due diligence being conducted, they should have been more vigilant. If they had, the vessel should never have been purchased or operated.

Failure to conduct Due Diligence by the Government

The Government of Tonga, as purchaser, clearly had a responsibility to conduct due diligence prior to the purchase. The Memorandum to Cabinet of 20th April 2009 in relation to the purchase of the MV Princess Ashika recommended that the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika. The agenda for the Cabinet meeting on the 23rd April 2009, also made reference to the recommendation that due diligence be completed.

The Cabinet decision however did not make any reference to the requirement that due diligence be completed. The Prime Minister nevertheless expected that due diligence had to be carried out before the vessel was purchased and that, in accordance with the Cabinet decision, “a report be later tabled in Cabinet”.

It was obvious that if independent due diligence had been conducted on behalf of the Government, which it should have, the vessel should never have been purchased or operated in Tonga. The Government well knew that the due diligence that should be conducted by the Government included an independent survey, independent valuation and the obtaining of important documents such as survey certificates and assessment of those documents.

Notwithstanding the clear Cabinet decision of 23rd April 2009 relating to the purchase of MV Princess Ashika that “a report be later tabled in Cabinet”; the Prime Minister’s clear understanding (for very good reason) that the MV Princess Ashika should not be purchased without due diligence being conducted; the fact that the Prime Minister was “always mindful of the need to maintain a safe and reliable ferry service”; the MV Olovaha being allowed to operate in an unseaworthy and unreliable condition; the requirement for the MV Princess Ashika to return to Fiji because it was damaged on the attempted voyage to Tonga in June 2009; concerns raised in Parliament about the vessel on 9th June 2009; good governance and common sense, no report was tabled in Cabinet in relation to any due diligence that had been conducted. There was never any follow up for such a report to be tabled. No proper due diligence was, of course, ever conducted in relation to the MV
Princess Ashika on behalf of the Government. These are both serious failings that should never have been allowed to occur.

Even if due diligence had been conducted and reported to Cabinet up to just prior to departure on the 5th August 2009, Cabinet could have taken steps to prevent the vessel from sailing and thus averted the tragedy. Although it would have meant that the Government had wasted FJD$600,000, needless lives would not have been lost.

There had been established, for good reason, a Government Procurement Committee.

The contract for the purchase of MV Princess Ashika entered into by Mr. Karalus and Ms. Mone on behalf of the Government was entered, contrary to the Government Procurement Instructions, which was produced by the Prime Minister during the course of his evidence. These instructions were well known, including by Mr. Karalus. Clause 19 of the Government Procurement Instructions appears under the heading “Contractual Agreement”. It provides:

“All form of contract or agreement including any for development projects shall be submitted to the Government Procurement Committee for review and endorsement before signing by all relevant parties” (Exhibit 428)

The evidence establishes that despite the cash unconditional contract being signed on 8th May 2009 and the FJD$90,000 deposit being paid on the same date, the members of the Government Procurement Committee only made their recommendations in respect of the purchase between the 20th and 29th May 2009. By the time the matter had been sent to the Government Procurement Committee, the Government had a clear legal obligation to pay the FJD$600,000 irrespective of any recommendations from the Government Procurement Committee and irrespective of the condition or value of the MV Princess Ashika. Most of the members took the view, understandably, that Cabinet had already resolved to purchase the MV Princess Ashika by the time the matter was sent to them for consideration.

**Mr. Karalus and the Marine and Ports Division of the Ministry of Transport**

Not one single person from the Marine and Ports Division of the Ministry of Transport saw the MV Princess Ashika prior to its arrival in Tonga on 1st July 2009. Shortly after its arrival on 1st July 2009, the Acting Director of Marine and Ports, Mr. Tu’ipulotu, and several surveyors from the Division inspected the MV Princess Ashika. They all realised that it was in a deplorable condition and was unseaworthy. They signed a lengthy deficiencies list on 3rd July 2009. Mr. Tu’ipulotu was of the view that not only was the vessel unseaworthy, but it was in such a condition that he would not have allowed members of his immediate family to travel on the vessel. Notwithstanding this, Mr. Tu’ipulotu signed a certificate, probably on 3rd July 2009, certifying that the vessel was seaworthy. This was inexcusable. The MV Princess Ashika sailed on 3rd July 2009 and on another four occasions. Steps should have been taken to stop the vessel from sailing on each of these voyages. Mr. Karalus, as Minister
for Transport, had authority under the Shipping Act to detain the vessel. He should have done so.

Captain William Johnson was the former Director of Marine and Ports. He officially retired from his position on 8\textsuperscript{th} June 2009. Neither he nor Mr. Tu’ipulotu recommended that any officials from the Marine and Ports Division inspect the vessel in Fiji. They should have.

It is apparent from the evidence that Mr. Karalus never sought any written report from any officials from the Marine and Ports Division concerning the suitability and seaworthiness of the MV Princess Ashika. He did not even seek any advice from the CEO and Secretary for Transport. That is not to say that they should not have sought to be proactive in ensuring that an unseaworthy vessel was not allowed to operate.

Mr. Karalus played a pivotal and personal role in relation to the purchase of the vessel, with Mr. Jonesse. Mr. Karalus personally prepared the Cabinet Memorandum dated 20\textsuperscript{th} April 2009 in respect of the purchase of the MV Princess Ashika; was a Member of Cabinet that considered and supported the purchase of the MV Princess Ashika at a Cabinet meeting on 23\textsuperscript{rd} April 2009; personally signed on 8\textsuperscript{th} May 2009 the cash unconditional contract for the purchase of the vessel; ensured the deposit of FJD$90,000 was paid on 8\textsuperscript{th} May 2009 by telegraphic transfer to Fiji; ensured the balance purchase price of FJD$510,000 was paid on 5\textsuperscript{th} June 2009 by telegraphic transfer to Fiji; had numerous conversations with Mr. Jonesse (the CEO of SCP) regarding the prospective and actual purchase of the vessel and personally retained in his office, documents in relation to the MV Princess Ashika.

The former Minister for Transport, who was an experienced businessman and been involved in the civil aviation industry for over 20 years, was fully aware that proper and thorough due diligence needed to be conducted prior to the purchase of the vessel. This included, as he acknowledged, an independent survey, independent valuation and the obtaining and inspection of documents (including survey documents) in relation to the MV Princess Ashika.

Regrettably, the evidence establishes that Mr. Karalus committed to purchasing the MV Princess Ashika and allowed it to operate in Tonga irrespective of the condition or suitability of the vessel. He made unsubstantiated and inaccurate statements to His Majesty, the Legislative Assembly, Cabinet, the Prime Minister, the Minister of Finance, the Solicitor General and the Media in relation to the vessel. He was aware that many of the positive statements and representations he made in relation to MV Princess Ashika were obviously false.

If Mr. Karalus had properly carried out his duties and responsibilities as the Minister of Transport, the MV Princess Ashika should never have been purchased. Having arrived in Tonga on 1\textsuperscript{st} July 2009, if Mr. Karalus had acted responsibly, the MV Princess Ashika should never have been allowed to sail. Mr. Karalus cannot avoid his duties and responsibilities as Minister by simply saying that Mr. Jonesse misled him or that he relied on others. If he had
properly carried out his duties, independent due diligence would have been conducted on behalf of the Government. It would thus have been patently obvious that any statements made by Mr. Jonesse to the Minister as to the favourable condition of the vessel or the maintenance of it, were false, just as were many of the statements Mr. Karalus made to others. Mr. Karalus well knew, irrespective of what Mr. Jonesse told him, at least by the time the vessel sank on 5\textsuperscript{th} August 2009, that the vessel was “no good”.

**Evidence leading to any criminal act contributing to the disaster.**

The Commission’s Term of Reference “(c)” states as follows:

> “The matters to be inquired into and reported upon by the Royal Commission include but are not limited to the following:

> (c) evidence leading to any criminal act contributing to the disaster.”

It is not for the Commission to specifically recommend that individual persons be charged. We note that some persons have already been charged by the authorities. It is up to those authorities if any other charges are to be laid.

The Commission is required to report upon the evidence leading to any criminal act contributing to the disaster. We have dealt with the law in relation to criminal acts which we consider may be relevant on all of the facts namely, manslaughter by negligence and certain offences under the *Shipping Act* (including section 144 of the Act relating to sending unseaworthy ships to sea). We have also set out various statutory provisions dealing with offences under the *Royal Commissions Act*.

Evidence that we consider may be relevant, which may lead to any criminal act contributing to the disaster is included in this Report. This includes evidence as to the whole acquisition and procurement of MV Princess Ashika; its seaworthiness or otherwise and its suitability or otherwise for operation in Tonga; the licensing, registration and surveying of the vessel and the manner in which it was allowed to operate; the involvement of Shipping Corporation of Polynesia, the Ministry of Transport, Cabinet and the Government of Tonga; the performance of the crew up until the fatal voyage on the 5\textsuperscript{th} August 2009; and of other persons involved therein throughout this tragic event. There is obviously evidence set out in the Report which relates to other terms of reference.

**Evidence leading to any civil responsibility for the disaster**

The Commission’s Term of Reference “(d)” states as follows:

> “The matters to be inquired into and reported upon by the Royal Commission include but are not limited to the following:

> (d) evidence leading to any civil responsibility for the disaster”.

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It is not necessary for the Commission to ultimately determine, pursuant to this term of reference, any civil liability or responsibility for the disaster. It is only required to consider the evidence leading to any civil responsibility leading to the disaster. The Courts, in the exercise of civil jurisdiction will ultimately need to determine civil liability. Having said that, it has been appropriate to consider briefly the law that may be relevant to the issue of possible civil responsibility, as this assists in inquiring into and reporting upon the evidence leading to any civil responsibility for the disaster.

We have briefly addressed the law in relation to breach of contract, negligence, breach of statutory duty and the tort of misfeasance in public office.

There is obviously evidence set out in the Report which relates to other terms of reference.

**Proposals to Promote Maritime Safety**

The Commission’s Term of Reference “(f)” states as follows:

“The matters to be inquired into and reported upon by the Royal Commission include but are not limited to the following:

(f) “Present proposals for any measures that would help to prevent the future occurrence of a similar disaster or may assist in future search, rescue, and recovery of disaster victims.”

The proposals for any measures that would help to prevent the future occurrence of a similar disaster are set out in the final chapter entitled “Proposals to Promote Maritime Safety”. Some of the proposals may be obvious. However, due to the extraordinary circumstances surrounding the sinking of the MV Princess Ashika we have nevertheless made the recommendations. Rather than summarising those proposals we think it more appropriate that the whole chapter be referred to.

Similarly, in relation to proposals to assist in future search and rescue and recovery of disaster victims, the proposals are contained in the final chapter of this Report.
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CHAPTER 1 - INTRODUCTION

1.1 On the night of the 5th August 2009, at approximately 11.50pm, the MV Princess Ashika (a passenger and cargo inter-island ferry) sank whilst en route from Nuku’alofa to Ha’apai at a position 20° 24′M 181° South and 174° 56′41.4′. This was approximately 11 nautical miles southwest of the island of Nomuka, Ha’apai group in the Kingdom of Tonga. The distress call “MAYDAY, MAYDAY” was received from the vessel at about 2350 hrs.

Tonga Police established that 128 passengers and crew were known to be on board when the vessel left Nuku’alofa at approximately 1635 hours on Wednesday 5th August 2009.

Tonga Police later established (after much difficulty due to the manifests being very inaccurate) that 87 men, 29 women and 12 children (7 boys and 5 girls) made up the crew and passengers confirmed on board.

54 persons (all male) were rescued, 2 bodies were located (1 male, 1 female) and 72 persons remain unaccounted for and are presumed drowned.

The vessel was located on the 12th August 2009 and confirmed as the MV Princess Ashika on the 16th August 2009. It lies upright on the sea floor at a depth of 110 metres.

1.2 Promptly after 5th August 2009, the then Minister for Transport, Hon. Paul Karalus ordered an inquiry into the sinking of the MV Princess Ashika. The inquiry was conducted by Michael Lloyd Eno, a marine surveyor. He reported his findings on 9th September 2009. The report was tendered as Exhibit 24.

Establishment of the Royal Commission of Inquiry

1.3 The Shipping Act (Cap. 136) was amended, in August 2009, so as to effectively enable a Royal Commission to inquire into particular incidents.

1.4 Pursuant to the Royal Commissions Act (Cap. 41) (“the Act”), consistent with the Amendments in August 2009 to the Shipping Act (Cap. 136), a Royal Commission (“the Commission”) of Inquiry was established to provide an interim report by no later than 30th November 2009 and a final report by no later than 31st March 2010.

1.5 Royal Commissions are often established in circumstances where a major tragedy has occurred. This is because Royal Commissions usually have broad powers to investigate matters and report. This is the case in Tonga.
Terms of Reference

1.6 The matters to be inquired into and reported upon by the Royal Commission include but are not limited to the following:

(a) the facts about the disaster and the accompanying search, rescue and recovery of the disaster victims;

(b) the cause of the disaster;

(c) evidence leading to any criminal act contributing to the disaster;

(d) evidence leading to any civil responsibility for the disaster;

(e) the reasons why the loss of lives attained such magnitude; and

(f) present proposals for any measures that would help to prevent the future occurrence of a similar disaster or may assist in future search, rescue and recovery of disaster victims.

Commissioners and Commission Staff

1.7 The Chairman of the Commission is Mr. Justice Warwick Andrew C.B.E, C.R.H. The other two Commissioners are Mr. Richard A James (a Naval Architect) and Mr. Michael K Handfield (a Master Mariner).

1.8 Mr. Handfield is a Master Mariner with over 50 years experience around the world. He rose through the ranks to 2nd mate, to 1st mate to Master with foreign going certificates of competency. He has numerous qualifications including pilot certificates. He is a Master Mariner class 1 and a mariner of great experience.

1.9 Mr. Richard James is a highly experienced Naval Architect and engineer with over 50 years experience whilst in private practice. He has designed over 240 vessels including passenger and cargo ships, landing barges, tugs and work boats, fishing boats and other vessels. He has been involved in the implementation of national standards for commercial vessels. He is a greatly respected Naval Architect.

1.10 Pursuant to section 4 of the Act, it is the duty of the Commissioners to make a full, faithful and impartial inquiry in accordance with the terms of the Commission and to report the result of the inquiry to His Majesty accordingly. In this regard each of the Commissioners have taken an oath that they will faithfully, impartially and to the best of their ability discharge the trust, and perform the duties devolving upon them. The Commissioners are also obliged to furnish their reports to the Legislative Assembly.

1.11 The Secretary to the Commission is Mrs. Lola B Koloamatangi.
1.12 Mr. Manuel M Varitimos (Barrister-at-law and Law Practitioner) and Mr. James B Lutui (Law Practitioner) were appointed as Counsel Assisting the Commission. Counsel Assisting have been instrumental in the assembly and presentation of evidence to assist the Commission to enable it to properly inquire into and report upon the matters subject of the terms of reference.

1.13 Pursuant to section 8 of the Act, the Commissioners have appointed Mr. Siosiua Fonua, Dr. ‘Ungatea Kata and Mrs. Meleane Tonga as Interpreters.

Public Hearings

1.14 On 1st October 2009 a preliminary public hearing was held at the Fa’onelua Convention Centre. Prior notice of the public hearing was provided by way of public notice in newspapers and radio.

1.15 Prior to the preliminary hearing extensive investigations were conducted. The New Zealand Transport Accident Investigation Commission (TAIC) and Mr. Ian C Tu’ihalangingie assisted in this regard.

Parties Represented by Counsel

1.16 Section 13 of the Act relates to the appearance of counsel before the Commission on behalf of interested parties. It provides that:

“13 Appearance of counsel

Any person whose conduct is the subject of inquiry under this Act or who is in any way implicated or concerned in the matter under inquiry shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may by leave of the Commissioners be represented in manner aforesaid.”

1.17 On 1st October 2009, at the preliminary hearing, submissions were heard as to whether leave should be granted for persons to be represented by counsel at the Inquiry. The following were granted leave to be represented by counsel.

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<td>Mr. Kahungunu Barron-Afeaki SC</td>
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<tr>
<td>Shipping Corporation of Polynesia Limited</td>
<td>Mr. Tu’inukutavake Barron Afeaki</td>
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1.18 Subsequently, on 27th October 2009, the Prime Minister’s Office was granted leave to be represented by Mr. Mark Woolford. On 6th November 2009, Mr. ‘Aisea Paseisei Havili Kaufusi and his wife Mrs. Maile Havili Kaufusi were granted leave (in
respect of their late son, Salesi Havili Kaufusi) to be represented by Mr. Soane J Foliaki. On 9th December 2009 the Ports Authority was administratively granted leave to be represented by Mr. David Garrett. On 21st January 2010, Mr. Laki Niu was granted leave to appear for Mr. John Owen Jonesse. On 25th January 2010, Ms. Helen Aikman QC was granted leave to appear for Mrs. Alisi Numia Taumoepeau.

**Conduct of Proceedings**

1.19 Section 6 of the Act is entitled “Commissioners’ power to regulate proceedings”. It provides:

“The Commissioners may make such rules for the conduct and management of the proceedings as they may think fit.”

1.20 On 15th October 2009, pursuant to section 6 of the Act, the Commission issued Practice Note No. 1 (**Appendix 1**) which dealt with the conduct and management of the proceedings. On 11th January 2010 the Commission issued Practice Note No. 2 (**Appendix 2**) which provided for written and oral submissions. Practice Note No. 3 (**Appendix 3**) was subsequently issued on 20th February 2010 to amend the dates for written and oral submissions provided for in Practice Note No. 2. The amendments were necessary after Tropical Cyclone Rene, which caused some delay to the Commission hearings.

1.21 On 27th October 2009 extensive public hearings commenced at the Fa’onelua Convention Centre. Public hearings were held on 27th – 30th October, as well as on 2nd, 3rd, 5th, 6th, 9th-13th (inclusive) and 16th-19th November 2009 (inclusive). Hearings continued on the 7th, 10th, 11th December, 2009 and 14th to 18th December, 2009 (inclusive); 12th to 15th January 2010 (inclusive); 18th to 22nd January 2010 (inclusive); 25th to 29th January 2010 (inclusive); 17th to 19th February, 2010 (inclusive); 22nd to 27th February 2010 (inclusive); and the 12th March 2010. Members of the public and the media, including from overseas, have attended the public hearings.

**Commission Website**

1.22 On 27th October 2009 the Commission established a website, the address of which is [www.rcimvprincessashika.to](http://www.rcimvprincessashika.to). The website contains useful information such as contact details for the Commission, hearing dates, Practice Notes and the transcript of the public hearings. The transcript ran to 6455 pages for the 54 days of public hearings.

**Video Footage of the MV Princess Ashika**

1.23 The Commission decided, after giving careful consideration to the matter, in the interests of openness and transparency, to allow the public to view video footage taken of MV Princess Ashika on 18 August 2009 resting on the seabed. Out of
respect to families of the deceased, a very small portion of the video footage was not shown.

1.24 On 13\textsuperscript{th} November 2009 the footage, lasting about 90 minutes, was shown at 4:30pm. Due to the considerable public interest which was reflected in over 1,000 people wishing to view the footage, the video was also shown at 6:30pm and 8:15pm (concluding at about 9:45pm).

**Powers of Commissioners**

1.25 Section 7 of the Act gives the Commissioners extensive powers. The section is in the following terms:

```
“7  Powers of Commissioners

The Commissioners shall have the following powers:

(a)  to issue summonses to witnesses in the form prescribed in the Schedule and to call for the production of books, plans and documents and to examine the witnesses and parties concerns on oath;

(b)  to admit any evidence whether written or oral and whether or not such evidence would be admissible in civil or criminal proceedings;

(c)  to admit or exclude the press from any meeting of the Commissioners;

(d)  to exclude any person if necessary so to do in order to ensure the due conduct of the inquiry or to preserve order;

(e)  to enter upon any land for the purpose of obtaining any information which may be of assistance to the Commissioners.”
```

**Evidence before the Commission**

1.26 In accordance with the powers given to the Commissioners pursuant to section 7 of the Act, the Commissioners have summoned numerous witnesses to produce documents and be examined on oath or affirmation. There were a number of individuals who were out of the jurisdiction and accordingly were unable to be summoned. This included Mr. George Patterson of Patterson Brothers Shipping Company Limited, Fiji, the previous owner of the MV Princess Ashika. In his case, numerous letters, e-mails and faxes were sent to him, as well as a letter served on him asking him to contact the Commission and to assist (Exhibit 410). He ignored all such correspondence. The names of the persons who have been summoned to appear and who have in fact appeared in the public hearings (in alphabetical order), including titles, are set out in the schedule below. For ease of reference, the
schedule also lists the transcript pages at which the person commenced giving evidence against the name of the witness.

**Witnesses**

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<td>Thursday, 21st January 2010</td>
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<td>Friday, 26 February 2010</td>
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<td>4 EKE, 'AISAKE VALU (Secretary for Finance and Planning, Member of Government Procurement Committee)</td>
<td>848-850, 3409-3410, 5417-5468</td>
<td>9</td>
<td>Monday, 9 November 2009</td>
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<td>Friday, 19 February 2010</td>
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<tr>
<td>5 ENO, MICHAEL LLOYD (Marine Consultant)</td>
<td>767-776</td>
<td>8</td>
<td>Friday, 6 November 2009</td>
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<tr>
<td>6 FAKAPELEA, TONGA VAIVAI (Acting Principal of Tongan Maritime Polytechnic Institute)</td>
<td>1818-1823, 2293-2294, 2637-2638, 2944-2950</td>
<td>18</td>
<td>Monday, 7 December 2009</td>
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<td>Wednesday, 13 January 2010</td>
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<td>7 FAKATOU, MOSESE (Surveyor engaged by British Marine and Lecturer, Tonga Maritime Polytechnic Institute)</td>
<td>31-42, 44-79, 87-182, 184-208, 245-249</td>
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<td>Tuesday, 27 October 2009</td>
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<td>8 FALEVAI, TEVITA VAIOLA (Chief Inspector, Tonga Police)</td>
<td>327-329, 2186-2189</td>
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<td>Monday, 14 December 2009</td>
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<td>9 FASI, DR. 'UHILA MOE LANGI (Chief executive of the Tonga national Qualifications and Accreditations Board)</td>
<td>2759-2762, 2981-3011</td>
<td>26</td>
<td>Tuesday, 12 January 2010</td>
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<td>Thursday, 14 January 2010</td>
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<td>10 FA'ANUNU, 'OFA (Director of Meteorology, Ministry of Transport)</td>
<td>28-29, 926-927, 1284-1287</td>
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<td>Friday, 13 November 2009</td>
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<td>11 FIFITA, SUSANA HETI (Senior reporter and editor of Radio and Television Tonga)</td>
<td>1795-1797, 1928-1929</td>
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<td>Thursday, 10 December 2009</td>
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<tr>
<td>12 FINAU, SIOSIUA (Captain of FMV Albacoa)</td>
<td>2764-2789</td>
<td>26</td>
<td>Tuesday, 12 January 2010</td>
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<td>13 FINAU, 'OFA (Assistant Secretary, Legal for the Ministry of Transport)</td>
<td>2420-2421, 3637-3645, 3718-3726, 4431-4463</td>
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<td>Wednesday, 16 December 2009</td>
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<td>Monday, 8 February 2010</td>
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<td>Name (Position)</td>
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<td>14</td>
<td>FOLAU, MELESEINI VEA (Secretary to the Electricity Commission and General Administrator)</td>
<td>Tuesday, 9 February 2010</td>
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<td>FONUA, PESI (Publisher/Editor of the Matangi Tonga)</td>
<td>Monday, 7 December 2009</td>
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<td>16</td>
<td>FUTUNA, ‘ALEKISANITA TUPOU (Transport Supervisor for Port Authority of Tonga)</td>
<td>Friday, 19 February 2010</td>
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<td>17</td>
<td>HASELI, SOANE (Principal Coast Watch officer of the Meteorological Division of the Ministry of Transport)</td>
<td>Tuesday, 27 October 2009, Monday, 10 November 2009, Monday, 16 November 2009</td>
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<td>18</td>
<td>HAUKinima, Rev. Tevita (Director, Shipping Corporation of Polynesia Limited)</td>
<td>Wednesday, 18 November 2009, Wednesday, 18 November 2009, Friday, 29th January 2010</td>
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<td>19</td>
<td>HAVILI, Solomone (Crew, 3rd Engineer, MV Princess Ashika)</td>
<td>Thursday, 10 December 2009, Thursday, 17 December 2009</td>
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<td>20</td>
<td>HE’EHAU, VILIAMI TATOFI (Survivor)</td>
<td>Thursday, 12 November 2009, Friday, 13 November 2009</td>
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<td>21</td>
<td>HOGAN, John Patrick (Manager for transport Programme, Secretariat for the Pacific Community)</td>
<td>Monday, 8 February 2010</td>
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<td>22</td>
<td>JOHNSON, William Leslie Simpson (Former Director of Marine and Ports, current designated person ashore under the ISM code for Bismarck Maritime Shipping-PNG)</td>
<td>Friday, 18 December 2009</td>
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<td>24</td>
<td>Kalu, Lotu (Security Officer on MV Princess Ashika)</td>
<td>Thursday, 14 January 2010</td>
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<td>No.</td>
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<td>KANONGATA’A, TEVITA LOTAKI</td>
<td>(Survivor)</td>
<td>1123-1128, 1130-1167, Thursday, 12 November 2009</td>
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<td>26</td>
<td>KAPELI, SIALE</td>
<td>(Motorman of the MV Princess Ashika)</td>
<td>2825-2844, Tuesday, 12 January 2010</td>
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<td>27</td>
<td>KATOA, MANASE</td>
<td>(Welder, Shipping Corporation of Polynesia Limited)</td>
<td>208-244, Thursday, 29 October 2009</td>
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<td>29</td>
<td>KAUOTOKE, BUSBY</td>
<td>(Chief Secretary and Secretary to Cabinet)</td>
<td>5-7, 5618-5676, 5701-5704, Tuesday, 27 October 2009, Tuesday, 23 February 2010</td>
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<td>30</td>
<td>KAVALIKU, SIONE MAFI MO LASIKE</td>
<td>(Marine Officer, Ministry of Transport)</td>
<td>1372-1393, Monday, 16 November 2009</td>
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<td>31</td>
<td>KEFU, ‘ASIPELI ‘AMINIASI</td>
<td>(Solicitor General, Member of Government Procurement Committee)</td>
<td>307-309, 2482-2499, 2501-2525, Friday, 30 October 2009, Wednesday, 16 December 2009, Thursday, 17 December 2009</td>
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<tr>
<td>32</td>
<td>KELLY, ALEXANDER CHRISTOPHER</td>
<td>(Police Commander of the Tongan Police)</td>
<td>3083-3107, Friday, 15th January 2010</td>
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<tr>
<td>33</td>
<td>KULUNI, LEONAITASI PULI KI POLUTO</td>
<td>(Deputy Secretary, Ministry of Foreign Affairs and current Acting Officer-in-charge of the Immigration Division)</td>
<td>1799-1817, 1911-1921, 2755-2759, 3121-3124, Monday, 7 December 2009, Monday, 7 December 2009, Tuesday, 12 January 2010, Monday, 18th January 2010</td>
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<td>34</td>
<td>LATU, LISIATE VUNI</td>
<td>(Marine Nautical Officer and Marine Surveyor, Ministry of Transport)</td>
<td>314-318, 1115-1118, 1206-1269, Friday, 30 October 2009, Wednesday, 11 October 2009, Friday, 13 November 2009</td>
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<td>35</td>
<td>LATU, PENISIMANI</td>
<td>(Deputy Registrar of Companies, Ministry of Labour, Commerce and Industries)</td>
<td>657-665, Thursday, 5 November 2009</td>
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<td>36</td>
<td>LEMOTO, TONGIA AFUITANGIMANA</td>
<td>(Survivor)</td>
<td>856-891, 895-923, Monday, 9 November 2009, Monday, 9 November 2009</td>
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<td>37</td>
<td>LEMOTO, FINE’EVA MESUI HINGANO</td>
<td>(Survivor)</td>
<td>1003-1020, Tuesday, 10 November 2009</td>
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<tr>
<td>38</td>
<td>LEWIS, JAMES BACON</td>
<td>(Director and Principal of New Zealand Marine Brokers Limited)</td>
<td>2883-2896, Wednesday, 13 January 2010</td>
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<td>39</td>
<td>LOLOHEA, KALIPENO</td>
<td>(Crew, Purser, MV Princess Ashika)</td>
<td>1034-1036, 2100-2124, Wednesday, 18 November 2009, Friday, 11 December 2009</td>
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<td>40</td>
<td>MAFI, CAPT. SOSAIA</td>
<td>(Port Master, Ports Authority)</td>
<td>324-325, 2421-2481, 5083-5106, Friday, 30 October 2009, Wednesday, 16 December 2009, Friday, 12 February 2010</td>
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<td>41</td>
<td>MANU, SATEKI VAINIKOLO</td>
<td>(Principal of Tonga Maritime Polytechnic Institute)</td>
<td>2896-2944, Wednesday, 13 January 2010</td>
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<tr>
<td>42</td>
<td>MATOTO, HON. ‘OTENIFI AFU’ALO</td>
<td>(Minister of Finance and Planning and Chairman, Government Procurement)</td>
<td>655-657, 5113-5242, 5247-5336, Thursday 5 November 2009, Wednesday, 17 February 2010, Thursday, 18 February 2010</td>
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<tr>
<td>No.</td>
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<td>43</td>
<td>MATOTO, DR. VEISINA ‘ELENOA</td>
<td>Physician consultant at Vaiola Hospital medical ward</td>
<td>6080-6090</td>
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<td>45</td>
<td>NEER, DR. LUCIEN van</td>
<td>General Practitioner</td>
<td>4680-4711</td>
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<td>NGALU, SIONE</td>
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<td>1020-1032, 1094-1115</td>
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<td>NUKU, NOPELE</td>
<td>Minister of Works and Acting Minister of Transport</td>
<td>4133-4173, 4300-4314</td>
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<tr>
<td>48</td>
<td>PALE, LOU</td>
<td>Senior Marine Nautical Officer and Marine Surveyor, Ministry of Transport</td>
<td>310-312, 930-992, 995-1000</td>
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<td>49</td>
<td>PANUVE, TAPU VAKAI</td>
<td>Tonga Electricity Commissioner</td>
<td>5964-6006</td>
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<td>50</td>
<td>POHIVA, LAUCALA</td>
<td>Editor/Publisher, Kele’a Newspaper</td>
<td>648-651, 705-706</td>
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<td>51</td>
<td>POHIVA, SAMUELA ‘AKILISI</td>
<td>Member of Parliament, No. 1 representative for the people of Tongatapu</td>
<td>5361-5377</td>
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<tr>
<td>53</td>
<td>POME’E, NIVATI ALOFI</td>
<td>Survivor</td>
<td>1167-1181</td>
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<td>54</td>
<td>SATINI, METUI</td>
<td>Crew member on MV Princess Ashika</td>
<td>2603-2622</td>
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<td>SEVELE, HON. DR. FELETI VAKA’UTA</td>
<td>Prime Minister of Tonga</td>
<td>5478-5615, 5704-5808</td>
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<td>56</td>
<td>SHAW, DAVID COOPER</td>
<td>Director of Shaw Diesels Limited</td>
<td>2855-2883</td>
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<td>57</td>
<td>TANGI, SEFITA</td>
<td>Commissioner of Revenue</td>
<td>1525-1535</td>
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<td>TAPUELELU, MATENI</td>
<td>Freelance Journalist</td>
<td>651-655</td>
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<td>TAU, NIKOLA</td>
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<td>TAUFU’I, SIMOTE</td>
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<td>TAUMOEPEAU, KALESITA MAFI</td>
<td>(Assistant Secretary, Ministry of Transport)</td>
<td>326-327, 1118-1123, 3852-3853, 4519-4601</td>
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<td>TAUMOEPEAU, MALIA VIVIENA ‘ALISI NUMIA AFEAKI</td>
<td>(Chairperson, Shipping Corporation of Polynesia Limited)</td>
<td>641-648, 3657-3715, 3748-3781, 3814-3850, 3859-3967</td>
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<td>TAUMOEPEAU, SIONE</td>
<td>(Director of Works and Deputy Chairman, Government Procurement Committee)</td>
<td>1270-1284</td>
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<td>64</td>
<td>TAU’ATAINA, UOKALANI FILIPE</td>
<td>(Crew, Steward, MV Princess Ashika)</td>
<td>85-87, 1716-1717, 2127-2186</td>
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<td>TA’UFO’OU, LEHOPOAME KAINGA</td>
<td>(Crew, AB Seaman, MV Princess Ashika)</td>
<td>1452-1483, 1487-1497</td>
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<td>66</td>
<td>TELEFONI, TASIMANI</td>
<td>(Immigration officer working at the airport)</td>
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<td>TIUETI, TIOFILUSI</td>
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<td>22-23, 850-851, 5377-5417</td>
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<td>68</td>
<td>TUPOU, ALASIU</td>
<td>(Computer Operator; Ministry of Transport, Marine Division)</td>
<td>2407-2414, 3645-3650, 3726-3729, 4381-4391, 4397-4431</td>
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<td>TUPOU, PENISIMANI (BENJAMIN)</td>
<td>(Able seaman of MV Princess Ashika)</td>
<td>1922-1923, 2050-2100</td>
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<td>TUPOU, SATEKI TONGA</td>
<td>(Workshop Foreman, Shipping Corporation of Polynesia Limited)</td>
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<td>71</td>
<td>TUPOU, UASIKE</td>
<td>(Crew, 2nd Mate, MV Princess Ashika)</td>
<td>1036-1037, 1393-1400, 1404-1451</td>
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<td>TU’AKOI, VILIAMI</td>
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<td>2622-2635</td>
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<td>TU’IFUA, ‘ONESI</td>
<td>(Senior Marine Engineering Officer and Marine Surveyor, Ministry of Transport)</td>
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<td>TU’IPULOTU, VILIAMI</td>
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<td>15-22, 42-44, 639-641, 1545-1627</td>
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<td>76</td>
<td>TU'I'ONETOA, POHIVA</td>
<td>Auditor General, Member of the Government Procurement Committee</td>
<td>1629-1637 to 4049-4052</td>
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<td>3976-3985 to 3858-3858</td>
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<td>77</td>
<td>UTA'ATU, TAU'AIAKA</td>
<td>Brigadier/Commanding Officer of Tonga Defence Services</td>
<td>3060-3082</td>
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<tr>
<td>78</td>
<td>VALA, 'INOKE FINAU</td>
<td>Chief Executive Officer, Ministry of Public Enterprises</td>
<td>24-26 to 1923</td>
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<td>894-895 to 1999-2004</td>
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<td>VEA, FISI'INAUA</td>
<td>Ordinary seaman MV Princess Ashika</td>
<td>1923 to 2010-2048</td>
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<td>VEA, TALANAIVINI MAFI</td>
<td>Secretariat, Government Procurement Committee</td>
<td>1508-1524</td>
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<td>VI, LUPE'TI</td>
<td>General Manager, Ports Authority</td>
<td>27-28 to 5031-5083</td>
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<td>82</td>
<td>VI, VILIAMI VAKAUTAPOLA</td>
<td>Master Mariner</td>
<td>3011-3036 to 3038-3060</td>
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<td>WILDE, MICHEL ROGER de</td>
<td>Passenger, July Trip on MV Princess Ashika</td>
<td>1502-1508</td>
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<tr>
<td>84</td>
<td>ZINGEL, DR. CARA PATRICIA</td>
<td>Medical Practitioner</td>
<td>4466-4470</td>
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<td>85</td>
<td>'AKAUOLA, FILOKALAFI</td>
<td>Editor of Talaki Newspaper</td>
<td>1924-1926 to 2005-2009</td>
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<td>1924-1926</td>
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<td>86</td>
<td>'ALI, SITIVENI</td>
<td>Motorman of the MV Princess Ashika</td>
<td>2789-2825</td>
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<tr>
<td>87</td>
<td>'OFAHULU, REV. TEVITA</td>
<td>Editor of the Free Wesleyan Newspaper; Tohi Fanongonongo</td>
<td>1794-1795</td>
</tr>
</tbody>
</table>

**Exhibits and documents Marked for Identification**

1.27 There were 496 Exhibits tendered as evidence before the Commission at the public hearings. A list of the Exhibits is contained in Appendix 4. These documents and files included affidavits, survey certificates, photographs of MV Princess Ashika and files from various Government Departments. In addition, many more documents and files were produced at the public hearings which were marked for identification...
Inadmissibility of evidence in Judicial Proceedings

1.28 The Act provides that evidence taken by the Commission cannot be used in criminal or civil proceedings. Section 9 of the Act states that:

“9 Use of evidence taken under this Act in judicial proceedings

No evidence taken under this Act shall be admissible against any person in any civil or criminal proceeding whatever, except in the case of a person charged under section 11 of this Act with false interpretation, or with giving false evidence before the Commissioners.”

1.29 Any person interested in the evidence given by witnesses before the Commission to date is encouraged to read the transcript which, as previously stated, is available at www.rcimvprincessashika.to

Outline of the report

1.30 The report has been divided into two volumes with VOLUME II being the Appendices. VOLUME I commences with an executive summary. The executive summary and this chapter have been translated into Tongan, and is contained at the end of this volume, for we believe that this will assist the public in readily understanding the main overview of the whole Report. We regret that due to the lack of time available to complete the report and due to the availability of funds it is not possible to translate the whole Report into Tongan.

1.31 It is not within the terms of reference for the Commission to ultimately determine any civil liability or civil responsibility for the disaster. It is only required to consider the evidence leading to any civil responsibility for the disaster. The courts, in the exercise of civil jurisdiction will ultimately need to determine civil liability.

1.32 It is not for the Commission to ultimately determine, pursuant to the terms of reference, any criminal act contributing to the disaster. It is not for the Commission to specifically recommend that individual persons be charged. We note that some persons have already been charged by the authorities. It is up to those authorities if any other charges are to be laid. Having said that, we considered it appropriate to consider briefly the law that may be relevant to the issue of criminal responsibility because of terms of reference (c) and (d).

1.33 The Royal Commission wishes to acknowledge the invaluable and outstanding assistance it has received from TAIC (Transport Accident Investigation Commission of New Zealand) with support from Maritime New Zealand and the Australian
Transport Safety Bureau. TAIC had been involved, with investigations into the sinking of MV Princess Ashika within days of the tragedy. The day after the accident, TAIC received a request from the Government of Tonga to help with its inquiry into the accident by gathering evidence and providing technical advice. TAIC immediately established a technical investigation team, which began working on 10th August 2009, five days after the tragedy. Once the Royal Commission was established, TAIC began to assist the Commission. They conducted extensive inquiries both in Tonga, Fiji and New Zealand. We gratefully acknowledge the professional and generous assistance given to the Commission and to Tonga through the New Zealand Government and TAIC.

The TAIC Final Preliminary Report was tendered as Exhibit 423.

We cannot single out each member of the TAIC team but our special thanks are due to Captain Douglas Paul Monks who played the leading role in the investigation and who produced the TAIC Final Preliminary Report under extreme time constraints with his usual good humour.

TAIC operates under its own charter or statutory function which is to determine the circumstances and causes of accidents with a view to avoiding similar occurrences in the future, rather that to subscribe blame to anyone. It is not the function of TAIC to establish criminal liability or civil responsibility.

We should caveat however that the TAIC Final Preliminary Report is dated the 15th February 2010 and as TAIC have advised they have only considered the evidence up until 20th January 2010. That is, only up to day 32 out of 54 days of public hearings before the Commission. It is apparent from considering the Final Preliminary Report that TAIC have not considered all of the evidence before the Commission. There was evidence heard from many important witnesses after the 20th January 2010 including from Mr. Paul David Karalus, the former Minister of Transport, the Honourable Prime Minister, Dr. Feleti Vaka’uta Sevele, and the Honourable Minister of Finance, ‘Otenifi Afu’alo Matoto, to name a few which was not considered by TAIC.

At the establishment of the Commission it was proposed that a Tongan Master Mariner be appointed as a Commissioner. Subsequently the Law Lords, Lord Dalgety QC and Lord Tupou KC advised His Majesty in Council on 10th September 2009 “that in the interest of transparency and independence the Law Lords are of the opinion that an expatriate Master Mariner with no past connection whatsoever with the Kingdom should be considered as Commissioner”. The Law Lords advised His Majesty in Council to:

“(1) decline to approve the appointment of a Tongan Master Mariner as a member of the MV PRINCESS ASHIKA ROYAL COMMISSION; and
(2) consider the appointment of an expatriate Master Mariner unconnected with the Kingdom of Tonga to be a member of said Royal Commission.”

1.35 Each hard copy of the Commission’s Final Report contains a disc of the whole transcript of the evidence.
CHAPTER 2 - THE MV PRINCESS ASHIKA

Olive Maru No. 1

2.1 On 10th August 1972, the Olive Maru No.1, Shipyard Number 757, which was later to become the MV Princess Ashika, was launched at the Shipyard of the Shikoku Dock Yard Company to the order of the Azuki Island Express Ferry Company. It was designed for smooth water operations, of one and a half to three hours duration, in the Inland Sea of Japan, to provide a ferry service between the ports of Takamatsu to Tosa. (Exhibit 244) This service commenced in 1973. From June 1983, the vessel serviced the Himeji to Fulsada, and Marukume to Shimotsui routes.

(Above: Photograph of Olive Maru No. 1 in Japan, later assigned the name "MV Princess Ashika")

2.2 As built, the principle details of the Olive Maru No.1 were as follows:-

<table>
<thead>
<tr>
<th>Ship Use</th>
<th>Passenger Ferry</th>
<th>Passengers</th>
<th>402</th>
</tr>
</thead>
<tbody>
<tr>
<td>Official Number</td>
<td>113370</td>
<td>Crew</td>
<td>15</td>
</tr>
<tr>
<td>Gross Tonnage</td>
<td>677.15</td>
<td>Length (overall)</td>
<td>50.50 m</td>
</tr>
<tr>
<td>Net Tonnage</td>
<td>301.32</td>
<td>Length (B.P.)</td>
<td>47.02 m</td>
</tr>
<tr>
<td>Deadweight</td>
<td>222 T</td>
<td>Breadth (Extreme)</td>
<td>13.21 m</td>
</tr>
<tr>
<td>Service Speed</td>
<td>13.5 knots</td>
<td>Breadth (Moulded)</td>
<td>11.00 m</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Draught</td>
<td>2.8 m</td>
</tr>
</tbody>
</table>
In 1975 the owner’s company name was changed from Azuki Island Express Ferry to Kansai Express Ferry.

2.3 In an Inspection Certificate of Ships, dated 14th June 1983, the Chief of the Shikoku Marine Bureau, Hisaji Fujitomi, extended the Certificate until 6th November 1984. This allowed the Olive Maru No.1 to carry 490 passengers and 10 crew as a “Passenger-Car Ferry” in “smooth waters” between Marugame and Shimotsui, and between Takamatsu and Tosa. (Exhibit 44 page 2347)

2.4 During 1984 the company decided to sell the Olive Maru No.1 to overseas interests but it was initially sold to Minamoto Trading Company which no longer exists. It was then purchased by North West Shipping Lines and Agencies of 8/9 Viria Road, Vatuwaqa, Suva, Fiji, and registered in Fiji on 5th November 1984. (Exhibit 44 page 2398), with the Certificate of British Registry being issued in Suva on 31st December 1984 with the name Princess Ashika. A letter to the Department of Customs, Japan, dated 6th November 1984, from the Registrar of British Ships in Suva, advises that the Olive Maru No.1 has been allocated the Official Number 385168, Call Sign 3DSD and has been granted approval to change the name to Princess Ashika. (Exhibit 44, page 2351)

MV Princess Ashika in Fiji

2.5 On 12th March 1985, Captain M.W.S. Drew, Principal Surveyor, Fiji Marine Board, having been called before the Fiji Marine Board, wrote a letter to the Owners of 'Princess Ashika' voicing concern as to seaworthiness for the intended trade and requiring modifications regarding danger of flooding and loosing stability. Production of clear stability information was required. Fiji Marine Board were of the opinion that the vessel should be enclosed forward to prevent water coming in over the bow. (Exhibit 44, pages 2374-2375).

2.6 The following are quotes from Captain Drew’s letter:-

“The outcome of the meeting was that the board require me to proceed in the case of the Princess Ashika as follows:

1) Require that you seek the services of a fully qualified Naval Architect to examine your vessel, in relation to the sea and trading conditions under which you currently operate.

2) Produce clear stability information according to I.M.O. Regulations.

3) Advise the Board as to the conversion of the vessel to ensure there can be no danger of the vessel loosing stability flooding of the car deck by heavy seas or trapping of fire fighting water.
4) Advise the Board that the vessel can operate safely within the present trade routes after such conversion.

5) Advise the Board that proper steps are regularly being taken, each time the ship sails, to ensure that passengers are aware of emergency procedures and that the crew know and understand their emergency duties."

2.7 The letter goes on to say that:

"In the case of 3) above, the Board and I are generally of the opinion that the vessel should be enclosed to prevent water coming over the bow, at the sides; through the sliding doors, and that there should be much larger (and non-return) clearing drains through the sponsors amidships on each side to clear any trapped water."

2.8 It was anticipated that:

"The after area would remain open in anticipation of carrying petroleum products"

and it was anticipated that all these modifications would be completed by the time the Princess Ashika completed her next survey in July 1985.

2.9 The Princess Ashika was sold by North West Shipping Lines and Agencies Limited on 8th July 1988 to Patterson Brothers Shipping Company for FJD$556,000 for further trading in Fiji. (Exhibit 44, page 2390)

2.10 On 11th January 1993 an Underwater Survey was carried out on Princess Ashika at P.W.D. Wharf, Walu Bay, to ascertain damage caused by a recent grounding incident in the Bay of Islands. Amongst items of damage in the report made by David Evans, an underwater surveyor, were two holes in the engine room hull plating. His report stated in part that:

"... the damage detailed is not the result of damage sustained during the grounding incident, but rather from general shell-plate corrosion. It was noted that there are already a number of shellplate patches in the area, and this suggests that the corrosion may be general in the area beneath the engineroom..." (Exhibit 44 page 2118)

2.11 On 15th December 1994, an Interim Certificate, Number 7717 was issued, (Exhibit 44, page 2107) after a Special Life Saving Appliance (LSA) Survey, to allow 500 passengers and 18 crew to be carried on Short Coasting and Interinsular Services. This was valid until 31st December 1994.
2.12 From about 1994, the owners, Patterson Brothers Shipping Company Limited, were continually applying to the Fiji Islands Maritime Safety Administration (FIMSA) for Special Safety Surveys to vary the number of passengers and crew on the Safety Certificate. The numbers of passengers varied from a high of 500 to a low of 195 in 2001. On most occasions the variations in numbers were only for a matter of days or at most, a few weeks. The crew numbers varied between 20 and 15. As these variations were at the owners request and not FIMSA, it may be assumed that there were varying numbers of surveyed and serviced lifesaving appliances such as life rafts available aboard Princess Ashika. It does not, at this stage, appear to be due to the deteriorating condition of the vessel itself.

2.13 A Special (LSA) Survey Certificate, Number 531 of 1994, had the following Endorsement, (one of 3):

“2 – CARGO AND VEHICLES TO BE PROPERLY LASHED BEFORE DEPARTURE AND REMAIN SO DURING THE VOYAGE” (Exhibit 44 page 2091)

2.14 During an Engine Survey dated 4th October 1996, the Surveyor noted:

“I found that the shaft tunnel was polluted with sea water caused by a leaking gland seal which was spraying water into the area. ... In my recommendation it is safe to place a portable pump in the tunnel space in case of any power failure, the portable pump can be used to bail out water.”

2.15 The Surveyor added that:

“If it get to worse it might reduce the value of the S.G. Certificate.” (Exhibit 44 page 2273)

2.16 Amongst many repair items noted by the Surveyor at the September 1997 Annual Survey were holes in the Mess Room, Vehicle Deck (starboard side), Elevation Deck (port side), Fire Escape (port side), Deck Head for Men’s Toilet, Passage for Crew’s Quarters, Drain for the Passage Deck, and Wall for Men’s Toilets. (Exhibit 44 page 116) These items, along with many others noted, illustrate the aging, and the deterioration in condition, of the Princess Ashika.

2.17 In a letter dated 3rd September 1998, Trevor Patterson, Operations Manager for the owners, Patterson Brothers, informed Mr. Nimilote Bulimaibau, at the Fiji Marine Board, that a Continuous Maintenance Schedule was being used on the Princess Ashika. He requested that the work involved should be inspected weekly. (Exhibit 44 page 1858) This is the first mention in the documentation, obtained from the Fiji Islands Maritime Safety Administration (FIMSA), of a continuous maintenance program.
2.18 After an Extension Survey on 28\textsuperscript{th} September 1998, the Surveyor noted, in part, \textit{“steering to be properly serviced”} adding that this needed to be done to fully meet the seaworthiness of the vessel. (Exhibit 44 page 1862) This may have been the time when there were problems noticed with the steering gear eventually resulting in the rudder movement being restricted to about 15° each way when the Princess Ashika was operating in Tongan waters some years later.

(Above: Chart of Fiji showing places where the MV Princess Ashika travelled to whilst in Fiji)

2.19 A year later, one of the comments on a Surveyor’s Deficiency Report, dated 28\textsuperscript{th} September 1999, said \textit{“All deck machineries to be maintained above its present deteriorating state”} and listing a number of examples. (Exhibit 44 page 1946) This suggests that the vessel was in a poor state of repair by this time. About this time,
(1\textsuperscript{st} October 1999) the big ballast pump was removed from the engine room as it was not being used. (Exhibit 44 page 1964)

2.20 A Safe Manning Certificate issued by the Fiji Marine Board, dated 20\textsuperscript{th} May 1999, set out the following manning requirements:

<table>
<thead>
<tr>
<th>OFFICERS</th>
<th>FIJI ISLANDS TRADE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Master</td>
<td>G. 4 Master</td>
</tr>
<tr>
<td>Chief Mate</td>
<td>G. 4 Mate</td>
</tr>
<tr>
<td>Second Mate</td>
<td>G. 4 Mate</td>
</tr>
<tr>
<td>Chief Engineer</td>
<td>G. 3 Engineer</td>
</tr>
<tr>
<td>Second Engineer</td>
<td>G. 4 Engineer</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RATINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosun</td>
</tr>
<tr>
<td>Able Seaman</td>
</tr>
<tr>
<td>Deck Watch Rating</td>
</tr>
<tr>
<td>Engine Watch Rating</td>
</tr>
<tr>
<td>Qualified Cook</td>
</tr>
<tr>
<td>Ordinary Seaman</td>
</tr>
<tr>
<td><strong>Total Min/Max Crew</strong></td>
</tr>
</tbody>
</table>

2.21 A Safe Manning Certificate issued by the Fiji Marine Board, dated 10\textsuperscript{th} May 2001, set out the following manning requirements:

<table>
<thead>
<tr>
<th>OFFICERS</th>
<th>FIJI ISLANDS TRADE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Master</td>
<td>G. 4 Master</td>
</tr>
<tr>
<td>Chief Mate</td>
<td>G. 4 Mate</td>
</tr>
<tr>
<td>Second Mate</td>
<td>G. 4 Mate</td>
</tr>
<tr>
<td>Chief Engineer</td>
<td>G. 3 Engineer</td>
</tr>
<tr>
<td>Second Engineer</td>
<td>G. 4 Engineer</td>
</tr>
<tr>
<td>-----------------</td>
<td>--------------</td>
</tr>
<tr>
<td><strong>RATINGS</strong></td>
<td></td>
</tr>
<tr>
<td>Bosun</td>
<td>1 Bosun</td>
</tr>
<tr>
<td>Able Seaman</td>
<td>1 A.B.</td>
</tr>
<tr>
<td>Deck Watch Rating</td>
<td>1 D.W.</td>
</tr>
<tr>
<td>Engine Watch Rating</td>
<td>1 E.W.</td>
</tr>
<tr>
<td>Qualified Cook</td>
<td>1 Cook</td>
</tr>
<tr>
<td>Ordinary Seaman</td>
<td>2 O.S.</td>
</tr>
<tr>
<td><strong>Total Min/Max Crew</strong></td>
<td><strong>12 / 15</strong></td>
</tr>
<tr>
<td><strong>Maximum Passengers</strong></td>
<td><strong>330</strong></td>
</tr>
</tbody>
</table>

2.22 The vessel remained in survey throughout its ownership by Patterson Brothers although evidence from the FIMSA files suggests that this frequently required the use of extensions to the Certificates for one reason or another. From the late 1990’s there were holes appearing in the hull and cargo deck which required repairing. On 15th October 2002, N.Bulimaibau, writing on behalf of the Director of Maritime Safety, Fiji, raised concerns with the owners regarding the condition of Princess Ashika. An extract of his letter follows:

“Considering the age and condition of your vessel, we wish to recommend that arrangement be made to have her slipped as soon as possible and not to continue operation until 12/03/2003”.

The date mentioned was the planned slipping date. (Exhibit 44 page1395)

2.23 In a memorandum dated 9th May 2003, N.Bulimaibau, Senior Surveyor, found it necessary to limit the operations of Princess Ashika to the Natovi to Buresala route due to the fact that certain defects noted at a survey at the end of the previous month had not been rectified. (Exhibit 44 page1445) The distance from Natovi to Buresala is about 8 nautical miles, around an hour’s steaming time.

2.24 In a letter dated 22nd October 2004, Captain S. Waqa wrote to the Chief Executive Officer of Fiji Ships and Heavy Industries, the operators of the slipway in Suva, requesting “emergency slipping” of Princess Ashika due to cracks in the hull. Part of his letter follows:
“It is strongly recommended that the vessel must be slipped at its earliest to avoid any catastrophic mishap to the said vessel...” (Exhibit 44 page 1506).

2.25 The Official Logbook entries of 5th July 2005 (Exhibit 44 page 1564) and 8th November 2005 record holes appearing in the engine room hull plating and these were being fitted with “sandwich plates”.

2.26 The latter part of 2005 saw a number of letters from the Maritime Safety authorities expressing concern at the delays in completing repairs, rectifying defects, and putting the Princess Ashika through her four yearly survey. In a lengthy letter to the Shipping Officer, A/PMO (SI), Malakai Cakau, A/SMO (E) Surveyor, states in one part:

“They were also reminded two years ago to have their leaking stern tube seals be rectified. Generally speaking, FIMSA has given them opportune time to prepare themselves for the Four Yearly Survey, especially the machinery aspects.

In view of the non conformity in not complying with all that has to be done, I am in a position to say that it would be unethical to call the Ashika a safe vessel.” (Exhibit 44 pages 1568 – 1570)

2.27 In the same letter, the surveyor refers to the incident which occurred earlier, on the 3rd August 2003, when the similar ferry, M.V. Ovalau II, also owned by Paterson Brothers, sank when holes appeared in the engine room hull plating. He said that:

“With the same token, the vessel ASHIKA falls in the same category if they do not rectify items under this schedule. It would be suicidal and off course a repetition to the OVALAU saga , if we are to re-entertain such procedures that we have erred from.” “The Owner has shown laxity in keeping the vessel’s standard to par and repairs done on time. We at FIMSA have substantial reasons to justify our stand on the issues I have raised here.” (Exhibit 44 page 1576) (Appendix 6)

2.28 It is interesting to note that, in a letter from Josefa Qarase, dated 9th November 2005, addressed to the Marine Checker at Natovi, Mr. Qarase lists Princess Ashika defects and mentions a water tight door between the shaft room and the engine room which needed to be fixed with proper locking handles. (Exhibit 44 page 1597)

The original ships plans only show a void space abaft the engine room, the two compartments being separated by a water tight bulkhead. No door appears in these plans although photographs taken in the engine room on 7th April 2009 show an opening in the bulkhead on the port side. It may be that this opening was installed without a proper closing device or authorisation and without due consideration of the increased risk of flooding to the overall safety of the Princess Ashika. This was a major factor in the flooding and eventual sinking of the Princess Ashika.
2.29 The Director of Marine Safety, John Rounds, writing to the Owners on 3rd February 2006 said in part:

“Close scrutiny of the recent survey carried out on your company’s vessel M.V. Princess Ashika have revealed longstanding major mechanical and structural defects. Our records show that these items have been outstanding for over two years and promises to rectify them have not eventuated. ... In the interest of safety and the travelling public the Fiji Islands Maritime Safety Administration and the Fiji Marine Board have reluctantly decided not to extend the validity of its Survey Certificate until these pending items are rectified.” (Exhibit 44 page 1608)
2.30 A major overhaul and slipping was carried out during August 2006 with an initial one month Survey Certificate issued on 15th August 2006, followed on 14th September 2006 by a six month Survey Certificate running from 15th August 2006.

2.31 Amongst items required at a survey on 6th February 2007, it is interesting to note there was a requirement to insert rubber sealant on both ramps to make them water tight.

2.32 Following a failure of the steering gear on 18th October 2006, there was a major overhaul of the steering gear. It was found that the motor had burnt out. A spare was fitted and the surveyor required a second hand steering motor be fitted and the coupling aligned. This was followed by a manoeuvring test to the satisfaction of the surveyor. (Exhibit 44 pages 1767-1764)

Condition of MV Princess Ashika in Fiji

2.33 At the six month survey on 6th March 2007, the Surveyors K.Toaisi, A.Rawasa, and Josefa Qarase wrote in the General Remarks the following:

"The condition of the vessel seems to be in an advanced state of deterioration especially in the passenger accommodation, and its toilets and accessories. We have also found that passenger access are not properly marked and therefore unsafe due to a lot of sharp edged frames and brackets ..." (Exhibit 44 page 1809) (Appendix 7)

2.34 Despite this report a Survey Certificate was issued for one month. (Exhibit 44 page 1830). A further Survey was conducted on 19th April 2007 and the Surveyor commented in the General Remarks that "She was found to be in a reasonably satisfactory condition." (Exhibit 44 page 1823) A Survey Certificate valid for six months was issued. When this Certificate was due for renewal, the surveyor found defects in the hull in the way of the forward ballast tanks (described by the Surveyors as the fore peak tanks) that prompted V.Kauwale (for the Director of Maritime Safety) to write the following to the Owners on 28th August 2007:

"Re: Princess Ashika: Underwater Hull Damages.

Following the Special Hull Survey of the above quoted vessel of yours, it is strongly recommended that the damages sustained at the fore peak tank bottom plate, to be attended while the vessel on Dock. Further temporary repairs not entertained.

With the above recommendations, the vessel has to dry-dock at the earliest from today, 28/08/07."
This recommendation follows the safety of the vessel and promoting quality repairs to avoid further or repeated accidents which may cause loss of valuable assets and human life.” (Exhibit 44 page 1835)

2.35 Although there are no supporting documents, the vessel appears to have been slipped during the period October to December 2007. At a survey by Samuela Bulimetuira it was recorded that a sufficient number of the defects had been addressed to allow the issuing of a six month Survey Certificate valid to 13\textsuperscript{th} June 2008. (Exhibit 44 pages 1168, 1169) It should be noted that the surveyor tested both the ship’s general alarm and the whistle and found them satisfactory. (Exhibit 44 page 1154) During this period at the end of 2007 correspondence from the authorities to the owner underlines the surveyors frustration at the owner’s failure to properly address the defects on the Princess Ashika and the use of inadequate repair methods. A letter of Malakai Cakau, Engineer Surveyor dated 15\textsuperscript{th} October 2007 demonstrated this frustration. (Exhibit 44 page 1143). Both Mr. Cakau and the Acting Secretary of the Fiji Marine Board, Mrs. E.Loiti, wrote letters on 17\textsuperscript{th} October complaining about the lack of co-operation by the Owners in undertaking works to the surveyors satisfaction at the annual docking, and in view of the owners attitude, a Survey Certificate could not be issued. (Exhibit 44 pages 1144, 1145)

2.36 A six monthly survey was conducted in June 2008 and another Survey Certificate, expiring on 11\textsuperscript{th} December 2008, was issued. The Acting Director of FIMSA, Mrs. E.Loiti, wrote to the owners noting that the defect from the previous survey concerning the replacement of the undersize port anchor cable had not been rectified and if this was still outstanding at the next survey in December 2008 another Survey Certificate would not be issued. (Exhibit 44 page 1213)

2.37 Matters seemed to have come to a head in Fiji in the latter part of 2008 at the annual survey, with the FIMSA Surveyors finally making serious demands of the owners with regard to major repairs and steel replacement. Samuela Bulimetuira, Senior Surveyor made the following comments in his lengthy General Remarks dated 12\textsuperscript{th} November 2008:

\emph{“Corrosion was widespread invading the whole vessel and had reached a conquering stage which showed that this vessel should and must be condemned from sea transportation of any nature, since it is a danger to the public and the crew who man her.”} (Exhibit 44 page 1219) (Appendix 8)

2.38 On the 15\textsuperscript{th} December 2008 as the annual survey continued, Engineer Surveyor, Malakai Cakau, made, amongst others, the following comments:

\emph{“It is also noted that repair works cannot commensurate with the speeding rate of corrosion below the waterline, at the vehicle deck and at the upper}
deck. The vessel is at a stage that all strengthening members needs to be monitored to keep the vessel intact. In addition, a frequent inspection to the underwater areas to verify the hull integrity. Furthermore, when considering safety factors of the vessel, it is about time that we limit the carrying capacity of the vessel. At the same time discuss with the ship owner matters pertaining to issues to safety, environment and viability of MV Princess Ashika.” (Exhibit 44 page 1224) (Appendix 9)

2.39 On the 16th December 2008 another surveyor involved in the annual survey, Samuela Bulimetuira, wrote the following in the General Remarks:

“The vessel is now 36 years old and the condition it is in now if it is allowed to trade will cause a Maritime Disaster and will be the cause of pollution. It is about time the vessel be condemned for good since its condition will continue to deteriorate further. The vessel is beyond repair and is no longer fit for sea service of any nature. We cannot ignore the fact that she is truly unseaworthy.” (Exhibit 44 page 1221) (Appendix 10)

2.40 By 24th December 2008, the FIMSA surveyors were demanding that the owners provide to FIMSA a written plan for the required major repairs. On 3rd January 2009 the vessel was un-slipped but due to several leaks which became apparent, the vessel had to be returned to the slip. (Exhibit 44 page 1232) It is apparent there was a large number of leaks in the hull, as there was a number of attempts at refloating the vessel, but each time the vessel had to be hauled out of the water to deal with more leaks.

2.41 On 6th January 2009 the surveyors in their general remarks said the following:

“Do recommend that until confirmation of the work schedule is provided to FIMSA by the ship owner, SURVEY and inspection of Ashika have to be temporarily halted. The Surveyors cannot be taken for granted and dragged into a situation where safety is compromised.” (Exhibit 44 page 1232)

2.42 On 7th January 2009 Navitalai Ratukalu, for the Chief Executive Officer of Fiji Ships and Heavy Industries provided a written quote for the repair work required by FIMSA and estimated these repairs would take 46 days. This information was relayed to FIMSA by the owners on the same day with information that the slipway was booked for late April to undertake the work. In response, Mrs. E.Loiti, Acting Director of Maritime Safety, advised that Princess Ashika would be restricted to sail between Natovi and Buresala only with restricted cargo. (Exhibit 44 page 1263)

2.43 Starting in January 2009 the following Survey Certificates were issued up to the time of the vessel’s sale and departure from Fiji:
<table>
<thead>
<tr>
<th>Certificate No.</th>
<th>Date from</th>
<th>Date to</th>
<th>Endorsement</th>
</tr>
</thead>
<tbody>
<tr>
<td>06 of 2009</td>
<td>13/01/09</td>
<td>12/02/09</td>
<td>Vessel to operate only between Natovi and Buresala with reduced cargo. Passengers 270, Crew 15 (Exhibit 44 page 1257) <em>(Appendix 11)</em></td>
</tr>
<tr>
<td>49 of 2009</td>
<td>10/02/09</td>
<td>09/03/09</td>
<td>Vessel to operate only between Natovi and Buresala with reduced cargo and at reduced speed. Passengers 145, Crew 15. (Exhibit 44 page 1273) <em>(Appendix 12)</em></td>
</tr>
<tr>
<td>116 of 2009</td>
<td>11/03/09</td>
<td>09/04/09</td>
<td>Vessel to operate only between Natovi and Buresala with reduced cargo and at reduced speed. Crew 145, Crew 15. (Exhibit 44 page 1278) <em>(Appendix 13)</em></td>
</tr>
<tr>
<td>163 of 2009</td>
<td>09/04/09</td>
<td>07/05/09</td>
<td>Vessel to operate only between Natovi and Buresala with reduced cargo and at reduced speed. Passengers 145, Crew 15. (Exhibit 44 page 1286) (Exhibit 52) <em>(Appendix 14)</em></td>
</tr>
<tr>
<td>277 of 2009</td>
<td>26/05/09</td>
<td>16/06/09</td>
<td>Vessel to operate only between Natovi and Buresala with reduced cargo and at reduced speed. Passengers 145, Crew 15. (Exhibit 44 page 1292) <em>(Appendix 16)</em></td>
</tr>
</tbody>
</table>

2.44 Initial approaches from the Shipping Corporation of Polynesia (SCP) about purchasing a replacement for the S.C.P. vessel Olovaha saw the CEO of SCP, Mr. John Jonesse, travelling on a round trip on Princess Ashika on 25\(^{th}\) - 26\(^{th}\) March 2009 and he stated that he was impressed with “the mechanical and electrical state of the equipment”. (Exhibit 29)
2.45 Mr. Jonesse made further voyages on the vessel on the 6th-7th April 2009, this time accompanied by Kerry Bennett and David Shaw, two diesel engineers, who were to assist in assessing the mechanical state of Princess Ashika. (Exhibit 29). On the basis of comments made by the engineers following this visit, Mr. Jonesse compiled an audit report for the Board of SCP, and for the Minister of Transport, Mr. Karalus. This report purported to be signed by both Mr. Bennett and Mr. Shaw, as well as Mr. Jonesse. Attached to this audit report was a schedule covering all the structures, spaces and machinery of the vessel. This was based on a spreadsheet which had originally been a report on the condition of MV Olovaha. It had been adapted by Mr. Jonesse to suit the Princess Ashika in such a manner so as to appear, to the casual observer, that it had been prepared by a surveyor employed by FIMSA.

(Above: Photograph taken on 7th April 2009, of cargo deck of the MV Princess Ashika showing corrosion and doubling plates)

2.46 In a quote by Fiji Ships & Heavy Industries dated 8th April 2009, the owners, Patterson Brothers were advised that the slip booking was now 1st June 2009. (Exhibit 44 pages 1280-1281) This was to complete the replacement of transverse floors and rider bars as required by the surveyors during their surveys in December 2008.

2.47 The purchase of MV Princess Ashika was completed by 9th June 2009 and a Certificate of Deletion from the Fijian Registry was issued on that date.
On the letter from George Patterson to The Director of FIMSA, dated 22\textsuperscript{nd} May 2009, a note was handwritten in the lower left corner for the action of “S/O”:

“\textit{Please advise shipowner that previous survey report conducted was not signed by the President of the Board due to the condition of the hull.}”

It is not known if this advice reached the new owner. (Exhibit 44 page 1288)

\textbf{Delivery of MV Princess Ashika to Tonga}

2.49 A further survey of Princess Ashika was undertaken at Natovi Jetty on 26\textsuperscript{th} May 2009. No further leaks were found in the hull and a Survey Certificate, No.277 of 2009, was issued, but for less than one month and only in order for the vessel to have a valid survey certificate whilst “foreign crew” were undergoing familiarisation onboard.

2.50 The Princess Ashika was allegedly given Provisional Tongan Documents on the 9\textsuperscript{th} June 2009 and sailed for Nuku'alofa on the 10\textsuperscript{th} June 2009 with a mixed Tongan and Fijian crew of 13, comprising the existing Fijian Master and Fijian Chief Engineer, 2 Mates, 3 other Engineers, a Bosun, a Greaser and 4 Able Seamen, was on board for the delivery voyage. Six of the crew were from Tonga and the rest were from Fiji. The ship did not carry any cargo or passengers.

2.51 The following Tongans were signed on for this voyage and were also part of the crew when the vessel sank: Semisi Pomale, Metui Satini, Kainga Taufo’ou, ‘Unaloto Uata, and Solomone Havili. Viliami Maka Tuputupu, who was to be the Master of Princess Ashika in Tonga, went to Fiji to become familiar with the vessel but returned to Tonga prior to the Princess Ashika’s first departure.

2.52 It should be noted that none of the steel replacement required by FIMSA had been done, neither had the worn down port anchor cable been replaced. This latter item had been included in the deficiencies at the survey in the latter part of 2007.

2.53 Two days into the voyage, pushing into head wind and seas, the bow ramp was set inwards by the sea leaving a 3-4 inch gap each side, (T 1462 N-S) and was dislodged from its securing points, although it did not drop completely. Sea water began to leak around the sides of the ramp into the cargo deck. The ramp was re-secured by means of a mooring rope. According to Mr. Ta’ufo’ou, A.B., who was a crew member on this voyage, the head wind was blowing at about 20 to 25 knots. (T 1482 D)

2.54 At about the same time, the stern ramp fell down. The stern ramp was retrieved by the crew and re-secured, also by using a mooring rope. Nothing could be done to prevent the ingress of water around the bow ramp. The Fijian Master made the decision to return to Fiji for repairs, even though the vessel was by now closer to Tonga than Fiji. (T 1462 D–T, 1463 A–F) Solomone Havili, who was to be motorman then eventually Third Engineer in Tonga, said that the water in the water depth in
the cargo deck was up to his thighs, about two feet. (T 2539 C-M) This water covered two thirds of the cargo deck, approximately.

2.55 In a radio conversation between Princess Ashika and the SCP Workshop on 16th July (copied by Coast Radio) reporting that the vessel was returning to Fiji it was reported that:

“... there are some leaks showing in the vessel ... there are many leaks ... The rooms should be repaired it’s leaking, the bow, mess and engineroom is taking in water, it needs to be patched and repaired ... there are many things to patch, the front ramp is starting to bend and two of the storerooms are damaged from the outside” (Exhibit 86)

2.56 In Suva repairs were made to the bow ramp. This required cutting the ramp down the centre line and inserting new steel plate. Once the ramp was repaired and in place, steel angles were welded on each side of the ramp where it met the superstructure and concrete was poured into the gap where the foot of the ramp met the cargo deck. (See photo below) (T 1465 C–E, T 1494 L–T) Repairs were also made to the sides of the cargo deck superstructure where the sea had breached it during the aborted voyage to Tonga. (T 1465 D)

Once this work was completed, Princess Ashika made a second departure from Suva on 29th June 2009, arriving in Nuku’alofa on 1st July 2009. The weather for this passage was good and the small amounts of seawater, that entered the cargo deck via the openings at each side of the bow ramp, were able to drain out through the scuppers located each side of the midships section of this deck. (T 1466, C – L)

**MV Princess Ashika in Tonga**

2.58 On 2nd July 2009, in Nuku’alofa, surveyors from the Ministry of Transport attended the vessel to undertake a survey. These were Lisiate Latu, Lou Pale, ‘Onesi Tu’ifua
accompanied by Sione Mafi Kavaliku who was under training. Several hours were spent surveying the vessel before the surveyors returned to their office in the early afternoon to prepare their report. This was ready on the morning of 3rd July 2009 and a Provisional Survey Certificate was issued although a large number of defects had been listed, the most notable were the following which were hand written by Mr. Tu’ipulotu, Director of Marine and Ports:

“1. The bow and stern ramp must be watertight to the satisfaction of the surveyor before departure.

2. Also the scuppers must be repaired to the surveyors’ satisfaction.

3. Load Line must not be submerged in any case on departure.

4. Or any other item that may be advised by the surveyor on the spot.”

(Exhibit 17)

The photo on the left was taken in Fiji on 27th March 2009 and appears to show the end of the rubber skirt (circled in red) referred to by Mr. Jonesse in evidence (T 4187 D-F) He spoke of this as if it would prevent sea water entering the cargo deck from below the ramp. At this stage it does not seem to be attached to the ramp, only to the steel fender.

The photo on the left was taken on 4th August 2009, prior to the final voyage of Princess Ashika, there appears to be only a small portion of the rubber skirt attached to the bow ramp and referred to above. It would appear that the rest of the skirt has been carried away by the action of the sea.
2.59 Despite the surveyors adverse comments, and the fact that none of the required repairs had been carried out, the necessary survey documents were completed and issued. It is not certain if a copy of the Deficiencies List reached Captain Tuputupu prior to commencing the first voyage on 3rd July 2009. He could not recall having seen the list. (T 1898-9) It is possible that this list only got as far as the CEO, John Jonesse as he gave evidence (T 4988 C-E) that he received the deficiencies list after Princess Ashika commenced her first voyage in Tonga. Mr. Jonesse also added that “the Master had a copy, and the Mate” (of the deficiencies list) (T 4988 F-H).

2.60 This is contrary to the evidence given by Captain Tuputupu (T 1729 D-P) where he stated that he did not receive a copy of the Survey Certificate prior to sailing but received a phone call from Mr. Jonesse who said “everything is okay and we must sail.”

2.61 This evidence suggests that the version of the list given to the Master and Mate prior to departure, if indeed they did receive a list, did not include the four additional hand written points added by Mr. Tu’ipulotu, (Acting Director of Marine and Ports).


2.63 The voyage details are as follows:

<table>
<thead>
<tr>
<th>Date of Departure from Nuku’alofa</th>
<th>Passengers</th>
<th>Cargo (tonnes)</th>
<th>Itinerary</th>
<th>Date of return to Nuku’alofa</th>
</tr>
</thead>
<tbody>
<tr>
<td>3rd July 2009</td>
<td>367*</td>
<td>341.4</td>
<td>Pangai, Vava’u, and Pangai</td>
<td>5th July 2009</td>
</tr>
<tr>
<td>9th July 2009</td>
<td>56</td>
<td>220</td>
<td>Ha’afeva, Pangai, Vava’u, Pangai, and Ha’afeva</td>
<td>11th July 2009</td>
</tr>
<tr>
<td>15th July 2009</td>
<td>28</td>
<td>177</td>
<td>Ha’afeva, Pangai, Vava’u, and Pangai</td>
<td>17th July 2009</td>
</tr>
<tr>
<td>23rd July 2009</td>
<td>89</td>
<td>367.82</td>
<td>Ha’afeva, Pangai, Vava’u, Niuafo’ou, Niuatoputapu, Vava’u, Pangai, and Ha’afeva</td>
<td>31st July 2009</td>
</tr>
<tr>
<td>5th August 2009</td>
<td>96</td>
<td>110</td>
<td>Sank in position 20° 24’S 174° 56’W</td>
<td></td>
</tr>
</tbody>
</table>

(Above: * This figure was obtained by an official count in Pangai, Ha’apai)
Voyage One

2.64 There was sufficient concern amongst the surveyors when the Princess Ashika departed at about midday, 3rd July 2009, despite the Acting Director of Marine’s comments on the deficiencies list, that one of them, ‘Onesi Tu’ifua, telephoned ahead to Pangai, to the local police and the Marine and Ports Officer, Molitoni Finau, to detain the vessel to count the passengers on the pretext that the vessel was overloaded. (T 1046 D - 1046 I) It transpired that the Port Authority Departure Clearance indicated that there were 340 passengers onboard whilst the Trip Report Message sent to Nuku’alofa Radio gave a total of 320 passengers. When the passengers were counted on arrival Pangai a total of 367 were onboard. This opportunity to detain the Princess Ashika was lost and she continued on her voyage.

2.65 This under reporting of passengers, and in some cases cargo figures, seems to have been common. Mrs. Taumoepeau, Chairperson of SCP, in her Affidavit (Exhibit 288) acknowledged that “...high percentage of people onboard were stowaways”, and “...stowaways took advantage of the lack of governance at the ticketing/boarding level.” Mr. Jonesse was also aware that there were ticketed passengers in addition to stowaways whose names did not appear on the passenger manifests. (T 4192 L-4193 D)

2.66 The fact that the weather for this voyage was fair, and that the concrete at the base of the bow ramp and the angle iron at the sides of the ramp were still in place, meant that crew reported only a small amount of water entering the cargo deck, even though the manifested weight of cargo loaded (342 tonnes) was way in excess of the vessel’s original deadweight. (222 tonnes)

2.67 Captain Tuputupu indicated in his oral evidence that on this voyage of the MV Princess Ashika in Tonga, waves had broken through the side of the vessel causing holes of up to more than a foot in diameter. (T 1696 G - 1697 I)

Voyage Two

2.68 After arriving back in Nuku’alofa on 5th July 2009, on completion of the first voyage for the SCP, the welds on the bow ramp were removed so that the ramp could be used on the ensuing voyages. The concrete at the base of the ramp remained to be removed during the voyage before the vessel reached Ha’afeva so the bow ramp could be used there. (T 1694 R-S) (T 2057 C-I)

2.69 According to the Seaman, P. Tupou, the Captain had wanted to remain alongside because of the:
“... excessive amount of corrosion and the holes at the side of the vessel.” (T 2084 N-P)

Mr. Tupou added:

“On the ‘Princess Ashika’ the captain had asked many times for the vessel to remain in port because of the excessive amount of corrosion and the holes at the side of the vessel. (T 2084 O-P)

... After the first voyage - after the first - even from the - after the first voyage, sir, the captain told us that he wants the vessel stopped from sailing because he wanted to see the deficiencies remedied before they sail again but it was the manager of the shipping company that wanted them to continue sailing.” (T 2085 A-B)

2.70 Mr. P. Tupou gave evidence that there were up to 20 holes of about 7 inches in diameter created in the ships side by the action of the sea during this voyage. (T 2055 N - 2056 M) New steel plating was welded on to repair these holes at the completion of the voyage.

2.71 From the first voyage the water on the cargo deck was reported by the Iceman, Samisoni Palu, to be sufficient to cause the refrigerators to float. (T 3139 S - 3141 R) This was reported to Mr. Jonesse by Nikola Tau, the SCP Freight Officer. Mr. Jonesse directed the Workshop to construct metal platforms to lift the refrigerators above water level. This was not done before the vessel sank and Mr. Tau had to arrange for pallets to do the job.

(Left: Photographs taken on 5th August 2009 of general state of the cargo deck; Right: Picture taken on 5th August 2009 of a hole in the cargo deck above No.1 void space)

2.72 It became the practice, when loading in Nuku’alofa, to place steel sheets on the cargo deck as there was a fear that, due to the advanced corrosion, the fork lift might penetrate the deck.
2.73 The Captain reported that waves opened three holes on the sides of the vessel on this voyage, the largest of which was about one metre in diameter on the port side of the vessel. (T 1697 I-U) Once again at the end of this voyage, welders were required to repair holes made in the ship’s side by the sea.

**Voyage Three**

2.74 The Master in his evidence (T 1736 E - 1738 I) thought a main engine stoppage occurred during this voyage and that this was due to a faulty fuel pump. He may have been mistaken with the voyage number as other evidence says that this occurred during the fourth voyage.

2.75 On the third voyage, a hole was caused by waves on the port side of the vessel which required a 2 metre by 2 metre metal sheet to be inserted to close the hole. (T 1698 - 1700 A - J) At the end of this voyage, welders were again required to make repairs to the ship’s side.

**Voyage Four**

2.76 The worst weather encountered by Princess Ashika occurred during this voyage which included calls into the Niua, the northern most islands in the Kingdom of Tonga. The level of water in the cargo deck was such that some items of cargo started to float. (Exhibit 169)

2.77 On this voyage the Master stated that some more holes were caused by waves, the largest hole being about three quarters of a metre in diameter. (T 1701 Q - 1702 G)

2.78 A passenger, Michel Wilde, travelled on Princess Ashika from Niuatoputapu to Vava'u during this voyage and gave evidence as to his anxiety for his own safety due to the excessive ingress of water into the cargo deck. Mr. Wilde has travelled in Tongan waters since 1992, is a free diver by occupation, and was travelling with a number of friends.

2.79 He became so concerned at the amount of water on the cargo deck, up to eight inches in the forward part, that he advised one of his friends, a non-swimmer, to wear a lifejacket, which he did for the whole voyage. Mr. Wilde said of the condition of the vessel:

“Well, a lot of it was on the sides exposed to the sea, by the railings and what-have-you. It seemed to have a new coat of paint or something on it but it was definitely - there was rust everywhere.” (T 1504 - 1506) (T 1507 O – 1508 D)

2.80 Mr. Wilde also stated:

“Well, I wasn’t going to get on the boat again.” (T 1507 L)
2.81 Mr. P. Tupou, A.B., said that during Voyage 4, the water level reached a depth of 1 metre on the cargo deck, highlighting an area along the port side of the cargo deck from the bow ramp to the port engine room entrance, where he said the water lay. (Exhibit 158) (T 2058 L – 2059 G)

2.82 This evidence was confirmed by Mr. Uasike Tupou, 2nd Mate, in his evidence and he said that the vessel listing heavily to port. (T 1415 C-R) He told of the crews efforts to clear the water off the cargo deck during this voyage:

“I was told by Kainga Ta’ufou’ou that they had worked in the cargo hold to try and remove the water and what they did was they brought a fireman’s axe. What they did was use the axe - the fireman’s axe - and chopped away the timber that was blocking the scuppers, which fell into the sea and enabled the water to drain out to sea. The - it was difficult to chop away the timber that was blocking the scuppers but, at the same time, we noticed some areas on the side of the vessel that was very heavily corroded. So we used the axe to chop a hole through the side of the vessel and enable the water to drain out. (T 1416 E-H)

(Above: Photographs taken on 4th and 5th August 2009 showing the condition of four of the 14 cargo deck scuppers on MV Princess Ashika)
2.83 There is considerable evidence of the generally poor condition of the Princess Ashika after its arrival in Tonga. This comes in the form of photographs principally those taken by the Surveyor, Mosese Fakatou, during a survey conducted on 4th and 5th August 2009 for the Insurers, British Marine Managers Limited, (Exhibit 6) and from verbal reports by welders who made repairs, the Ministry of Transport surveyors who made the initial survey and one of whom, Mr.Lou Pale also took a series of photos, and several crew and passengers. There is also evidence that on all the above voyages, water entered the cargo deck around the bow ramp and through holes in the ship’s side and decks, to a greater or lesser extent. Repairs and steel replacement went on each time the vessel was berthed in Nuku’alofa, but it was always going to be a losing battle against deterioration of the ship’s structure.

2.84 A welder, Mr. Katoa, gave evidence that:

“...we started working on the boat the day after it arrived ... we worked on the vessel continuously up until the day it sailed for the last time.” (T 215 C-F)

2.85 It seems incomprehensible that the CEO of SCP, Mr. Jonesse, was unaware of all the welding repairs that the SCP welders under his management were making to the sides of the Princess Ashika after every voyage. By all accounts he had frequent contact with both the ship and the workshop.

2.86 The Chief Mate, Mr. Pomale, gave evidence that the only maintenance work carried out on Princess Ashika since arriving in Tonga, that he was aware of, was the welding repairs to the holes in the vessel’s sides caused by the sea on passage. (T 2231 G)

2.87 There is evidence in the photos taken by Mr. Fakatou on the 4th and 5th August 2009, as part of his survey, that the installation of the light metal sheets that the CEO of SCP had wanted in the erection deck had commenced. The metal sheets were mentioned in the so called audit prepared by the CEO. (Exhibit 29) This metal sheeting would only have reduced the amount of sea spray and rain blowing into the cargo deck and onto the cargo. It would not have had the slightest effect in slowing or preventing the inflow of sea water as occurred when the Princess Ashika foundered.
2.88 During either the third or fourth Voyage (or possibly both) the vessel was stopped at sea due to the main engines becoming starved of fuel. The Master in his evidence (T 1736 E – 1738 I) thought the stoppage occurred during the third voyage and was due to a faulty fuel pump. The Master gave evidence that the Chief Engineer installed a portable electric pump to transfer fuel from the bunker tank.

2.89 The evidence from Mr. Havili, Third Engineer, (T 2559 K – 2561 T) suggests that the engines were starved of fuel due to a leaking fuel pipe on the 4th voyage. Whatever the reason, a portable pump was used to transfer fuel from the bunker tanks to the service tank via a hose which passed through the doorway in the bulkhead between the shaft tunnel void space and the engine room.

2.90 This meant that this door could not be closed and flooding of either compartment would cause the other to flood. In a photo of this door, taken in Fiji during April 2009, a hose can be seen passing through the doorway. It is not known whether the ship stopped once or twice at sea, but the SCP workshop was aware that a fuel pump had failed and the fuel pipe required repairs.

2.91 One of the welders was able to confirm that he had repaired a split fuel pipe immediately prior to the final voyage. (T 224 M- 225 G) This was not re-installed.

2.92 Documentary evidence from a crew member, Mr. Tulihakau, confirms that it was on this voyage that the fuel pipe supplying the main engine had developed a leak. Although he didn’t confirm this, the leak would have necessitated stopping the engine until temporary repairs were made.

2.93 Mr. Tulihakau also reported the following in a statement tendered to the Commission:

“During the voyage between Ha’apai and Vava’u I noticed how the waves struck against her and water came into the vessel through the Bow Ramp which caused the hold to be filled with water. I was in the Hold and the level was approximately up to knee level and there was a call for us to join the person who was the Security Guard on board the vessel to bail out water. Part of the cargo had started to float.”

He also stated:

“When the vessel sailed for Tongatapu I asked to be relieved of my duties because what I had seen on the voyage to Niuafo’ou had truly scared me.” (Exhibit 169)
During the 4\textsuperscript{th} and 5\textsuperscript{th} August 2009, Mosese Fakatou undertook a survey of Princess Ashika on behalf of the British Marine Managers Limited for the Protection and Indemnity Insurance. He took a large number of photographs which highlighted the extremely poor condition of the vessel.

During Mr. Fakatou’s survey he required the lid of the forward port ballast tank to be opened in order to check the ballasting operation. The Chief Mate, Mr. Pomale, gave evidence that he believed the tank was closed for the voyage but did not see the lid bolted down (T 2223 E - H). The motorman, Sitiveni ‘Ali, gave evidence that both the forward ballast tank lids were always left off for the ease of checking ballast water levels. (T 2797 P – 2798 P) The open manhole into the port forward water ballast tank is shown in the photo. This is located inside the door to the port side forward deck store.
2.96 Mr. Pomale was unclear about the condition of the ballast at departure Nuku’alofa on this voyage. He estimated that the aft ballast tanks were three quarters full but no soundings had been taken. He had no idea what was in the forward ballast tanks. (T 2222 K-T) He did give evidence that one of the Aft Ballast Tanks leaked into the void space (shaft tunnel) when partially filled and therefore it was not the practice to fill above these holes in the tank. (T 2228 K-T)

2.97 Loading of cargo was completed at about 1600 hrs, 5\textsuperscript{th} August 2009, and the vessel prepared for sea. This does not seem to have involved anyone checking, that watertight doors, tank lids and hatches were closed prior to departure. (T 2232 E-L)

2.98 There is no evidence that there was comprehensive testing and checking of Bridge and engine room equipment. These tests should always be carried out prior to sailing and should include, but not be limited to, steering gear, engine telegraphs, alarms and ship’s whistle and all Bridge navigation gear.

2.99 Princess Ashika departed Nuku’alofa at about 1635 hrs, 5\textsuperscript{th} August 2009, on what was to be her final voyage. Captain Tuputupu was on the bridge with the Chief Engineer and Ta’ufo’ou, AB, the Quartermaster on the wheel. Once the mooring lines were let go, the Chief Mate, Mr. Pomale, joined the Master on the Bridge. The Master conned the vessel until clear of the shallow waters. The Chief Engineer was assigned to operate the engine controls (telegraphs) as there had been problems with these in Tonga. The Master had said the controls never worked properly. On this final voyage the port engine control was not operating correctly. (T 1846 A-U) In addition this, the fault with the steering remained. The rudder could not be moved more than 15° to port or to starboard. (T 1876 O-Q)

2.100 Onboard were 32 crew and 96 passengers although these figures were not known at the time.

2.101 At sometime between 1700 and 1730hrs, the Master handed over the watch to the First Mate and watches were set. The normal practice at sea on MV Princess Ashika was for two seamen to be assigned to each of the three four hour watches, on a 4 hours on, 8 hours off routine.

2.102 The Master would undertake the pilotage in confined waters but not keep a navigation watch. The navigation watches at sea would be shared by the Chief and Second Mates to suit the particular passage being undertaken. On this passage, it was normal for one Mate to do the complete open sea navigation watch until the Master returned to the Bridge to con the vessel into port at Ha’afeva.

2.103 At 17:55 hrs the Chief Mate contacted Nuku’alofa Radio by Radio Telephone (R/T) and passed the following message:
2.104 This conveyed the information regarding time of departure Nuku’alofa, the estimated time of arrival at Ha’afeva, crew and passenger numbers, cargo onboard, current position, speed and course, and radio stations to be used. This message included the erroneous passenger and crew numbers of 45 and 27 respectively, which was to be the cause of major confusion later, during the search and rescue.

2.105 The Master and Chief Engineer talked for a time on the Bridge wing and then both left the Bridge shortly after 1800hrs (T 1758 P-T), with the Master reading for a while before going to sleep. At this time there was a force 4-5 east to south-easterly wind and a moderate sea.

2.106 About 18:30 the Chief Mate was feeling unwell and called the Steward, Uokalani Filipe Tau’ataina to the Bridge to take over the watch. Mr. Tau’ataina held a Master Class 5 Certificate and had previously sailed on Princess Ashika as Second Mate for one voyage. According to the Master he was not made aware of this change of Officer of the Watch.

2.107 At about 18:35 hrs, the Chief Mate asked a crew member ‘Ilai Haukinima to fetch Panadol, a pillow and a blanket.

2.108 This watchkeeping arrangement was to cause confusion amongst the crew up to the time the Master returned to the Bridge. Some would not accept Mr. Tau’ataina as the Officer of the watch and would report the ingress of water to the Chief Mate. Others would report to Mr. Tau’ataina, although he said that he told all who reported to him to report to the Chief Mate as well.

2.109 According to a passenger, Sione Ngalu, by 19:30 hrs. there was sufficient water on the cargo deck to wash the wooden chocks away from the wheels of vehicles stowed there. (T 1028 H)

2.110 The Third Engineer was asked three times to pump out forward ballast tanks during the 1600 – 2000 watch. (T 2569 F – 2570 A) This could have been due to some concern over the vessel’s trim and water entering the cargo deck around the bow ramp, but there is no evidence to support or contradict this.

2.111 When the two seamen, Fisi’inaua Vea, Ordinary Seaman (OS), and Penismani Tupou, AB, commenced their 8-12 watch at 2000 hrs, they observed water in the crew accommodation and on the cargo deck. The two seamen would take alternating half hour spells on the wheel after which they would make a patrol of the ship and keep a Bridge lookout. Fisi’inaua Vea, the O.S., who was to take the first spell on the
wheel, remembered at this time immediately noticing water coming through the Bow Ramp and thought it strange because:

“... it was coming continuously and the water was getting fairly deep in the cargo hold.” (T 2020 R) “In previous voyages of the vessel I noticed water only in the cargo hold but on this particular voyage there were water in the argo Hold as well as down in the crews’ cabin.” (T 2020 N)

2.112 There were up to 7 crew members who were bailing out the crew accommodation at this time. The sea water entered the vessel through holes in the deck of the crew galley/messroom where it protruded outside the hull on the starboard side. From there it poured down the starboard stairway into the alleyway between the crew cabins. At some stage in these proceedings, some rags were pushed into the holes in the deck in an attempt to stem the flow of water. (T 2072 H) The water eventually forced the rags out of the holes.

2.113 Mr. Vea estimated that the water depth in the amidships on the cargo deck to be 12 inches deep at this time and spreading towards the bow. (T 2021 M-N) He also stated that water was coming in through the scuppers. He said that during the fourth voyage the scuppers had been blocked to prevent water entering the cargo deck but the crew had removed the wooden plugs to drain water out. (T 2022 Q – 2023 D)

2.114 On reaching the Bridge, Mr. Vea reported to Mr. Pomale, the Chief Mate, the water in the crew accommodation and on the cargo deck, and that some cargo appeared to have been damaged:

“I repeatedly told him about the conditions, sir, and at one time he swore at me and said to have some answers that were more prudent.” (T 2026 I-N)

2.115 Mr. Vea estimated that there was 2 inches of water in the crew accommodation at this time, 2000hrs. (T 2026 R-T)

2.116 Throughout the evening, the two 8-12 Watchkeepers made their rounds of the vessel at half hourly intervals, and reported back to the Bridge.

2.117 Mr. Tau’taina says that at some time before 21:00 hrs, the Chief Mate asked him to have the fore peak ballast water pumped out. (On this vessel the forward ballast Tanks were commonly referred to as the fore peak. The fore peak is, in reality, the void space forward of the collision bulkhead.) (T 2154 F) This action was confirmed by the motorman on the 8-12 watch, Mr. Kapeli. (T 2835 S-T) It seems likely that there was some concern in the Chief Mate’s mind about the watertight integrity of these tanks as, after the vessel sailed, there were at least three or four requests for the crew on duty in the engine room to pump them out.
2.118 The Bosun, Metui Satini, had taken part in the bailing of the crew’s accommodation and went to the Bridge at about 21:00hrs to report to the Chief Mate who he found lying down. He reported that there was about two and a half feet of water on the cargo deck, starboard side, and about 3 inches of water in the Crew Accommodation. Mr. Satini said that the Mate told him to contact the engine room and ask for the aft starboard ballast tank to be pumped out to correct the list. (T 2615 O)

2.119 Presumably the de-ballasting of the forward ballast tanks had ceased by this time. It is quite possible, and in fact, likely, that once pumping of the forward ballast tanks ceased, they started to fill with sea water, either from holes in the deck, or open tank lids, or both as it is evident that the vessel maintained a trim by the head which allowed the water to flow into the cargo deck under and around the bow ramp.

2.120 Not surprisingly, there is some confusion about the timing of events in the middle of the 8-12 watch prior to the sinking, and we have pieced together the likely time frame from the more credible reports from crew.

2.121 The crew generally seem to have had difficulty in estimating angles of list of the vessel. In most cases this was overestimated by a considerable degree.

2.122 There seems to be agreement that the vessel had a list to starboard until about 22:00 hrs when the action of pumping out the aft starboard ballast tank caused a change to a port list. The motorman on duty, Mr. Kapeli, indicated that the water in the engine room was lying on the port side, at about this time, so the pumping from the Starboard aft ballast tank had caused the list to change from starboard to port. (Exhibit 223)

2.123 Mr. Tau’ataina stated that he didn’t notice the list change from starboard to port so neither list could have been large despite his statement that the list to port was 30°. (T 2158 P- 2159 D) We consider that the list would not have been more than 5° at this time, and probably less.

2.124 At about 22:40 hrs, the Second Engineer who was in the passenger cabin, realised the vessel was listing to port. He went to the Bridge and telephoned the duty Motorman and ordered him to stop pumping out the aft starboard ballast tank. (Exhibit 423 paragraph 1.2.12)

2.125 The Chief Engineer was woken about 2300 hrs by the sound of water and found 25-30cm of water in his cabin which was situated port side aft in the crew accommodation. He saw water flowing down the port side stairs and that the vessel was listing. (Exhibit paragraph 1.2.13)

2.126 At about 2300 hrs, the 8-12 Motorman was told by the 2nd Engineer, Unaloto Uata, to try and close the port side engine room door to prevent the water entering. (T
2839 K – 2840 B). His evidence did not make it clear if he did manage to close this door. The Commission suspects that he was unable to do so. He added:

“... There was also water coming through a hole at the top of the engine room where the water was coming through from topside....”

2.127 It is not clear just where this hole was, but it is likely that the holes were adjacent to the port side engine room casing and the ventilator trunking situated there.

2.128 At about 2305 hrs, the Chief Engineer made his way out of the crew accommodation via the starboard stairs, and through the crew messroom, waking the crew as he went, including Kainga Ta’ufo’ou, AB, who was asleep in his cabin with his 2 year old son. (Exhibit 423 paragraph 1.2.13)

2.129 The Chief Engineer made his way to the engine room where he found all the engine crew. It was about 2315hrs by this time. There was a considerable amount of water on the port side which his crew were trying to pump out using the general service pump. The pump could not keep up with the rate at which the water was flowing into the engine room. (Exhibit 423 paragraph 1.2.14)

2.130 At about 2320hrs, the Bosun woke the Chief Mate again to report that the water on the cargo deck was now on the port side and was increasing in depth even though the crew were bailing it out with buckets. After going down to the cargo deck to check on the situation, the Chief Mate returned to the Bridge and told the watch officer to order the engineers to start pumping water back into the after starboard ballast Tank. It is considered unlikely that this was done as the engineroom crew would have been using the general service pump to clear the water from the engine room at about this time. (Exhibit 423 paragraph 1.2.16)

2.131 About this time the Chief Mate ordered the Officer of the watch, Mr. Tau’ataina, to alter the course into the wind which was blowing from the East North East.

2.132 Shortly after, between 2335 and 2340, the Chief Mate woke the Master and informed him of the situation.

2.133 Once on the bridge, the Master ordered “slow ahead” on the engines and told the Chief Mate and OS Vea to rig the diesel-driven portable fire pump on the cargo deck to pump the water from that deck. The Master also ordered an alteration of course to port, back to approximately the original course of 000° (M). (Exhibit 423 paragraph 1.2.17)

2.134 Shortly after 2345hrs, the portable fire pump was brought from the engineer’s store and placed on some drums on the port side of the cargo deck. The crew did not get the pump to operate. Initially they could not find the necessary hoses, then, having
jury-rigged a suction hose, they could not start the diesel engine. (Exhibit 423 paragraph 1.2.17)

2.135 Also at about 2345hrs, the Chief Engineer went to the bridge to inform the Master of the amount of water in the engine room, and that the port main engine needed to be stopped because its flywheel was submerged. At about 2348hrs, the port engine was stopped. At about this time, the water level in the engine room had risen to cover the electric motor of the general service pump and it needed to be stopped too. (Exhibit 423 paragraph 1.2.18-19)

2.136 Captain Tuputupu instructed the watch officer, Mr. Tau’ataina, to call everyone to the muster station. To do this, the Watch Officer ran down to the passenger deck and from there called to those on deck and in the Passenger Lounge. It appeared that that very few persons either heard or heeded his calls. (Exhibit 423 paragraph 1.2.18)

2.137 The Master made an announcement over the public address directing everyone to the muster station. Whilst a number of the crew heard something over the P.A., it is likely that very few crew or passengers, if any, understood this message.

2.138 The Chief Mate, Mr. Pomale, gave evidence that he had tested both the ship’s whistle and the alarm bells when the vessel was still in Fiji. (T 2234 S – 2235 P).

2.139 The Survey Deficiencies List prepared when the vessel arrived in Tonga stated in Part 6 LSA, “General Emergency Alarm is not available onboard”. (Exhibit 17)

2.140 Captain Tuputupu gave evidence that the ship’s whistle was not working because there was no air supply from the engine room:

“That whistle not working that night during the sinking of Princess Ashika, but that whistle might be operated during the time of - during the signalling of the vessel. ... The whistle working but depending because the air was operated from the engine room. When the air is turned on, then the whistle can be used on the bridge.”

2.141 The Captain said that the ship’s whistle worked but the air supply from the engine room was not turned on. (T 1854 I-R)

2.142 Whatever the reason for the general alarms and ship’s whistle not being available, the prime methods of alerting passengers and crew to the emergency, were lost. It is likely that many more persons would have been saved had the alarms and whistle been used.

2.143 The evidence indicates that the port list increased rapidly from about the time the port main engine was stopped (2348hrs) and several of the crew reported seeing the
forklift and some of the cargo shifting to port. The sea began to boil over the forward port side mooring deck at this time, rapidly filling the cargo deck and increasing the rate of water ingress into the spaces beneath the Cargo Deck, particularly the crew’s accommodation, engine room, and shaft tunnel. The water would also have been entering the void spaces and ballast tanks via corroded air vents.

2.144 At 2350hrs on 5th August 2009, the Coast Watch radio station at Nuku’alofa (Nuku’alofa Radio) logged the following call on the international distress frequency 6215 hertz:

“MAYDAY, MAYDAY, this is Ashika, A3CI2. We are going to sink in this position 20 degrees 24 minutes south, 174 degrees 56 minutes west.”

2.145 The transmission of this MAYDAY message was the last act of the Master as the vessel rolled to port and the Bridge filled with water. No-one onboard had donned lifejackets and no liferafts had been prepared or launched by this time. There is no evidence to show that any persons in the passenger cabin survived the sinking. This suggests the final moment of the capsize of Princess Ashika was very rapid giving no-one inside the passenger cabin an opportunity to reach the exit doors. It also suggests that the list of the vessel prior to this was not large enough to cause concern amongst those in the passenger cabin.

2.146 It appears that all the survivors were in the cargo deck, erection deck or the after, open part of the passenger deck.

2.147 When the Princess Ashika rolled over to port it became completely inverted. A number of survivors managed to get on to the bottom of the upturned hull for a short time before the vessel finally sank.

2.148 POSITION OF PRINCESS ASHIKA SINKING - 20°24’S 174°56W.

It is tragic to have to report that:

- no women or children survived the sinking;
- nobody donned lifejacket,
- a much higher proportion of crew survived;
- not one liferaft was launched by the crew (those that were deployed, did so automatically).
Position of Princess Ashika foundering.

(Above: Map of Tonga containing marks of the route taken by MV Princess Ashika on 5th August 2009 and the position it sank)
CHAPTER 3 - SEAWORTHINESS AND CONDITION OF THE MV PRINCESS ASHIKA

Overview of Evidence

3.1 The evidence before the Commission as to the seaworthiness and condition of MV Princess Ashika from well before the time it arrived in Tonga on 1st July 2009, until it sank on 5th August 2009, is clear. The MV Princess Ashika was unquestionably unseaworthy and in an appalling condition. It should never have been allowed to sail in Tonga under any conditions. Any suggestion to the contrary, including by Mr. John Jonesse (the CEO of Shipping Corporation of Polynesia Limited until he was suspended by the Board of Shipping Corporation on 6th November 2009) and Mr. Paul David Karalus (the former Minister for Transport), to the effect that the vessel was in good condition or well maintained is not only patently absurd, but dishonest. The evidence as to the unseaworthiness and appalling state of the vessel is overwhelming and compelling. Mr. Sione Mafi Kavaliku, a Marine Officer in the employ of the Ministry of Transport, when asked by the Acting Director of Marine and Ports as to his opinion about the vessel aptly responded by advising that “any fool (could) tell how bad the ship was”. (T 1378 F)

3.2 We have had the benefit of viewing over 100 photographs taken of the vessel from when it first arrived in Tonga on 1st July 2009 until the day it tragically sank on 5th August 2009. We have also viewed a video of the MV Princess Ashika taken on 18th August 2009 resting on the sea bed. The photographs and video graphically reinforce and support the documentary and oral evidence as to the horrendous and frightening condition of the MV Princess Ashika. The vessel was demonstrably and unequivocally unseaworthy and unsafe. Even a person with no shipping experience could tell from the briefest inspection of the vessel that it was in appalling condition.

3.3 On 2nd and 3rd July 2009 a deficiencies list (Exhibit 17) was prepared by the three surveyors in the Marine Division of the Ministry of Transport and signed by Mr. Tu’ipulotu (the Director of Marine and Ports). It contained a long list of deficiencies which were required to be rectified. Clearly, many needed to be rectified before the vessel could safely sail. Few, if any, of the deficiencies were properly rectified by the time the vessel sank on 5th August 2009.

3.4 The MV Princess Ashika was regularly inspected, for many years, by Surveyors and officers of the Fiji Islands Maritime Safety Administration (FIMSA). The FIMSA files demonstrate that the vessel was in a terrible state of disrepair and had been deteriorating rapidly over a number of years. We adopt, as an accurate opinion and assessment of MV Princes Ashika, the remarks made by a FIMSA Surveyor involved in the annual survey of the vessel on 16th December 2008, where he said:
“The vessel is now 36 years old and the condition it is now in if it is allowed to trade will cause a Maritime Disaster and will be the cause of pollution. It is about time the vessel be condemned for good since its condition will continue to deteriorate further. The vessel is beyond repair and is no longer fit for sea services of any nature. We cannot ignore the fact that she is truly unseaworthy.” (Underlining added) (Exhibit 44 page 1221) (Appendix 10)

3.5 The MV Princess Ashika, even if it had been a new vessel, was completely unsuitable for Tongan waters given its design. It was built and designed in Japan for short distance voyages and for smooth waters only. It was not built or designed for the long distance voyages and sea conditions it operated under in Tonga (including the voyage on 5th August 2009). MV Princess Ashika was unseaworthy for this reason alone.

The Law

3.6 It is now proposed to consider certain documentary and oral evidence before the Commission relevant to the seaworthiness and condition of the vessel. For ease of reference, it is proposed to address under headings the oral evidence given by various witnesses before the Commission. However, before doing so, it is timely to note that “unseaworthy” is defined in section 2 of the Shipping Act (Cap. 136). Unless the context otherwise requires, section 2 of the Shipping Act provides that:

“Unseaworthy” means, in relation to a ship, that—

(a) the material of which the ship is made;
(b) the condition of the hull of the ship;
(c) the construction of the ship;
(d) the condition of the ship’s equipment, boilers or machinery;
(e) the ship's safety equipment;
(f) the qualification of the ship's master;
(g) the number, description or qualifications of the crew of the ship, including its officers;
(h) the weight, description or stowage of cargo or ballast on board the ship; or
(i) the ship's draft, trim or heel;

is not of a reasonable standard, is not in accordance with the ordinary practice of seamen, is in contravention of this Act or the regulations or is
Although dealt with in another section of this Report, it should be appreciated that by force of section 144(1) of the *Shipping Act* “no person shall take or send or attempt to take or send an unseaworthy ship to sea”. Additionally, section 145(1) of the *Shipping Act* provides that where a ship appears to be unseaworthy the Minister for Transport may issue a certificate of provisional detention and detain the ship until it can be properly surveyed and inspected.

**Consideration of evidence as to seaworthiness and condition of Princess Ashika**

**Mosese Fakatou (Surveyor engaged by British Marine Managers Limited)**

3.8 Mr. Mosese Fakatou is a Marine Engineer by profession. He has worked as a Marine Engineer for a period of about 25 years. He was a former General Manager and Director of Shipping Corporation. Mr. Fakatou swore an affidavit (Exhibit 5) and provided detailed oral evidence. Although attempts were made by Counsel for Shipping Corporation to attack Mr. Fakatou’s credibility, we found Mr. Fakatou to be a credible witness who provided very useful information to the Commission. In fact, Mr. Fakatou’s assessment of the likely cause of the sinking, particularly as to the failure of the bow ramp to be properly sealed and thereby allow significant water onto the cargo deck creating instability and down flooding, was confirmed to be a cause of the tragedy.

3.9 Mr. Fakatou was appointed by British Marine Managers Limited to carry out a Loss Prevention Survey of Princess Ashika in Tonga. On 4th and 5th August 2009, Mr. Fakatou conducted a survey of Princess Ashika. Although he was unable to complete the survey because the vessel sailed on the afternoon of 5th August 2009, Mr. Fakatou took and produced over 80 coloured photographs which were tendered before the Commission (Exhibit 6), having spent many hours on the vessel on the 4th and 5th August 2009.

3.10 The photographs and evidence given by Mr. Fakatou are a damning condemnation of the condition of MV Princess Ashika and the flagrant neglect, over many years, to properly maintain the vessel in a seaworthy condition.

3.11 Mr. Fakatou in his affidavit (Exhibit 5), stated that:

“*Shipping Corporation of Polynesia Ltd have maintained that the vessel MV Princess Ashika had a planned preventative maintenance programme in place. At no stage during my above mentioned survey inspection, did I see any signs of this. As a matter of fact, I had observed just the opposite of what they claimed, which would lead me to believe that the management of this*
company do not know what a planned preventative maintenance programme is. The majority of maintenance witnessed were temporary, ‘ad-hoc’, and ‘catch-up’ maintenance. There were even, temporary repairs made on top of temporary repairs…”.

3.12 Mr. Fakatou stated that the bottom of the bow ramp had been “done up” with rubber pads and that this was not a very good method of repairing leaks. Mr. Fakatou indicated that the proper sealing of the bow ramp was the use of rubber inside and compression bars.

3.13 When asked about the likelihood of water coming through the bottom when waves hit the bow ramp, Mr. Fakatou replied “I would say water was leaking through the joint, regardless of these rubber pads – these rubber pads would not stop any leaks”. He also stated that the extent of the rust on the bow ramp was very bad. (T 49 A – P)

3.14 Mr. Fakatou also stated in his affidavit (Exhibit 5) that:

“The vessel was of the wrong type and totally unsuitable for the trade she was engaged in. A serious error was made in selecting this ship for this trade.

The open type cargo storage area with large drainage scuppers without non-return mechanisms would suggest this vessel was purposely designed for smooth water, short distance operation only. The small fuel storage capacity would also support this.

The near coastal or domestic trade of the Kingdom of Tonga ply through open waters experiencing waves of up to 5 mtrs high, with distances of up to 200 nautical miles between land masses. Vessels used in this area must be designed to withstand the conditions of open seas.
It is my strong opinion from experience in actual sailing on ferry boats and operating ferry boats in Tongan waters, that the MV Princess Ashika and totally unsuitable for the trade she was engaged on.”

3.15 Mr. Fakatou further stated in his affidavit (Exhibit 5) that:

“The drainage scuppers from the Wagon Deck (main or cargo deck) had no non-return mechanisms, some were blocked, some had reduced diameter holes. The vessel can be considered unseaworthy for this.” (Underlining added)

3.16 In his evidence Mr. Fakatou indicated that some scuppers had been reduced from the normal specification of 100 millimetres diameter, effectively reducing the capacity of the scuppers to get rid of water accumulating in the area around the scupper. (T 61 Q – U), (T 122 A – E) Mr. Fakatou stated that some scuppers on the wagon deck had been blocked with dirt and mud. (T 71 A – C) He further indicated that some of the scuppers had no non return valves, and water could enter the vessel through the scuppers. As it transpired none of the scuppers had non return valves. (T 69 J – O), (T 105 A – Q), (T 106 C – J)

3.17 Mr. Fakatou stated in his affidavit (Exhibit 5) that:

“From what could be seen (i.e. above water areas), the vessel was unseaworthy due to the un repaired, advance corrosion of the ship’s hull, ramps, water-tight and weather-tight doors and side scuttles, tank vents, access hatch covers, and vents to storage areas. These could be clearly seen from the attached survey report and photos.

The main deck plating had holes, was paper thin at places, had frequent use of doubling plates for repairs and can be considered unseaworthy for this until
all defective plating is satisfactorily repaired permanently with inserts. These could be clearly seen from the attached survey report and photos.” (Underlining added)

3.18 Mr. Fakatou, during his oral evidence, indicated that there had been a large number of temporary repairs in the form of doubling plates used throughout the vessel, especially on the wagon deck. (T 52 A – K) Additionally, in some parts of the vessel doubling plates had been welded on top of doubling plates. (T 65 F – M)

3.19 During Mr. Fakatou’s evidence in relation to the structure of the vessel he indicated that most areas of the bow and stern ramps, decks and sides of the vessel, were in a state of advanced corrosion. Furthermore, he stated that in some areas on the bow and stern ramps, decks and sides of the vessel the plating had corroded through leaving holes. (T 47 G – T), (T 51 D – H), (T 55 A – F), (T 71 N – T), (T 77 L – P), (T 93 C – O), (T 99 O – U), (T 100 M – 101 F), (T 114 O – 115 I)

3.20 Mr. Fakatou was cross-examined by Counsel for the Shipping Corporation in relation to his use of the term “paper thin” in his evidence in relation to the thickness of plating in various areas on the vessel, and why he did not measure the width of plating on the vessel in accordance with standard survey standards. Mr. Fakatou rightly stated “when you see holes through there is no need for measurement”. It is obvious that the thickness of the sides of the vessel was hopelessly inadequate, given that waves smashed large holes through both sides of the vessel during every voyage in Tonga.

3.21 Additionally, Mr. Fakatou stated in his affidavit (Exhibit 5) that:

“The loadline markings on both sides of the vessel were not above the waterline as required by SOLAS and the Shipping Act Cap 136. This makes the ship unseaworthy.”
3.22 Upon viewing television footage and whilst conducting his survey on the MV Princess Ashika Mr. Fakatou did not see a load line. (T 27 L – P), (T 152 O – 153 K) (T 161 L – 162 H) Mr. Fakatou agreed with the suggestion that the vessel may in fact have had a load line but he could not have seen it because it was submerged. (T 151 L – N)

3.23 It was suggested to Mr. Fakatou by Counsel for Shipping Corporation in cross examination that on the occasions he viewed the MV Princess Ashika he could not see a load line because the vessel was ballasted. Mr. Fakatou stated that load line markings should not be submerged at any time and that at the time he had viewed the vessel it had no cargo. (T 175 M – 177 L)

3.24 Mr. Fakatou conducted a Loss Prevention Survey for British Marine Managers Limited, which was not completed by 5th August 2009. He subsequently prepared a Loss Prevention Survey Report after the vessel sank on 5th August 2009. (T148P - 150K) From a total of 11 items on the report, Mr. Fakatou rated a majority of the items with the highest possible risk factor, thereby requiring immediate or urgent action to reduce the risk. (T 38 – 42), (T 89 A – I)

3.25 The rating of risk factors were calculated taking into account two categories. The first category, being the probability of an identified hazard causing an incident, a rating of 4 being the highest where the hazard will almost certainly cause an incident. The second category is the consequence or severity of the outcome if a hazardous incident occurs, a rating of 4 being catastrophic where the consequence is loss of life, total loss of ship and/or cargo, or widespread and very severe environmental damage. A combination of the two highest ratings from the two categories for an identified hazard, would total a rating of 16, the highest possible risk factor. (Exhibit 14)

3.26 Some of the items that rated as the highest possible risk factor were:

1. Hazard: No Load Line and Draft marks in accordance with local legislation, and International Load line Convention of which Tonga is a signatory.

   Risk: Overloading of vessel, resulting in loss of vessel, cargo, and passengers with associated claims.

2. Hazard: Cargo deck and surrounding shell plating heavily corroded with holes visible at places.

   Risk: Ingress of water into cargo space, damaging cargo, and possible loss of vessel, cargo and passengers with associated claims.

3. Hazard: Bow and Stern ramps heavily corroded, not watertight, poorly secured, unsatisfactory locking arrangement.
Risk: Ingress of water into cargo space, damaging cargo, and possible loss of vessel, cargo and passengers with associated claims.

4. Hazard: Drainage scuppers of cargo deck have no non-return flaps. Some are blocked.

Risk: Ingress of water into cargo deck when ship is listing, damaging cargo, and possible loss of vessel, cargo and passengers with associated claims.

5. Hazard: Water tight doors, tank vents without non return mechanisms, escape hatches and inspection hatches (with broken hatch covers), not sealing (or functioning) due to heavy corrosion.

Risk: Loss of vessel reserve buoyancy resulting in loss of vessel, cargo, and passengers with associated claims.

6. Hazard: Steering only goes 15 degrees to Port and 15 degrees to Stbd.

Risk: Vessel will not respond quick enough to steering, and steer properly which may lead to collision with other ships and wharf causing damage not only to own vessel but to third parties as well, with associated claims. (Exhibit 5)

3.27 We accept the evidence given by Mr. Fakatou, particularly as set out above, as reliable and materially accurate in relation to the MV Princess Ashika. It is consistent with the overwhelming body of evidence, both documentary and oral, before the Commission as to the unseaworthiness of the MV Princess Ashika.

Viliami Tu’ipulotu (Acting Director of Marine and Ports, Ministry of Transport)

3.28 Mr. Tu’ipulotu is the Director of Marine and Ports of the Ministry of Transport. He is also a Government of Tonga certified marine surveyor and appointed under the Shipping Act. Mr. Tu’ipulotu is also the Registrar of Ships in Tonga, being appointed to such position by Cabinet Decision No. 515 of the 3rd July 2009. (Exhibit 2) Mr. Tu’ipulotu started his career as a cadet officer in 1972. He worked his way up through the ranks and after further studies in Australia in 1993, became a Chief Mate Class 1.

3.29 Mr. Tu’ipulotu, upon seeing the MV Princess Ashika for the first time on 1st July 2009, was of the opinion that work had to be done on to the scuppers and the water tightness of the ramps before it could be allowed to sail. (T 1569 O – 1570 C)

3.30 On 3rd July 2009, Mr. Tu’ipulotu discussed the condition of the vessel with two of the three Marine Division surveyors, Mr. ‘Onesi Tu’ifua and Mr. Lisiate Vuni Latu, who both conducted the survey of the MV Princess Ashika on 2nd July 2009 and who subsequently prepared a deficiencies list. Mr. Tu’ipulotu noted on the deficiencies
list, major deficiencies that were to be rectified before the ship could sail. Unless the items noted on the deficiencies list were rectified, Mr. Tu’ipulotu was of the opinion that the vessel was unseaworthy. (T 1575 B – 1576 J)

3.31 Mr. Tu’ipulotu’s handwritten comments added to the deficiencies list, signed and dated 3rd July 2009 by him, were as follows:

“1. The bow and stern ramp must be watertight to the satisfaction of the surveyor before departure.

2. Also the scuppers must be repaired to the surveyor’s satisfaction.

3. Load line must not be submerged in any case on departure.

4. Or any other item that may be advised by the surveyor on the spot.”

(Exhibit 17) (Appendix 17)

3.32 Significantly, neither Mr. Tu’ipulotu nor any of the Marine Surveyors ever inspected MV Princess Ashika after 2nd July 2009 to check if any of the items on the deficiencies list had been properly rectified. The evidence establishes that none of the deficiencies noted in the handwritten comments had been rectified at the time of the voyage on 5th August 2009.

3.33 Mr. Tu’ipulotu accepted that given his concerns about the safety of the Ashika before it sank, he would not have allowed any members of his immediate family to sail on the MV Princess Ashika. (T 1616 F – H) We fully understand and accept Mr. Tu’ipulotu’s opinion that the state of the MV Princess Ashika was in such a poor condition that he would not have allowed any member of his immediate family to travel on the vessel. What is remarkable is that given his concerns and the fact he considered the vessel to be unseaworthy and unsafe, he was nevertheless prepared to sign a Provisional Certificate of Survey on 3rd July 2009 certifying that MV Princess
Ashika was “as far (as) it could be ascertained is considered to be Seaworthy”. (Appendix 19) (Exhibit 111) There is another Provisional Certificate of Survey in almost identical terms dated 2\textsuperscript{nd} July 2009. (Appendix 20) (Exhibit 3) We also have serious doubts about the authenticity of the Provisional Certificates of Survey dated 2\textsuperscript{nd} and 3\textsuperscript{rd} July 2009.

3.34 Mr. Tu’ipulotu also accepted that the design of MV Princess Ashika was unsuitable for Tongan waters. The cargo hold was not enclosed and water could enter the vessel over the bow sides of the vessel. The cargo deck was also exposed to the weather and rain. (T 1570 C – 1571 K) The evidence of Mr. Tu’ipulotu will be dealt with under another section of this report, dealing specifically with his evidence.

‘Onesi Tu’ifua (Marine Surveyor, Ministry of Transport)

3.35 Mr. Tu’ifua is a Senior Marine Engineering Officer employed by the Marine Division of the Ministry of Transport. He is also a Government of Tonga certified Marine Surveyor and appointed under the Shipping Act in 2004. Mr. Tu’ifua had been at sea as an engineer for 15 years both on local and foreign vessels. He had also been the Chief Engineer of the Olovaha for 3 years and sailed extensively throughout Tonga.

3.36 He had seen the MV Princess Ashika for the first time when the vessel arrived in Tonga on 1\textsuperscript{st} July 2009. Prior to that date, he had only been shown one photograph of the vessel by the former Director of Marine and Ports, Mr. William Johnson. He was accompanied by colleagues from the Marine Division who boarded and inspected the vessel for about an hour. His opinion of the vessel upon inspection was that it should be detained and a lot of work would have to be conducted on the vessel to make it seaworthy. (T 1067)

3.37 On 2\textsuperscript{nd} July 2009, an application for survey of MV Princess Ashika was received by Mr. Tu’ifua. A survey was promptly conducted on the MV Princess Ashika by Mr. Tu’ifua together with Mr. Lou Pale and Mr. Lisiate Vuni Latu. Mr. Lou Pale was a Senior Marine Nautical Officer and Mr. Lisiate Vuni Latu was a Marine Nautical Officer.

3.38 A comprehensive deficiencies list (Exhibit 19) was prepared as a result of the survey of the MV Princess Ashika. On 3\textsuperscript{rd} July 2009 Mr. Tu’ifua and Mr. Latu had a meeting with the Director of Marine and Ports, Mr. Viliami Tu’ipulotu, where the deficiency list was discussed. Mr. Tu’ifua in his oral evidence indicated that there were some items on the deficiency list that did not require immediate rectification. However there were major deficiencies, such as the rust on the scuppers and bow and stern ramps that needed to be rectified and were grounds to detain the vessel. (T 1067 Q – 1068 B)
3.39 Mr. Tu’ifua told Mr. Viliami Tu’ipulotu, which we accept, that the MV Princess Ashika should be stopped to rectify the deficiencies. Mr. Tu’ifua also expressed his opinion to other employees of the Ministry of Transport that he believed that the vessel should not be allowed to sail. (T 1059 – 1063) (T 1077 N – 1080 U) Mr. Tu’ifua was of the opinion that it would take eight months to one year to rectify the deficiencies of the MV Princess Ashika. (T 1067 L – O) We find that the vessel was in such a deplorable condition that it was beyond repair.

3.40 This witness rejected the suggestion put to him by Counsel for Shipping Corporation that the submerged load was due to the ballast tanks being filled. We accept the evidence of Mr. Tu’ifua in this regard. It should be appreciated that the load line was submerged on MV Princess Ashika even when there was no cargo loaded on it. (1069 K – 1070 G) The evidence from other witnesses, which is referred to in other parts of this report (including the Master of the MV Princess Ashika, Viliami Makahokovalu Tuputupu), demonstrates that the load line on Princess Ashika was most likely submerged throughout the entire time the vessel was in Tonga. This is yet a further independent reason the vessel was unseaworthy and an unacceptable danger to life at sea.

3.41 Mr Tu’ifua correctly stated that the design of the MV Princess Ashika was not suitable for Tongan waters because of the open cargo space where waves can enter the cargo deck. This could destabilise the vessel and cause it to sink. (T 1068 H – P)

3.42 Undoubtedly, Mr. Tu’ifua was correct in expressing his opinion from the survey of the vessel that “she was of very bad condition due to extensive rust and corrosion.” (Exhibit 71, paragraph 11)

Lisiate Vuni Latu (Marine Surveyor, Ministry of Transport)

3.43 Mr. Latu is a Marine Nautical Officer employed by the Marine Division of the Ministry of Transport. He is also a Government of Tonga certified Marine Surveyor appointed under the Shipping Act in 2008. Mr. Latu had been a Chief Officer of the Olovaha in 1983 and eventually became Captain of the Olovaha.

3.44 Mr. Latu was one of the three Marine Surveyors that conducted the survey of the MV Princess Ashika on 2nd July 2009. The survey lasted about 3 ½ hours. He recorded all the findings of the surveyors which was later typed up as a deficiencies list and discussed with the Director of Marine and Ports, Mr. Viliami Tu’ipulotu.

3.45 During the survey of 2nd July 2009 of the MV Princess Ashika, Mr. Latu sighted the load line and found it to be submerged. He was understandably concerned about this, particularly as there was no cargo on the vessel at the time of survey. (T 1232 Q – 1233 L)
3.46 Mr. Latu had expressed to various people his concerns about the vessel, including the then Minister of Transport, Mr. Paul Karalus, a few days after the survey. He told Mr. Karalus at a meeting that the vessel was “no good”. (T 1243 L – P) We accept that Mr. Latu told Mr. Karalus in early July 2009 that the vessel was “no good”. Mr. Latu stated that it would take six months to rectify the deficiencies of the MV Princess Ashika and to make the vessel seaworthy. (T 1235 J – S) However, the totality of the evidence before the Commission clearly supports the conclusion that the vessel was beyond repair.

3.47 Mr. Latu indicated that the MV Princess Ashika was not suitable for use in Tongan waters because of the non enclosed cargo area and would be prone to water coming onto the cargo deck and causing instability. Additionally, he stated that the MV Princess Ashika should have been decommissioned or used only in the Fanga’uta Lagoon. Apart from use in rivers, Mr Latu had never seen a vessel with such design used in open waters. (T 1249 H – 1252 E) We find that the vessel was unseaworthy for use in any conditions in Tonga.

3.48 As in the case of Mr. Tu’ifua, we accept the opinion expressed by Mr. Latu that the MV Princess Ashika was in very bad condition due to extensive rust and corrosion. (Exhibit 75, paragraph 8)
Lou Pale (Marine Surveyor, Ministry of Transport)

3.49 Mr. Pale is a Senior Marine Nautical Officer employed by the Marine Division of the Ministry of Transport. He is also a Government of Tonga certified Marine Surveyor and appointed under the *Shipping Act* in 2009.

3.50 Mr. Pale was one of the surveyors that conducted the survey of the MV Princess Ashika on 2nd July 2009. On 1st July 2009 this witness, after a brief inspection of the vessel, described the MV Princess Ashika to be in a very bad condition. He had formed the view after seeing, for example, the condition of the scuppers, bow and stern ramps, the amount of doubling plates on the decks and extensive corrosion throughout the vessel. Additionally, it appeared that the vessel had been newly painted, covering much of the rust. (T 954 F – U)

3.51 During the course of the survey on 2nd July 2009, Mr. Pale took 14 photographs of various parts of the MV Princess Ashika. (Exhibit 66) A number of the pictures show the advanced stated of corrosion on the vessel, including the ramps and scuppers. (T 960 D – 965 E) He indicated that the load line had been submerged by about 2 inches. At the time he understood that the ballast tanks were filled. However there was no cargo on the vessel. (T 957 D – K) (T 964 B – 965 F)

3.52 Mr. Pale considered it would take six months to rectify the items on the deficiency list of 2nd July 2009, which he was involved in preparing with the other surveyors. He also indicated that the vessel was unseaworthy until a majority of the defects on the deficiencies list were rectified. (T 958 K – 959 R)

3.53 Mr. Pale considered that the vessel was unseaworthy and should be detained. He said that “it shouldn’t be running, it should be a nightclub”. (T 968 F – Q)
Sione Mafi Kavaliku (Marine Officer, Ministry of Transport)

3.54 Mr. Kavaliku is a Marine Officer with the Marine and Ports Division, Ministry of Transport. He started working for the Ministry of Transport in January 2009, and is a trainee under the supervision of Senior Marine Engineering Officer, Mr. ‘Onesi Tu’ifua.

3.55 Mr. Kavaliku accompanied Mr. Tu’ifua to see the MV Princess Ashika when it arrived on 1st July 2009. He stated that vessel was in a very bad condition with rust and corrosion widespread over the vessel. On one occasion, whilst proceeding up the steps to the wheelhouse, the handrail buckled and broke apart when Mr. Kavaliku was holding onto it. The appalling state of the handrails on the vessel, including extensive rust and parts broken off, were also shown in some of the photographs taken by Mr. Fakatou on 4th and 5th August 2009. Some of the handrails were in such atrocious condition that ropes were used, unacceptably, instead of repairing or replacing the damaged railings. This was an obvious danger to passengers and crew. He indicated that the scuppers and bow and stern ramps were not in good condition.

(T 1376 A – 1377 E)

3.56 Mr. Kavaliku accompanied the surveyors to survey the vessel on 2nd July 2009. His opinion of the condition of the vessel remained the same as on 1st July 2009.

3.57 On 3rd July 2009, Mr. Kavaliku typed up the list of deficiencies prepared by the surveyors and took part in a discussion with the Director of Marine and Ports, Mr. Viliami Tu’ipulotu, with the other surveyors. It was at this meeting that he, together with Mr. Tu’ifua and Mr. Latu, told the Director that the vessel should be stopped from sailing. When asked by Mr. Tu’ipulotu for his opinion, Mr. Kavaliku replied “any fool (could) tell how bad the ship was”. (T 1378 F)

3.58 We accept Mr. Kavaliku’s oral evidence and his description of the condition of the vessel as being very bad. His oral evidence and description of the MV Princess
Ashika clearly indicates the appalling condition and extent of unseaworthiness of the vessel.

3.59 Mr. Kavaliku confirms, which we accept, that Mr. Tu’ifua made it “crystal clear” to Mr. Tu’ipulotu, the Director of Marine and Ports, that the vessel should not sail because of the deficiencies. (T 1384)

Soane Haseli (Principal Coast Watch Officer, Ministry of Transport)

3.60 Mr. Haseli is a Principal Coast Watch Officer, Meteorology Division, Ministry of Transport. Over a 27 year period, Mr. Haseli had worked in radio telecommunications for predecessors of the Meteorological Division of the Ministry of Transport.

3.61 Mr. Haseli in oral evidence stated that he first became aware of the MV Princess Ashika when the then Minister for Transport, Mr. Paul Karalus, telephoned him on 12th June 2009 enquiring as to the position of the MV Princess Ashika. He then established radio communication with the MV Princess Ashika.

3.62 Radio communication from the MV Princess Ashika indicated that the vessel was on a voyage from Fiji, “the sea is very rough and there are some leaks showing in the vessel …… the room should be repaired it’s leaking. The bow, mess and the engine room is taking in water it needs to be patched and repaired and it is better that we return to Fiji …… we are 124 miles away from reaching Tonga and it is better that we return to Fiji so that the repairs are done because there are many things to patch. The front ramp is starting to bend and two of the storerooms are damaged from the outside”. (Appendix 21) (Underlining added) He informed Mr. Karalus that the MV Princess Ashika had been damaged and was returning to Fiji to undergo repairs. (Exhibit 86)

Sateki Tonga Tupou (Workshop Foreman, Shipping Corporation of Polynesia)

3.63 Mr. Tupou was a qualified carpenter and employed by Shipping Corporation of Polynesia Limited as a Workshop Manager. Mr. Tupou, in his position as Workshop Manager, supervised staff such as welders who had conducted work on the MV Princess Ashika and in the workshop in relation to the vessel.

3.64 On 1st July 2009, Mr. Tupou inspected the MV Princess Ashika from the wharf and it was evident that there was extensive corrosion on the vessel and that the rust had been freshly painted over. He indicated that the corrosion was excessive and anything hitting the side of the vessel would have caused a hole on the side of the vessel. (T 335 A – P) This evidence is not only supported by various photographs tendered before the Commission, but also the Master of the vessel, Captain Tuputupu and many other witnesses.
3.65 On 2\textsuperscript{nd} July 2009, he boarded the vessel and proceeded through the vessel carrying out a more detailed inspection. He indicated that most of the cargo deck was heavily corroded, and in some areas the thickness of the deck was 2 millimetres and in other areas, layers of rust had built up to about 8 millimetres. He stated that if a welder’s hammer was used to chip the rust it would cause holes on the cargo deck. The sides of the cargo deck were also heavily corroded and some areas had holes where one could see through to the sea. The advanced stage of corrosion was also evident on both the bow and stern ramps. (T 3460 – 348 B)

3.66 In relation to the scuppers on MV Princess Ashika, Mr. Tupou stated that out of all the scuppers on board the vessel, he believed that not one could perform its proper function. (T 351 D – R) Because of the excessive corrosion on the cargo deck he was concerned with the forklift working on the cargo deck. Four large metal sheets were laid on the cargo deck for the forklift to work on in an attempt to avoid the forklift falling through the cargo deck. (T 352 E – Q)

3.67 Mr. Tupou was of the opinion that major work had to be done on the MV Princess Ashika. He stated that the sides of the vessel along the cargo deck had to be totally replaced due to the extensive corrosion. (T 353 Q – 354 J)

\textbf{Manase Katoa (Welder, Shipping Corporation of Polynesia)}

3.68 Mr. Katoa was a fitter and welder who had been employed by Shipping Corporation of Polynesia Limited for over 20 years. In the time the MV Princess Ashika was in Tonga, he worked on the actual vessel for about 30 hours and about an additional 20 hours in the Shipping Corporation Workshop in relation to the MV Princess Ashika.

3.69 Mr. Katoa saw the MV Princess Ashika for the first time on 1\textsuperscript{st} July 2009 when it arrived in Tonga. He stated that he was surprised about the amount of corrosion visible on the vessel and because of the advanced state of corrosion, he felt that the vessel should not be used in Tonga. (T 212 K – S)

3.70 Mr. Katoa stated that there was extensive corrosion to both the starboard and port sides of the vessel running through the length of the vessel from bow to stern. He indicated that one could poke a hole through the side of the vessel using a welder's chipping hammer. He accepted the suggestion that at various places along the sides of the vessel, where it was heavily corroded, a pen could be used to poke a hole through the sides. The sides were so brittle from extensive corrosion, that even a young child could kick a hole through the side. (T 217 S – 219 L)

3.71 Because of the extensive corrosion to the cargo deck of the vessel, Mr. Katoa raised his concerns with the Workshop Manager, Mr. Tupou, about the forklift falling through the cargo deck. Four large metal sheets with a thickness of 6mm each were placed on the MV Princess Ashika and were moved around certain areas of the cargo
deck where the forklift was working to avoid it from falling through the deck. (T 219 P – 220 R) We appreciate that other witnesses have stated that there were sheets of metal placed on the cargo deck of the MV Princess Ashika for the forklifts to use but were not moved around.

3.72 Mr. Katoa stated that some of the scuppers on MV Princess Ashika were blocked and one could look through some of them into the sea. He had been instructed by the Workshop Foreman that pieces of timber that had been pre-cut were to be used to block the scuppers and to stop sea water from entering the vessel when it sailed. (T 220 R – 222 B)

3.73 Mr. Katoa indicated that upon the return of the MV Princess Ashika from one of her voyages he was instructed by the Workshop Manager to weld a large metal plate to cover a hole on the port side of the vessel which had been created by waves breaking through the side of the vessel on the previous voyage. (T 222 C – 224 I) He identified photographs taken on 14th July 2009 of MV Princess Ashika as showing the damage caused by the waves to the side of the vessel. (Exhibit 20)

(Above: Photograph taken on 14 July 2009 showing holes on the side of the MV Princess Ashika caused by waves during the second voyage)

3.74 On 4th August 2009, Mr. Katoa worked extensively in trying to carry out repairs on MV Princess Ashika. He commenced work at about 8:30am and did work in relation to the MV Princess Ashika until 10 at night. During the day he repaired a fuel pipe
from the MV Princess Ashika which was leaking due to corrosion. (T 224 M – 226 C) Mr. Katoa also did a lot of welding repairs to one of the sides of the vessel. Many of the other staff worked constantly on 4th August 2009 making repairs to the MV Princess Ashika. However, by the time the vessel sank he was of the opinion that most of both the port and starboard side of the vessel along the cargo deck needed to be replaced. (T 227 K – 228 C)

3.75 Mr. Katoa was one of the first witnesses summoned before the Royal Commission. We found Mr. Katoa to be a highly credible witness.

Nikola Tau (Freight Officer, Shipping Corporation of Polynesia)

3.76 Mr. Tau was a freight officer employed by Shipping Corporation of Polynesia Limited since 2004. Mr. Tau indicated that part of his job involved the preparation of the freight or cargo manifest and he had prepared the cargo manifest for the voyage of the Ashika on 5th August 2009. Mr. Tau accepted that the cargo manifest for the 5th August 2009 voyage indicated that 110 tonnes of cargo was loaded onto the vessel (Appendix 22) which included vehicles, building materials, drums of diesel oil, containers and crates. Additionally, 18,000 litres of fuel had been ordered from British Petroleum to fill the vessel (Appendix 23). Mr. Tau accepted that Shipping Corporation has no proper weighing apparatus and the preparation of the cargo manifest was based on estimations. (Exhibit 261; 262) (T 3128 O – 3136 S) It has been established in evidence that the maximum deadweight of the MV Princess Ashika on 5th August 2009 was only 28 tonnes but the vessel had been carrying 110 tonnes of cargo and approximately 21 tonnes of fuel. We accept that the MV Princess Ashika on 5th August 2009 was grossly overloaded.

3.77 Mr. Tau indicated that he saw the MV Princess Ashika for the first time when it arrived in Tonga in July 2009. He stated that he was shocked by the amount of corrosion on the cargo deck and that it was advanced corrosion. Additionally, employees of Shipping Corporation had put large pieces of metal on the cargo deck for the forklift to operate on and to avoid the forklift from falling through the deck. (T 3143 L – 3144 Q)

Viliami Makahokovalu Tuputupu (Master, MV Princess Ashika)

3.78 Mr Tuputupu was the Master of the MV Princess Ashika in all its five voyages in Tonga. Captain Tuputupu had worked on both domestic and foreign going vessels in the region for many years. He had a Master Class 3 Certificate.

3.79 Captain Tuputupu saw the MV Princess Ashika for the first time in June 2009 when he travelled to Fiji to deliver the vessel to Tonga. His initial opinion of the vessel was that it was rusted everywhere. He observed the Fijian crew members of the vessel had painted over the rust without chipping it. (T 1665 K – R) He also indicated that
the vessel was unseaworthy due to the excessive corrosion of the hull and inside the cargo deck. (T 1669 I – P) Captain Tuputupu also stated that up to the final voyage of the MV Princess Ashika he never saw a load line on the vessel. Additionally, his opinion was that it would take up to three months to fix the MV Princess Ashika. Captain Tuputupu accepted that MV Princess Ashika was designed for smooth waters and was a totally inadequate design for Tongan waters.

3.80 Captain Tuputupu in oral evidence ticked the items on the Marine Department, Ministry of Transport, deficiencies list of 2nd and 3rd July 2009 which should have been rectified before the vessel sailed. The items ticked were:

(a) Radio Transponders are not on board.
(b) Life jackets – without whistle.
(c) Fireman’s outfit is not on board.
(d) Only 1 air cylinder and respirator available on board.
(e) International Shore connections is not available on board.
(f) Lashing chains and tension bars are not available onboard.
(g) Scuppers on Wagon Deck (need to be repaired), heavily corroded and without cover.
(h) In general, the condition of all deck platings, carlings, casing deck house, air vent etc are heavily corroded/wastage. (Exhibit 118)

3.81 We totally reject the suggestion by Captain Tuputupu, that the bow and stern ramps did not need to be rectified before the vessel sailed. He stated that any water that would come through the ramps could be drained out through the scuppers. (T 1692 A – 1694 I) We find his opinion untenable. The scuppers were not only in disrepair, but completely inadequate to deal with the likely amount of water coming onto the deck, in other than the mildest of conditions.

3.82 Captain Tuputupu indicated in his oral evidence that on the first voyage of the MV Princess Ashika in Tonga, waves had broken through the side of the vessel causing holes of up to more than a foot in diameter. (T 1696 G – 1697 I) On the second voyage, the waves opened three holes on the sides of the vessel, the largest was a hole of about one metre in diameter on the port side of the vessel. (T 1697 I – U) On the third voyage, a hole was caused by waves on the port side of the vessel which required a 2 metre by 2 metre metal sheet to be inserted to close the hole. (T 1698 A – 1700 J) On the fourth voyage, some more holes were caused by waves the largest being about three quarter of a metre in diameter. (T 1701 Q – 1702 G) Captain Tuputupu accepted that the sides of MV Princess Ashika were brittle and weak and it
was easy for waves to break through the sides of the vessel. This was obviously the tragic truth.

3.83 Captain Tuputupu indicated that on the forth voyage he was told that water had accumulated on the cargo deck and had reached a depth of half a metre on the port side. It was also reported to him that a crew member, Mr. Kainga Ta’ufo’ou, punched a hole through the side of vessel with an axe to release the water from the cargo deck. (T 1702 Q – 1704 D) Some of the scuppers which had been blocked were also hit with the axe to unblock them. We do not support the evidence of Captain Tuputupu that he believed that water coming onto the deck would drain through the scuppers, such that the bow and stern ramps did not need to be rectified to make them watertight. When the vessel departed on its first voyage in Tonga, the bow ramp had been welded closed with the use of angle iron to help seal it. However, at the end of the first voyage in Tonga on 3rd July 2009, the welding and angle iron were removed.

3.84 Captain Tuputupu conceded in his evidence that cargo was not lashed down on the MV Princess Ashika and a system of block stowage was adopted and used on the MV Princess Ashika. He described this as a system where cargo was put against the walls or on top of other cargo to stop them from moving during the voyage. According to Captain Tuputupu, only 100 metres of rope had been on the MV Princess Ashika when it departed on 5th August 2009 and another 200 metres would have been needed to properly lash the cargo. Captain Tuputupu also accepted that on the fourth voyage cargo had been seen floating in the cargo hold. (T 1744 A – 1747 F) The cargo was not properly stowed on MV Princess Ashika before it sailed on either the fourth or final voyage. This resulted in the vessel being unseaworthy and unsafe.

3.85 The Captain correctly accepted that the MV Princess Ashika was unseaworthy on every occasion the vessel sailed in Tonga. (T 1726 E – I)

Semisi Ve’etutu Pomale (Chief Mate, MV Princess Ashika)

3.86 Mr. Pomale had been the Chief Mate of the MV Princess Ashika on all its five voyages in Tonga. He obtained a Master Class 4 from the Tonga Maritime and Polytechnic Institute in 2006 and had been at sea for nine years. Mr. Pomale had also obtained in 2009 a Master Class 3.

3.87 Mr. Pomale was sent to Fiji in late May 2009, with other crew members to assist in the delivery voyage of the Ashika to Tonga. Mr. Pomale stated that his initial impression of the Princess Ashika when he saw her was that the vessel was not suitable for Tongan waters. He was concerned that water would enter the vessel over the bow and sides of the vessel and also through the scuppers. Additionally, Mr Pomale stated that the vessel was very old and heavily corroded. (T 2196 K – 2197 N)
Mr. Pomale indicated that he had travelled on the Ashika in Fiji between Natovi and Buresala which was a very short trip and that the waters in that area was very calm which we accept was in no way a comparison to the conditions the vessel was to endure in Tongan waters. (T 2211 E – N)

3.88 Mr. Pomale stated that during the attempted delivery voyage to Tonga, which departed Fiji on 10th June 2009, the vessel was damaged days into sailing. The bow ramp was dented into a V shape which caused two inch gaps on the sides of the ramp allowing water to enter the cargo deck which reached a depth of one foot and covered seventy percent of the surface area of the cargo deck. Mr. Pomale was also informed by one of the Tongan crew on the delivery voyage that the stern ramp had collapsed. The vessel subsequently returned to Fiji to conduct repairs on the bow ramp. (T 2207 R – 2211 D)

3.89 Mr. Pomale stated that water had entered the cargo deck of the vessel on all its five voyages in Tonga. Mr. Pomale indicated that on the first and second voyages of the Ashika water had entered the cargo deck reaching a depth of six inches and covering fifty percent of the cargo deck on the starboard side. Additionally, the water had entered the vessel through the bow ramp and the scuppers. The water that had entered the cargo deck of the vessel on the third was similar to that of the second voyage. He also indicated that on the fourth voyage the depth of the water on the cargo deck had reached a foot. (T 2213 I – 2215 B)

3.90 Mr. Pomale stated that during the first four voyages of the MV Princess Ashika in Tonga he was aware that the vessel had been damaged. He indicated that on all the first four voyages of the vessel the waves had smashed holes through the sides of the vessel because it was heavily corroded. Constant welding and patching of these were required when the vessel returned to Nuku’alofa. (T 2216 Q – 2218 M)

3.91 Mr. Pomale indicated that during the whole time the MV Princess Ashika was in Tonga, he did not see a load line on the vessel. (T 2225 M – 2226 P) We accept that there was a load line on the Princess Ashika but it was always submerged whilst the vessel was in Tonga.

3.92 Mr. Pomale stated that one of the aft ballast tanks on the MV Princess Ashika had holes caused by corrosion which caused water in the ballast tank to leak into the shaft tunnel. Additionally, pumping of water into the aft ballast tanks would cease when water started leaking into the shaft tunnel. He indicated that he was aware of the ballast tank leaking into the engine room on the second voyage and believed that it was also the case on its final voyage because nothing had been done to rectify the leak. (T 2228 H - 2229 L)
3.93 Mr. Pomale indicated that on the fifth voyage of the vessel in Tonga most of the cargo had not been lashed. There was nothing on the cargo deck for cargo to be lashed onto. He accepted that cargo such as containers, crates and fridges for refrigerated goods were not lashed which created an unsafe situation when water entered the cargo deck. (T 2230 C–2231 C) We appreciate that the crew were probably not aware that there were deck fittings set into the cargo deck for securing cargo but no special “elephants foot” fittings were available.

3.94 Mr. Pomale stated that around 9:00pm, Etuate Fa’uhiva a crew member, reported to him that water had entered the cargo deck of the vessel and that some of the cargo was getting wet. He immediately went to the cargo deck and saw that water had entered the cargo deck through the bottom and sides of the bow ramp and was at a depth of about a foot at its deepest point. Additionally, the water was concentrated at the bow ramp area and the starboard side of the vessel. (Appendix 24) (Exhibit 165) (T 2245 O–2247 S)

3.95 Mr. Pomale stated that around 11:00pm on the last voyage, three different crew members reported to him that water was entering the cargo deck. He went to the cargo deck to see for himself at around 11:15pm and saw that water had collected on the port side of the vessel which extended almost to the stern of the vessel. Additionally, the depth of the water at that time was approximately a foot and a half to two feet and water was continuing to enter through the bottom and sides of the bow ramp. (Appendix 25) (Exhibit 166) (T 2253 H–2255 E) Mr. Pomale indicated in sworn evidence that the vessel was listing to port at about 10 to 15 degrees. (T 2258 B–G)

3.96 Mr. Pomale indicated that at 11:30pm he saw a crate floating on the cargo deck and drums that had been lashed to the side of the vessel had moved. Additionally, the depth of the water had increased to two to three feet. (T 2260 B–2261 M)

Uasike Tupou (Second Mate, MV Princess Ashika)

3.97 Mr. Tupou was the 2nd mate on the MV Princess Ashika on four of its five voyages in Tonga. He had previously worked on other local vessels and fishing vessel. He obtained a Master Class 4 in 2004.

3.98 Mr. Tupou stated the obvious, namely that when he saw the MV Princess Ashika for the first time on 1st July 2009 at the wharf it was very rusty. On 2nd July 2009 he boarded the vessel and confirmed that there was a lot of rust on the bridge deck towards the stern, cargo hold, sides of the vessel and the ramps and that it was very old. Additionally, he indicated that the rust was not just surface rust and that it had been painted over. (T 1404 G–1405 L)
3.99 On the first and third voyages of the vessel in Tonga, Mr. Tupou said that water entered the cargo deck through the bow ramp. The depth of the water on the cargo deck was about one inch and it extended from the bow ramp right through to the stern ramp. (T 1406 L – 1408 B), (T 1410 O – 1412 H) He also indicated that when the MV Princess Ashika returned after the second voyage there was a hole of about one and a half metres in width and three quarters of a metre in height on the port side of the vessel. (T 1408 G – 1410 K)

3.100 Mr. Tupou indicated that on the fourth voyage, while the vessel was between Vava’u and the Niua’s, water had come onto the vessel through both sides and the bottom of the bow ramp. The water extended on the cargo deck from bow to stern ramp and a depth of about a metre on the port side towards the bow. The vessel, according to Mr. Tupou’s evidence, was listing to the port side and some of the cargo had started to float. The water was eventually removed from the cargo deck when an axe was used to punch a 6 inch hole on the side of the vessel allowing the water to escape. (T 1412 I – 1417 K)

3.101 Mr. Tupou, in his oral evidence, stated that before the vessel sank on 5th August 2009, he saw water coming through the bow ramp and over the side of the vessel. The water on the cargo deck was at a depth of about one and a half metres and extended from the bow to stern ramp. Additionally, the vessel was listing heavily towards port and sinking was imminent at that stage. (T 1426 I – 1428 G)

Solomone Havili (Third Engineer, MV Princess Ashika)

3.102 Mr. Havili had travelled on all the five voyages of the MV Princess Ashika in Tonga. He travelled on the first three voyages as a motorman and on the final two voyages as third engineer. He obtained a Marine Engineer Class 4 in June 2008.

3.103 Mr. Havili saw the MV Princess Ashika for the first time in Fiji when he was sent over with other Tongan crew members for the delivery voyage. His original impression of the vessel as he put it, “it was the ugliest ship he had ever seen”. Mr. Havili indicated that the vessel had a lot of rust on its structure. (T 2534 A – I)

3.104 Mr. Havili stated that when the vessel left Fiji on 10th June 2009 for its delivery voyage to Tonga the vessel was damaged and they had to return to Fiji where repairs were done to the bow ramp. He indicated that during the voyage, water had entered the cargo deck through the bow ramp and over the bow ramp. Additionally, the water covered two thirds of the cargo deck area extending from port to starboard and the depth of the water reached two feet. (T 2537 M – 2540 J) Mr. Havili also stated that on the second delivery voyage in late June, water had also entered the cargo deck through the bow ramp which covered one eighth of the cargo deck and reaching a depth of three inches. (T 2542 N – 2543 E)
3.105 Mr. Havili indicated that on all the five voyages of the MV Princess Ashika in Tonga, water had entered the cargo deck to varying degrees. On the fourth voyage, the water that had entered the cargo deck had reached his knees. Mr Havili stated that during the voyages of the MV Princess Ashika in Tonga, damage was caused to the vessel by waves, and recalls one occasion where a big hole had been punched through the starboard side of the vessel by waves. Additionally, the sides of the vessel had been very rusty and thin. (T 2545C – 2548 G)

3.106 Mr. Havili stated that the aft ballast tanks on the MV Princess Ashika had been leaking water into the adjacent spaces. He also stated that the port aft ballast tank had been heavily corroded and holes, including one of an inch in diameter, were leaking water into the adjacent spaces. The port aft ballast tank also had pinholes which were also leaking water into the adjacent spaces. (T 2555 C-2558 O)

3.107 Mr. Havili indicated that the MV Princess Ashika had leaking fuel pipes which needed to be fixed, it had been fixed but was not reinstalled by the final voyage. The fuel pipe had been corroded causing the fuel leak causing the engine to stop on one of the voyages. He stated that a portable pump had been used to transfer fuel from the bunker tank to the engines to keep them running. Additionally the fuel line was led through a watertight door leading into the shaft tunnel which was kept open because of the fuel line. (T 2559 K – 2562 B)

(Left: Photograph taken on 5th August 2009 showing heavily corroded watertight door on cargo deck; Right: Photograph taken on 5th August 2009 showing manhole leading into port forepeak ballast tank with no cover)

3.108 Mr. Havili stated that leading into the forepeak ballast tanks on the Princess Ashika were two manholes located on both the starboard and port sides of the cargo deck level. The manholes were in watertight compartments located opposite to each other with door sills of approximately a foot above the cargo deck. Mr. Havili indicated that both the watertight doors to the compartments and the manhole
3.109 Mr. Havili indicated that on the fifth voyage he had gone to sleep in the crew cabins after 8:00pm and woke up at approximately 11:30pm and noticed that the crew cabin he was sleeping in was flooded with water reaching a depth of 18 inches and was rapidly rising. He then went into the engine room and saw that there was half a metre of water in the engine room. He also stated that around the same time water had collected on the port side of the cargo deck reaching a depth of one and a half foot and extending almost throughout the length of the vessel towards the stern. (Appendix 26) (Exhibit 200) (T 2575 N – 2581 I)

Metui Satini (Bosun, MV Princess Ashika)

3.110 Mr. Satini was the Bosun on the MV Princess Ashika when it sailed in Tonga. Mr. Satini saw the MV Princess Ashika for the first time in Fiji in June 2009 when he was sent over with some of the Tongan crew for the delivery voyage of the MV Princess Ashika to Tonga. His original impression of the vessel was that it was too old.

3.111 Mr. Satini stated that during the attempted delivery voyage of the Ashika to Tonga on 10th June 2009, the vessel was damaged. He indicated that the bow ramp had been bent inwards causing 10 centimetre gaps on the sides of the bow ramp. Additionally, water had enter the cargo deck through the bow ramp reaching a depth of 20 centimetres and extending from the bow ramp to half way through the length of the vessel towards the stern. (T 2604 N – 2606 U)

3.112 Mr. Satini indicated that on the fourth voyage of the Princess Ashika in Tonga, water had entered the cargo deck through the bow ramp, reaching a depth of 60 centimetres and extending twenty metres from the bow ramp and mainly collecting on the port side of the vessel. He also recalls a crew member smashing a hole through the side of the vessel to let water out of the cargo deck. (T 2608 B – 2609 R)

3.113 Mr. Satini stated that on the final voyage of the Ashika cargo had not been lashed because there was nothing to lash the cargo with. (T 2613 G – J) He also stated that after 9:00pm, there was approximately two and half feet of water on the cargo deck. Mr. Satini indicated that by 11:00 the depth of the water on the port side of the cargo deck was over a metre and cargo had started to float in the cargo hold. He had reported this to the Chief Mate. (Exhibit 202) (T 2616 S – 2618 I) (Appendix 27)
Penisimani Tupou (AB Seaman, MV Princess Ashika)

3.114 Mr. Tupou was an Able Seaman on the MV Princess Ashika on all its five voyages in Tonga. He had seen the MV Princess Ashika for the first time in Fiji in 2007 when had been working on the MV Pulupaki which had travelled to Fiji. He had seen the vessel from a distance of fifty metres and formed the view that it was an old vessel and the swellings along the sides of the vessel indicated that there was a lot of corrosion. (T 2052 I – S)

3.115 Mr. Tupou indicated that on the second, third and fourth voyages of the MV Princess Ashika water had entered the cargo deck through the bow ramp, scuppers and holes on the sides of the vessel. He stated that on the third trip the depth of the water at its deepest point on the cargo deck was about 13 inches. On the fourth voyage, Mr. Tupou stated that the depth of the water at its deepest point on the cargo deck was about a metre deep. (Exhibit 158) (Appendix 28) He had seen one of the crew members use an axe to punch a hole through the side of the vessel to drain the water out. He also stated that the water had also entered through finger sized holes on the sides of the vessel and on the cargo deck which had not been repaired whilst in port. (T 2054 Q – 2060 H)

3.116 Mr. Tupou stated that on one of the earlier trips of the MV Princess Ashika, waves had broken a hole through the side of the vessel which required a 2 x 2 metre metal sheet to be inserted on the side of the vessel to close the hole. Additionally, metal sheets had been laid on the cargo deck for the forklift to use when loading cargo onto the deck because the cargo deck was thin and there was concern that the forklift might fall through the cargo deck. (T 2060 H – 2061 O)

3.117 Mr. Tupou, on the fifth voyage of the MV Princess Ashika, was on the 8-12 watch with another crew member and they alternated every half an hour on the wheel and patrolling the vessel. Mr. Tupou indicated that during his patrols whilst on watch he had seen water on the cargo deck and crew cabin of the vessel at various times. (Exhibit 159) (Appendix 29) The depth of the water at these places at the times he patrolled was:

<table>
<thead>
<tr>
<th>Approximate time</th>
<th>Cargo Deck</th>
<th>Crew Accommodation</th>
</tr>
</thead>
<tbody>
<tr>
<td>0830</td>
<td>30cm</td>
<td>11cm</td>
</tr>
<tr>
<td><strong>Starboard</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0930</td>
<td>30cm</td>
<td></td>
</tr>
<tr>
<td>1030</td>
<td>30cm</td>
<td>5cm</td>
</tr>
<tr>
<td><strong>Port</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1130</td>
<td>60cm</td>
<td>20cm</td>
</tr>
</tbody>
</table>

(Exhibit 157)
Mr. Tupou also stated that 15 minutes before the MV Princess Ashika sank he estimated that the depth of the water at its deepest point on the cargo deck was about 5 feet high and the vessel was listing to port at about a 45 degree angle. (Exhibit 160) (T 2064 O – 2066 Q) (Appendix 30)

3.118 Mr. Tupou indicated that there had been holes adjacent to the crew dining rooms where water was coming through. The crew had used flannels to plug the two finger sized holes in the dining room to stop the water from entering the dining room. Mr. Tupou accepted that the holes in the dining room were a result of corrosion. (T 2072 C – 2073 B)

3.119 Mr. Tupou in oral evidence stated that on the fifth voyage he had tried to use a portable pump on the vessel to pump the water on the cargo deck out of the vessel. He indicated that the suction hose for the pump was not the correct size and was too small and he had tried to sellotape it to the pump but he could not get it to work. He attempted to fix the portable pump until the vessel capsized and sank. (T 2079 J - 2080 F)

3.120 Mr. Tupou stated that on all the voyages including the fifth voyage of the MV Princess Ashika, cargo had not been lashed because there was nothing for the cargo to be lashed to. (T 2061 J – S) Additionally the lashing cleats on the cargo deck were not functioning and could not be used to lash the containers on the vessel. (T 2093 J – 2094 D)

Lehopoame Kainga Ta’ufo’ou (AB Seaman, MV Princess Ashika)

3.121 Mr. Ta’ufo’ou had worked on various other domestic vessels in Tonga since 2001. Mr. Ta’ufo’ou saw the MV Princess Ashika for the first time on 1st June 2009 in Suva Fiji. He immediately was of the view that the vessel was not fit to be brought to Tonga due to the extensive corrosion. This witness observed that members of the Fijian crew were painting MV Princess Ashika, when he was in Fiji in June 2009.

3.122 Mr. Ta’ufo’ou was on the MV Princess Ashika on its first attempted delivery voyage from Fiji to Tonga. During the voyage, which departed Suva on 10th June 2009, the bow ramp was bent inward due to waves breaking onto the vessel. The bent ramp left 3 to 4 inch gaps on the sides of the ramp. Waves had also broken through the sides of the vessel and the vessel was taking onto the cargo deck a lot of water. The MV Princess Ashika had to return to Fiji for repairs before attempting the voyage again. (T 1462 A – 1465 E) On the trip back to Fiji, Mr Taufou’ou stated that the stern ramp had collapsed into the sea. He was then assisted by another two crew members in securing the stern ramp using a winch and rope. (T 1492 B – 1494 B)

3.123 After the first four voyages of the MV Princess Ashika in Tonga, repairs had to be done to the sides of the vessel to fix holes caused by waves breaking through the
sides. (T 1471 K – Q) Mr. Ta’ufo’ou indicated that on the first four voyages water had come onto the cargo deck through the bow ramp.

3.124 On 5\textsuperscript{th} August 2009, the final voyage of the MV Princess Ashika, Mr. Ta’ufo’ou was awoken about ten minutes before the vessel sank and told that there was a lot of water on the vessel. This is despite the fact that the vessel was taking on water hours before it sank. He discovered that the water had reached a depth of half a metre in the crew cabin, where he was sleeping with his two year old son who did not survive the tragedy. (T 1473 K – Q) Additionally, in his oral evidence, Mr. Ta’ufo’ou indicated that when he went to the cargo deck, water at a depth of about one metre was on the port side of the deck and extended up to about 5 metres from the stern. The vessel had started listing towards the port side of the vessel. Just before the vessel capsized, Mr. Ta’ufo’ou stated that the cargo had shifted towards the port side of the vessel. (T 1474 E – 1476 I) It had clearly not been stowed to a reasonable standard.

Viliami Tu’akoi (AB Seaman, MV Princess Ashika)

3.125 Mr. Tu’akoi was AB on the MV Princess Ashika in Tonga. He had been at sea for 11 years, six of which was under the employment of Shipping Corporation of Polynesia Limited both on foreign and domestic ships.

3.126 Mr. Tu’akoi stated that he had been asleep during the fifth voyage of the MV Princess Ashika in Tonga and was only awoken at about 11:45pm, just before the vessel sank. He indicated that there was water in the crew accommodation when he woke up. Additionally, he stated that there was five to six inches of water on the port side of the cargo deck, extending almost throughout the length of the vessel, before the vessel sank. (Exhibit 203) (T 2615 M – 2627 C) (Appendix 31) We appreciate that the evidence of other crew members clearly establishes that the depth of the water on the cargo deck at that time was significantly deeper.

Sitiveni Ali (Motorman, MV Princess Ashika)

3.127 Mr. Ali was a motorman on the MV Princess Ashika in Tonga. Mr. Ali obtained a Marine Engineer Class 4 certificate from the Tonga Maritime and Polytechnic School. Mr. Ali saw the MV Princess Ashika for the first time on 1\textsuperscript{st} July 2009 when the vessel arrived in Tonga and his original impression of the vessel was that it was old. Mr. Ali indicated that when they eventually started working in the MV Princess Ashika engine room, the vibration from the engines would shake the rust of the engine room floor and sides. (T 2794 B – P)

3.128 Mr. Ali stated that on the first four voyages of the MV Princess Ashika in Tonga, water had entered the cargo deck of the vessel through the bottom and the sides of the bow ramp. Additionally, water had also entered through the scuppers, some of
which had no non return valves. He indicated that the depth of the water on the cargo deck of the vessel reached half a foot on some of the four voyages. (T 2795 A - 2797 E)

3.129 Mr. Ali indicated that when the MV Princess Ashika sailed in Tonga on all the five voyages there was no manhole cover placed on the manhole leading into the port forward ballast tank. Mr. Ali accepted that if water on the cargo deck had reached a depth of 12 inches, the water would spill over the door sill and into the uncovered manhole filling the port forepeak ballast tank. (T 2797 Q – 2799 H)

3.130 Mr. Ali stated that during the fourth voyage of the MV Princess Ashika, the engines stopped because there was insufficient fuel getting into the engine to operate due to a leaking fuel pipe caused by corrosion. Additionally, a portable pump was used to transfer fuel directly from the bunker tank to the daily services tank which involved passing a fuel line through a watertight door leading into the shaft tunnel, which had to be kept open in consequence. (T 2803 J – 2804 G)

(Above: Photograph taken in Fiji of the Engine Room of the MV Princess Ashika showing doorway, not on original ship drawings and plans, leading into shaft tunnel)

3.131 Mr. Ali indicated that by 8:00pm on the final voyage of the MV Princess Ashika, water had started to enter the cargo deck of the vessel. By 10:30pm, Mr. Ali indicated that water had accumulated on the port side of the cargo deck and extended almost throughout the length of the vessel with the water reaching a depth of one metre. Additionally, water was entering the cargo deck through the bow ramp and the scuppers. Mr. Ali also stated that at 10:40pm the depth of the water on the port side of the engine room had reached a depth of half a metre. The depth of the water in the shaft tunnel was one and a half metre. Mr. Ali also states
that by 11:00pm the depth of the water in the engine room had reached three to four feet deep. (Exhibit 222) (T 2807 P – 2815 H) (Appendix 32)

*Siale Kapeli (Motorman, MV Princess Ashika)*

3.132 Mr. Kapeli was a motorman on the MV Princess Ashika and had travelled on all the voyages of the MV Princess Ashika in Tonga with the exception of the first voyage. He indicated that water had entered the cargo deck of the vessel on his first three voyages. Additionally, the depth of the water on those trips had reached three inches of water and the water had entered through the bow ramp. (T 2830 C – 2831 K)

3.133 Mr. Kapeli stated that on the fourth voyage of the MV Princess Ashika the engines on the vessel stopped for two hours due to a leaking fuel pipe caused by corrosion. He indicated that on the final voyage of the vessel the leaking fuel pipe had been fixed but was not reinstalled. (T 2833 J – 2834 U)

3.134 Mr. Kapeli indicated by 7:55pm on the final voyage of the MV Princess Ashika, water had entered the cargo deck of the vessel and had reached a depth of eight inches in the deepest areas. At 10:00pm, the depth of the water in the engine room had reached six inches and by 11:45pm the depth of the water in the engine room and the shaft tunnel was one meter and the vessel was listing to port. (Exhibit 223) (T 2836 E – 2838 I) (Appendix 33) Mr Kapeli also stated that water had also been entering the engine room through holes on the cargo deck, the ceiling of the engine room, caused by corrosion. (T 2839 K – U)

*Simote Taufu‘i (Motorman, MV Princess Ashika)*

3.135 Mr. Taufu‘i was a motorman on the MV Princess Ashika in Tonga and travelled only on the final voyage.

3.136 Mr. Taufu‘i indicated that at 8:04pm on the final voyage water had entered the cargo deck of the vessel and had accumulated on the starboard side of the vessel and at a depth of 18 inches, extending almost throughout the length of the vessel. Additionally, at 8:09 pm water had entered the crew accommodations and the depth of the water was 18 inches. By 11:30 pm the depth of the water, on the cargo deck had reached a metre and a half on the port side where the water had accumulated causing the vessel to list. Mr. Taufu‘i stated that the depth of the water in the engine room by 11:30 pm was 18 inches and a metre in the crew accommodation. (Exhibit 224) (T 2848 P – 2852 E) (Appendix 34)

*Fisi’inaua Vea (Ordinary Seaman, MV Princess Ashika)*

3.137 Mr. Vea had been an Ordinary Seaman on four of the five voyages of the MV Princess Ashika in Tonga. Mr. Vea together with Mr. Penismani Tupou were on the 8-12
watch on the fifth voyage of the MV Princess Ashika. When he first saw the MV Princess Ashika in early July 2009 he could easily tell the extent of the corrosion on the vessel from the swellings along the sides which had been painted over. There were also holes on the cargo deck and even on the passenger cabins. (T 2014 Q – 2015 M)

3.138 Mr. Vea stated that on the three voyages of the MV Princess Ashika prior to the fifth voyage, water had entered the cargo deck of the vessel through the bow ramp and from holes on the sides of the vessel. He indicated that on one of the trips an axe was used to punch a hole through the side of the vessel to release water from the cargo deck which had reached a depth of half a metre. On these three voyages, waves had punched holes through the sides of the vessel and on one occasion a hole of about one metre wide was caused by waves on the side of the vessel. (T 2015 O – 2018 B)

3.139 Mr. Vea stated that when he started his watch at 8:00pm on the fifth voyage there was about 12 inches of water on the cargo deck. The water had entered through the bow ramp and holes on the sides of the vessel. Water had also entered the vessel through the scuppers which had no non return valves. Mr. Vea also indicated that the depth of the water on the cargo deck had gradually increased and water had also entered the crew cabins which reached a depth of 10 inches at about 10:00pm. (T 2021 H - 2029 V) Additionally, Mr. Vea indicated that other crew members on the vessel had attempted to use a portable pump to pump water out of the vessel but the pump was not working. (T 2033 E – L)

Kalipeno Lolohea (Purser, MV Princess Ashika)

3.140 Mr. Lolohea had been the Purser on the MV Princess Ashika on all its five trips in Tonga. Mr. Lolohea’s main duty on the vessel was to check that passengers boarding the vessel correspond with the passenger manifest.

3.141 During the final voyage of the MV Princess Ashika, Mr Lolohea had spent most of the time in the passenger accommodation. Between 8:00 pm and 9:00 pm, Mr. Lolohea went down into the crew accommodation and discovered that water had entered the crew accommodation at a depth of approximately 3 to 4 inches. (T 2109 E – Q) Mr. Lolohea stated that the water entering the crew accommodation was coming from the galley and some crew members were bailing the water with buckets. (T 2111 A – 2112 K)

3.142 At around the same time the depth of the water on the cargo deck had been 30 centimetres which had collected mainly on the starboard side of the vessel. Mr. Lolohea indicated that water was entering the cargo deck through the bow ramp. (T 2110 B – 2111 G)
3.143 Mr. Lolohea stated that about 10 minutes before the vessel sank he went to check on pallets of beer that were part of the cargo. He observed from the observation deck that the pallets of beer were floating on the cargo deck and that the depth of the water in that part of the cargo deck was approximately one metre deep. Additionally, the water had collected throughout the length of the port side of the vessel. (Exhibit 161) (T 2113 K – 2115 L) (Appendix 35)

3.144 Mr. Lolohea suggested that one of the causes of the disaster is that cargo had not been lashed onto the deck of the vessel. He accepted that the cargo was never lashed down during any of the five voyages of the MV Princess Ashika in Tonga. Additionally, the floating and moving cargo created instability in the vessel. (T 2116 H – Q)

Uokalani Filipe Tau’ataina (Steward, MV Princess Ashika)

3.145 Mr. Tau’ataina had only travelled on four of the five voyages of the MV Princess Ashika in Tonga, which were the last four voyages. Mr Tau’ataina was the second mate of the MV Princess Ashika on its second voyage in Tonga and was a Steward on the remaining three voyages.

3.146 Mr. Tau’ataina had seen the MV Princess Ashika for the first time in Tonga on 2\textsuperscript{nd} July 2009, whilst on his way to work on the MV Olovaha. He has observed the Princess Ashika from the wharf. Mr Tau’ataina stated that the vessel looked bad and had rust all over it, and accepted that it was not just surface rust. (T 2132 H-T)

3.147 Mr. Tau’ataina stated that on the second voyage of the Ashika water had entered the cargo deck through the bottom and 18 inch gaps on the sides of bow ramp of the vessel. Additionally, water had entered the cargo deck of the vessel through approximately 50 small holes on the sides of the vessel, a majority of the holes were located on the starboard side of the vessel. Mr Tau’ataina indicated that the depth of the water towards the bow of the vessel was approximately 8 inches which extended to half way through the cargo deck. (T 2134 G - 2137 J) Mr. Tau’ataina also indicated that on both the third and fourth voyages, water had entered the vessel in the same manner as the second voyage.

3.148 On the final voyage of the Princess Ashika, Mr Tau’ataina was ordered by the First Mate to keep bridge watch within two hours from departure from Nuku’alofa and he was to keep watch until 18 miles from Ha’afeva. Mr Tau’ataina stated that the 8-12 watch keepers had reported to the Chief Mate at 8:30pm that there was water on the cargo deck and that some of the water was going out through the scuppers. (T2152 C-G) At 10:00pm, Mr Tau’ataina stated that he saw from the bridge deck that water had enter the cargo deck and was at a depth of approximately 10 inches. (T 2155 G-U)
Lotu Kalu (Security Officer, MV Princess Ashika)

3.149 Mr. Kalu was the security officer on the MV Princess Ashika in Tonga on all its five voyages. Mr Kalu stated that he had seen from the wharf the Princess Ashika for the first time on 1 July 2009 and he could tell from the bubbles and swellings along the side of the vessel that there was a lot of rust but had been painted over. Mr. Kalu indicated that he boarded the Princess Ashika on 2nd July 2009 and the floor and sides of the cargo deck was covered with corrosion and rust. (T 2954-2955)

3.150 Mr. Kalu indicated that on the first three voyages of the Princess Ashika in Tonga water had entered the cargo deck of the vessel through the sides of the bow ramp. Mr. Kalu also indicated that on the fourth voyage of the Ashika the depth of water on the cargo deck reached one and a half foot and member of the crew had knocked a hole on the side of the vessel to drain the water out because the scuppers had been blocked. (T 2956-2962)

3.151 Mr. Kalu stated that around 8:00pm during the final voyage of the Princess Ashika, water had started to enter the cargo deck through the bow ramp of the vessel reaching a depth of 15 inches. Additionally, the depth of the water in the crew accommodation was 3 inches and had entered the crew accommodation from the galley which had a number of cracks on the floor letting water through. Mr. Kalu indicated that by 11:30pm the water in the cargo deck had accumulated on the port side and extended almost throughout the length of the vessel and the water in the crew accommodation reached a depth of three feet. (Exhibit 234)(T 2964-2967) (Appendix 36)

Tongia Afuitangimana Lemoto (Survivor)

3.152 Mr. Lemoto was a survivor from the MV Princess Ashika when it sunk on 5th August 2009. He had formerly been a mechanic on the Olovaha for a period of about five months in 2004, and during such time had travelled on numerous voyages to Ha‘apai and Vava‘u.

3.153 Mr. Lemoto indicated that when he first boarded the vessel he saw a lot of rust and corrosion on the bow area and he could see bubbles of rust along the port side of the vessel which had been painted over. (T 862 E-R) During the voyage, Mr. Lemoto had gone down to the observation deck and saw that water was coming through the sides and bottom of the bow ramp onto the cargo deck. Additionally, pieces of timber stacked against the wheels of a vehicle on the cargo deck had been displaced and were floating on the cargo deck. The depth of the water on the cargo deck was about 2 inches deep. (T 863 B – 864 T)

3.154 Mr. Lemoto indicated that a short while before the MV Princess Ashika sank it had taken on a lot of water on the cargo deck, and one vehicle that was parked close to
the bow ramp had been completely immersed in water. The water had collected on the port side of the cargo deck and the vessel was also listing to port before it capsized and sank. (T 887 N - 888 T)

Sione Ngalu (Survivor)

3.155 Mr. Ngalu was a survivor when the MV Princess Ashika sunk on 5th August 2009. Mr. Ngalu had formerly been a carpenter by trade. His occupation required him to travel on numerous occasions to various islands throughout Tonga for work. He stated that when he first boarded the vessel he could tell that the “swellings” of rust on the side of the vessel had been painted over.

3.156 Mr. Ngalu had seen from the observation deck that water was coming through the bow ramp and that pieces of timber used to stop the vehicles on the cargo deck from moving had been displaced and were floating on the cargo deck. The water was coming through the sides and the bottom of the bow ramp into the cargo deck. (T 1027 C - 1030 I)

3.157 Mr Ngalu indicated that he had seen the bow area of the vessel and the water was accumulating and rising on the port side of the bow and had reached the under carriage of the vehicles parked on the cargo deck. Shortly before the vessel capsized and sank, Mr Ngalu indicated that the port side towards the bow of the MV Princess Ashika was submerged. (T 1030 Q -1032 B)

Tevita Lotaki Kanongata’a (Survivor)

3.158 Mr. Kanongata’a travelled on the MV Princess Ashika on 5th August 2009 with his wife and youngest daughter. Tragically his wife and daughter died. Mr. Kanongata’a had regularly travelled back and forth between Nuku’alofa and Ha’afeva since 1987 taking goods for his shop.

3.159 After boarding the MV Princess Ashika, Mr Kanongata’a was of the opinion that the vessel was heavily corroded, in very bad condition and should not be allowed to sail. (T 1131 R – 1132 R) Such opinion was obviously correct.

3.160 Mr. Kanongata’a stated in his oral evidence, that during the voyage on 5th August 2009, he had gone to the cargo deck four times and on all four occasions, he observed that water entered the cargo deck through the sides and bottom of the bow ramp. Over these four different occasions the depth of the water had gradually increased on the cargo deck. Water was entering onto the cargo deck hours before it sank. From Mr. Kanongata’a’s evidence, and others, it is apparent that at least two hours before MV Princess Ashika sank, the amount of water that was on the cargo deck had reached an alarming level which progressively got worse. We accept that cargo had started to shift and some was floating in the cargo hold shortly before the
vessel sank. This supports the conclusion that the cargo was not stowed to a reasonable standard and the vessel was therefore unseaworthy. (T1150Q -1151E)

Viliami Tatofi He‘ehau (Survivor)

3.161 Mr. He‘ehau travelled on the MV Princess Ashika on 5th August 2009 for Ha’aféva, which was the second occasion he had travelled on the vessel. On his first voyage on the MV Princess Ashika from Ha’aféva to Nuku’alofa, he stated that he had seen water coming through the bow ramp onto the cargo deck but it had eventually drained out of the vessel. (T 1182 Q - 1183 E)

3.162 Mr. He‘ehau indicated that on the voyage of 5th August 2009, he had gone to the cargo deck and seen water coming through the bow ramp but did not think much of it. He later went to the cargo deck at about 10:00 pm and found the water on the cargo deck to be up to his knees and that the water had collected on the port side of the vessel. (T 1187 S – 1189 J)

3.163 Mr. He‘ehau, on his two voyages on the MV Princess Ashika, formed the opinion that there was extensive rust and corrosion on the vessel and was in very poor condition. (T 1201 O - 1202 D)

Nivati ‘Alofi Pome’e (Survivor)

3.164 Mr. Pome’e saw the vessel for the first time on 5th July 2009 before he boarded the vessel. He stated that he saw a lot of rust along the sides of the vessel. (T 1169 F-R) Additionally, he indicated that about an hour before the vessel sank he went to the cargo hold and saw that water had accumulated on the cargo deck. The water was at a depth of about two feet and had collected mainly on the port side of the cargo deck and extended from the bow ramp to about half way to the stern. (T 1175 N - 1177 M)

Finevea Mesui Hingano Lemoto (Survivor)

3.165 Mr. Lemoto was travelling to Vava’u on the MV Princess Ashika with his older brother and two other friends. One of his friends, Mr. Salesi Havili Kaufusi, tragically did not survive the disaster of the 5th August 2009. Mr. Lemoto had not been paying very much attention to the state of the vessel but he indicated that about five minutes before the vessel capsized and sank it had listed heavily towards port.

Michel Roger de Wilde (Passenger, Fourth voyage of the MV Princess Ashika in Tonga)

3.166 Mr. de Wilde had been a passenger on the return leg of the MV Princess Ashika’s fourth voyage from Niuatoputapu to Vava’u. He is a free diver by profession and has travelled throughout the Kingdom by ship since 1992. Mr. de Wilde stated that when he saw the vessel before and whilst boarding, he could see rust everywhere on
the vessel and in particular the sides of the vessel that were exposed to the water. He also observed that the vessel had been recently painted. (T 1504 A-O)

3.167 Mr. de Wilde stated that about two hours into the voyage he had seen water coming through the hinges at the bottom of the bow ramp. Every time the vessel hit a wave water came through the bottom of the ramp at about a 45 degree angle and up to a height of about six to seven feet. The depth of the water on the cargo deck was about eight inches at the bow ramp and would thin out half way to the stern. The water was sloshing around the cargo deck. Mr. de Wilde indicated that he was so concerned that he got his diving gear ready and kept inspecting the cargo hold throughout the voyage. He had also warned his friends, who he had been travelling with, not to sleep too deep into the rooms. He also advised one of them who could not swim to wear his life jacket. (T1504 P -1506 S)

Paul David Karalus (Former Minister of Transport)

3.168 Mr. Karalus, the Former Minister of Transport had represented to various persons and entities before he had seen the MV Princess Ashika that the vessel was well maintained. On 20th April 2009, Mr. Karalus in a Memorandum to Cabinet represented that “While the vessel is older than the Olovaha it has been very well maintained and has come out of a December 2008 survey”. (Exhibit 64) On 28th April 2009, Mr. Karalus advised Ministry of Transport senior officials at a Mexco meeting that the new ship (MV Princess Ashika) would be better than the Olovaha as although old, was looked after and would be making trips to the Niuas. (Exhibit 349 paragraph 55) On 10th May 2009, Mr. Karalus in an email to His Majesty stated that “The vessel is very well maintained and the comfort it affords passengers will allow for the development of the passenger trade to the outer Islands”. Mr. Karalus stated during oral evidence, that statements made by him as to the “good condition” of the vessel or that it had been “well maintained” turned out to be “totally incorrect” and that he was “very highly embarrassed” and “sadly embarrassed” by those statements” (T 6405 P)

3.169 Mr. Karalus went on the MV Princess Ashika on three separate occasions before it sank on 5th August 2009. Mr. Karalus on 1st July 2009 was on the vessel for at least 30 minutes with a news crew and had been on the passenger deck and engine room. (T6348-6349) On 3rd July 2009 Mr. Karalus spent 40 minutes on the vessel. (T 6349) On 22nd July 2009, Mr. Karalus went onto the vessel with Mr. Kilvington (an expert maritime consultant) for three to four minutes to have a quick look at the vessel. (T6349-6350) Despite being on the vessel on three separate occasions, Mr. Karalus in evidence offered only a scintilla of information in relation to his observations on the vessel. We consider that Mr. Karalus would have known, consistent with the evidence of many witnesses and photographs, that the vessel was in an appalling
condition. The evidence of Mr. Karalus is set out in much more detail in a separate part of this Report.

**John Owen Jonesse (General Manager, Shipping Corporation of Polynesian Limited)**

3.170 Mr. John Owen Jonesse on four occasions in March-June 2009 travelled to Fiji and saw the MV Princess Ashika. He stated in evidence that the vessel was in good mechanical condition but accepted that the description was inadequate. Like Mr. Karalus, Mr. Jonesse had represented to various entities such as the Board of Shipping Corporation and the CEO of Ministry of Public Enterprises that the MV Princess Ashika was well maintained and in good condition. Mr. Jonesse was the only official from Tonga that saw the vessel in Fiji before the unconditional contract for the purchase was entered into on 8th May 2009. The evidence of Mr. Jonesse is set out in greater detail later in this Report.
CHAPTER 4 – DESIGN AND STABILITY

Overview of Evidence

4.1 The Princess Ashika was built in Japan in 1972 as the Olive Maru No.1 for service on the Inland Sea of Japan as a short range, smooth water, passenger and vehicle carrier. It was brought to Fiji in 1984 to serve as an inter-island ferry.

4.2 On 8th May 2009, an unconditional contract to purchase the vessel was entered into by the Government of Tonga as a replacement for MV Olovaha. The design was totally unsuited for the service in the open seas in Tonga because of its open construction. A reduction in draft, increase in weight due to age and to the build up of corrosion had reduced the original deadweight of the vessel which was 222 tonnes to an estimated 28 tonnes at 2.5 metres draft. Due to this the vessel was regularly overloaded in Tonga but this was not recognised by the owner, operator, Master or crew.

4.3 The steelwork was extremely wasted by corrosion. The openings to below deck, which were required to be weathertight, were in a deplorable state and were unable to keep out water. Water entering through gaps around the bow ramp and could not drain from the cargo deck as the scuppers were too small.

4.4 A combination of overloading, non weathertight ramp, non weathertight closing appliances, and of lack of freeing ports contributed to the disaster. In addition, the Master and crew appear to have been unaware of the seriousness of their situation until far too late. Princess Ashika was in such a poor state that an accident was inevitable, it only required the right set of circumstances to come along.

Vessel Particulars

4.5 The MV Princess Ashika, previously named Olive Maru No.1, was built in Japan at Shikoku Dockyard in 1972 as a smooth water, short voyage, and RORO vessel to carry vehicles and passengers for short voyages in smooth water in the Japanese Inland Sea.

4.6 There were 5 decks or part decks on the ship. Lowest were part decks of the engine room and crew accommodation, with void spaces and tanks taking up the remaining spaces below the cargo deck. Access to the crew accommodation and the engine room was by stairways through casings on the cargo deck. Access to the void spaces and tanks was through nominally watertight hatchways and manholes.

4.7 Above was the cargo or wagon deck, with side houses for accommodation and access to below, and also ramps for vehicles at bow and stern. Ramps each end allowed vehicles to drive on and drive off without turning or reversing. The cargo
deck overhung the hull structure by about 1.1 m on each side of the vessel. This cantilevered portion of the deck was supported by external brackets.

4.8 Above the cargo deck was the passenger deck containing passenger lounges, kiosk and covered aft deck. Between the cargo deck and the passenger deck was the erection deck about 2 metres wide, port and starboard, above the side houses. This part deck had passenger toilets, access ladders between decks, mooring equipment and ramp operating gear at each end, and anchoring equipment forward.

4.9 Above the passenger deck was the navigation Bridge deck, which included the wheelhouse, the cabins of the Master and Chief Mate, the latter was used as a store room for old lifejackets, and the life raft cradles.

FORM OF STABILITY REPORT

<table>
<thead>
<tr>
<th>Date of the report</th>
<th>02 September 1974</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kind of survey</td>
<td>Class-1 intermediate survey</td>
</tr>
<tr>
<td>Administrator Office</td>
<td>Surveyor</td>
</tr>
<tr>
<td>Shikoku District Maritime Bureau</td>
<td></td>
</tr>
</tbody>
</table>

**Motor Vessel Olive Maru No. 1 Stability booklet**

| Hull material | Steel |
| Purpose of the vessel | Passenger ferry |
| Official number | 113370 |
| Gross tonnage | 677.15 |
| Port of registry | Takamatsu |
| Type of main engine | Diesel |

**Area of navigation**

- Smooth water
- 1.5 hours or over but less than 3 hours

<table>
<thead>
<tr>
<th>Passenger</th>
<th>1st class persons</th>
<th>Length of the vessel as shown on the Certificate of Registry</th>
<th>47.91 m</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2nd class persons</td>
<td>Length of the vessel</td>
<td>47.00 m</td>
</tr>
<tr>
<td></td>
<td>3rd class persons</td>
<td>Width of the Vessel</td>
<td>11.00 m</td>
</tr>
<tr>
<td></td>
<td>Total 402 persons</td>
<td>Depth of the vessel</td>
<td>3.80 m</td>
</tr>
<tr>
<td>Crew</td>
<td>15 persons</td>
<td>Length / Depth</td>
<td>12.368</td>
</tr>
<tr>
<td>Other</td>
<td>15 persons</td>
<td>Length / Breadth</td>
<td>4.273</td>
</tr>
<tr>
<td>Total</td>
<td>417 persons</td>
<td>Breadth / Depth</td>
<td>2.895</td>
</tr>
</tbody>
</table>

(Above: Translation of page from the original stability information obtained from Japan)

4.10 The hull below the cargo deck was divided, starting from forward, into fore peak forward of the collision bulkhead, port and starboard water ballast tanks, (called fore peak by the crew) No.1 void, crew accommodation with a void space below, engine
room, aft void or shaft tunnel, port and starboard water ballast and fresh water tanks, and at the stern, the steering gear compartment.

4.11 The aft void contained fuel tanks, with daily service tanks in the engine room. The compartments were separated by watertight bulkheads providing one compartment subdivision up to an original draft of 2.8 metres.

4.12 At some time before Princess Ashika reached Tonga, an access door was cut in the bulkhead between the Engineroom and the aft void. On the fourth voyage the fuel transfer pipe leaked, so a semi-submersible pump was used to transfer fuel to the daily service tank via a hose passing through the doorway. Although the transfer pipe was repaired in time, it was not reinstalled for the fifth voyage, so the door could not be closed watertight, destroying the one compartment subdivision.

4.13 One compartment subdivision means that the vessel will retain sufficient reserve buoyancy to remain afloat with any one compartment open to the sea. With two compartments joined by the open doorway, flooding of these spaces would cause the loaded vessel to sink.

4.14 The plans below form part of the General Arrangement Plan of MV Princess Ashika. (Exhibit 145) (Appendix 37) The passenger deck and navigating Bridge deck are not shown.
4.15 Below is a cross section of MV Princess Ashika showing the deck overhang.

4.16 The sketch above shows a cross section of the hull of Princess Ashika at around amidships, showing the overhang of the cargo deck and the position of the scuppers, which are simply holes in the deck without non return valves. Above the passenger deck is the navigating Bridge deck which is not shown on the sketch.

**Engine Room Equipment**

4.17 The Alternators appear to have been changed, having lower output; one alternator was not capable of running two pumps together. The other was regarded as a standby. (T 2573 S-U) **Both alternators could not be put on load together.** (T 2602 F - J)
4.18 The original ballast pump was 125mm diameter with a capacity of about 80 tonnes per hour. This pump was said to have been removed because it imposed too great a load on the generators.

4.19 The general service pump was used for ballasting. (T 2819 O-P) Mosese Fakatou in oral evidence stated that after one and a half hours pumping, this pump was unable to fill the two forward ballast tanks. (T 156 G-J) The motorman, Sitiveni Ali, stated that the pump could fill one ballast tank in 45 minutes to one hour. (T 2833 B-J) This would indicate a capacity of between 40 and 50 tonnes per hour.

4.20 A second pump was available for bilge service but was reported to be too slow so was not used. (T 2574 L) Normal practice is to have two means of pumping the engine room bilge, one by bilge main and one by direct bilge suction. This would require two pumps operating at the same time, and was impossible on Princess Ashika.

4.21 Bilge pumping capacity was inadequate to cope with the inflow into the engine room, which was coming through the open engine room port doorway and holes on the port side above deck. Instructions were given to close the door but it is not known if it was in fact closed. (T 2839 K-L) In any event, the door could not be made weathertight because of advanced corrosion. Water continued to enter through the doorway after the pumps were submerged.

Loadline

4.22 The vessel was marked with a Loadline giving a loaded draft of 2.5 metres, (Exhibit 66) but no Loadline Certificate was available to identify whether it was for smooth water, partially smooth water or seagoing.

(Above: Photograph taken on 2nd July 2009, with Load Line submerged with some ballast but no cargo (Exhibit 66))
Tonga is a signatory to the *Load Line Convention*; therefore seagoing ships over 24 metres should conform to the requirements of that Convention. Section 130(1)(b) of the *Shipping Act* provides that the *Load Line Convention* applies to all vessels registered in Tonga.

**Non Conformity with the Load Line Convention in the case of MV Princess Ashika:**

**Regulation 39 - Bow height**

4.24 Minimum bow height required for this vessel is about 2.4 metres. (Exhibit 10) Taking an allowance of 0.7 metres for the forward structures, the required bow height to the cargo deck would be about 1.7 metres.

Draft to the deck forward was about 4.1 metres.

At a draft amidships of 2.5 metres, neglecting trim, the freeboard to the deck forward would be about 1.6 metres.

This seems to indicate that the draft of 2.5 metres represents a seagoing draft according to the *Load Line Regulations*.

4.25 Bow height to the cargo deck on the 5th voyage at departure would be equal to the freeboard amidships less any trim by the bow, not more than 850mm, a deficiency of at least 850mm. The vessel may have had an appropriate bow height when loaded with fuel and water to the Load Line mark, but was deficient when loaded with cargo.

4.26 Bow height required under the *Load line Regulations* is a minimum. For practical reasons, bow height is often increased above the minimum to cope with exceptional conditions. In the case of Princess Ashika the bow height and design were not suitable for the sea conditions in which it was to operate.

**Regulation 24 - Freeing Ports to rapidly clear water from the deck**

4.27 The Princess Ashika had a single deck, originally weathertight, drained by seven 100mm diameter scuppers on each side. This was adequate for service in smooth water for which the vessel was designed. Due to the effects of corrosion, the area of some of the scuppers had increased, and on the final voyage, some of the scuppers were blocked by debris. (T 2549 J-T) The scupper area, even when cleared of obstructions, was insufficient to properly drain the deck at sea.

4.28 A seagoing vessel of similar dimensions, without deck sheer, would require a freeing port area of around 5 square metres each side to cope with any severe weather conditions encountered at sea.
4.29  In moderate weather a vessel may survive with less freeing port area; however most Regulations require that the freeing port area is not less than the minimum. These freeing ports may be openings in the bulwark, or may be fitted with non return flaps.

4.30  Freeing ports should not be blocked at sea. The blocking of scuppers on the voyage from Fiji to Tonga (T 1779 P-S) was a dangerous practice which could have lead to disaster. Any water coming on board would be unable to find its way overboard. The resulting free surface effect could be sufficient to cause negative stability. One of the criticisms of the vessel was that the scuppers were not fitted with non return valves. This would have been an appropriate criticism if the cargo deck had been fully enclosed. With the vessel in the condition that it was, non return valves would have been of little use.

4.31  Excessive water entering from around the bow ramp required a way to get overboard. Action by a crew member on voyage four, by knocking a hole in the ship’s side with an axe, (T 1416 E-U) probably saved the vessel from a fate similar to that on voyage five. The hole was reported to be about 6 inches in diameter. It is important to clear water quickly, and not allow it to build up.

4.32  No surveyor or any other person in Tonga seemed to have queried the absence of adequate freeing ports, other than Captain Johnson long after the sinking. (T 2651 S)

4.33  The objection to freeing ports was that they may increase water on deck, causing damage to cargo which is stowed unprotected on deck. Means of protecting cargo such as shrink-wrap is not readily available in Tonga. Cargo could have been stowed on pallets which would have provided protection if the water was not too deep. However, cargo damage is less important than the loss of the vessel.

(Above: Scuppers on cargo deck showing them to be simply holes in the deck without any non return valves (Exhibit 6))

Conditions of Assignment under the Load Line Convention were deficient as follows

4.34  No Loadline Certificate had been supplied.
Regulation 1 - Strength and Stability of Ships

4.35 A vessel must have adequate strength for its draft and service. There is ample evidence that the strength of the vessel was sub-standard due to extensive corrosion.

4.36 No up to date stability information was available on the vessel. The Japanese information (Exhibit 245) is useful only that it provides Hydrostatic Curves, Cross Curves, and some Loading Conditions for the vessel on its original trade, tank capacities for fuel and water, and centres of gravity for some components of load.

4.37 Light Ship displacement and centre of gravity of the original vessel is unlikely to be accurate after 37 years. A draft check would have been required to establish the Light Weight of the vessel.

Regulation 10 - Information to be supplied to the Master

4.38 No information was supplied to the Master to assist in loading the vessel, and to assess the stability or allowable load.(T 1675 J) The vessel was built with a rake of keel by the stern. (Exhibit 245 part 7) Unless the Master was aware of this, reading of drafts could lead to sailing with a trim by the head. (A rake of keel means that the keel is not parallel to the designed waterline of the vessel. In Princess Ashika the keel at the bow was about 0.64 metres closer to the designed waterline than it was at the stern)

Regulations 12 and 17 - Doors to enclosed spaces on the cargo deck shall be equivalent to the bulkhead and weathertight.

Engine room door starboard side
Door to forward store starboard side
(These doors show extensive corrosion preventing them from being closed weathertight)
4.39 Photographic evidence shows all doors to be weakened by corrosion, and incapable of being made weathertight. (Exhibit 6) Sill heights were about 300mm instead of 600mm minimum for doors on the weather deck.

Regulation 18 - Miscellaneous openings on the freeboard deck and winch deck should be capable of being made watertight

4.40 Photographic evidence shows some manholes without covers and some with only a few securing nuts. The hatch to the No.1 void space in the crew messroom has broken hinges. Access to the rope stores forward is broken. Manholes to the forward ballast tanks were without covers. (Exhibit 6) Ship practice was to leave the covers off to assess water depth by sighting through the manholes, instead of using the sounding pipes. (T 2798, C-K)

Regulation 19 - Ventilators shall be supplied with weathertight closing appliances

4.41 Photographic evidence shows that most of the ventilators on Princess Ashika were heavily corroded and incapable of being closed weathertight. (Exhibit 6)

Regulation 20 - Air pipes are to be fitted with automatic closing devices.

4.42 Generally air pipes were heavily corroded without effective closing appliances. (Exhibit 6)
The non conformities with Loadline Regulations, and the deficient Conditions of Assignment, were major factors contributing to the sinking.

**Overloading**

**NOTE:** Displacement is the weight of water which is displaced by a vessel in order for it to float in any given condition i.e. the weight of the vessel plus everything loaded on it. Deadweight is the difference between the Light Weight (Empty) and the Loaded Displacement (Fully loaded) i.e. the maximum weight permitted to be loaded.

4.43 Light Weight of the vessel when built was 669 tonnes. All vessels tend to accumulate weight with age. Without having done a draft check on the vessel it would be difficult to estimate the amount of accumulated weight. Considerable amounts of concrete were stated to have been used in the hull to cover corroded areas. However a weight of 50 tonnes has been allowed for additional weight with age. (Exhibit 243) (Appendix 38) The new lightweight then becomes 719 tonnes.

4.44 The load line is stated to be at a draft of 2.5 metres. (Exhibit 243) Displacement at 2.5 metres draft is 747 tonnes. (Exhibit 243) Using the above figures, the maximum deadweight would be only 28 tonnes which includes cargo, bunkers, fresh water, stores and passengers.

4.45 On the final voyage the vessel, neglecting trim, was loaded as follows:

<table>
<thead>
<tr>
<th>Item</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cargo on deck from manifest</td>
<td>110 tonnes</td>
</tr>
<tr>
<td>Bunkers</td>
<td>21 tonnes</td>
</tr>
<tr>
<td>Passengers and Crew</td>
<td>13 tonnes</td>
</tr>
<tr>
<td>Fresh Water (estimated)</td>
<td>17 tonnes</td>
</tr>
</tbody>
</table>

Total deadweight without ballast = 161 tonnes

4.46 Some ballast must have been carried in the aft ballast tanks because the starboard tank was pumped and refilled to control list on the final voyage. (T2843, E-H) There were holes in the aft ballast tank bulkhead adjoining the shaft tunnel, but their location was not revealed in evidence. Practice was to fill the aft ballast tanks up to the level of the holes.

4.47 No evidence indicated that the forward ballast tanks contained any water on departure although the Duty Engineer on watch when Princess Ashika sailed on the final voyage was asked three times to pump these out.

4.48 Water in the aft ballast tanks is assumed to be 30 tonnes.
4.49 Known weights onboard:

<table>
<thead>
<tr>
<th>Item</th>
<th>Weight (tonnes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cargo</td>
<td>110</td>
</tr>
<tr>
<td>+ passengers &amp; crew</td>
<td>13</td>
</tr>
<tr>
<td>+ fuel</td>
<td>21</td>
</tr>
<tr>
<td>+ water (estimate)</td>
<td>17</td>
</tr>
<tr>
<td>+ ballast (estimate)</td>
<td>30</td>
</tr>
</tbody>
</table>

**Total known weights**: 191 tonnes

**Deadweight at 2.5 metres draft**: 28 tonnes

**From the above figures (known weights minus deadweight)**

Vessel was overloaded by **163 tonnes**

<table>
<thead>
<tr>
<th>Calculation</th>
<th>Weight (tonnes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Displacement at 2.5 metres draft</td>
<td>747</td>
</tr>
<tr>
<td>Overload</td>
<td>163</td>
</tr>
<tr>
<td>Loaded displacement</td>
<td>910</td>
</tr>
</tbody>
</table>

4.50 The draft would have been in excess of the original smooth water loaded departure condition of 873 tonnes displacement at 2.78 metres draft. (Exhibit 178) **(Appendix 39)** The draft in fact would be about 2.85 metres.

4.51 At this draft the loadline would be submerged by 350mm.

4.52 The first four voyages in Tonga carried cargo and passengers so would also have been overloaded. While carrying out the survey for British Marine Managers Limited, Mosese Fakatou stated the loaded freeboard before departure on voyage 5 to be about 800mm, which represents a draft of about 3 metres. (T 52, L)

4.53 Even though some weights above are an estimate, it is clear that the vessel was always overloaded on departure from Nuku’alofo. No means of accurately measuring weight was available, therefore the majority of weights were estimated. (T 3131B-O) It would have been in a shipper’s interest to underestimate the weight of cargo to reduce the freight charges. Anecdotal evidence suggests that the actual cargo weight may have been more than the manifest figure. (Exhibit 261)

4.54 The void spaces were never sounded so they may have contained some water. (T 1851 L)

4.55 For passenger service a vessel must have one compartment subdivision. Princess Ashika had a subdivision draft of about 2.8 metres. That means the vessel was loaded beyond the permissible draft for passengers.

4.56 The practice of reading drafts was not observed on Princess Ashika (T 1850 A) The Master claims to never have seen the loadline. (T 1719 P-Q)

4.57 The vessel was never detained by Marine and Ports even though the load line mark was submerged on departure.
4.58 The Shipping Corporation loaded cargo which immersed the Load Line. The crew was prepared to sail with the Load Line immersed.

**Suitability for the Trade**

4.59 Mr. Jonesse claimed that the cargo deadweight was twice that of the MV Olovaha. (Exhibit 272) His figure for deadweight seems to have been derived by subtracting net tonnage from gross tonnage, indicating that he was unaware of the meaning of deadweight, which is the weight that the vessel can carry without immersing the load line.

**NOTE:** Gross Tonnage is based on the total internal volume of spaces within a vessel. Net Tonnage is based on the volume of the vessel used to earn income.

4.60 Any competent person standing on the wharf, seeing the unladen vessel with the load line close to the waterline, would know that the vessel would be unable to carry enough deadweight. If the vessel happened to be loaded, the Load Line mark would have been immersed. This would be cause for alarm. The vessel would be overloaded.

The information in the paragraph above, in itself, would be sufficient to dismiss the vessel as unsuitable without even having to go on board.

4.61 Mr. Jonesse claimed that the vessel was well maintained. (Exhibit 317) A casual walk through the vessel would have revealed extensive corrosion and wastage. A competent person, taking a closer look at the closing appliances, would have shown them to be in a state of total disrepair. The vessel should not have been allowed to go to sea in such a condition. *The corroded condition of the vessel has been covered in the previous chapter.*

4.62 To repair the above defects would have been very costly, and the vessel would have been out of service for several months.

4.63 Notwithstanding any certificates which the vessel may or may not have had, the items above should have shown that the vessel was not a suitable replacement for MV Olovaha. It is unfortunate that a competent person was not engaged in the early stages to inspect the vessel.

4.64 Several witnesses commented on the unsuitability of Princess Ashika for service in Tongan waters. Some of the comments with which we agree are as follows:

4.65 *Michael Eno (Exhibit 24 page26)*

“The purchase of a vessel whose design, suitability and fitness was wholly unsuited for the open ocean going conditions in which she would have to ply……”
4.66 Vuni Latu, MOT Surveyor (T 1249 I-L)

“The design of the vessel is not fit for the trading in Tongan waters”.

4.67 Lou Pale, MOT Surveyor (T 968 G)

“...And I explained to him, it shouldn’t be running, it should be a nightclub”

4.68 Master of Princess Ashika (T 1669 R- T 1670 A)

“I think that the vessel....should be sailing...not more than force 4 or 3.......The design of that vessel is not good for Tonga waters because the bow is too low.”

4.69 Mosese Fakatou, Marine Surveyor (Exhibit 5 page 4)

“The vessel was of the wrong type and totally unsuitable for the trade she was engaged in. A serious mistake was made in selecting this ship for this trade. ...

It is my strong opinion, from experience in actual sailing on ferry boats and operating ferry boats in Tongan waters, that the MV Princess Ashika was totally unsuitable for the trade she was engaged on (i.e. Tongan near coastal areas, or the Tongan domestic trade).”

4.70 Viliami Vi, Master Mariner (Exhibit 238) elaborated on the unsuitability of the vessel.

“The design of the MV Princess Ashika has failed in 7 of the criteria that influence the designing of ships. Even buying a second hand ship, the criteria will still be used for finding a vessel to suit your requirements or close to your requirements.

Buying the MV Princess Ashika was not done by Maritime professionals (Master Mariners, Class 1 Engineers etc) but it was done by Land lubbers who do not know the difference between the Bow and Stern of a ship. This is shown in the type of ship that was bought. I will explain the failures of the design of the MV Princess Ashika compared to the criteria ...

Nature of service:

Perform its function safely and effectively. The MV Princess Ashika failed because there are so many openings on the sides, open from forward end of Ro-Ro to aft of Ro-Ro space and low freeboard, water can easily enter the vessel which is a hazard to the crew going from their accommodation to the watch on the bridge and also the water will damage the cargo as it runs freely
on the roro deck. So the design of the MV Princess Ashika failed to perform its function safely and effectively.

**Area of operations:**

Generally, a vessel that is required to spend longer periods at sea without replenishment will have a correspondingly larger capacity to carry fuel and stores. Weather conditions also influence design. Frequent rough conditions may require the decks to be located sufficiently high above the water to keep them reasonably dry. The MV Princess Ashika fuel capacity is only 14 tonnes so when it traveled to the Niuas it will refuel in Vava’u before going to the Niuas and again in Vava’u on the return from the Niuas so that it can complete the trip back to Tongatapu. The low freeboard and the open design of the MV Princess Ashika shows there was no consideration on the weather conditions here in Tonga and the open water conditions between the islands here in Tonga. The height of waves and swells that can be generated by Cyclones during Cyclone season and swells that generated by Low pressure systems South of Tonga can easily go over the gunwale of the MV Princess Ashika when it rolls flooding the roro deck. No one considered that the **AREA of OPERATION** of MV Princess Ashika will change if the ship was bought.

**Seaworthiness and Stability:**

A vessel should be structurally sound to cope with the weather and operating conditions likely to be encountered in its area of operation. Under normal operating conditions, the vessel should have enough stability to keep it upright and afloat. Careful attention must be paid to the hull shape, the distribution of weights, and the protection of hull openings.

The MV Princess Ashika was not structurally sound to withstand the weather condition in its new operating area. With the open design water will easily enter the roro area, and doing so will add weight to the ship and cargo might absorb the water and increases the weight making the ship sink lower in the water reducing the freeboard and at the same time causes free surface effect which will reduce the stability of the ship. With the water moving around in the roro area, the water can shift cargo as it moves from side to side as the ship rolls. With the cargo shifted by the water the ship could easily be listed by the shift of cargo and cause the low side to take more water onboard.

**Stress:**

When carrying out its planned operations a vessel’s structure should be able to withstand the stresses caused by the **Action of wind and waves.**
It was clearly shown on the MV Princess Ashika that it cannot withstand the stresses of the new **Area of Operation** as it first left Fiji on the delivery voyage. The ship has to turn back to Fiji due to problems with the ramp. The hull and structures of the ship cannot stand the stresses as the ship flex and twist longitudinally when the ship met the swells and waves of the open waters.

**Survey requirements:**

“Periodically throughout its life to ensure that it complies with the regulations. The MV Princess Ashika was not surveyed to regulations. If it was surveyed to regulations it would have been scrapped years ago.

**Personnel safety:**

Persons on board must have safe working areas, safe access to and from the working areas. The MV Princess Ashika has big openings on the sides where the walkways and stairs for the crew will use to move from crew accommodations to the bridge for their watch at sea. If there is rough weather or beam seas and swells the ship will roll and together with its low freeboard water can easily enter this space and any of the crew can be washed over board or carried by the water and ran him to a bulkhead or railing causing injury to the crew member. So the open sides are not safe for the crew.

**Commercial requirements:**

On-going operational costs. The new owner of the MV Princess Ashika cannot afford to operate the ship due to the conditions the ship was in. The ship has to be laid up for about 6 to 8 months so that the repairs to the ship can be carried out and the cost of the steel for the repair from NZ will be phenomenon and with this lay up of the ship it will make the shipping company bankrupt, because there is no revenue from the ship to pay for the repairs required. So this could have been a point in forcing the ship to continue operating while it is in bad condition and end up sinking and losing 73 souls.

With all the criteria above being explained, it shows that whom ever made the decision to buy the MV Princess Ashika (it) was done in a selfish manner with no consultancy or not listening to consultants disagreement with the ship and (they) did not know anything about shipping business and ships and (with) stubbornness and total disregards to Maritime professionals here in the Kingdom for consultancy. They went ahead and purchased the MV Princess Ashika and disaster strikes …”
Design of MV Olovaha

4.71 Observations by the crew and others indicated that an Olovaha type vessel was considered best suited for trade in Tongan waters. It had an enclosed cargo deck with a bow door access, passenger accommodation, and was serviced by derricks. Water on the enclosed cargo deck was drained by deck scuppers fitted with non-return valves.

4.72 The bow ramp was mostly weathertight, (T 2100 E-H) so water could come on deck from the bow ramp or wash down or from a fire hose. Such water apparently could be discharged by the scuppers.

4.73 Items of cargo generally could be stowed on deck without having to be covered to avoid water damage.

4.74 Crew accommodation was reasonable, as was the passenger accommodation.

Design of MV Princess Ashika

4.75 The vessel was not considered suitable mainly because the deck was open to the weather, which meant that cargo stowed in the usual way would be damaged by the inevitable presence of water. Also the bow height to the winch deck was too low to avoid water coming on board in heavy weather.

4.76 Furthermore the bow door was not weathertight, allowing large quantities of water on to the deck, which was unable to find its way overboard quickly enough. Water on deck would cause a free surface effect which would reduce the stability.

4.77 When loaded to the load line, the vessel was able to carry an estimated 28 tonnes deadweight, which is less than full tanks of fuel and water.

4.78 A suggested modification (Exhibit 59) was to enclose the cargo space and seal both bow and stern ramps, and the “cutouts” on the vessel’s sides, making the cargo area totally enclosed. This would ensure that the cargo was protected from water damage, but the additional steel would have further decreased the available deadweight, and incur considerable costs.

4.79 A reduction of freeboard, associated with an increase in deadweight, may have been allowable as a result of the modification of the superstructure enclosing the cargo deck, provided the structure of the superstructure was of adequate strength.

4.80 All of the above is somewhat academic when the state of the vessel due to advanced corrosion is taken into account. No structural modifications would have been worth considering.
Stability and Seaworthiness

4.81 The following is an extract from the New Zealand Transport Accident Investigation Commission (TAIC) Final Preliminary Report which we accept and adopt. (Exhibit 423 pages 38, 40-44)

“STABILITY AND SEAWORTHINESS CONCEPTS

Buoyancy and stability

A vessel’s stability is its tendency or ability to return to its original position when disturbed, after the disturbing force has been removed. The ability depends on the forces of gravity and buoyancy acting on the vessel and their relative position of action, which are represented by the centre of gravity and centre of buoyancy respectively.

The centre of gravity is a function of weight distribution; its position varies with loading, by shifting weight in the vessel, or by adding or removing weight. However, with all weights stationary, the centre of gravity remains fixed regardless of the movement of the vessel. The positions of the vessels’ centre of gravity and displacement are determined by an inclining experiment carried out after the vessel’s construction.

The centre of buoyancy is located at the centroid of the submerged hull form or underwater portion of the hull. Its position is solely a function of the shape of the underwater volume, which varies with trim and heel. The buoyancy of all other enclosed watertight spaces above the waterline is therefore residual buoyancy, more commonly referred to as reserve buoyancy. As it relates to stability, the vessels freeboard is the distance from the waterline to the watertight deck, and this provides an indication of the reserve buoyancy. A vessel with lots of freeboard has more reserve buoyancy than a vessel with very little freeboard.

The disturbing forces may be caused by internal or external forces, for instance by the shifting of onboard weights, the addition or removal of weights, wave action or wind.

A vessel floating at rest, with or without list and trim, is in static equilibrium; that is, the forces of gravity and buoyancy are equal and acting in opposite directions in line with one another. As the centre of buoyancy shifts with a heel, the 2 opposing forces act along separate and parallel line... The forces establish the couple that tends to return a stable vessel to the upright position. The distance between the lines of action of the centre of gravity and the centre of buoyancy corresponds to a righting arm, commonly referred to as the GZ. This righting arm is represented in a stability curve as a function of the angle of heel.
The area under the stability curve is a measure of the vessel's ability to absorb energy imparted by winds, waves or other external force. A vessel with very little area (righting energy) under its stability curve could be rolled past its range of stability and capsized by even a momentary disturbance.

Stability Curve

Righting Energy

The vessel’s stability characteristics in various loading conditions reflecting the operation of the vessel can be calculated and are usually presented in a stability book as graphs, tables and curves. The master of the vessel should be supplied with a copy of the stability book in a format approved by the maritime authority. The use of this book will enable the master to obtain accurate guidance as to the stability of the vessel and assure them that the vessel has sufficient stability throughout the voyage.
The vessel stability may be compromised by multiple factors that could deplete righting energy:

**Overloading** – Added weight means the freeboard has been reduced and deck immersion will occur at smaller angles of heel. Vessels also get heavier as they get older. This can be due to accumulated equipment on board. Beyond a certain limit, usually established during the load line assignment process, the reserve stability may become insufficient by the addition of weights and overloading. Moreover, if weights are added above the initial position of the centre of gravity, the centre of gravity of the vessel is raised.

**Deck edge immersion** – This will happen sooner where there is reduced freeboard. When deck immersion occurs, the shape of the underwater portion of the hull changes and this reduces the righting energy available to return the vessel to the upright.

**Free surface effect** - When a vessel with a partially filled tank or with free water on its deck is heeled, the liquid will seek to remain parallel with the waterline and will flow to the low side. The centre of gravity of the liquid, being the centre of its volume, will move with the liquid towards the lower side of the vessel and this will cause the vessels’ centre of gravity to shift, thereby reducing the vessels’ stability. The greater the surface area covered by liquid, the greater the effect. The area covered with water is more significant than the depth of water, and this is especially true for water on deck.
Downflooding  

Downflooding is the entry of water into the hull that results in progressive flooding with which pumps cannot keep up. Watertight and weathertight integrity is necessary to prevent downflooding. Downflooding introduces free surface, which raises the centre of gravity, increases the draught and reduces freeboard. Consequently, it reduces the reserve buoyancy and stability, and if no corrective action is taken quickly enough to stop it, it may cause an extreme list and represent a progressive loss of stability that may finally result in a capsize.

The accident voyage of the **Princess Ashika** is a good illustration of the phenomena. The buoyancy and stability were compromised by the progressive and cumulative effect of the factors mentioned above, until the vessel capsized.
Seaworthiness

A vessel’s seaworthiness may be defined as its sufficiency (or suitability) in materials, construction, equipment, crew and outfitting for the trade or service in which it is employed. This suitability is initially obtained through suitable design and construction. The suitability of design is usually verified by the submission of vessel drawings for approval by the marine authority or the classification society before the initial certification. Seaworthiness, however, must also be maintained by proper operation, by inspections and surveys, and by maintenance and repair.

In the case of the Princess Ashika, the suitability of design has been briefly dealt with in a previous section of the report.

In the maritime industry, the expression “fit for purpose” is often used to describe not only the condition of the vessel and its compliance with the relevant standards, but also the suitability of its design for the intended purpose or trade for which it is to be used. Needless to say, fit for purpose is from the point of view of safety of life at sea.

Suitability or seaworthiness during the operation of the vessel must be achieved in various ways, one of them being maintaining the vessel integrity as follows:

- Structural integrity of the hull and the superstructure
- Watertight integrity of the main hull and the main bulkheads
- Weathertight integrity of the superstructure
- Structural and weathertight integrities of the conditions of assignment of freeboard (i.e. hatchways, doorways, manholes, ventilators, air pipes, scuppers, et cetera).

Assigning load lines and freeboard to a vessel is one of the most efficient ways to ensure a vessel’s integrity, as it:

- Ensures that the vessel structure is not subjected to excessive or unacceptable stresses
- Maintains sufficient reserve stability
- Maintains the reserve buoyancy
- Protects weathertight openings from the sea
- Ensures sufficient height of the bow and of the working platform above the waterline to prevent the ingress of water.

Submerging the load lines by overloading can have multiple adverse consequences. The structure will be subjected to excessive stresses, thereby increasing the possibility of distortion, deformation and fracture of the structural components with subsequent ingress of water. Reserve buoyancy and stability will also be reduced and might become insufficient or non-compliant with the international standards. Moreover, watertight closing appliances, such as the connection to the shell, will be subjected to
a greater hydrostatic pressure and the weathertight closing appliances will be more exposed to the sea and thereby more prone to damage, leakage and ingress of water. Finally, the vessel, the cargo, the crew and the passengers will be exposed to greater risks.”

**Stability of the MV Princess Ashika on the voyage on 5th August 2009**

4.82 Abbreviations and terms used in the following sections are explained as follows:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>VCG</td>
<td>Vertical Centre of Gravity</td>
</tr>
<tr>
<td>LCG</td>
<td>Longitudinal Centre of Gravity</td>
</tr>
<tr>
<td>TCG</td>
<td>Transverse Centre of Gravity</td>
</tr>
<tr>
<td>FR.SURF</td>
<td>Means the free surface effect of free water on deck or in a compartment</td>
</tr>
<tr>
<td>LCB</td>
<td>Longitudinal Centre of Buoyancy of the hull of a vessel</td>
</tr>
<tr>
<td>LCF</td>
<td>Longitudinal Centre of Flotation of a vessel at a particular waterline about which a vessel trims.</td>
</tr>
<tr>
<td>MCT</td>
<td>is the Moment to Change Trim of a vessel by one centimetre over the length of the vessel.</td>
</tr>
<tr>
<td>KG</td>
<td>is the height of the centre of gravity of an item or vessel above the keel or baseline.</td>
</tr>
<tr>
<td>KMt</td>
<td>is the height of the Metacentre above the keel or baseline.</td>
</tr>
<tr>
<td>GM</td>
<td>is the distance from the centre of gravity of a vessel to the metacentre.</td>
</tr>
<tr>
<td>GMf</td>
<td>is the value of GM corrected for free surface effects.</td>
</tr>
<tr>
<td>GfZ</td>
<td>is the righting lever tending to return a heeled vessel back to upright.</td>
</tr>
<tr>
<td>Draft</td>
<td>is the distance from a reference point such as a baseline or keel to the waterline</td>
</tr>
<tr>
<td>Displacement</td>
<td>Is the weight of the volume of water which a vessel displaces.</td>
</tr>
<tr>
<td>Hydrostatic Curves</td>
<td>represent various characteristics of a vessel’s hull shape.</td>
</tr>
<tr>
<td>Cross Curves</td>
<td>relate to the stability of a vessel at various angles of heel.</td>
</tr>
<tr>
<td>Stability Curves</td>
<td>show the vessel’s ability to return to upright if heeled.</td>
</tr>
</tbody>
</table>

**Light Weight**

4.83 Light Weight of the vessel for the purpose of this report has been established as 719 tonnes. (Exhibit 243)

Centres of gravity have been taken as original figures. VCG = 4.55metres, LCG = (0.84) metres.

These figures have been used to establish the departure condition and the condition at 2340 hours
4.84 The table below is based on several assumptions:

- Vessel is assumed to have a slight trim by the head, and a slight list to starboard, as suggested by Exhibit 157 (Appendix 81) and 165 (Appendix 24), which shows water on the port side of the deck. The initial list could have been caused by the aft ballast tanks or cargo distribution.
- Cargo is taken as 4 metres forward of amidships and on the vessel centreline. This is to obtain a reasonable trim.
- Bunkers were fully loaded on departure.
- Water tanks assumed to be full.
- Passengers and crew weight is taken as 100kg each as passengers have baggage.
- Ballast aft is taken as part filled, and ballast forward is taken as empty. The Chief Mate instructed that the forward ballast be pumped out after the surveyor departed on 5th August 2009. (T 2223 A-D)
- Fore peak (Void) is assumed to be filled to water level having regard to the general condition of the vessel. It seems probable that the extended spindle operating the control valve would not be much used and could be inoperable, so pumping of this tank would be difficult. Crew made no mention of pumping this space.
- Water in the void spaces has been adjusted to achieve the desired trim. Void under the crew’s space may have taken water through the air vents on earlier voyages. There is no evidence that the crew pumped the void spaces.
- With regard to the main void space, surveyors in Fiji inspected the main void and the forward ballast tanks in April and May 2009, and found no breaches, so it is possible that water may not have entered this space from the sea. Breaches may have occurred in service over the following months, but nothing showed up in evidence.
- Considering the lack of firm evidence, the following calculations are, of necessity, only an approximation.

<table>
<thead>
<tr>
<th>ITEM</th>
<th>WEIGHT tonnes</th>
<th>V.C.G m</th>
<th>L.C.G. m</th>
<th>T.C.G m</th>
<th>FREE SURF $m^4$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cargo on Deck</td>
<td>110</td>
<td>4.8</td>
<td>4.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Bunkers</td>
<td>21</td>
<td>0.5</td>
<td>(12.3)</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Fresh Water</td>
<td>17</td>
<td>2.3</td>
<td>(18.0)</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Passengers &amp; Crew</td>
<td>13</td>
<td>11.7</td>
<td>0.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Ballast Aft (estimated)</td>
<td>30</td>
<td>2.5</td>
<td>(20.0)</td>
<td>1.0</td>
<td>40</td>
</tr>
<tr>
<td>Water in shaft space</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water in Engine room</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water in Crew space</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water in Crew Void</td>
<td>20</td>
<td>0.5</td>
<td>5.5</td>
<td>0.0</td>
<td>150</td>
</tr>
<tr>
<td>Water in main Void</td>
<td>35</td>
<td>1.0</td>
<td>13.0</td>
<td>0.0</td>
<td>160</td>
</tr>
<tr>
<td>Ballast Forward</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fore Peak</td>
<td>7</td>
<td>2.5</td>
<td>22.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Water on Deck</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Deadweight</td>
<td>253</td>
<td>3.6</td>
<td>1.69</td>
<td>0.1</td>
<td>350</td>
</tr>
<tr>
<td>Light ship</td>
<td>719</td>
<td>4.55</td>
<td>(0.84)</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Displacement</td>
<td>972</td>
<td>4.31</td>
<td>(0.28)</td>
<td>0.03</td>
<td>350</td>
</tr>
</tbody>
</table>

Figures in brackets are negative. Moments are taken about Frame 47, +ve forward, -ve aft. Vertical moments and drafts are above base line which is through the top of the keel amidships. For draft marks forward deduct 320mm, and for drafts marks aft add 320mm.

4.85 From Hydrostatic Curves:

Draft mean 3000mm LCB = (0.95) LCF = (1.34) MCT = 16 Trim = 407mm by head

Draft forward = 3215mm KMt = 6.35m GM = 2.04M, GfM = 1.68 M Freeboard amidships = 800mm, this is in agreement with Mosese Fakatou figure of about 800mm. Freeboard forward = 885mm to deck, and about 685mm to the top of the fender forward.

4.86 From Cross Curves:

GfZ values are, 15 deg. = 0.47M, 30 deg. = 0.55M, 45 deg. = 0.06M, 60 deg. = -0.62M

(Stability Curve of Princess Ashika departure Nuku’alofa)

4.87 The figures show that the vessel was overloaded but with reasonable stability if the deck were free of holes and the closing appliances were in working order. However it has been established that the closing appliances were in a deplorable condition and
there were a number of holes in the deck and bulkheads. The engine room door would become immersed when the vessel heeled to about 11 degrees.

4.88 As the vessel approached open sea, water entered through gaps around the bow ramp onto the cargo deck forward. The vessel may have had an initial list to starboard. It appears that water entered the starboard forward ballast tank, and the vessel developed a noticeable list to starboard. Water also accumulated on the deck forward on the starboard side. This deck water would have increased the list, and probably caused a trim by the head. Crew reported that deck water initially was confined to the forward part of the vessel.

4.89 During the 4 to 8 watch the engine room was ordered to pump the forward ballast tanks. (T 2569 G-J) Pumping took one hour to one and half hours. (T 2570 B-C) This suggests that a large amount of water was entering the ballast tanks, either through the open manholes or through corrosion holes in the deck. The deck in way of the ballast tanks was covered by a hinged platform, so the deck could not have been easily inspected or maintained. Holes in the deck here would be in keeping with the condition of the rest of the deck.

4.90 Around about 2130 hrs the Chief Mate ordered ballast to be pumped from the aft starboard tank in an endeavour to correct the starboard list. (T 2246 R-S) At about
2200 hrs the deck patrol reported a list to starboard and rougher seas. Later the deck patrol reported a port list. The Chief Mate ordered ballast to be pumped back into the Aft Starboard Tank to reduce the list to port. As more water entered the Cargo Deck the list slowly increased.

4.91 When the water on deck reached the level of the low door sills, water would flow into the forward ballast tanks, the crew accommodation, and the engine room through the open doors.

4.92 When the level of water on deck increased, water would flow into the void space under the crew accommodation and the shaft compartment, via the air vents. Also water would enter the shaft space through the open door in the aft engine room bulkhead.

4.93 While the general service pump was working on the engine room bilge, other spaces could not be pumped.

4.94 At about 2340 hrs the depth of water on deck was reported to be about 1.5 metres, so water would have been flowing into spaces below deck. The port forward ballast tank would have filled rapidly through the open manhole, increasing trim by the head.

**Condition at about 2340 hrs on 5th August 2009**

4.95 An estimate of the condition of the vessel at about 2340 hours has been developed based on crew reports of water on deck and in the hull, together with estimates of water in the tanks and void spaces.

4.96 This condition has been arrived at by using the departure condition and the following assumptions:

- The vessel had a list of about 14 degrees. Angles of list are difficult to judge and are generally overestimated for example a figure of 45 degrees at about 2335 hrs has been stated. (T2066 N-O) Crews were capable of moving around so the angle of list must have been reasonable.
- Depth of water in the engine room was taken as 1500mm at the deepest point.
- Port forward ballast was taken as full, and the starboard forward ballast half full.
- Water on deck was taken as level with the sea, giving a maximum depth amidships of about 1000mm and a depth forward of about 1400mm. This is roughly in accord with witness statements.
- Water on deck would have no weight effect on the vessel, but the free surface would be effective because of the small scupper openings restricting flow from the sea.
- Water in the crew’s accommodation was taken as about 800mm at its deepest point.
- The void under the crew’s accommodation was assumed to have taken water through the air pipe on the port side.
- As with the departure condition, absence of hard facts makes the following calculations an approximation.

<table>
<thead>
<tr>
<th>ITEM</th>
<th>WEIGHT</th>
<th>V.C.G</th>
<th>L.C.G.</th>
<th>T.C.G</th>
<th>FREE SURF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cargo on Deck</td>
<td>110</td>
<td>4.8</td>
<td>4.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Bunkers</td>
<td>21</td>
<td>0.5</td>
<td>(12.3)</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Fresh Water</td>
<td>17</td>
<td>2.3</td>
<td>(18.0)</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Passengers &amp; Crew</td>
<td>13</td>
<td>11.7</td>
<td>0.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Ballast Aft</td>
<td>30</td>
<td>2.5</td>
<td>(20.0)</td>
<td>1.0</td>
<td>40</td>
</tr>
<tr>
<td>Water in shaft space</td>
<td>2</td>
<td>1.2</td>
<td>(12.0)</td>
<td>2.4</td>
<td>30</td>
</tr>
<tr>
<td>Water in Engine room</td>
<td>36</td>
<td>0.6</td>
<td>(2.5)</td>
<td>2.5</td>
<td>190</td>
</tr>
<tr>
<td>Water in Crew space</td>
<td>10</td>
<td>1.8</td>
<td>6.0</td>
<td>4.0</td>
<td>17</td>
</tr>
<tr>
<td>Water in Crew Void</td>
<td>40</td>
<td>0.8</td>
<td>6.0</td>
<td>2.6</td>
<td>180</td>
</tr>
<tr>
<td>Water in main Void</td>
<td>35</td>
<td>1.2</td>
<td>12.6</td>
<td>1.3</td>
<td>160</td>
</tr>
<tr>
<td>Ballast Forward</td>
<td>60</td>
<td>2.3</td>
<td>18.2</td>
<td>0.8</td>
<td>75</td>
</tr>
<tr>
<td>Fore Peak</td>
<td>7</td>
<td>2.5</td>
<td>22.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Water on Deck</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>Total Deadweight</td>
<td>381</td>
<td>2.82</td>
<td>2.85</td>
<td>0.95</td>
<td>792</td>
</tr>
<tr>
<td>Light ship</td>
<td>719</td>
<td>4.55</td>
<td>(0.84)</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Displacement</td>
<td>1100</td>
<td>3.95</td>
<td>0.43</td>
<td>0.33</td>
<td>792</td>
</tr>
</tbody>
</table>

Figures in brackets are negative. Moments are taken about Frame 47, +ve forward, -ve aft. Vertical moments and drafts are above base Line which is through the top of the keel amidships. For draft marks forward deduct 320mm, and for drafts marks aft add 320mm.

4.97 From Hydrostatic Curves:

Draft mean 3250mm  LCB = (1.00)  LCF = (1.54)  MCT = Trim = 968mm by head,
Draft forward = 3766mm  Draft aft = 2796mm,  KMt = 6.25M,  GM = 2.30M,  GfM = 1.58M
Freeboard amidships = 550mm  Freeboard forward = 334mm,

4.98 From Cross Curves:

GfZ values are: 15 deg. = 0.40M, 30 deg. = 0.37M, 45 deg. = -0.18M, 60 deg. = -0.8M
4.99 The Cross Curves used considered side houses on the vehicle deck to be intact. Water entering the forward store, crew’s toilet, engine room casing, and aft store would increase the heeling moment.

4.100 Figures for free surface are based on the estimated still water surface of the water in the flooded spaces. With the vessel rolling the free surface effect would be considerably greater, raising the value of KGf and reducing the GfZ figures. At this point the port corner of the bow ramp would be submerged by about 400mm, so water would enter the vessel freely.

(Above: Stability Curve of Princess Ashika at about 2340 hours)

(Above: General Arrangement Plan marked in evidence by 3rd Engineer. Bold lines show extent of water on the cargo deck at 2340 (Exhibit 200))
The sketch shows a cross section of the vessel looking forward at 2340 hours listing to 14 degrees. Port side scuppers are under water allowing ingress of the sea. Around 2340 hours the deck at the port side of the ramp would be submerged, and water would continue to flow into spaces below deck, decreasing buoyancy. Cargo commenced to shift to port, (T 1476 H) together with the forklift, ending with the vessel capsizing to port. When the air pipes to the main void became immersed, the void would fill rapidly, depressing the bow. As other spaces below deck filled, the vessel sank.
4.101 Witness statements as to their estimate of the depth of water in various compartments. The figures are in millimetres:

<table>
<thead>
<tr>
<th>TIME</th>
<th>CREW</th>
<th>ENGINEEROM</th>
<th>DECK</th>
<th>REMARKS</th>
<th>TRANSCRIPT REFERENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>350</td>
<td>459</td>
<td>100</td>
<td></td>
<td>2020 B-E</td>
</tr>
<tr>
<td></td>
<td></td>
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(Above: Approximate waterline on departure from Nuku’alofa as proposed in TAIC Final Preliminary Report (Exhibit 423))
4.102 TIAC investigated the vessel’s stability in their Final Preliminary Report in considerable detail by constructing a computer model of ASHIKA to prepare their conditions.

4.103 The assumptions made by TAIC in their calculations of condition, departure Nuku’alofa, gave a draft forward of 3.88 metres, which seems rather high, meaning that water would be lapping the top of the fender forward of the ramp. The diagram above shows the vessel trimmed approximately as in TAIC Condition Departure Nuku’alofa on 5th August. We consider it unlikely that the vessel would depart in such a condition.

4.104 Also TAIC, in their Report of Departure Nuku’alofa, assumed that the vessel trimmed by the head sufficient for water to pond near the ramp. (Exhibits 157; 165) do not support this assumption. They show water extending well past amidships.

4.105 In the TAIC Report, final condition, very near to capsize, the report showed an angle of list of 0.59 degrees. We do not agree.

4.106 Witnesses reported a significant angle of list before capsizing. (Exhibits 167; 200) In these exhibits the water is confined to the port side, whereas at an angle of list of 0.59 degrees, water would cover the full beam of the vessel.

4.107 We consider that the two conditions of Princess Ashika in this report, 1) on departure from Nuku’alofa, and 2) at 2340 on the 5th August, reasonably reflect witness evidence which is at times contradictory. They show that the vessel capsized and sank as a result of water coming on deck, being unable to get away quickly enough, increased in depth and flooded the hull below deck, resulting in loss of buoyancy and stability.

Conclusion

4.108 The Princess Ashika has been shown to be totally unsuited for the service for which she was purchased, due to such things as inadequate bow design, absence of adequate freeing ports, no enclosed cargo area, almost no deadweight capacity, and corroded to the point that it was beyond repair. Even if the vessel had been in good condition it would have been of no use because of its small deadweight. The disastrous sinking with loss of life could have been avoided by intervention at several stages such as:

(1) If a competent person were to have sighted the vessel in the early stages, the vessel would not have been considered. This was not done.

(2) If a survey had been carried out before the contract was signed, the vessel would not have been purchased. This was not done.
(3) If the Ministry of Transport surveyor’s report had been acted upon properly the vessel would have been detained. This may have given sufficient time to properly appraise the viability of operating the vessel. This was not done.

(4) If the vessel had been detained for being overloaded, it would be obvious that the vessel was of no use in the service. This was not done.

(5) If the Master had acted on a decision not to sail, and he had the support of the crew, the disaster may have been avoided. This was not done.

(6) If the Chief Mate had been aware of the seriousness of the situation, he may have woken the Master in sufficient time to get passengers to the muster station with life jackets, and into the life rafts. Even though the vessel may have been lost, loss of life would have been prevented or at least considerably reduced.
CHAPTER 5 - PROCUREMENT

Overview of Evidence

5.1 Prominent government officials giving sworn evidence before the Commission have expressly stated or accepted that one of the main causes of the disaster was the failure to conduct proper due diligence prior to the purchase of the MV Princess Ashika. There is compelling evidence before the Commission that elementary, fundamental and well established procedures and practices were not adhered to and complied with. One such practice included the awarding of contracts for the purchase of goods with a consideration value of over $100,000, such as that for the purchase of Princess Ashika, to certain parties after the Government Procurement Committee has reviewed and endorsed such contract. The Government Procurement Committee was established by Cabinet and is considered by its members to be a Committee established by Cabinet or a Cabinet Sub-Committee. The Government Procurement Committee comprises of the Minister of Finance (Chairman), Director of Works (Deputy Chairman), Auditor General, Secretary for Finance, Commissioner of Revenue and the Solicitor General. The composition of the Committee brings together highly experienced and capable government officials and the appropriate spectrum of expertise required to adequately review and consider contracts reaching a certain threshold before such contracts are entered into by the Government. The Government Procurement Committee is and was established to ensure that before the Government commits to purchasing goods and services, the Government Procurement Committee is given an opportunity to consider the proposed purchase to ensure it is soundly based having regard to adequate and appropriate documentation to support the purchase.

5.2 On 20th April 2009 a Memorandum signed by Mr. Karalus and the Minister of Finance recommended to Cabinet the purchase of the MV Princess Ashika, subject to the completion of due diligence on the technical suitability and seaworthiness of the vessel. On 23rd April 2009, His Majesty’s Cabinet approved in decision No. 300 that:

“the Hon. Minister of Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposit and other financial arrangements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorised to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.”

5.3 On 8th May 2009, Mr. Karalus and Ms. ‘Eleni Mone signed the contract for the purchase of Princess Ashika on behalf of the Government which was witnessed by Mr. John Jonesse. The cash unconditional contract was signed by Mr. Karalus despite obtaining sensible legal advice from the Solicitor General on 7th May 2009
highlighting that the Marine and Ports Division of the Ministry of Transport have not audited the vessel or at the very least endorsed an audit conducted by any consultants. The Solicitor General also advised that it appeared that no due diligence had been carried out on the financial viability to Government in purchasing the vessel. The deposit of FJD$90,000 was paid by telegraphic transfer to Fiji on 8th May 2009.

5.4 On 11th May 2009, subsequent to the signing of the contract for the purchase of the MV Princess Ashika, the Secretariat of the Government Procurement Committee became aware of the request for the Committee to consider the purchase. The only information initially provided to the Secretariat of the Procurement Committee on 11th May 2009 for circulation to the committee members was a copy of Cabinet Decision No. 300 of 23rd April 2009 and a signed copy of the contract for the purchase of the MV Princess Ashika. The Secretariat of the Procurement Committee prepared a circular dated 13th May 2009 attaching documents later provided, upon request from the Secretariat of the Procurement Committee, by the Ministry of Transport, which was then circulated by messenger to the members of the Committee for their consideration and approval. Most of the Government Procurement Committee members formed the view that when the matter was submitted to them, Cabinet by virtue of the Decision No. 300 of 23rd April 2009 had already resolved to purchase the vessel. Certainly, the cash unconditional contract had been signed and entered into and the FJD$90,000 deposit had been paid well before the matter was forwarded to the Government Procurement Committee and considered by the members. Some members of the Committee accepted, as we do, that it was an insult and a mockery to submit the matter to the Procurement Committee under such circumstances.

5.5 The first member of the Procurement Committee approved the circular on 20th May 2009 and the approval of the Procurement Committee members was completed on 29th May 2009 when it was signed by the Minister of Finance. The members of the Procurement Committee approved the purchase of the MV Princess Ashika based on the assurance provided by Mr. Karalus in a letter to the Minister of Finance dated 7th May 2009, that due diligence had been carried out. It had not. The final payment of FJD$510,000 was paid on 5th June 2009. However, irrespective of what the members of the Government Procurement Committee considered, the Government had a legal obligation to proceed with the purchase under the terms of the cash unconditional contract.

**Basic events shortly prior to Government Procurement Committee consideration**

5.6 On 20th April 2009, the then Minister of Transport (Mr. Paul David Karalus) and the Minister of Finance and National Planning (Mr. ‘Otenifi Afu’alo Matoto) signed and
submitted a submission to Cabinet recommending the purchase of the MV Princess Ashika. The submission to Cabinet stated that:

“The Ministry of Transport has sought full technical data to allow for due diligence to be completed on the replacement vessel, the MV Princess Ashika ...

While the vessel is older than the Olovaha it has been very well maintained and has come out of a December 2008 survey.” (Exhibit 285)

5.7 The Recommendations in the submission to Cabinet for consideration and approval were:

“1. That the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika.

2. That, subject to the successful completion of (1) above, the Ministry of Finance and National Planning source funding for the purchase of the vessel and for any requirements to ensure rapid deployment into service.

3. That, subject to the successful completion of (2) above, the Ministry of Public Enterprises and Information and the Ministry of Transport determine the ownership and on lease of the vessel to Shipping Corporation of Polynesia.” (Exhibit 285)

5.8 On 21st April 2009, the Board of Shipping Corporation of Polynesia Limited, supported by the Company Secretary, unanimously resolved to recommend to His Majesty’s Government that they purchase the MV Princess Ashika. (Exhibit 272)

5.9 His Majesty’s Cabinet, in Cabinet Decision No. 300 of 23rd April 2009, approved:

“That the Hon. Minister of Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposit and other financial arrangements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.” (Exhibit 283)

5.10 On 25th April 2009, the Solicitor General, Mr. ‘Asipeli ‘Aminiasi Kefu, became aware of the MV Princess Ashika. The former Attorney General and Minister of Justice, Mrs. ‘Alisi Taumoepeau, raised her concerns with the Solicitor General regarding the proposed purchase of the MV Princess Ashika from Fiji to replace the MV Olovaha. Mrs. Taumoepeau was and is also the Chairperson of the Board of Shipping
Corporation of Polynesia Limited. Her concerns, at least as expressed to the Solicitor General, were directed at a proper procurement process being carried out and that due diligence was carried out regarding the commercial viability of the vessel. (Exhibit 127, paragraphs 7-15)

5.11 On 28th April 2009, Mr. Kefu emailed the Secretary of Finance, Mr. ‘Aisake Eke and the then Acting Secretary for Transport, Ms. Eleni Mone raising his concerns about the Ministry of Finance and Ministry of Transport not being involved in the due diligence and procurement process of the MV Princess Ashika. The email stated:

“Aisake and ‘Eleni

In have been referred to the current work done on purchasing the new MV Olavaha.

My concern is to ensure that the purchase is done by the correct authority and in accordance with Government procedure.

I understand that the Shipping Corporation is carrying out this work without any involvement of Government, either Transport or Finance, or Crown Law.

I am proposing that you please raise your concerns with your respective Ministers for Government to be involved in the process, particularly the Due Diligence study (Finance and Transport) and the Procurement Process (Finance and Crown Law).

I understand that at the end of the day the Government will be purchasing the vessel, and it will belong to Government, not Shipping Corporation.

I will send this in writing once you confirm your positions.

I look forward to your responses.

Malo

‘Aminiasi” (Exhibit 398)

5.12 On 28th April 2009, Ms. Mone replied to the Solicitor General’s email raising his concerns. Ms. Mone in her email stated:

“Aminiasi

I understand my Minister has been involved in this from day one and my understanding is both Prime Minister and Minister of Finance are aware of process so far. My Minister submitted the details to Cabinet last week although I’m not sure whether it was formally or informally. Anyway please let me know where I can assist.
5.13 On 6th May 2009, the then Minister of Transport, Mr. Paul David Karalus sent a savingram to the Solicitor General entitled “M.O.A for Purchase of MV Princess Ashika”. The savingram stated that the Government is giving urgent consideration to the purchase of the MV Princess Ashika. The Solicitor General was requested to urgently peruse the Sale and Purchase Agreement and advice on its legal status. It was also indicated that a deposit was to be paid through Ministry of Finance on Friday, 8th May 2009. (Exhibit 458)

5.14 Attached to the savingram was a dossier on the MV Princess Ashika. The dossier included 13 coloured photographs of the MV Princess Ashika and other documents including a document entitled “Audit completed 6th – 8th April 2009”. It purported to be signed by David Shaw, Kerry Bennett and John Jonesse. However the evidence establishes that Mr. Jonesse placed the signature of Mr. Shaw without his authority on the document. Much of the information contained in the audit document is highly misleading and false. (Exhibit 38, pages 9-10)

5.15 On 7th May 2009, the Solicitor General replied in a savingram (Saving No. AK 383/09 – SG/c.2) to the request of the Minister of Transport in the savingram dated 6th May 2009. The Solicitor General under items 4 and 5 of his advice stated:

   “4 Furthermore, we are concerned that the Marine and Ports Division of your Ministry has not conducted the auditing of the vessel. They are the Government’s shipping experts, who should at least endorse the audit conducted by the consultants.

   5 Moreover, there seems to have been no due diligence carried out at all by the consultants or Government on the financial viability to Government in purchasing this vessel. The Ministry of Finance and National Planning should at least have carried out or endorsed the findings of any consultants who were given that task” (Exhibit 459)

5.16 On the same day the then Minister of Transport, Mr. Karalus, sent a savingram to the Minister of Finance which was also copied to the Solicitor General. The savingram contained the following:

   “For points 4 and 5 be advised that we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted the latest dry docking report (scope of works). We have also taken note of the further reports as provided by Engineers Shaw and Bennett.”
We are satisfied that the vessel meets our seaworthiness and mechanical requirements.” (Exhibit 460)

5.17 On 8th May 2009, Mr Karalus and the Acting Secretary for Transport as she was then, signed the contract for the purchase of the MV Princess Ashika on behalf of the purchasers, the Government of the Kingdom Tonga, and witnessed by Mr. John Jonesse. Mr. Karalus had crossed out the provision for Secretary for Finance, originally provided for in the contract to sign with the Minister of Transport, and placed Acting Secretary for Transport. The signatures of Mr Karalus and Eleni Mone effectively committed the Government of Tonga to the cash unconditional contract irrespective of the condition of the vessel. (Exhibit 477)

5.18 The contract, as signed on 8th May 2009, was a cash unconditional contract as agreed to by members of the Procurement Committee. It was clear from the terms of the contract that there was a contractual obligation on the Government of the Kingdom of Tonga to purchase the vessel for FJD$600,000, made up of an initial deposit of FJD$90,000 and the balance of FJD$510,000 on the settlement date. (Exhibit 417)

The contract expressly provided in the terms of conditions, by clause “c” as follows:

“The Purchaser acknowledges and declares that it has fully inspected ship on an “as-is-where-is” basis and that it relies entirely on its own judgment without any warranty or any representation (save as herein mentioned) and that no error or mis-description of the “condition, “merchantability”, “fitness for purpose”, and “state of repair” of the Ship shall annul this agreement or entitle it to any damages or compensation or abatement of the Price. The Purchaser will take the Ship on the Settlement Date on an “as-is-where-is/walk-in-walk-out” basis but without any liabilities (unless expressed in this Agreement)” (Exhibit 417 clause “c”)

5.19 Counsel for the Prime Minister in his written submission, at paragraph 44, said that it was accepted that the Sale and Purchase Agreement signed by the Minister of Transport and the Acting Secretary of Transport on 8th May 2009 was inadequate to protect the interests of the Government of Tonga. He correctly submitted that the agreement was completely one-sided in that the vendors expressly denied any warranty or representation as to the vessel’s condition, fitness for purpose or state of repair. The Prime Minister rightly acknowledged that it would be intolerable that a responsible Minister, in Mr. Karalus’s position, would commit the Government of Tonga to the purchase of Ashika irrespective to the condition of the vessel. (T 5523)

Of course, the evidence establishes that Mr. Karalus did commit the Government of Tonga to the purchase of the vessel irrespective of its condition.
In terms of the payment obligation, the balance of FJD$510,000 was required to “be paid by the Purchaser to the Vendor by such means as agreed at the Settlement Date.” The expression “the Settlement Date”, pursuant to the contract, meant “the date of this agreement or such other earlier or later date as the parties may mutually agree in writing.” There was no other date mutually agreed in writing until, at the earliest, the 4th or 5th June 2009. On that date Mr. Jonesse was in Fiji with Mr. George Patterson. At that time they inserted on the contract which had been entered into on 8th May 2009 against settlement date the 5th June 2009. Counsel for the Prime Minister correctly submitted in paragraph 46 of his written submissions dated 9th March 2010, that a date “earlier or later” than the date of the agreement had not been mutually agreed in writing and accordingly the balance of the purchase price, as well as the deposit, was payable on the 8th May 2009 being the date of the agreement.

On any rational and reasonable construction of the contract, as of 8th May 2009, there was a contractual obligation on the Government of the Kingdom of Tonga to pay the:

- entire FJD$600,000 by the 8th May 2009;
- purchase price irrespective of the condition, merchantability or fitness for purchase of the vessel.

The deposit payment of FJD$90,000 was paid by the Ministry of Finance by telegraphic transfer on 8th May 2009 into the ANZ Bank trust account of Parshotam & Co in Fiji, Solicitors of the Vendors, Patterson Brother Shipping Company Limited.

Establishment of the Government Procurement Committee

The Government Procurement Committee was established by His Majesty’s Cabinet by Cabinet Decision No. 666 of 23rd April 2003. (Exhibit 102) (Appendix 40) In accordance with the Cabinet Decision, the Procurement Committee was to comprise of the:

(a) Minister of Finance (Chairman);
(b) Director of Works;
(c) Auditor General;
(d) Solicitor General;
(e) Commissioner of Revenue;
(f) Secretary for Finance and Accountant General (Secretary);
(g) Representatives of line ministries (to be co-opted as appropriate).
The terms of reference of the Government Procurement Committee as approved by Cabinet, included the following:

(a) to assess all proposed procurement of individual items costing over $20,000 which are to be financed from Tonga Government Funds in the annual budget estimates;

(b) to monitor the procurement of goods and services to be acquired on behalf of the Government in financing agreements under multilateral and bilateral aid and loan programmes.

His Majesty’s Cabinet, in Cabinet Decision No. 1075 of 17th June 2003 (Exhibit 103) (Appendix 41) amended the threshold to which Procurement Committee assessment was required. The decision provided that:

“purchases greater than $100,000 shall generally require an open tender process, which shall be assessed by the procurement Committee.”

The Decision also appointed the Director of Works as the Deputy Chair of the Government Procurement Committee.

Cabinet further amended the procurement policy in Cabinet Decision No. 839 of 16th August 2005. (Exhibit 104) (Appendix 42) The decision stipulated that for goods of more than TOP$100,000 an international competitive bidding process was to be adopted and the procurement was to be carried out through the Bid Awarding Committee and the Procurement Committee. As it transpired, there was no separate Bid Awarding Committee ever established.

In 2007 the Ministry of Finance issued the Procurement Instructions (Appendix 43) to supplement Cabinet Decision No. 839 of 16th August 2005. (Exhibit 187, paragraph 16) (Exhibit 195)(Exhibit 428)

The Procurement Instructions stipulate that when a Government Ministry or Department initiates procurement, they are committing government funds and:

- a legitimate need for the purchase must exist;
- the purchasers have been competitively bid or negotiated;
- existing government procurement policies have been met;
- there has been compliance with existing government policies on conflict of interest and codes of ethics;
- there has been compliance with documentation requirements to support the purchase;
- funds are available for prompt processing of invoices. (Exhibit 428)

Paragraph 19 of the Procurement Instructions provides:
“All form of contract or agreement including any for development projects shall be submitted to the Government Procurement Committee for review and endorsement before signing by all relevant parties.” (Exhibit 428)

5.31 Effectively, the Government Procurement Committee was established by Cabinet to assess, approve and advise the Minister of Finance, and Cabinet, in relation to the financial viability of goods and services over TOP$100,000 in value, to be purchased by Government. In essence, the Procurement Committee is to ensure that Government money is wisely and properly spent in an accountable fashion.

Evidence of Tiofilusi Tiueti (Deputy Secretary for Finance)

5.32 Mr. Tiueti is the Deputy Secretary for Finance and has held that position since July 2008. Mr. Tiueti was previously employed by the Office of the Auditor General from 1992 to 2008 and had been the Deputy Auditor General from 1996 to June 2008, before taking up his new post with the Ministry of Finance.

5.33 Mr. Tiueti indicated that on 28th April 2009 he received a copy of the Cabinet decision No. 300 of 23rd April 2009. Upon receipt of the Cabinet decision Mr. Tiueti formed the view that Cabinet had already decided to purchase the vessel and the government had committed to purchase the Ashika. (T 5384 L – 5385 E)

5.34 Mr. Tiueti in paragraphs 3-6 of his affidavit stated:

3. On 7th May 2009 I was still acting Secretary for Finance. On that date I received a Savingram entitled “Purchase of MV Princess Ashika” from the Minister of Transport which had been addressed to the Minister of Finance. I attach as Exhibits 2, 3 and 4 the savingram from the Minister of Transport to the Minister of Finance together with a savingram from the Solicitor General dated 7th May 2009 and a copy of a sale and purchase agreement all of which I received at the same time.

4. The Minister of Finance had written on the savingram from the Minister of Transport to me as acting Secretary for Finance:

“For your further action on this to forward the money to the trust A/c by tomorrow. Any concerns can be discussed with me.”

5. Underneath the handwritten request from the Minister of Finance, I wrote a note to Makeleta T Siliva, the Chief Accountant:

“Please note & discuss with me. The S & P Agreement should be forwarded to Vini [Talanaivini Vea, the Secretariat for the Government
6. The only evidence I saw about the seaworthiness of the MV Princess Ashika was in the savingram from the Minister of Transport to the Minister of Finance in which he stated:

“For points 4 and 5 be advised that we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted the latest dry docking report (scope of works). We have also taken note of the further reports as provided by Engineers Shaw and Bennett.

We are satisfied that the vessel meets our seaworthiness and mechanical requirements.” (Exhibit 411)

5.35 Mr. Tiueti indicated that by the time the contract for the purchase of Princess Ashika was referred to the Government Procurement Committee for approval, the government had already committed to purchase the vessel and the contract had already been signed by Mr. Karalus and Eleni Mone, committing the government to the purchase. Mr. Tiueti also agreed that in the purchase of the Princess Ashika the normal Government Procurement Committee process was bypassed. (T 5395 M - 5397 G)

5.36 Mr. Tiueti stated in oral evidence that on 8th May 2009 the deposit of FJD$90,000, equivalent of TOP$88,235.29, was paid by telegraphic transfer into the Fiji ANZ Bank Trust Account of the vendor’s Solicitor. The funds used to pay the deposit was sourced from the Government of Tonga General Services bank account. (T 5399 J - 5403 Q) (Exhibit 411, Annexure 5-7) (Exhibit 412)

Evidence of Talanaivini Mafi Vea (Secretariat of the Government Procurement Committee)

5.37 Mrs. Vea is the Secretariat of the Government Procurement Committee, having been appointed in October 2008. Mrs Vea was in charge of collating the documents in relation to the purchase of the MV Princess Ashika and circulating them via messenger to all the members of the Government Procurement Committee for their perusal and consideration. The process is that a circular is given to one member of the Procurement Committee at a time. It is circulated to the next member until all members of the Government Procurement Committee have perused and considered the relevant documentation attached to the circular in relation to the intended procurement.

5.38 Mrs. Vea became aware of the MV Princess Ashika on 11th May 2009 when she returned from an overseas trip and discovered on her office desk a post-it note
stating “for your comments and appropriate action to be submitted to Procurement Committee” and signed by Makeleta Siliva (Chief Accountant, Ministry of Finance). The only documents accompanying the post-it note was a Cabinet Decision No. 300 of 23rd April 2009 (Exhibit 283) (Appendix 44) and a signed Sale and Purchase Agreement between Patterson Brothers Shipping Company Limited and the Government of the Kingdom of Tonga for the purchase of the MV Princess Ashika (Exhibit 417) (Appendix 45). (Exhibit 105) (T 1513 F - 1514 S)

5.39 As previously stated, His Majesty’s Cabinet, in Cabinet Decision No. 300 of 23rd April 2009, approved:

“That the Hon. Minister of Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposit and other financial arrangements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.”

(Exhibit 105)

5.40 The Sale and Purchase Agreement had been signed, by 8th May 2009, on behalf of Government of the Kingdom of Tonga by Mr. Paul David Karalus (the then Minister of Transport) and ‘Eleni Mone (the then Acting Secretary for Transport). It was witnessed by Mr. John Owen Jonesse (the then CEO of the Shipping Corporation of Polynesia Limited). The parties agreed that the Government of the Kingdom of Tonga was to pay a deposit of FJD $90,000 to Patterson Brothers Shipping Company Limited on or before 8th May 2009. (Exhibit 477) The deposit was in fact paid on 8th May 2009 by Telegraphic Transfer to the account of lawyers Parshotam & Co Trust Account in Fiji.

5.41 When Mrs. Vea received the note on 11th May 2009, the Sale and Purchase Agreement had already been signed and the deposit payment had already been paid. It must be appreciated that the Sale and Purchase Agreement for the purchase of the MV Princess Ashika was an unconditional agreement. It was not, for example, subject to any satisfactory survey, valuation or approval for the purchase by the Procurement Committee.

5.42 Mrs. Vea, upon receiving the post-it note and the two documents, discussed the matter with Mr. Robert Yardley a specialist procurement adviser. Mr. Yardley, rightly stated in a note to the Secretariat of the Government Procurement Committee that:

“…The object of submitting a contract for GPC approval is to allow the GPC to check that stipulated procurement procedures have been followed and that
any other procurement procedures necessary to protect the interests of the Government of Tonga have been carried out.

In this case the procurement is the decision of Cabinet. This then negates the current requirement of procurement instructions. The decision of Cabinet is based on a report from the Ministry of Transport. This report is not included for the information of the GPC.

The Sales & Purchase Agreement is on the basis of “as is where is/walk in walk out” with no guarantees of fitness for purpose, state of repair or condition. It is the stated responsibility of the purchaser to inspect and satisfy themselves in this respect. No evidence that this has been done is included. The minimum would be a comprehensive report of the condition of the vessel with an assessment of “fitness for purpose” by persons competent to do so acting solely on behalf of the purchaser.” (Exhibit 105)(T 1512 B – 1513 C)

5.43 On 12th May 2009, Mrs. Vea emailed the Acting Secretary for Transport, Ms. ‘Eleni Mone and rightly raised her concerns in relation to the lack of information provided to the Government Procurement Committee. (Exhibit 105) (T 1515 C-K)

5.44 A few days after 12th May 2009, Mrs. Vea received a spiral bound folder of documents on the MV Princess Ashika from the Ministry of Transport. (Exhibit 106) Mrs. Vea prepared and signed a Circular dated 13th May 2009 seeking the approval of the Government Procurement Committee of the Sale & Purchase Agreement between Ministry of Transport and Patterson Brothers Shipping Company Ltd.

5.45 The recommendations on the circular for the Government Procurement Committee to approve were:

“1. That Crown Law checks the legality of the Sales and Purchase Agreement accordingly.

2. That the purchase price of an amount not exceeding FJ$600,000 be approved.

3. That the contract between Ministry of Transport and Patterson Brothers Shipping Company Ltd be approved subject to confirmation of 1.”

The circular included the spiral bound folder received from Ministry of Transport. The Circular was than submitted to the Secretary of Finance to be cleared for circulation. (Exhibit 105) (Appendix 46)

5.46 On 20th May 2009, the Secretary of Finance, Mr. ‘Aisake Eke, approved the recommendations on the circular and for on forwarding of the circular.
5.47 On 21st May 2009 the Solicitor General, Mr ‘Asipeli ‘Aminiasi Kefu signed and approved the circular. However, certain concerns were noted endorsed in handwriting by the Solicitor General on the circular which were as follows:

“Please note that Crown Law:

(1) Had given advice on agreement, it is satisfactory;
(2) Raised concerns about due diligence assessment – financial and seaworthiness;
(3) Hon. Minister of Transport advised Crown Law & Minister of Finance that due diligence was completed.” (Exhibit 129)

5.48 On 25th May 2009 the Circular was delivered to the Commissioner of Revenue, Mr. Sefita Tangi, who approved the recommendations.

5.49 The circular was also forwarded to the Auditor General, Mr. Pohiva Tui’onetoa who conditionally approved the recommendations in the circular. On 25th May 2009, he noted on the circular that:

“approved on the basis that Crown Law advised that if satisfied with evidence from Ministry of Transport that due diligence was duly (sic) completed, otherwise Not Approved.” (Exhibit 116, paragraph 7)

5.50 The circular was delivered on 26th May 2009 to the Director of Works, Mr Sione Taumopeau, who approved the circular.

5.51 On 29th May 2009 the Chairperson, Minister of Finance, Hon. Afu’alo Matoto signed the circular completing the circulation and approving the recommendation. (Exhibit 105) A copy of the circular signed by all the members of the Procurement Committee is contained in Appendix 46 to this Report.

5.52 On 1st June 2009, Mrs. Vea wrote a savingram to the Secretary of Finance and Planning advising that the Government Procurement Committee had approved the contract between Ministry of Transport and Patterson Brothers Shipping Company Ltd and that payment should be processed. (Exhibit 105)

5.53 Mrs. Vea rightly accepted that it was an exercise in futility to ask the opinion of the Procurement Committee and an insult to the members of the Procurements Committee to ask for their recommendation if MV Princess Ashika should be purchased, particularly that a decision had already been made to purchase it. (T 1518 K-S) Mrs. Vea stated that the function of the Government Procurement Committee had been negated by Cabinet when they had already approved that the vessel would be purchased. The Procurement Committee is, according to Mrs. Vea, a Committee of Cabinet and when Cabinet makes a prior decision, the function of the
Procurement Committee is negated. (T 1522 H-K) Mrs. Vea accepted that by the time the matter was submitted to the Procurement Committee, Cabinet had effectively resolved by virtue of Cabinet Decision No. 300 of 23rd April 2009 to purchase the MV Princess Ashika.

Evidence of ‘Aisake Valu Eke (Secretary for Finance)

5.54 Mr. Eke is the Secretary of Finance and had held that position since 1994. He had been a member of the Government Procurement Committee since its formation. Mr. Eke received the procurement committee circular seeking the approval of the purchase of the MV Princess Ashika on 20th May 2009. He was the first member of the Committee to receive the circular and the first to sign the circular on 20th May 2009.

5.55 Mr. Eke indicated in his oral evidence that in approving to recommend the purchase of the MV Princess Ashika, on 20th May 2009, he relied on the statement of the Minister of Transport, Mr. Karalus, in his letter of 7th May 2009 to the Minister of Finance and copied to the Solicitor General, stating that due diligence had been conducted. (T 5429 G – 5432 E) (T 5435 F - 5436 B)

5.56 Mr. Eke accepted that when he received the procurement committee circular on 20th May the contract had already been signed. He also accepted that the terms of the contract he had seen on 20th May 2009 stipulated that unless the parties agree to a different date the entire purchase price of FJD$600,000 was payable on 8th May 2009, the date of the contract. Mr. Eke indicated that since the vessel sank he had become aware that the original provision for signing of the contract stated that it was the Secretary of Finance. The evidence establishes that the provision for Secretary for Finance to sign the contract was crossed out of the contract by Mr. Karalus and replaced with Acting Secretary for Transport where ‘Eleni Mone signed the contract. Mr. Eke stated that if he had been asked to sign the contract in May 2009 he would have refused and proposed that the matter be referred to the procurement committee for approval. (Exhibit 284, 417, 477)(T 5437 I - 5445 K)

5.57 Mr. Eke stated in paragraph 7 of his affidavit that:

“I approved the purchase on the basis of Cabinet decision No. 300 and the advice of the former Minister of Transport in his letter to the Minister for Finance dated 7th May 2009 that:

“... we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted the latest dry docking report (scope of works). We have also taken note of the further reports as provided by Engineers
Shaw and Bennett. We are satisfied that the vessel meets our seaworthiness and mechanical requirements.” (Exhibit 413)

5.58 Mr. Eke accepted that the documentation submitted to the Procurement Committee to consider in recommending approval of the purchase of the Princess Ashika did not contain any valuation of the vessel. He accepted that a valuation should have been obtained as part of conducting proper due diligence. He indicated that the Government Ministry, Ministry of Transport, responsible for conducting due diligence failed to conduct proper due diligence. (T 5446 O - 5447 S)

5.59 Mr. Eke in his evidence stated that the balance of the purchase price FJD$510,000 was paid out of monies from the Peoples Republic of China to TONGASAT through the Government, amounting to over TOP$24 million. The Secretary of Finance indicated that the TOP$24 million was paid to the Kingdom of Tonga around September 2008 and it was not in his opinion, aid money. (T 5461 L – 5462 I)

5.60 Mr. Eke stated in paragraph 13 of his Affidavit that:

“The Ministry of Finance and Planning accordingly made the final payment of F$510,000 to a lawyer’s trust account in Fiji for the benefit of Patterson Brothers Shipping Company Limited on 5th June 2009. I attach as Exhibit 8, 9 and 10 an Application for Permit to Remit Money Overseas, a request from the Ministry to the National Reserve Bank of Tonga to fund the final payment and confirmation from the National Reserve Bank of Tonga that they had instructed the Reserve Bank of Fiji to make the final payment ...” (Exhibit 413 paragraph 13)

Evidence of Sefita Tangi (Commissioner of Revenue)

5.61 Mr. Tangi is the Commissioner of Revenue and had been a member of the Government Procurement Committee for about six years. Mr. Tangi had received the Procurement Committee circular in relation to the MV Princess Ashika on 13th May 2009 and approved it on the same day. Mr. Tangi agreed that part of the functions of the Procurement Committee is to determine that government is procuring goods for a reasonable price and an appropriate quality.

5.62 Mr. Tangi accepted that asking the Procurement Committee to consider the procurement of MV Princess Ashika, when in fact Cabinet had already resolved to purchase the vessel and the contract for the purchase had been signed, was a mockery of the Procurement Committee. (T 1528 C - 1530 H) In his evidence, Mr Tangi indicated that the Procurement Committee cannot, in theory, overrule or not approve what Cabinet has approved. In effect, his view was that the Procurement Committee had no choice in the case but to concede to what Cabinet had already decided. (T 1534 C - 1535 I)
Mr. Tangi accepted that the documents circulated to the Procurement Committee members did not contain a valuation and the purchase price of FJD$600,000 for the purchase of the MV Princess Ashika was not supported by the circulated documentation. He stated that if there had been evidence to suggest that the Princess Ashika was worthless he would not have approved the Procurement Committee circular. (T 1528 E-1530 H)

Evidence of ‘Asipeli ‘Aminiasi Kefu (Solicitor General)

Mr. Kefu was appointed the Solicitor General of the Government of the Kingdom of Tonga on 14th April 2009. Mr. Kefu had been a member of the Procurement Committee since July 2008 in his capacity as Acting Solicitor General, before his formal appointment in 2009.

The Solicitor General first became aware of the MV Princess Ashika or the temporary replacement for the Olovaha on 25th April 2009. He was asked by the Attorney General and Minister for Justice, Mrs. ‘Alisi Taumoepeau, who was also the Chairperson of Shipping Corporation of Polynesia, to look out for the matter as she was concerned that Government was not involved in the purchase process and that normal procedures have not been complied with.

On 28th April 2009, Mr. Kefu emailed the Secretary of Finance which was copied to the Secretary for Transport (Exhibit 398) raising his concerns in relation to Government's lack of involvement in purchasing the replacement vessel for the Ashika, particularly the due diligence study and the following of the proper procurement procedures. The Secretary for Transport, ‘Eleni Mone, replied by email dated 28 April 2009 to Mr Kefu’s email stating:

“I understand my Minister has been involved in this from day one and my understanding is both Prime Minister and Minister of Finance are aware of process so far. My Minister submitted the details to Cabinet last week although I’m not sure whether it was formally or informally. Anyway please let me know where I can assist.” (T 2489 G-I)

On 6th May 2009, the Minister of Transport, Mr. Karalus sent a savingram to the Solicitor General. (Exhibit 458) The savingram stated that the Government is giving urgent consideration to the purchase of the MV Princess Ashika. The Solicitor General was requested to urgently peruse the Sale and Purchase Agreement and advise on its legal status. It was also indicated that a deposit was to be paid through Ministry of Finance on Friday, 8th May 2009. We accept that the timeframe given by Mr. Karalus for the legal advice to be provided was inadequate. (Exhibit 129, Annexure E)
5.68 On 7th May 2009, the Solicitor General replied in a savingram (Exhibit 459) (Appendix 49) to the request of the Minister of Transport in the savingram dated 6th May 2009. The Solicitor General under items 4 and 5 of his advice stated:

“4. Furthermore, we are concerned that the Marine and Ports Division of your Ministry has not conducted the auditing of the vessel. They are the Government’s shipping experts, who should at least endorse the audit conducted by the consultants.

5. Moreover, there seems to have been no due diligence carried out at all by the consultants or Government on the financial viability to Government in purchasing this vessel. The Ministry of Finance and National Planning should at least have carried out or endorsed the findings of any consultants who were given that task.” (Exhibit 129, Annexure D)

5.69 Mr. Kefu in oral evidence stated that he had met Mr. Karalus on the morning of 7th May 2009 where he informed the Minister of the effect of his advice which had been sent earlier that morning. Mr. Kefu indicated that Mr. Karalus assured him that his concerns had already been addressed. (T 2494 R - 2495 S) The Solicitor General states in paragraphs 2-7 of his affidavit that:

“2. I recall that after I issued my legal advice on 7th May 2009 to the former Minister of Transport, I met the former Minister around 9am at the opening of a legal workshop on maritime security at the Free Wesleyan Church of Tonga’s Moulton Hall, which was jointly administered by the United Nations Office of Drugs and Crime, and the Pacific Islands Maritime Lawyers Association.

3. The former Minister and I were invited to make opening remarks to open the legal workshop.

4. After the formalities at the Moulton Hall the former Minister asked me about his request for legal advice on the vessel.

5. I then advised him that I had issued the advice that morning, and briefly advised him that in the advice I had concerns that there was no Government approval, and no survey of seaworthiness or commercial viability study had been done in relation to the vessel.

6. The former Minister then replied that all of my concerns had already been addressed.” (Exhibit 187)
5.70 On the same day the Minister of Transport, Mr. Karalus, sent a savingram to the Minister of Finance which was also copied to the Solicitor General. (Exhibit 460) (Appendix 50) The savingram contained the following:

“For points 4 and 5 be advised that we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted the latest dry docking report (scope of works). We have also taken note of the further reports as provided by Engineers Shaw and Bennett.

We are satisfied that the vessel meets our seaworthiness and mechanical requirements.” (Exhibit 129, Annexure E)

5.71 On 21st May 2009, Mr. Kefu received, signed and approved the circular. However, certain concerns were noted endorsed in handwriting by the Solicitor General on the circular which were as follows:

“Please note that Crown Law:

(1) Had given advice on agreement, it is satisfactory;
(2) Raised concerns about due diligence assessment – financial and seaworthiness;
(3) Hon. Minister of Transport advised Crown Law & Minister of Finance that due diligence was completed.” (Exhibit 129, Annexure F)

5.72 Mr. Kefu indicated that the contract for the purchase of MV Princess Ashika was a cash unconditional contract. Once the contract was signed the Government was obliged to purchase the vessel irrespective of its condition and suitability. He accepted that is the reason he advised the Minister of Transport, Mr. Karalus, in his legal advice of 7th May 2009 for due diligence to be completed. (T 2514 M – 2516 I)

5.73 Mr. Kefu maintained in oral evidence that he relied on the assurances given by Mr. Karalus because of his Ministerial position and standing. The following is an extract from the transcript:

“MR K BARRON AFEAKI SC: And in essence you relied on the Minister of Transport communicating to you verbally and on paper - - -

MR KEFU: That's correct.

MR K BARRON AFEAKI SC: - - - that due diligence and all proper checks for safety and seaworthiness had been completed?

MR KEFU: That's correct.
MR K BARRON AFEAKI SC: And am I right to say you were entitled to - it is proper for you to rely on a Minister and his standing and trust on what he says to you?

MR KEFU: That's correct. I had no place to question him or go behind him and ask him to justify what he’s saying.” (T 2525 A-G)

Evidence of Pohiva Tui’onetoa (Auditor General)

5.74 Mr. Tui’onetoa is the Auditor General and had been a member of the Government Procurement Committee since it was established. Mr Tui’onetoa has been the Auditor General since 1983.

5.75 Mr. Tui’onetoa received the circular of 13th May 2009 with attached documents from the Secretariat of the Government Procurement Committee seeking his consideration. One of the documents attached to the circular entitled “Purchase of MV Princess Ashika (IMO no:385168)” (Exhibit 105) (Appendix 46) stated concerns in relation to the lack of information provided to the Procurement Committee and in relation to the condition of the vessel and the vessel itself. The Auditor General placed the following comment on the document:

“Note: This memo should be signed by the preparer. However the point raised was valid. For instance, we do not know how old is this boat. It might be the same age as Olovaha. A report on its condition is very important. FJ$600,000 is not a small amount of money.” (T 1985 J-O)(Exhibit 116)

5.76 Mr. Tui’onetoa when approving on 25th May 2009 the recommendations on the circular placed an endorsement on the circular as follows:

“Approved on the basis that advise that if satisfied with oral evidence from Ministry of Transport that due diligence was duly (sic) completed. Otherwise not Approved.” (Exhibit 116, paragraph 7)

5.77 Mr. Tui’onetoa indicated that when he received the circular and attachments he was aware that the contract had been signed but was not aware that the deposit had already been paid. Mr. Tui’onetoa accepted that it would be appropriate as is usual practice that the matter be submitted to the Government Procurement Committee as a sub-committee of Cabinet for their consideration before Cabinet makes a decision, the contract is signed and the deposit payment made. (T 1989 A-N)

5.78 Mr. Tui’onetoa accepted that there was insufficient information on the condition of the vessel and there was no valuation of the vessel provided to the Government Procurement Committee. Additionally he stated that an independent valuation of the vessel was appropriate. Futhermore, if he had had been advised that the vessel
was worthless he would not approve the recommendations on the circular. (T 1989 P – 1990 R)

5.79 Mr. Tui’onetoa upon citing the Cabinet Decision of 23 April 2009 resolving and approving the purchase of the MV Princess Ashika was of the opinion that Cabinet had already effectively resolved to purchase the vessel. (T 1991 A-F)

Evidence of Sione Taumoepeau (Director of Works and Deputy Chair of Government Procurement Committee)

5.80 Mr. Taumoepeau is the Director of Works and has been the Deputy Chair of the Government Procurement Committee for four years. Mr. Taumoepeau stated that the Procurement Committee was set up by Cabinet and it primarily assists the Minister of Finance in ensuring payments for procurement purposes. He accepted that the Procurement Committee was effectively a sub-committee of Cabinet. Mr. Taumoepeau also accepted, as is obviously the case, that part of the Procurement Committee functions is to determine if Government is procuring goods at a reasonable price and of an appropriate quality.

5.81 Mr. Taumoepeau in his oral evidence accepted that Cabinet had approved the purchase of the MV Princess Ashika on 23rd April 2009. By the time the matter was presented to the Government Procurement Committee for their consideration, the contract had been signed and entered into. He accepted that there was no real point in the Procurement Committee considering the matter after Cabinet had decided the matter. He also accepted that the appropriate process was for the Procurement Committee to consider the matter before it went to Cabinet. (T 1270-1284)

5.82 We accept the evidence of Mr. Taumoepeau as referred to above. His evidence illustrates the failure of a system put in place for a good reason, namely, to ensure prudent and well informed decisions are made before public monies are committed to purchasing goods or services. It was also evident from Mr. Taumoepeau’s evidence that on certain occasions in the past, the advice of the Procurement Committee had been inappropriately bypassed.

Evidence of ‘Otenifi Afu’alo Matoto (Minister for Finance and National Planning)

5.83 Mr. Matoto was appointed in October 2006 as the Minister for Public Enterprises. In March 2008, Mr. Matoto became Minister for Finance and National Planning. Mr. Matoto’s appointment as Minister for Finance in 2008 immediately made him the most senior member of the government procurement committee.

5.84 Mr. Matoto indicated in paragraph 5 of his affidavit that:
“I ... co-signed a memorandum to Cabinet dated 20th April 2009 with the former Minister of Transport. The former Minister had told me that he needed my support to advance a proposal to Cabinet to purchase a replacement vessel for the MV Olovaha. He told me that he had identified a vessel which appeared to be suitable. It was a little bit older than the Olovaha but had been pretty well maintained and that it was in a better seaworthy condition than the MV Olovaha. He also told me that the asking price for the vessel was affordable.” (Exhibit 393)

5.85 Mr. Matoto stated that he signed the Cabinet Memorandum of 20th April 2009 on the reliance that the former Minister of Transport, Mr. Paul Karalus, had assured him that the Ministry of Transport had conducted due diligence and that the vessel was in a reasonable condition despite its age. Mr. Matoto indicated that he placed his trust and confidence in Mr. Karalus to provide him with accurate information in relation to technical aspects and seaworthiness of the vessel. Mr. Matoto accepted that he had been misled by Mr. Karalus into signing the Cabinet Memorandum. (T 5156 E – 5164 F)

5.86 Mr. Matoto states in paragraph 6 of his affidavit that:

“I was relying on advice from the former Minister of Transport when we (sic) stated that the MV Princess Ashika “had been very well maintained and had come out of a December 2008 survey” and that “an Australian engineering company was preparing the vessel for sale to ensure full serviceability”. I had no independent knowledge of the maintenance of the vessel. In any event the memorandum I co-signed recommended that the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika.” (Exhibit 393)

5.87 Paragraph 9 of the affidavit of Mr. Matoto provides that:

“While the Cabinet memorandum No.300 does not specifically refer to the completion of due diligence, it does make reference to “the arrangements to do with MV Princess Ashika”. It was accordingly assumed that the normal procedures such as completion of due diligence and approval by the Government Procurement Committee would be followed.” (Exhibit 393)(T 5247-5248)

5.88 However, Mr. Matoto in his oral evidence accepted that any person who was not in Cabinet or was not aware of the requirement at that time could rightly conclude that the Cabinet Decision No. 300 of 23rd April 2009 did not require due diligence to be conducted. Mr. Matoto also accepted that it was a fair judgement on the part of Procurement Committee members that when they received the Cabinet Decision
they formed the view that Cabinet had already resolved to purchase the vessel. (T 5224 N – 5225 E) That was the view expressed by all the Procurement Committee members.

5.89 Mr. Matoto states in paragraphs 11-13 of his affidavit that:

"11. .... on 7th May 2009, I received a savingram from the former Minister for Transport seeking the payment of the deposit on the purchase of the MV Princess Ashika. Attached was a legal opinion from the Solicitor General dated 7th May 2009 and the Cabinet memorandum No. 300 ... In his legal opinion the Solicitor General stated:

“4 Furthermore, we are concerned that the Marine and Ports Division of your Ministry has not conducted the auditing of the vessel. They are the Government’s shipping experts, who should at least endorse the audit conducted by the consultants.

5 Moreover, there seems to have been no due diligence carried out at all by the consultants or Government on the financial viability to Government in purchasing this vessel. The Ministry of Finance and National Planning should at least have carried out or endorsed the findings of any consultants who were given that task.”

12. The former Minister for Transport advised me in the savingram dated 7th May 2009:

“For points 4 and 5 be advised that we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted the latest dry docking report (scope of works). We have also taken note of further reports as provided by Engineers Shaw and Bennett.

We are satisfied that the vessel meets our seaworthiness and mechanical requirements.”

13. To my eternal regret, I took the former Ministers word that due diligence had been carried out and endorsed the proposed transaction as I was authorised to do by Cabinet. I would not have endorsed the proposed transaction had I known for instance that no survey documents had been supplied by the Fiji Ministry, that Mr Jonesse had signed Mr Shaw’s name to the report said to be provided by him and that there had been no survey conducted of the vessel by the Ministry
of Transport or any independent surveyor on behalf of the Ministry to establish its seaworthiness.” (Exhibit 393)

5.90 Mr. Matoto stated that he agreed with the advice of the learned Solicitor General of 7\textsuperscript{th} May 2009. He also indicated that he relied on the written confirmation by Mr. Karalus on the savingram sent to him on 7\textsuperscript{th} May 2009 that due diligence had been conducted. Mr. Matoto accepted that he had not been provided or sighted any documents to support the conclusion or assertions by the Minister of Transport that due diligence on the survey documents had been carried out. (T 5262-5265)

5.91 Mr. Matoto accepted that he had signed the Procurement Committee circular to approve the purchase of the Ashika on 29\textsuperscript{th} May 2009, which was the first time he had seen the contract. Additionally, by 29\textsuperscript{th} May 2009 it was too late for the government to extricate itself from the purchase because the contract Mr. Karalus had signed on behalf of the government committed the government to the purchase of the Princess Ashika for FJD$600,000 irrespective of the condition of the vessel. Mr. Matoto indicated that if the Secretary of Finance had been asked to sign the contract as originally provided for in the contract he should not have signed it because he would have known as a member of the Government Procurement Committee that it had not been submitted or approved by the Procurement Committee. This as it turned out was the position of the Secretary of Finance when asked the question. Mr. Matoto agreed that by requiring the Acting Secretary for Transport to sign the contract with Mr. Karalus in lieu of the Secretary of Finance, had the ultimate effect of bypassing the Procurement Committee. (T 5283-5287)

5.92 Mr. Matoto stated in paragraph 18 of his affidavit that:

“At the time I received the circular it had already been signed by all other members of the Committee. I noted that both the Solicitor General and the Auditor General had also relied upon the advice given by the Minister for Transport that due diligence had been completed in approving the transaction. If due diligence had not been completed, the Auditor General made it quite plain that the transaction would not be approved. Having received a similar assurance from the former Minister for Transport, I signed the circular on 29\textsuperscript{th} May 2009.” (Exhibit 393)

5.93 The Minister of Finance accepted that the contract signed by Mr. Karalus had a number of unusual features. He properly accepted that the entire FJD$600,000 was required, pursuant to the contract signed on 8\textsuperscript{th} May 2009, to be paid by the date of the signing of the contract. (T 5281) That being the case, it would obviously not allow for proper due diligence to be conducted after the contract was signed, as Mr. Karalus had suggested in evidence. The Minister also conceded that the effect of the agreement signed by Mr. Karalus was that the state was obliged to pay the
FJD$600,000 irrespective of the value or condition of the vessel. (T 5281) He understood that the whole purpose of due diligence was to avoid something like that happening. (T 5282)

5.94 Throughout the course of Mr. Matoto’s evidence he repeatedly agreed and accepted that part of proper due diligence in the purchase of the MV Princess Ashika was to obtain an independent valuation of the vessel. Mr. Matoto accepted that when he signed the Procurement Committee circular on 29th May 2009, he had not been provided or sighted an independent valuation of the vessel. (T 5283-5286)

5.95 On 3rd June 2009, Mr. Matoto received a savingram from Mr. Karalus (Exhibit 375) (Appendix 51) stating that:

“The Procurements Committee has approved the purchase of the vessel M.V. Princess Ashika.

The CEO of the SCP is travelling to Fiji (via NZ) today to be in Suva early tomorrow to complete verification of all documentation. Remembering tomorrow is a Public Holiday we plan to make Friday, 5th June, 2009, the settlement date.

Prior to settlement John Jonesse will fax the confirmation that documentation is in order, including the insurance cover of the vessel. The settlement date will also be appended to the existing agreement.

On receipt of this fax we are to send the balance of FJD 510,000 to the account specified in the sale/purchase agreement.

The Telegraphic Transfer receipt is to then be faxed to Patterson Brothers as confirmation of the settlement.

The receipt of this TT receipt will release the vessel for the voyage to Tonga to commence that same day; via Friday, 5th June 2009,

I trust this procurement meets with your approval.” (Exhibit 375)

5.96 Mr. Matoto stated in paragraph 20 of his Affidavit that:

“The Ministry of Finance and Planning subsequently received a six page facsimile from John Jonesse from Fiji. Although the facsimile which was addressed to the former Minister for Transport is said to have been copied to me, I have no recollection of receiving it. I attach the facsimile obtained from the Ministry’s files as Exhibit 10. I note that I have not initialled the facsimile as having received and read it which is my normal practice. In the facsimile, Mr. Jonesse confirmed that he had sighted copies of the Fiji Marine certified
documents required for the Ministry of Transport in Tonga and also confirmed that insurance had been arranged with SCP’s current brokers British Marine to cover the full value of the vessel. On that basis, I understand that the Ministry of Finance went ahead and arranged to pay the balance outstanding on the purchase of the vessel to the vendors of the vessel through the National Reserve Bank of Tonga. I had earlier discussed the purchase of the vessel with both Mr. Eke and Mr. Tiueti, so when the request for payment was received, they or their staff would action the request once they were satisfied that all the documentation was in order.” (Exhibit 393)

Evidence of James Bacon Lewis (Director, New Zealand Marine Brokers Limited)

5.97 Mr. Lewis is a Director and Principal of New Zealand Marine Brokers Limited. He obtained a Bachelor of Laws degree in 1970 and practised both as a Solicitor and Barrister until he retired with good standing in 1991. Since 1992, Mr. Lewis has been a commercial broker and marine valuer. Mr. Lewis on a number of occasions has been commissioned by the High Court of New Zealand to prepare valuations of vessels. Mr. Lewis has prepared valuations on more than 250 vessels, ranging from small to large vessels, which included the valuation of vessels in Fiji. Mr. Lewis has personally been involved in the sale and purchase of over 450 vessels.

5.98 On 9th December 2009, Mr. Lewis prepared a valuation of the MV Princess Ashika based on information provided by the Commission. The information relied on by Mr. Lewis for his valuation included over 100 photographs, most of which were taken on 4th-5th August 2009, deficiency lists and survey certificates from both Fiji and Tonga.

5.99 Mr. Lewis in the valuation of the MV Princess Ashika on 9th December 2009 formed the following view:

“Valuation

Value Pre Sinking

Vessel’s value prior to the accident. We cannot see any justification whatsoever for the reported purchase price of FJ$600,000 – in our opinion the pre accident going concern market value of the vessel was nil or negative. Vessel had ever diminishing surveys and had massive areas of advanced corrosion. Vessel was effectively unsaleable as a commercial vessel. To have had any significant value whatsoever, there would have needed to be spent hundreds of thousands of dollars – this not in any way viable for a 37 year old vessel of this type.
**Scrap Value**

Difficult to quantify accurately in view of the vessel’s paper thin plating. The usual rationale to calculate the scrap value is as follows – the light ship displacement tonnage is calculated and multiplied by the scrap price – in this case these figures are: - nominal LDT = 669 tonnes x current scrap price of around **US$260** per tonne delivered to a nominated Asian Beach equates to **US$173,940**. In our view the cost of delivery – in all probability she would need to be towed to say India – this cost likely to exceed **US$200,000** – therefore the scrap value is either **nil or negative**. In this case, the actual recoverable scrap would have been considerably less than 669 tonnes.” (Exhibit 226)

5.100 Parties represented at the Inquiry did not question the accuracy of the valuation prepared by Mr. Lewis. Additionally, a majority of the witnesses giving sworn evidence before the Commission rightly accepted as we do, and in accordance with the compelling evidence on the appalling condition of the vessel, that the MV Princess Ashika was truly worthless and may in fact have a negative value. We agree as did various witnesses that if proper due diligence had been conducted, an independent valuation would have been obtained revealing the true value of the MV Princess Ashika, and the vessel would never have been purchased.

**Evidence of Paul David Karalus (Former Minister of Transport)**

5.101 The Former Minister of Transport, Mr. Paul David Karalus understood from the Cabinet Decision of 23rd April that the decision “charged the Ministers for Transport and Finance and the Attorney General with the respective roles to further the procurement process. For the Ministry of Transport, this meant completion of due diligence on the technical suitability and the seaworthiness of MV Princess Ashika.”. (Exhibit 64 page 18, T 6008 I – M, T 6023 O)

5.102 On 7th May 2009, after receipt of a Savingram from the Solicitor General of the same date, Mr. Karalus in an urgently marked Savingram to the Minister of Finance and copied to the Solicitor General stated:

“**I am in receipt of the legal opinion from the Solicitor General. My comments follow.**

**CD300 of 23rd April, 2009, is attached in answer to points 1, 2, and 3.**

For points 4 and 5 be advised that we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted the latest dry docking report (scope of works). We
have also taken note of the further reports as provided by Engineers Shaw and Bennett.

We are satisfied that the vessel meets our seaworthiness and mechanical requirements.

We agree that the Sale and Purchase agreement is the preferred document and the corrected version is attached.

Should you be in agreement the deposit of FJD 90,000 is payable by Friday 8th May, 2009, to:-

Parshotam & Co Trust Account.

Account No.1464382. ANZ Bank – House Branch, Suva, Fiji Islands.

Swift Code ANZBFFX. BSB 010890.” (Exhibit 129 attachment “E”) (Underlining added)

5.103 On 8th May 2009, Mr. Karalus signed the contract for the purchase of the MV Princess Ashika by the Government of the Kingdom of Tonga. (Exhibit 477) He crossed out the reference on the signing page to “Secretary for Finance” and changed it to “Acting Secretary for Transport”. Mr. Karalus asked Ms. Mone to sign the contract in his office and for Mr. Jonesse to witness the signatures. It was clear that the contract was a cash unconditional contract. In other words the contract signed by Mr. Karalus required the Government to pay FJD$600,000 irrespective of the “condition”, “merchantability”, “fitness for purpose” and “state of repair”. Additionally, unless the parties mutually agreed in writing, the entire FJD$600,000, represented by the deposit of FJD$90,000 and the balance of FJD$510,000 had to be paid on the date of the agreement.

5.104 Mr. Karalus directed on 8th May 2009, his Personal Assistant Mrs. Taumoepeau to fax the contract to Patterson Brothers Shipping Company Limited which was done at approximately 1:52pm on 8th May 2009. Mr. Karalus gave the fax number to Mrs. Taumoepeau (Exhibit 349 paragraph 65, 66 and attachments 14, 15 and 16; T 4546 – 4549)

5.105 Consistent with the Savingram of 7th May 2009 from Mr. Karalus to the Minister of Finance, the FJD$90,000 initial deposit was paid on 8th May 2009 by telegraphic transfer to the trust account of the lawyers for the vendors in Fiji.

5.106 Mr. Karalus, as Minister of Transport, was aware that a contract should not be entered into without the prior approval of the Government Procurement Committee. The Procurement Instructions provided in clause 19 under the heading “Contractual Agreement”, to the knowledge of Mr. Karalus, as follows:
“All form of contract or agreement including any for development projects shall be submitted to the Government Procurement Committee for review and endorsement before signing by all relevant parties.” (Exhibit 428)

5.107 Mr. Karalus knew that when he signed the contract on 8th May 2009, it was in defiance and contrary to the Procurement Instructions. He also knew that the Procurement Instructions were there to safeguard the expenditure of public money and to ensure that the Government did not enter in to a service of goods and service which were inappropriate. (T 6302)

5.108 As stated earlier, Mr. Karalus organised for the Acting Secretary for Transport to sign the contract for the purchase of the vessel in addition to him, despite the fact that the contract was originally to be signed by the Secretary for Finance. Mr. Karalus was aware that the Secretary for Finance was a member of the Procurement Committee and if he had been asked to sign the contract, he should have refused as the contract had not been submitted to the Procurement Committee. We do not accept the evidence of Mr. Karalus as to the reason why he had Ms. Mone sign the contract instead of the Secretary for Finance. (T 6304)

5.109 Mr. Karalus was correct in accepting that the Procurement Committee did not have enough information before them to make any informed decision and that members of the Procurement Committee could reach the reasonable conclusion that Cabinet had already resolved to purchase the vessel by the Cabinet Decision of 23rd April 2009. (T 6369 N – 6371 C)

5.110 By 8th May 2009, the contract had also been signed on behalf of Patterson Brothers Shipping Company Limited, who were the vendors under the contract. (Exhibit 417) Mr. Jonesse was in Fiji in early June 2009 and purported to make some handwritten amendments to the contract, and in particular nominate the settlement date to be 5th June 2009. (Exhibit 284) The amendments made by Mr. Jonesse were never initialed by Mr. Karalus or Ms. Mone.

5.111 On 3rd June 2009, Mr. Karalus sent a Savingram marked urgent to the Minister of Finance stating that:

“... Prior to settlement John Jonesse will fax the confirmation that documentation is in order, including the insurance cover of the vessel. The settlement date will also be appended to the existing agreement.

On receipt of this fax we are to send the balance of FJD$ 510, 000 to the account specified in the sale/purchase agreement.

The Telegraphic Transfer receipt is to then be faxed to Patterson Brothers as confirmation of the settlement ...” (Exhibit 375)
Evidence of Dr. Feleti Vaka'uta Sevele (Prime Minister of the Kingdom of Tonga)

5.112 The Prime Minister acknowledged that as part of the completion of due diligence in relation to the decision by Cabinet of 23rd April 2009, “there was no suggestion that normal procedures including approval by the Government Procurement Committee would not be followed.” (Exhibit 408 paragraph 19) This implies that the Prime Minister well knew that normal procedures, including approval by the Government Procurement Committee, needed to be attended to before the purchase was entered into.

5.113 The Prime Minister accepted that the Government has to be accountable for the payment of public funds and that the payment of the FJD$90,000 deposit was a substantial amount of money for the Government to pay. Those funds were public funds. (T 5716)

5.114 Dr. Sevele was questioned about the contract for the purchase of the MV Princess Ashika having been signed prior to it being submitted to the Government Procurement Committee. The Prime Minister refused to assume, although it had been clearly established in evidence and he had been asked by Counsel Assisting to assume it to be a fact, that the contract was signed on the 7th or 8th May 2009. (T 5715) The Prime Minister also sought to suggest that the contract was not valid because it did not have a date on it. (T 5714 M) This is contrary to the written submissions to the Commission lodged by his own learned Counsel.

5.115 The contract for the purchase of MV Princess Ashika entered into by Mr. Karalus and Ms. Mone on behalf of the Government was entered into contrary to the Government Procurement Instructions, which was produced by the Prime Minister during the course of his evidence. Clause 19 of the Government Procurement Instructions appears under the heading “Contractual Agreement”. It provides:

“All form of contract or agreement including any for development projections shall be submitted to the Government Procurement Committee for review and endorsement before signing by all relevant parties” (Exhibit 428)

5.116 As the Counsel for the Prime Minister accepted in paragraph 37 of his submissions, the Government Procurement process “broke down”. The contract should never have been entered into without it having been submitted to the Government Procurement Committee for their consideration and recommendation.

5.117 Dr. Sevele rightly accepted that it was imperative that proper due diligence be conducted prior to the purchase of the MV Princess Ashika and that included an evaluation by the Government Procurement Committee. (Exhibit 393, Exhibit 6; T 5532 I–M)
5.118 The evidence clearly establishes that despite the cash unconditional contract being entered into on 8th May 2009 and the FJD$90,000 deposit being paid on the same date, the members of the Government Procurement Committee only made their recommendations in respect of the purchase from the 20th and 29th May 2009. By the time the matter had been sent to the Government Procurement Committee, the Government had a clear legal obligation to pay the FJD$600,000 irrespective of any recommendations from the Government Procurement Committee and irrespective of the condition of the vessel or its value. This is precisely what the Government Procurement Committee was established to prevent.
Overview of Evidence

6.1 On 30th March 2006, Dr. Feleti Vaka’uta Sevele was appointed by His Majesty King Taufa’ahau Tupou IV as the fourteenth Prime Minister of Tonga. He was also appointed a Chairman of the Ports Authority Tonga in about the same year.

6.2 Dr. Sevele is extremely well educated, having graduated with a Bachelor of Science degree, Bachelor of Arts degree, completed a Master of Arts degree and obtained a Doctorate from the University of Canterbury in New Zealand.

6.3 The Prime Minister had considerable business experience prior to his appointment as Prime Minister. For example, in November 1974 he was appointed the Chief Executive and Director of the Commodities Board, which was the second largest employer in Tonga, with a turnover of about TOP$15 million per annum.

6.4 Prior to being elected to the Parliament of Tonga in 1999, Dr. Sevele established a number of business ventures operating in Tonga including commercial farming, wholesale and retail businesses, financial and consultancy services, and real estate.

6.5 The Prime Minister accepted that principles of good governance were applicable not only to companies (including public enterprises), but also to Cabinet and Government. He was aware that an important theme of corporate governance is to ensure accountability and ultimately, if there is good corporate governance, sound decisions can be made.

6.6 The Prime Minister said that he has always been mindful of the need to maintain a safe and reliable ferry service between Tongatapu and the other Tongan islands. He well knew that unseaworthy ships should not be allowed to sail in Tonga and that it was contrary to law.

6.7 Prior to 2008, Dr. Sevele was aware that the MV Olovaha, an inter island ferry, needed to be replaced because it had become old, poorly maintained and unreliable. The Prime Minister was aware by the end of 2008 that the MV Olovaha needed to be urgently replaced because it was operating in an unsafe or unseaworthy condition.
6.8 On 16th April 2009, Cabinet approved a recommendation that the then Minister for Transport, Mr. Karalus, submit to Cabinet the plan for the replacement of the MV Olovaha.

6.9 On 23rd April 2009, Cabinet, Chaired by the Prime Minister, considered a paper from Mr. Karalus and the Hon. ‘Otenifi Afu’alo Matoto (Minister for Finance) in relation to the purchase of the MV Princess Ashika. The paper made a recommendation that the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika. This recommendation was consistent with the agenda which had been approved by the Prime Minister for circulation on the 20th April 2009. The written Resolution made no reference to any requirement for due diligence, although the Prime Minister considered it was clear from discussions that it needed to be conducted.

6.10 The Cabinet resolved by Resolution No. 2:

   “2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposit and other financial arrangements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet”.

6.11 The Prime Minister correctly accepted that there was insufficient information put to Cabinet to enable it to make an informed decision that the MV Princess Ashika was seaworthy or make an informed decision on whether to purchase the vessel or not. He says that the decision was not intended to unconditionally purchase the vessel. The Prime Minister expected that due diligence had to be carried out before the vessel was purchased and that, in accordance with the Cabinet decision, “a report be later tabled in Cabinet”.

6.12 The Prime Minister accepted that if thorough and proper due diligence was conducted, which it should have, the vessel should never have been purchased or operated in Tonga.

6.13 Notwithstanding the clear Cabinet decision of 23rd April 2009 relating to the purchase of MV Princess Ashika that “a report be later tabled in Cabinet”; the Prime Minister’s clear understanding (for very good reason) that the MV Princess Ashika should not be purchased without due diligence being conducted; the fact that the Prime Minister was “always mindful of the need to maintain a safe and reliable ferry
service”; the MV Olovaha being allowed to operate in an unseaworthy and unreliable condition; the requirement for the MV Princess Ashika to return to Fiji because it was damaged on the attempted voyage to Tonga in June 2009; concerns raised in Parliament about the vessel on 9th June 2009; good governance and common sense, no report was tabled in Cabinet in relation to any due diligence that had been conducted. There was never any follow up for such a report to be tabled. No proper due diligence was, of course, ever conducted in relation to the MV Princess Ashika. These are both serious failures, that should never have been allowed to occur.

6.14 Clearly, the Prime Minister should have insisted that reports were tabled in Cabinet in relation to the MV Princess Ashika addressing, for example, what due diligence had been conducted in relation to the vessel and the results of such due diligence. It must be remembered that the vessel did not arrive in Tonga until the 1st July 2009 and sank on 5th August 2009 on the fifth and final voyage in Tonga. Thus, even if due diligence had been conducted and reported to Cabinet up to just prior to departure on the 5th August 2009, Cabinet could have taken steps to prevent the vessel from sailing and averted the tragedy.

6.15 The Prime Minister accepted that there were e-mails sent to him or by him of direct relevance to the MV Princess Ashika, which he failed to produce in response to the summons served on him. These e-mails indicate that Dr. Sevele played a role in relation to facilitating the purchase of the MV Princess Ashika.

6.16 Dr. Sevele was defensive in many of his responses and refused to accept the obvious. For example, the contract signed on 8th May 2009 for the purchase of the MV Princess Ashika was a cash unconditional contract which required the Government to pay the FJD$600,000 for the purchase of the vessel irrespective of any recommendation from the Government Procurement Committee; the condition or the value of the MV Princess Ashika. He also refused to accept that there was a systemic failure that was the cause in any way of the disaster.

6.17 On 22nd December 2009, the Prime Minister Chaired a Cabinet meeting at which he and the other members of Cabinet present were informed that the Ports Authority had advised the public that it was not safe to travel on the MV Pulupaki, an inter island ferry, and that it would not be allowed to berth in Nuku’alofa. There was no discussion or report at the Cabinet meeting as to the safety concerns. Notwithstanding this, the Cabinet resolved to effectively ensure that the vessel was allowed to enter the Port of Nuku’alofa. The very next day, the MV Pulupaki departed the Port of Nuku’alofa.
The Prime Minister became aware that the MV Pulupaki had been detained by January 2010 because it was unseaworthy. Dr. Sevele was however told, after the event that the vessel was allowed to sail to Fiji, allegedly to tow an oil tanker after the detention. The Prime Minister’s condoning of this approval by the Ministry of Transport for the vessel to sail over 250 miles to tow an oil tanker is most disturbing.

Substantive Evidence of Dr. Feleti Vaka’uta Sevele

Educational Background, Qualifications and Experience

Dr. Feleti Vaka’uta Sevele was appointed by His Majesty King Taufa’ahau Tupou IV as the fourteenth Prime Minister of Tonga on 30th March 2006.

Dr. Sevele was educated at the Catholic Primary School at the Ma’ufanga Convent before commencing his secondary education at ‘Apifo’ou College, Ma’ufanga in Tonga. In 1958, he moved on to St. John’s College in Levuka, Fiji where he remained until 1961. Dr. Sevele then attended the Marists Brothers High School in Suva, Fiji before completing his secondary education at St Bede’s College in Christchurch, New Zealand in 1963.

In 1964, Dr. Sevele entered the University of Canterbury in Christchurch and graduated in 1967 with a Bachelor of Science degree in mathematics and a Bachelor of Arts degree in economic geography. He then completed a Master of Arts degree with Honours in 1969. The area of discipline for Dr. Sevele’s Master’s degree was geography with emphasis on economic geography, which was about the regional development in the Kingdom of Tonga and its inequalities in regional development. It looked at the disparities or the inequalities in the development throughout the Kingdom, particularly between Tongatapu and the outer islands and ways through which the disparities could be mitigated. In 1973, Dr. Sevele obtained a Doctorate from the University of Canterbury in New Zealand.

Upon Dr. Sevele’s return to Tonga, he joined the Tonga Commodities Board as Board Secretary from August 1973 to October 1974. The Commodities Board was a quasi-government body with three main functions; the processing of agricultural commodities for export; the export marketing of all Tonga’s agricultural commodities and a construction division which undertook all types of construction on a commercial basis. At the time, the Commodities Board was the second largest employer in the country with close to 1500 employees who were all effectively under the charge of Dr. Sevele. It had a turnover of around TOP$15 million per annum. From this, Dr. Sevele became experienced in managing large organisations.
In November 1974, he was appointed the Chief Executive and Director of the Commodities Board, a post he held until 1978.

6.23 Dr. Sevele was Treasurer and Secretary of the Tonga Amateur Sports Association in 1973-1974, and was elected Chairman in 1975 and remained Chairman until he departed Tonga in 1978 for the South Pacific Commission in New Caledonia. Dr. Sevele also became a member and the Chairman of Tonga Rugby Union in the mid-70s.

6.24 In 1978, Dr. Sevele was appointed the Chief Economist for the South Pacific Commission, a post he held for six years in New Caledonia. As Chief Economist, Dr. Sevele was engaged in running training courses for the Governments of member countries and conducting these courses throughout the region. Dr. Sevele also acted as a consultant to various Governments in the South Pacific.

6.25 Between 1978 and 1982 he was a member of the Council of the University of the South Pacific.

6.26 Between 1984 and 1988, Dr. Sevele was appointed by Bishop Finau, the Bishop of the Catholic Diocese of Tonga, as Director of Catholic Education on a voluntary basis. Dr. Sevele was also one of the main architects of the submissions to Government which were accepted to do with state financial aid to non-government secondary schools.

6.27 In 1987, Dr. Sevele was asked to return to Sports Administration and be Vice President to the Tonga National Olympic Mini-Games Committee to assist in the development of Sports Facilities and the hosting of the 1989 South Pacific Mini Games. From 1990 to 1996, he became the Secretary General of the Tonga Amateur Sports Association and National Olympic Committee.

6.28 Between 1990 and 1992, Dr. Sevele was an Asian Development Bank funded consultant to the Central Planning Department of the Government of Tonga. In 1993 and 1994 he was adviser to the ANZ Bank and was instrumental in the establishment of the Bank in Tonga. (Exhibit 408 paragraphs 1 – 8; T 5487 – 5494)

6.29 Dr. Sevele was first elected to the Parliament of Tonga as a People’s Representative in 1999 and was re-elected in 2002 and 2005.

6.30 He became one of the Kingdom’s first two Ministers to have been appointed from the elected People’s Representatives to Parliament. He was appointed as Acting
Prime Minister on the 11th February 2006, upon the resignation of His Royal Highness Prince ‘Ulukalala Lavaka Ata. (T 5497)

6.31 Prior to being elected to the Parliament of Tonga in 1999, Dr. Sevele established a number of business ventures operating in Tonga, including commercial farming, wholesale and retail businesses, financial and consultancy services, and real estate. (Exhibit 408 paragraph 5; T 5493 – 5494)

6.32 Upon his appointment to Cabinet on 21st March 2005 as the Minister of Labour, Commerce and Industries, Dr. Sevele swore in his affidavit that he “handed over the running of his business ventures to his wife and daughter”. (Exhibit 408 paragraph 9) Having said that, he accepted during the course of his evidence that he is still a shareholder of several of these companies and from time to time he “gets called upon to give advice or give signatures to the banks”. Dr. Sevele said that he was shareholder of the same number of companies, which “could be five”, as when he came into Parliament, but he was not “sure at the moment”. (T 5496 H) When asked if he was a director of any of those companies, his reply was “on the books, yes” (T 5496) He also accepted that he “had taken some of the profits, I have been paid some of the profits over the years” from some of the companies since he had been a Member of Parliament. (T 5496 N – Q)

6.33 In about 2006 to 2007, Dr. Sevele was paid money as a consultant for his negotiating payments to one of his companies in relation to properties that had been burnt. Dr. Sevele said that he took leave to negotiate the insurance claims. (T 5496 Q – 5497 N)

6.34 The Prime Minister said he did not know whether politicians had to declare assets that they had in a Declaration of Interests Registry. He said however that in 2005, he gave his predecessor, the former Prime Minister and the then Speaker of the House a list of his business interests soon after he became a Minister. Since 2005, he had not provided any updated list. (T 5495; 5459) Dr. Sevele confirmed that there is no requirement of Ministers or Members of Parliament to advise of their interest in any companies or properties. He accepted that it would be a good idea for some sort of register to exist. When asked whether he agreed that it would be good idea for some sort of register to exist so as to “avoid conflict of interest”, the Prime Minister responded by answering “I guess so”. Dr. Sevele said that they relied on the integrity of those in Cabinet to verbally declare their interest. (T 5500 A – N) A declaration of interest register, properly maintained, is a fundamental and basic requirement necessary to “address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence”. This would include addressing issues of conflict of interest in relation to maritime related
matters in Tonga. There is no justifiable reason why such register should not be immediately put in place. We recommend that this be done forthwith.

6.35 In about 2006, Dr. Sevele was appointed as the Chairman of the Ports Authority Tonga, a position which he continuously held even to the time of his giving evidence on the 22nd February 2010. (T 5498) It was expected that Dr. Sevele would cease to become the Chairman by April 2010.

Role of Prime Minister

6.36 Tonga is an archipelago of some 170 islands with a total land area of 700 square kilometres, but which stretches over 1100 kilometres from North to South and 600 kilometres from East to West carrying a total surface area of over 700,000 square kilometres. Essentially, the physical geography of Tonga is one of a moderate number of islands in a large area of ocean. (Exhibit 64 paragraphs 86 an 87). The population of the Kingdom of Tonga, in the last census, in 2006, was approximately 102,000 (T 5480)

6.37 Dr. Sevele was first elected to the Parliament of Tonga as a People’s Representative in 1999 and was re-elected in 2002 and 2005. On the 30th March 2006, Dr. Sevele was appointed by His Majesty King Taufa’ahau Tupou IV as the 14th Prime Minister of the Kingdom of Tonga. On his appointment as Prime Minister, it was clear that he was extremely well educated; had experience as a politician and was a very experienced businessman.

6.38 When asked as to what he considered were his duties, responsibilities and obligations as Prime Minister of the Kingdom of Tonga, Dr. Sevele replied:

“Duty is to lead the government, to protect, promote the interests of the people and of the country according to law and according to policies.” (T 5502 B –D) (Underlining added)

6.39 The Prime Minister amplified this to say that it covered “a lot of things, in promoting the interests of the people, in protecting its interest. Locally, domestically and also in its international relations”. (T 5502 F)

6.40 Dr. Sevele said that he was leader of Cabinet, leader of the Government and leader of the People. (T 5502 N – Q)

6.41 When asked as to what he saw as the main characteristics of a good leader he initially had trouble answering the question effectively. His answer was, “as any good leader should”. When further questioned, he explained this to mean “that you
lead according to policies, according to law”. Dr. Sevele accepted that one of the characteristics would be to make decisions based on logic and fact, not on assumptions. (T 5503)

6.42 As Prime Minister, Dr. Sevele accepted that sometimes he had to make difficult decisions despite the fact that it may alienate some members of the public as this “comes with the territory”. (T 5501 E – G)

Good Governance

6.43 The Prime Minister correctly accepted that principles of good governance were applicable not only to companies (including Public Enterprises), but also to Cabinet and Government. (T 5503 Q – 5504 C) He also acknowledged that an important theme of corporate governance is to ensure accountability and ultimately, if there is good corporate governance, sound decisions can be made. As part of good corporate governance, Cabinet and companies need to promote ethical and responsible decision making and establish a sound system of risk oversight. (T 5504 – 5505)

6.44 The Prime Minister was not familiar with the Commonwealth (Latimer House) Principles on the three branches of Government. (Exhibit 421; T 5508 B) The objective of the Commonwealth (Latimer House) Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by Governments, Parliaments and Judiciaries of the Commonwealth fundamental values. (Exhibit 421 page 10) Tonga is a member of the Commonwealth. (T 5508 I) The Prime Minister was not sure about whether the Government of Tonga was “bound” by the Commonwealth (Latimer House) Principles, but said that the “principles are accepted, generally”. (T 5565 K – O)

6.45 The Commonwealth (Latimer House) Principles deals with Ethical Governance, it provides specifically that:

“Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.” (Exhibit 421 page 12)

6.46 The Principles also deal with Oversight of Government in the following terms:

“The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process.

Steps which may be taken to encourage public sector accountability include:
(a) *The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government’s activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditor-General, Anti-Corruption Commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances.*

(b) *Government’s transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.*” (Exhibit 421 pages 13 and 14)

6.47 The Prime Minister correctly accepted the principle that Parliament and Government should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. This would include the conduct of business in relation to the Ministry of Transport. Dr. Sevele also correctly accepted that there needs to be “checks and balances” on Government, members of Government and public servants. (T 5508 R – 5509 H; T 5565)

6.48 Dr. Sevele acknowledged correctly that all members of Cabinet would have been aware, as part of the good governance process, that Government contracts needed to be approved by the Government Procurement Committee prior to them being entered into. (T 5535 Q – 5536 F) The Prime Minister was aware that as part of good governance, Cabinet needed sufficient details before it to enable it to debate an issue and make an informed decision. (T 5586 S – 5587 G)

6.49 The Prime Minister is aware that confidence and trust needs to be restored in Tonga that people can travel on vessels which are safe and seaworthy, as the MV Princess Ashika disaster had adversely affected such confidence and trust. This lack of confidence includes a lack of confidence in Ministers and Regulators in the industry, such as the Marine and Ports Division of the Ministry of Transport, to carrying out their duties and responsibilities honestly, professionally, with integrity and according to law. (T 5564) The MV Princess Ashika, as the Prime Minister accepted, should never have been allowed to depart Nuku’alofa because of its condition and the Ministry of Transport was responsible for ensuring that only safe vessels or seaworthy vessels sailed. (T 5562) He acknowledged that no responsible person could have signed a certificate on 2nd or 3rd July 2009, as had been done by the Director of Marine and Ports, certifying that MV Princess Ashika was considered to be seaworthy and that there had clearly been a terrible derogation of duties.
Dr. Sevele also accepted that the Ministry of Transport is responsible, under the control and authority of the Minister for Transport, for ensuring that only seaworthy vessels sail. (T 5562)

Although the Anti-Corruption Commissioner Act came into force on the 13th September 2007, as a matter of fact Cabinet has never put forward any recommendation for the appointment of an Anti-Corruption Commissioner. (T 5567 Q – R) Thus, in practical terms, the Act is not in operation. (T 5566 J – K) Pursuant to the Anti-Corruption Commissioner Act, an Anti-Corruption Commissioner would have power to direct attention to serious and systemic corrupt conduct and take into account the responsibilities and role of other public authorities and public officials in the prevention of corrupt conduct. “Corrupt conduct” is defined in section 6 of the Act very widely and includes “any conduct of a public official that constitutes or involved the dishonest or partial exercise of any of its official functions”. The definition of “public official” is defined in section 2 of the Act very widely. It means “an individual having public official functions or acting in a public official capacity” and includes a person in the service of the Crown or of a public authority and a Minister of the Crown. “Public Authority” includes a number of entities including “a government department” and “a statutory body or public enterprise”.

If properly operative, the Anti-Corruption Commissioner Act would enable investigations in relation to any person employed at the Ministry of Transport and in fact the Minister himself. It would also allow investigation of a person in the service of a public enterprise such as Shipping Corporation of Polynesia. The Prime Minster acknowledged that it was “obvious that the Director of Marine and Ports is there to safeguard the public in the maritime industry”. (T 5510 E – G) There is evidence before the Commission, suggestive of recent attempted bribery, after the MV Princess Ashika sank in the Maritime Industry in Tonga. (Exhibit 388; 389 and 414)

When the Prime Minister was asked whether he accepted that it would be part of good governance to appoint a properly qualified person as a Commissioner under the Anti-Corruption Commissioner Act and Investigator, the Prime Minister replied:

“Yes, when funds permit” (T 5569 I)

However, when asked about whether his major concern about the establishment of a workable Anti-Corruption Commissioner Act was the lack of resources available, he said that, “It’s not just the lack of resources”. (T 5571 C – F)

The Prime Minister was aware that funds were offered and made available to pay for costs associated with the running of the Anti-Corruption Commission, but says that “effectively only covered part of the funding required”. (T 5567) He said that “the law is there and it will be done.” (T 5569 R) However, when asked when it would be done
his answer was “I can’t say when”. (T 5570A) Ultimately the Prime Minister accepted that if funding was made available shortly, he was prepared to commit to the establishment and appointment of an Anti-Corruption Commissioner. (T 5571) The Prime Minister is, most regrettably, obviously very reluctant to have an Anti-Corruption Commissioner appointed.

6.55 The Commonwealth (Latimer House) Principles provide that steps which may be taken to encourage public sector accountability include the establishment of Anti-Corruption Commissions. Dr. Sevele acknowledged that “it would help”, in terms of taking steps to encourage public sector accountability, including the Marine and Ports Division, to have a properly operating Anti-Corruption Commissioner Act or something similar. (T 5570 M – P)

6.56 In terms of the Ministry of Transport, the Ministry officials have allowed unseaworthy vessels to sail in Tonga for years. This is hardly surprising, given that leaders such as the Prime Minister have known about unseaworthy vessels being allowed to sail, yet not taken any positive measures to stop this happening. Officials involved in the Maritime Industry in Tonga, and those making decisions affecting the industry, have largely been able to do so irrespective of the consequences of any decision they make. They have had no concerns about being held accountable for their actions.

6.57 Shipping Corporation of Polynesia in many instances have not provided annual reports or half yearly reports to the Minister of Public Enterprises, contrary to the provisions of the Public Enterprises Act. The provision of these reports assists in making the organisations accountable and transparent. A number of the reports are required to be tabled in Parliament under the Act. The attention of the Prime Minister had been drawn to the fact that several of the Ministries and several of the Public Enterprises have not tabled their annual reports or bi-annual reports. (T 5506 – 5507) It is disconcerting that public enterprises, such as Shipping Corporation can, and have for many years, been allowed to ignore such important statutory obligations relating to accountability and transparency.

6.58 We recommend the urgent appointment of appropriately qualified and independent persons as a Commissioner under the Anti-Corruption Commissioner Act and an Investigator, as well as the operation of the Anti-Corruption Commission. It would be a very positive step in keeping public servants at, for example, the Ministry of Transport and officers at Shipping Corporation of Polynesia accountable and make them focus on their duties and responsibilities. The position will need to be widely and appropriately re-advertised, with an independent selection panel appointed. There should be no political interference in these appointments. If even a few of those at SCP and the Ministry of Transport involved in MV Princess Ashika, including
Mr. Karalus, had properly carried out their duties and responsibilities, the disaster would never have occurred.

Allowing Unseaworthy Vessels to Sail

6.59 As Prime Minister, Dr. Sevele deposed in paragraph 10 of his affidavit that:

“As Prime Minister, I have always been mindful of the need to maintain a safe and reliable ferry service between Tongatapu and the other Tongan islands. I was aware that there were a number of maintenance issues with regard to the MV Olovaha which had been in service since 1981.” (Exhibit 408; T 5571 R – T 5572 B)

6.60 Dr. Sevele said he:

“was therefore gratified when the Government of Japan agreed to fund a replacement vessel for the MV Olovaha. It was with some dismay that I learnt in the latter half of 2008 that the replacement vessel would not be available until the end of the Japanese fiscal year 2010.” (Exhibit 408 paragraph 11; T 5572)

6.61 Dr. Sevele was aware unseaworthy ships should not be allowed to sail in Tonga and that it was contrary to law (T 5519 R – T; T 5552 I – M; T 5557). This law is, as the Prime Minister accepted, an eminently sensible law and one that should be enforced. If enforced, Dr. Sevele rightly conceded the MV Princess Ashika should never have been allowed to sail in Tonga. (T 5557 G – M)

6.62 The Prime Minister said that:

“The Government of Tonga, given the importance of shipping to the whole of the Kingdom, and in particular to the outlying islands, have always through government, corporate board, Pacific Navigation, have always taken great care to ensure that there were ships available and in good condition. In respect of the current inquiry the Government of Tonga had taken steps, and this was before I came into government - to consider the years of economic life of the old Olovaha that would remain, and took steps back in 2004 to consider a replacement for the Olovaha. It did that in earnest with the Government of Japan in 2005. Unfortunately, with this government mindful of the needs of the outer islands and the need to have a vessel to replace the Olovaha which it considered at the time would need to be replaced by around 2008, the Government of Tonga - as I said, this was before I came into government - started the negotiations in earnest in 2005 with the Government of Japan.
The target was for that to be funded under aid a vessel that would suit - a new vessel that would suit the conditions of Tonga and suitable for the needs of the Kingdom and, in particular, of the outer islands up to the Niuas. The plan was then for Japan to fund, in its financial aid of 2006/2007, and have the vessel here in Tonga, a modern very suitable vessel, arriving in Tonga in 2008. Unfortunately, unfortunately, shipping interests intervened and with correspondence with the Government of Japan the negotiations that His Majesty’s Government had begun in earnest in 2005 were derailed by interferences from the private sector and it led to a derailment of those plans of the Government of Tonga that finally got back on track in 2006 and 2007, resulting in the signing of a contract only in 2008. If government’s intentions and plans had been allowed to proceed, we would have had a new Olovaha in 2008. There wouldn’t have been a need for the purchase of the Ashika, and unfortunately the tragedy...

6.63 It is clear that the Government of Tonga, well prior to 2008, was aware that the MV Olovaha needed to be replaced because it had become old, poorly maintained and unreliable. This was the reason for seeking the aid vessel from the Government of Japan.

6.64 Such was the condition of the MV Olovaha that consideration was being given to disposing of it “at scrap value”. (T 5600)

6.65 Shipping in the South Pacific is clearly a difficult and challenging issue to address. (T 5537) This is often because of the cost of properly maintaining vessels. Substandard shipping is not uncommon in the Pacific Islands Region. (Exhibit 339 pages 126 – 135)

6.66 On 10th November 2008, a Memorandum to Cabinet was submitted by Mr. Karalus to Cabinet in relation to the MV Olovaha. (Exhibit 408 annexure “A”) The Memorandum made reference to the fact that the MV Olovaha was delivered to Tonga in 1981 and had been in service for a full 27 years. Mr. Karalus also stated in the Memorandum that in the early days it was well operated and maintained, but for the 10 years or so, prior to mid-2006, maintenance was very much neglected. One of the recommendations made reference to the fact “that inter-island shipping be considered an essential service”. The Prime Minister accepted that it was his practice to read papers or submissions presented to Cabinet “generally” prior to the Cabinet meetings, although sometimes Cabinet papers were tabled at the Cabinet meetings. (T 5548 P – 5549 B)

6.67 In the Memorandum to Cabinet dated 10th November, it stated in the first paragraph that “a full report on the mechanical state of the MV Olovaha will be tabled at the Cabinet meeting.” The Prime Minister was asked whether a full report on the
mechanical state of the MV Olovaha was subsequently tabled at a Cabinet meeting. His answer was:

“I cannot recall whether it was and I cannot recall a...” (T 5544 D – F)

6.68 The Prime Minister was then shown Exhibit 369. This document was a document forwarded by e-mail by Mr. Jonesse to Mr. Karalus on 11th November 2008. It had attached to the e-mail a three page report in relation to the MV Olovaha. When shown Exhibit 369, the Prime Minister said that he remembered seeing this as part of a submission to Cabinet and “I think I have that in my affidavit as going together with attachment A”.

6.69 As it transpired, the report was not attached to the affidavit of the Prime Minister or disclosed by him. This is despite the fact that the Prime Minister was served personally with a summons dated 11th January 2010 to produce documents. Dr. Sevele read the summons and understood the requirements of it, including as to the production of documents such as e-mails. (Exhibit 418; T 5481 – 5482) The Prime Minister checked his affidavit before swearing it and attached documents to it which he considered as relevant. (T 5479)

6.70 During the course of Dr. Sevele’s evidence it became apparent that he had a document in a file which someone had written on the top “Cabinet Meeting, Cabinet Chambers, No. 52/2008, 12/11/2008. Report on the MV Olovaha from SCP”. It also had written on the top “Paper for No. 1191”. (Exhibit 419) He said he did not know why the document had not been produced earlier. (T 5547) It appeared to the Prime Minister that the writing on top of the document was that of Mr. Karalus. The document was definitely produced to Cabinet on 12th November 2008. (T 5546 R – S) It was discussed at the Cabinet meeting. (T 5544 – 5548)

6.71 The report to Cabinet of 12th November 2008 should have been produced pursuant to the summons served on the Prime Minister. Given that the very first attachment to the affidavit sworn by the Prime Minister on 8th February 2010 was the Memorandum to Cabinet dated 10th November 2008 in relation to the MV Olovaha, and the fact that such Memorandum referred in the first paragraph to “a full report on the mechanical state of the MV Olovaha will be tabled at the Cabinet meeting”, it would have alerted the Prime Minister and his advisers that another “full report” should have existed.

6.72 The report tabled at the Cabinet meeting 12th November 2008 by Mr. Karalus provided under the heading “General Overview”:

“While deterioration is a factor in any vessel of this age, with the Olovaha it is compounded by historic failure to maintain any rational programme of R&M (repairs and maintenance) to the extent of gross negligence and any failure
resulting in injury would have been deemed to be criminal negligence. With this in mind we have set up a PMP (Preventative maintenance programme) that had proven its worth over the last 2 years.” (Exhibit 419) (Underlining added)

6.73 The report of 12th November 2008, made it abundantly clear that at least some point in the past, the MV Olovaha had been very poorly maintained to such an extent that there could be “criminal negligence” as a result of the failure. (T 5549; T 5707 – 5709)

6.74 It is obvious that the Prime Minister was aware by late 2008 and into 2009 that there were concerns about maintenance issues and the reliability of the MV Olovaha. (T 5542; T 5572)

6.75 Despite Dr. Sevele stating that he had “always been mindful of the need to maintain a safe and reliable ferry service”, he was aware for a long time that the MV Olovaha, which was ultimately temporarily replaced by the MV Princess Ashika, was operating in an unsafe or unseaworthy condition. (T 5572 – 5573; T 5577) This was also the case in late 2008. As previously stated, Dr. Sevele was aware that unseaworthy ships should not be allowed to sail in Tonga and that this was contrary to law. (T 5519 R – T; T 5521 I – M; T 5557) Given also his understanding that one should lead “according to law”, he unfortunately failed to do so by allowing the safety of lives at sea to be compromised.

6.76 The Prime Minister had been aware, also through correspondence, that at least in the opinion of other qualified people, vessels have been allowed to operate in Tonga for a number of years which are unseaworthy. (Exhibit 420; T 5550 – 5555) He had known about concerns raised about the safety or seaworthiness of vessels in Tonga from various sources since he had become Prime Minister. (T 5550)

6.77 The Prime Minister said he was gratified when the Government of Japan agreed to fund a replacement vessel for the MV Olovaha because he knew that the MV Olovaha was unreliable and operating in an unsafe or unseaworthy condition. It therefore needed to be replaced as soon as possible. (T 5572 D – 5573 G; T 5801)

6.78 On 17th December 2008, the Prime Minister wrote to the Ambassador of Japan to the Kingdom of Tonga in response to a letter to the Minister for Foreign Affairs dated 12th December 2008, (Exhibit 422), which had been copied to him and the Minister of Transport advising of a delay in the replacement vessel from Japan.

6.79 The Prime Minister relevantly stated in the letter to the Ambassador the following:

“I noted with extreme concern and disappointment that the tender for this project was rejected due to inappropriate documentation and that your
Excellency advises that the period of construction of the vessel should be extended until the end of the Japanese Fiscal Year (JFY) 2010, instead of the end of JFY 2009.

This new time frame is indeed a major set back to the property and to the plans and priorities already established between our Governments. The existing ferry will not be able to continue for another year longer, which will be the case if this delay occurs. I am, therefore, writing to request whether there is any possibility or options available that can return the project to its original schedule?

I look forward to hearing from your Excellency on this important matter. ”

(Exhibit 408 annexure “B”) (Underlining added)

6.80 The Prime Minister was very disappointed about the delay in the delivery of the replacement vessel being funded by the Government of Japan because he knew the ferry service was an essential service and the MV Olovaha needed to be replaced because it was unseaworthy. This explains why the Prime Minister wrote to the Ambassador of Japan wherein he expressed “extreme concern and disappointment”. The Prime Minister could not recall whether he ever received any response from the Ambassador of Japan. He said that if he had it should have been in his file, which it was not. (T 5572 – 5577) Despite expressing extreme concern and disappointment, the Prime Minister did not consider that he should have been more proactive and followed up with another letter to the Ambassador of Japan. (T 5584 B –F)

6.81 The Prime Minister was also aware, as Chairman of the Ports Authority Tonga, that vessels were allowed to depart without departure clearances in defiance of the law. He had been aware of this for a number of years. (T 5555 P – 5556 J) He said he would have discussed this with Mr. Karalus from time to time. We are not convinced that Dr. Sevele adequately addressed the failure of vessels to obtain departure clearances from the Ports Authority Tonga. Even after the MV Princess Ashika sank, it is troubling to note that vessels have been allowed to depart Nuku’alofa without departure clearances in defiance of concerns raised by the General Manager, Commander Lupeti Vi.

Cabinet Decisions Regarding the Purchase of MV Princess Ashika and the Requirement for Due Diligence to be Conducted

6.82 The Prime Minister stated in his affidavit sworn 8th February 2010 that:

“The decision about whether to continue with the service using of the MV Olovaha or lease to purchase a replacement vessel on a temporary basis awaiting the delivery of the Japanese funded vessel was initially one for the Shipping Corporation of Polynesia but was ultimately one for the Government
of Tonga if significant capital expenditure was involved as the Shipping Corporation of Polynesia is fully owned by the Government. After my letter to the Japanese Embassy in December 2008, I cannot recall any specific involvement with the issue of a replacement vessel for the MV Olovaha until the matter came back to Cabinet at its meeting on 16 April 2009.” (Exhibit 408 paragraph 12) (Underlining added)

6.83 In his affidavit, as to the Cabinet meeting on 16th April 2009, Dr. Sevele swore:

“At that meeting there was some discussion about the inter island ferry service. I have been advised by the Secretary to Cabinet that there was no paper on the issue submitted to Cabinet before the meeting on 16 April 2009. However at the meeting, the former Minister of Transport made it plain that the MV Olovaha could not continue to provide a safe and reliable service. He was accordingly asked to submit a plan to Cabinet for the replacement of the MV Olovaha.” (Exhibit 408 paragraph 13) (Underlining added)

6.84 By the time of the Cabinet meeting on 16th April 2009, the Prime Minister accepted that the MV Olovaha was not providing a safe and reliable service. There were serious concerns raised about the seaworthiness of the vessel at the meeting and that it needed to be urgently replaced. Hence there was the need for an urgent plan to be submitted and urgent steps needed to be taken to replace the MV Olovaha. By the 16th April 2009, the Prime Minister had sufficient information before him to realise that the MV Olovaha was unsafe and unseaworthy. (T 5584 – 5589 B) The vessel was accordingly, with full knowledge of the Prime Minister, being allowed to operate whilst unseaworthy and unsafe.

6.85 On 16th April 2009, the Cabinet decided (by Cabinet Decision No. 292), in a meeting Chaired by the Prime Minister, to approve the following recommendations:

“That the Hon. Minister for Transport to kindly, i.e.:

i. arrange the advice of Government and the public of the travel details of the subsidized ship for Niuafo’ou and Niuatoputapu scheduled for the week beginning Monday 20th April, 2009;

ii. submit to Cabinet the plan for the replacement of the MV Olovaha

iii. submit to Cabinet the air services and maintenance/repair plan of the airports of Niuafo’ou and Niuatoputapu.”

(Exhibit 408 annexure “C”) (Underlining added)

6.86 On 20th April 2009, Mr. Karalus prepared a Memorandum to Cabinet (Exhibit 64). A copy of the Memorandum, with the handwritten notations made by the former
Minister of Transport on page 2, is Appendix 52 to this Report. The handwritten notations made reference to “independent assessment”, “survey documents”, “Fiji”, “deferred payment: 20%”, “MOF, A.G, MOT, as Chairperson” (T 4537 – 4538)

6.87 Mr. Karalus sought the support of the Minister of Finance and National Planning and Minister for Public Enterprises and Information (Hon. ‘Otenifi Af’aloo Matoto), by requesting the Minister to also sign the Memorandum to Cabinet.

6.88 The Memorandum of 20th April 2009 provided:

“The mechanical state of the M.V. Olovaha has been of increasing concern over the past six months.

While the ship remains seaworthy it is becoming increasingly difficult to maintain any reliability in its service to the outer islands.

The delivery of the new ferry to be provided by grant aid from the Government of Japan will not be before late 2010. In the meantime it is estimated that up to TOP 800,000 needs to be spent on the existing M.V Olovaha to keep it in service. The attached financial summary (attachment one) from the Shipping Corporation of Polynesia and the Ministry of Public Enterprises and Information compares the cost of continuing services with existing ship against the cost of purchasing a ship that has been sourced in Fiji. It is clear that the financial outlay for a replacement ship to fill the gap until the arrival of the new ferry is the preferred option as there is also the residual value of the replacement ship once the new ferry arrives.

The Ministry of Transport has sought full technical data to allow for due diligence to be completed on the replacement vessel, the M.V. Princess Ashika (some detail is provided as attachment two).

In summary, the vessel is surveyed to carry 390 passengers and 370 tonnes of cargo (c.p. Olovaha, 400 passengers and 140 tonnes of cargo). It has both bow and stern loading capability, cruises at 10 knots (Olovaha 8 knots), has similar draft to the Olovaha to allow safe entry and exit to all ports (it is suggested that the vessel can also service ‘Eua though this is to be substantiated) and burns 30 per cent less fuel. The vessel is both bow and stern loading and is of the “roll on, roll off” (Ro-Ro) type. While the vessel is older than the Olovaha it has been very well maintained and has come out of a December 2008 survey. An Australian engineering company is preparing the vessel for sale to ensure full serviceability.
The SCP has put in a purchase option to expire at the end of this month for FJD 600,000 (this is now TOP 580,000) and has sourced cargo to cover the cost of positioning the ship in Tonga.

Both the Ministry of Transport and the Ministry of Public Enterprises and Information recommend that the ship be purchased by the Government of Tonga and leased to the Shipping Corporation of Polynesia and that this be effected without delay once all the necessary documentation is completed. The ship can enter service in Tonga during May, 2009, in time for the major Church conferences. This vessel can also be used to test new scheduling and loading procedures in readiness for the entry of the new ferry from Japan in late 2010. The total funding to be sought is expected to be within TOP 750,000.

Recommendations:-

1. *That the Ministry of Transport complete due diligence on the technical suitability and sea worthiness of the M.V. Princess Ashika.*

2. *That, subject to the successful completion of (1.) above, the Ministry of Finance and National Planning source funding for the purchase of the vessel and for any requirements to ensure rapid deployment into service.*

3. *That, subject to the successful completion of (2.) above, the Ministry of Public Enterprises and Information and the Ministry of Transport determine the ownership and on-lease of the vessel to the Shipping Corporation of Polynesia.*” (Underlining added)

The Memorandum to Cabinet had attached to it the following documents:

(a) Letter from Mr. Jonasse to Mr. Karalus and Mr. MacQueen c/o Ministry of Public Enterprises dated 17th April 2009;

(b) Investment analysis regarding retaining Olovaha versus buying a replacement vessel;

(c) Cash Flow Projections;

(d) A photograph of the MV Princess Ashika taken from a distance;

(e) A document entitled “Princess Ashika...Survey December 2008 valid to December 2010- Fiji Marine Board- Rusiate Waqa”. (Exhibit 408 attachment “D”)
6.90 There were no documents to support the investment analysis or the cash flow projections. According to the investment analysis, if interest was to be paid and there was no Government subsidy, the operation of the MV Princess Ashika was projecting a loss. (T 5602 – 5603) In terms of the document entitled “Princess Ashika...Survey December 2008 valid to December 2010” submitted to Cabinet, the document was effectively useless. There were large gaps in the document and it was very incomplete. It was clear, from even a very preliminary look at the document that it had not been issued by the Fiji Marine Board. This is because, for example, it made references to SCP (Shipping Corporation of Polynesia) and numerous references to MV Olovaha including that certain equipment was “recoverable from new equipment on Olovaha”. It should also be noted that the document was not signed or dated. It was also not on any letterhead or under the cover of any letter. We consider that the Prime Minister placed no reliance on the document. (T 5604 – 5606)

6.91 The Prime Minister talked regularly to Ministers. This included talking regularly to Mr. Karalus between 17th December 2008 and 16th April 2009, (T 5583 D – H) and would constantly communicate with him by e-mail. (T 5742 – 5743) The Minister for Transport was very much a hands-on Minister who actively got involved in matters. He was noted for his hard work. (T 5611 D – G) Mr. Karalus, to the knowledge of the Prime Minister played an active role in relation to the prospective purchase of the MV Princess Ashika. (T 5742)

6.92 On 23rd April 2009, there was a meeting of Cabinet. Those present at the meeting were the Prime Minister (Hon. Dr. Sevele), Deputy Prime Minister and Minister for Health (Hon. Dr. Viliami Tangi), Minister for Police, Prisons and Fire Services (Hon. Siaosi T ‘Aho), Minister for Training, Employment, Youth and Sports (Lord Tu’ivakano), Minister for Works (Lord Nuku), The Attorney General and Minister for Justice (Hon. ‘Alisi Numia A Taumoepeau), Minister for Transport (Hon. Paul Karalus), Minister for Finance and National Planning, Public Enterprises and Information (Hon. ‘Otenifi Afu’alo Matoto). (Exhibit 427) The Prime Minister was aware that the use of inter island ferry services is and was critical to the people of Tonga. (T 5564 R – T) A significant amount of money, as Dr. Sevele acknowledged, was required to purchase the MV Princess Ashika, and the Kingdom of Tonga was ultimately responsible on whether to purchase the vessel MV Princess Ashika or not. (T 5579)

6.93 The signed Cabinet Decision No. 300 (Appendix 44) records that Cabinet decided:

“1. That the report from Ministry of Transport on the Vessel to Replace the MV Olovaha be noted.
2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposit and other financial agreements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.

3. That discussions with the Government of Japan to continue to ascertain that there are no further delays on the delivery of the new ferry to replace the MV Olovaha.”

6.94 Mr. Kautoke prepared the agenda for the Cabinet meeting of 23\textsuperscript{rd} April 2009 in consultation with the Prime Minister. The Prime Minister approved the agenda prior to its circulation. (T 5701 – 5702) The agenda and papers were distributed on Monday 20\textsuperscript{th} April. (T 5647) The relevant agenda for the meeting on 23\textsuperscript{rd} April 2009 was as follows:

“300. MAR 2/2/2 V5  Vessel Purchase to Replace the MV Olovaha

\textit{Recommendations}

1. \textit{That the Ministry of Transport complete due diligence on the technical suitability and sea worthiness of the MV Princess Ashika.}

2. \textit{That, subject to the successful completion of (1) above, the Ministry of Finance and national planning source funding for the purchase of the vessel and for any requirements to ensure rapid deployment into service.}

3. \textit{That, subject to the successful completion of (2) above, the Ministry of Public Enterprises and Information and the Ministry of Transport determine the ownership and on-lease of the vessel to the Shipping Corporation of Polynesia.” (Exhibit 427) (Underlining added) }

6.95 The agenda was not originally produced to the Commission. (T 5651) It was produced by Mr. Kautoke after Counsel Assisting ascertained during questioning of Mr. Kautoke that an agenda was not produced.
It will be observed that the wording of the decision made on 23rd April 2009 neither followed the wording of the recommendations contained in the Cabinet Memorandum of 20th April, nor did it follow the recommendations contained in the agenda for the meeting. Both the Cabinet Memorandum and the agenda clearly provided that the Ministry of Transport was to complete due diligence on the technical suitability and the seaworthiness of the MV Princess Ashika. This should be contrasted with the terms of the Cabinet decision. This seems to be implicitly accepted by the Prime Minister deposing, in paragraph 19 of his affidavit, that the Cabinet decision did not specifically refer to the completion of due diligence. (Exhibit 408)

The Minister for Finance rightly acknowledged that the Cabinet decision of 23rd April 2009 did not make any reference to due diligence. He appreciated that if anyone read the Cabinet decision they would have rightly concluded that Cabinet did not by its decision require due diligence to be conducted. (T 5224 Q – 5224 B)

Rather than simply having to assume that normal procedures such as the completion of due diligence and approval by the Government Procurement Committee would be followed, it should have been made clear when the Cabinet made the resolution on 23rd April 2009. The requirement to carry out due diligence was critical. Cabinet resolved to adopt different wording to that contained in the recommendations put before them. This resulted in Mr. Kautoke noting the words “new wordings” on the copy of the agenda. (Exhibit 427) It would have been a very simple exercise for Cabinet, if it wished, to adopt the written recommendations put before it. It chose not to do so.

The Prime Minister in paragraphs 16 – 19 (inclusive) of his affidavit states in respect of the Cabinet meeting on 23rd April 2009:

“16. The recommendations contained in the memorandum, which Cabinet finally endorsed, were based, in part, on the advice of the consultants to the Ministry of Public Enterprises that the better financial option was to purchase a replacement vessel rather than continue to maintain the MV Olovaha.

17. I wanted to know if the replacement vessel could be purchased with aid funds and asked if enquiry could be made about that possibility. I also emphasised that all due diligence had to be carried out before any vessel was purchased.

18. Annexed hereto and marked “F” is the Cabinet Memorandum No. 300 which records the decision of Cabinet and directed that the former
Minister for Transport assisted by the Attorney-General and Minister for Justice “to proceed with the arrangements to do with the MV Princess Ashika” and because of the urgency of the matter that necessary deposit and other financial arrangements be finalised with the Minister of Finance. The Minister of Finance was specifically authorised “to endorse or otherwise the proposed transaction”.

19. While the Cabinet Memorandum No. 300 does not specifically refer to the completion of due diligence, the completion of due diligence was clearly required in terms of the Cabinet decision. There was no suggestion that normal procedures including approval by the Government Procurement Committee would not be followed. The Cabinet Decision to “to proceed with the arrangements to do with the MV Princess Ashika” was also still conditional upon subsequent endorsement by the Minister for Finance.” (Exhibit 408 16-19) (Underlining added)

6.100 It is the practice of Cabinet that when it makes decisions, only the actual resolutions are recorded but not a record of the conversations, discussions or debates in Cabinet. Dr. Sevele said that this has been the practice for decades and it allows members of Cabinet to freely discuss and express their opinions. Dr. Sevele accepted that the proper practice is for detailed papers to be submitted to Cabinet in advance of meetings that contain sufficient details to enable Cabinet to debate the issue and make an informed decision. That is part of good governance. (T 5586 – 5587)

6.101 The Prime Minister expected that submissions put to Cabinet by Ministers would be accurate, reliable and not misleading. (T 5544 A; T 5590 Q –U) Any submission put to Cabinet by a Minister should enable the Cabinet to make an informed decision. (T 5544 A – D) When asked that if a Minister puts forward submissions to Cabinet which are inaccurate, unreliable and misleading, whether they should be asked to resign, the Prime Minister indicated that it “depends on the severity of the failure”. (T 5591 A –C) When then asked if a Minister of Transport puts forward a submission suggesting that due diligence had been conducted when it had not been conducted, the Prime Minister stated that if “the Minister had intentionally misled Government, Cabinet, then the Minister should be asked to resign”. (T 5591)

6.102 The Memorandum to Cabinet of 20th April 2009, prepared by Mr. Karalus and signed by him and the Minister for Finance, was received in the Prime Minister’s office on the 20th April 2009 as evidenced by the Prime Minister’s Cabinet office stamp. Prior to the Cabinet Decision of 23rd April 2009, the Prime Minister read the documents carefully before Cabinet. The Prime Minister correctly accepted that there was
insufficient information put to Cabinet to enable it to make an informed decision that the MV Princess Ashika was seaworthy or make an informed decision of whether to purchase the vessel or not. (T 5593 P – 5594 C; T 5606)

6.103 The Minister for Finance was also correctly of the view that Cabinet did not have sufficient information before it to make an informed decision to purchase or recommend the purchase of the MV Princess Ashika. (T 5175 S – 5176 B) In fact, the Minister was also of the opinion that even by the time the vessel sank on 5th August 2009, he had not been supplied with sufficient information to make an informed decision on whether the MV Princess Ashika should be purchased or not. (T 5231)

6.104 The Prime Minister was aware, at the time of the Cabinet Decision on 23rd April 2009, that there was no technical data provided to support the conclusion that due diligence had been conducted. (T 5597 I – K) Additionally, although the Memorandum to Cabinet clearly stated that the MV Princess Ashika “has been very well maintained” there was no documentation to support this statement. (T 5597 P – 5598 C) There were also other significant statements made in the Memorandum to Cabinet relating to the MV Princess Ashika which were not supported by any material. (T 5597 – 5598)

6.105 The Prime Minister stated in paragraph 17 of his affidavit that he “emphasised that all due diligence had to be carried out before any vessel was purchased.” (Exhibit 408) The Minister for Finance (Hon ‘Otenifi Afu’alo Matoto) also stated in paragraph 7 of his affidavit in exactly the same words that the Prime Minister “emphasized that all due diligence had to be carried out before the vessel was purchased.” (Exhibit 393) The Prime Minister was given an opportunity to explain why the references in the two affidavits were identical. (T 5611 – 5613) When asked how it was that the wording was identical, the answer was:

“Okay. I was twice, I think, before Christmas, I had a meeting with my counsel, which we discuss exactly the history and all the decisions taken and what might have transpired at Cabinet and two things I said to him. I said as far as that decision was concerned, was always conditional. One, was that due diligence would need to be undertaken and, secondly, if we could source aid funds for the vessel. Upon which he said that’s similar to what the Minister for Finance had told him.” (T 5613 D – G)

6.106 There is clearly a difference between saying that due diligence would need to be undertaken and to have “emphasised that all due diligence had to be carried out before any vessel was purchased”. There is yet a further difference to stating what due diligence is or was required.
6.107 The Prime Minister was asked whether he had any communications with Mr. Karalus prior to the purchase of the vessel in relation to due diligence in terms of e-mails. His response was that “I cannot remember, apart from the due diligence in the paper that was tabled to Cabinet.” (T 5487 F – H) Dr. Sevele was also asked whether he recalled having raised with Mr. Karalus, prior to MV Princess Ashika coming into Tonga in July 2009, the need to ensure that the vessel was properly surveyed. The Prime Minister could not remember raising it with him specifically. However, he said he raised the issue in Cabinet when the submission by Mr. Karalus and the Minister of Finance, dated 20\textsuperscript{th} April 2009, was tabled in Cabinet and that “due diligence was stressed as one of the imperatives to be undertaken.” (T 4587 I – K) On about 19\textsuperscript{th} May 2009, as it transpired, the Prime Minister sent an e-mail to Mr. Karalus as follows:

“Paull

I thoht u hav personaly seen all relv survey results We don’t want any nasty surprises” (Exhibit 429; T 5734)

6.108 When asked during evidence what he recalls saying at the Cabinet meeting on 23\textsuperscript{rd} April 2009 in relation to due diligence, the recollection of the Prime Minister was very poor. Of course, as the Prime Minister indicated, there is no record kept by Cabinet as to what is discussed at Cabinet meetings. Only the actual resolutions are recorded. The Prime Minister was given an opportunity in his affidavit to state what he had said, if anything, about due diligence. He was also given numerous opportunities during the course of his evidence. We are not satisfied that the Prime Minister has any reliable recollection of anything said that would support the conclusion that he emphasised that all due diligence had to be carried out before any vessel was purchased. (T 5609 – 5614; T 5704 – 5706)

6.109 The Cabinet decision of 23\textsuperscript{rd} April 2009, simply provided that the report from the Ministry of Transport on the vessel to replace the MV Olovaha “be noted”. The report of 20\textsuperscript{th} April 2009 expressly and clearly recommended that the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika and that subject to successful completion of this, the Ministry of Finance source funding for the purchase. (Exhibit 408 annexure “D”) The report did not adopt the terminology contained in the recommendation that appeared in the 20\textsuperscript{th} April 2009 report (Memorandum) to Cabinet. Cabinet could easily have done so. It did not. Having said that, the Cabinet decision of 23\textsuperscript{rd} April 2009 did provide as follows:

“2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do
with MV Princess Ashika and because of the urgency of this matter, that necessary deposits and other financial arrangements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet” (Underlining added)

6.110 The Prime Minister was interviewed in August 2009, shortly after the vessel sank at a press conference in Australia. During the press conference, the Prime Minister stated in substance:

“There were two things required by Cabinet. First, that there should be a certificate of seaworthiness and second was insurance. And with these things in relation to vessels, these two go together. There can be no insurance without a certificate of seaworthiness.” (Exhibit 434: T 5762)

6.111 At the same press conference, the concluding statement by the Prime Minister was:

“Our role in this thing is to provide the money which was requested of government to purchase the vessel and to ensure that the condition of seaworthiness and insurance are covered that’s our role as government as a Cabinet we don’t get involved in these details they’re done by different people just like things thing here it’s for you to run I don’t come and tell you which program you should run ok.”

6.112 Although we have serious doubts that the Prime Minister emphasised that all due diligence had to be carried out, we accept that the Prime Minister would have legitimately expected that proper and thorough due diligence would be conducted to ensure that the Government purchase a safe, seaworthy and reliable vessel. Dr. Sevele effectively assumed that due diligence would be properly conducted because it was so fundamental and critical and it would, in his view, go without saying. (T 5610; T 5706) As the Prime Minister put it, the MV Princess Ashika was a large purchase and an important one and as Ministers “we would have understood...that the various aspects of due diligence would be all carried out”. (T 5610 B – D) The Prime Minister was placing his trust and confidence in the Minister of Transport to ensure that the vessel was not purchased unless it was seaworthy and safe. (T 5606) Dr. Sevele was of the opinion that “we wouldn’t accept a vessel that was not suitable or seaworthy to be in Tonga.” (T 5607 B) It was imperative that proper due diligence be conducted including an evaluation by the Government Procurement Committee prior to purchase. (T 5532 J – M)
6.113 It was correctly accepted by the Prime Minister, that Shipping Corporation of Polynesia should not have recommended the purchase of MV Princess Ashika to the Government, or operated the vessel, without having undertaken thorough and independent due diligence. (T 5512 F – H) When asked what due diligence he anticipated would have been done by SCP prior to them making a recommendation to purchase the vessel or operate a vessel, his answer was:

“The normal due diligence that one would have undertaken before making...a purchase of that nature, i.e looking at the technical suitability of the vessel, seaworthiness, other considerations normally a shipping company would make before purchasing a ship.” (T 5513 B – D)

6.114 The Prime Minister accepted that due diligence to be conducted by SCP would have included an independent survey of the vessel, an independent valuation and attaining copies of relevant documents (including survey documents) and have them independently assessed. He expected that it was a fairly basic proposition that SCP should not make a recommendation to purchase the vessel unless effectively the Government was going to get value for money. (T 5513)

6.115 Dr. Sevele properly acknowledged that as the Government of Tonga was purchasing the vessel, the Government needed to conduct its own due diligence independent of SCP. The importance of having independent due diligence was to avoid conflict. (T 5515)

6.116 The Prime Minister was aware that proper due diligence conducted by the Government would include an independent survey, independent valuation and obtaining copies of relevant documents such as survey certificates and assessment of those documents. (T 5515 – 5516; T 5599 – 5601; T 5609 R – T; T 5610 F - I) As Dr. Sevele put it, what had to be done was “all due diligence, all exercises that had to be done in connection with the purchase of the vessel- which is financial, technical, legal. That is what I understand- that is what I understood to be what is required in due diligence.” (T 5704 Q – S)

6.117 Dr. Sevele correctly accepted that due diligence was not completed. (T 5516 – 5517) He said however that the Cabinet decision was “based on the fact that all the due diligent exercises would be carried out and that no purchases would be made until all those due diligence exercises would be completed.” (T 5609 A – C)

6.118 The Government had a duty, as did SCP, as the Prime Minister was aware, to ensure that before MV Princess Ashika sailed and before it was purchased, it had to be
seaworthy, safe and reliable. (T 5517 N – T) However, the Prime Minister accepted from the evidence presented to the Commission that for the whole of 2009, the MV Princess Ashika was not seaworthy and was not safe. It should be appreciated that the Prime Minister had been reading parts of the transcript. Also some reports had been given to him as to what was happening at the Commission and what was being said. (T 5516 P – 5517 C) He conceded that if proper due diligence had been conducted by SCP or the Government, the MV Princess Ashika should never have left Fiji let alone purchased. (T 5518 A – I; T 5581 A – G; T 5601)

6.119 The Prime Minister was aware when Cabinet met on the 23rd April 2009, that the MV Princess Ashika was to provide an essential service to the citizens of Tonga. The Cabinet decision was also being made at a time when he was aware that the MV Olovaha had become unreliable and unseaworthy. (T 5572 – 5573; T 5577; T 5580) Dr. Sevele was fully aware that as the owner of the vessel, the Government had a legal duty and obligation to ensure that unseaworthy vessels were not sent to sea. (T 5580 P – S)

6.120 The Cabinet Decision of 23rd April 2009, expressly provided that a report was to “be later tabled in Cabinet”. The requirement for a report to be later tabled in Cabinet was a very prudent one given, for example, the importance and cost of the acquisition of the MV Princess Ashika. One would have expected a written report to be tabled irrespective of the terms of the Cabinet Decision consistent with the principles of good governance. The Prime Minister went to lengths during the course of his evidence to point out that he expected due diligence was required to be done prior to purchase. Obviously, thorough and proper due diligence was required before purchase and if it had been done the vessel should never have been purchased or operated in Tonga. Dr. Sevele expected that a detailed report would be tabled in Cabinet dealing with the due diligence issue such as to satisfy Cabinet that proper due diligence had been done. As it transpired a report was not tabled to Cabinet relating to any due diligence having been conducted. We are of the view that the only reports were verbal and were to the effect that “the vessel has been bought” and the time that the vessel was expected to arrive. (T 5719 – 5725) It was suggested to the Prime Minister that it was a totally unsatisfactory position for Cabinet to commit to the purchase of the vessel and to make a decision on 23rd April 2009 that a report be later tabled in Cabinet, but a written report had not been produced. The Prime Minister did not accept this. Dr. Sevele said that “there would have been a report in due course but events have taken over”. (T 5723) He also said that “report will come”.

6.121 The Minister for Finance, Hon. ‘Otenifi Afu’alo Matoto, had no hesitation in correctly accepting that no report was ever tabled in Cabinet in conformity and compliance
with the Cabinet decision dated 23rd April 2009. Normally he said there would be a reminder that there is an outstanding report. (T 5226) However, in the case of the report required to be tabled in relation to the MV Princess Ashika, there was never any reminder. This was a major shortcoming, particularly given that the decision being made was a very important one. It was well known to the Prime Minister and others in Cabinet that it was critical that due diligence be conducted and that a safe and reliable vessel be purchased by the Government of Tonga to provide a essential service.

6.122 It was clearly suggested to the Prime Minister that he should have taken a more proactive role in Cabinet to ensure that reports were in fact tabled in Cabinet about due diligence. (T 5724 F) The Prime Minister disagreed. He suggested that “as Prime Minister you’ve got one in a thousand things to deal with” (T 5725 I) and “as Prime Minister you have a thousand things to do. You rely on your Ministers to carry out the decisions of Cabinet”. (T 5727 A)

6.123 Dr. Sevele accepted that Mr. Karalus failed in his responsibilities in that “it appears that due diligence wasn’t done”. He also suggested that others had failed. (T 5727) The evidence is that Cabinet would normally meet once a week. The Prime Minister is the Chairman of Cabinet. He accepted that Ministers need to be accountable and responsible for their actions. (T 5726 G – I) Dr. Sevele also accepted that he was a leader of not only Cabinet, but also the Government and as a leader he needed to ensure that the Government made proper decisions. (T 5726)

6.124 The original Memorandum to Cabinet of 23rd April 2009 prepared by Mr. Karalus provided that the ship could enter service in Tonga during May 2009, in time for the major church conferences. The Prime Minister subsequently anticipated that the vessel would depart Fiji before the end of May and arrive in Tonga in early June. (T 5738 E – L) However, the vessel was delayed and did not arrive until 1st July 2009. The Prime Minister received some advice that the vessel had been delayed. He could not however remember what exactly the advice was or when it was received. He thought that “there was some advice about the boat having to return to Suva.” (T 5738 R – T) The vessel in fact returned to Suva for repairs due to damage caused to the vessel, including to the bow ramp. The Prime Minister was aware at the time that the MV Olovaha, which the MV Princess Ashika was to replace, was unseaworthy and unreliable. (T 5542; T 5572 – 5573; T 5577) He well knew that the MV Princess Ashika was urgently required. This should have put the Prime Minister and all of Cabinet on guard to find out about the condition of the MV Princess Ashika and the results of any due diligence.
6.125 Mr. Karalus was, as the Prime Minister was aware, playing an active role in relation to the prospective purchase of the MV Princess Ashika. Dr. Sevele accepted that Mr. Karalus should have given him an update on whether due diligence had been conducted by e-mail or otherwise, particularly given the Cabinet decision of 23rd April 2009. The Prime Minister also correctly agreed that Mr. Karalus had plenty of opportunity to advise him on what due diligence had been conducted or not conducted. Mr. Karalus clearly should have done so. (T 5742 – 5743)

6.126 When suggested to the Prime Minister effectively that he should have insisted that Mr. Karalus provide him with information on what due diligence had been conducted or not conducted, Dr. Sevele answered as follows:

“Well, I guess it’s the same with the – they communicated with me, he and the Minister, and at the time, as I said, I was overseas. I mean, to me, that was their responsibility. They had to come to me for certain decisions or my views. I’d come back to them on that.” (T 5743 H – I)

6.127 The Prime Minister sent and received many e-mails when he was overseas, including communicating with Mr. Karalus and the Minister for Finance about the MV Princess Ashika. Dr. Sevele would normally check his e-mails, even when overseas, on a daily basis (Exhibit 429; 430 and 432; T 5735 – 5741; T 5484 O – Q)

6.128 Clearly, the Prime Minister should have insisted that reports were tabled in Cabinet in relation to the MV Princess Ashika addressing, for example, what due diligence had been conducted in relation to the vessel and the results of such due diligence. It must be remembered that the vessel did not arrive in Tonga until the 1st July 2009 and sank on 5th August 2009 on the fifth and final voyage in Tonga. Thus, even if due diligence had been conducted and reported to Cabinet up to just prior to departure on the 5th August 2009, Cabinet could have taken steps to prevent the vessel from sailing and averted that tragedy.

6.129 Notwithstanding the clear Cabinet decision of 23rd April 2009 relating to the purchase of MV Princess Ashika that “a report be later tabled in Cabinet”; the Prime Minister’s clear understanding (for very good reason) that the MV Princess Ashika should not be purchased without due diligence; the fact that the Prime Minister was “always mindful of the need to maintain a safe and reliable ferry service”; the MV Olovaha being allowed to operate in an unsavoury and unreliable condition; the requirement for the MV Princess Ashika to return to Fiji because it was damaged on the attempted voyage to Tonga in June 2009; concerns raised in Parliament on 9th June 2009; good governance and common sense, no report was tabled in Cabinet in
relation to any due diligence that had been conducted. No proper due diligence was, of course, ever conducted in relation to the MV Princess Ashika.

6.130 It is not surprising, given that the vessel was never seaworthy and that there was a failure to undertake due diligence, that the Prime Minister accepted that the deaths were senseless. (T 5789 J – N) Tragically, the deaths could have been very easily avoided. The Prime Minister correctly accepted that there had been failings at various levels including of Government and Government owned enterprises and at the end of the day they must accept responsibility in part for the disaster. (T 5779)

E-mail Communications

6.131 The Prime Minister was served personally with a summons dated 11th January 2010 to produce documents. Dr. Sevele read the summons and understood the requirements of it, including as to the production of documents such as e-mails. (Exhibit 418; T 5481 – 5482) The Prime Minister checked his affidavit before swearing it and attached documents which he considered as relevant. (T 5479) No e-mails were ever produced to the Commission by the Prime Minister, either attached to his affidavit or otherwise.

6.132 The Prime Minister accepted that he sent and received e-mails in relation to the MV Princess Ashika prior to purchase. (T 5482 D – F) When asked whether he had sent and received e-mails subsequent to purchase he said that he was “not sure, subsequent to purchase is of relevance to the inquiry.” On being questioned as to whether he accepted that there were e-mails sent by him or to him prior to the vessel coming to Tonga in July relating to the MV Princess Ashika, he stated “I think there would have been”. Dr. Sevele said “until the e-mail produced to me over the weekend, or last week, I couldn’t remember any that were of direct relevance to the Commission and to the Ashika that were not covered in what I had tendered.” (T 5482 K) The Prime Minister accepted that there were e-mails sent by him or to him of direct relevance to MV Princess Ashika. Dr. Sevele responded when asked whether he accepted that there are fairly critical e-mails for the purposes of the Commission (that had not been produced):

“Sure, sure. Now, now, I accept that.” (T 5735 S)

6.133 Over the week prior to Dr. Sevele giving evidence on 23rd February 2010, his Counsel reinforced the need to produce e-mails to the Commission in response to the summons to make sure that all relevant e-mails were produced. (T 5736) Despite this, no e-mails were produced by the Prime Minister.

6.134 Dr. Sevele did not attach any e-mails whatsoever to his affidavit (Exhibit 408), nor did he produce any e-mails in response to the summons served on him. When asked
whether he accepted that a thorough search had not been done to locate certain e-mails, his response was “possibly”. (T 5483 L – N) It was suggested to the Prime Minister that he was well aware that he had sent e-mails or received e-mails relevant to MV Princess Ashika that should have been produced when he prepared his affidavit. The response by the Prime Minister was “No, I don’t”. (T 5483 M – Q) The Prime Minister should have been aware.

6.135 E-mails should have been produced pursuant to the summons served on the Prime Minister. There was no valid excuse given by the Prime Minister for the failure to produce e-mails sent by or to him in relation to the MV Princess Ashika, including e-mails in May 2009.

6.136 It should be appreciated that the Prime Minister was away overseas from 13th May to 25th May. (Exhibit 432) However, his evidence was to the effect that he would normally check his e-mails on a daily basis, even when overseas relating to the MV Princess Ashika. (T 5484) This is clear by reason of the fact that he responded to e-mails when he was overseas. (Exhibit 429 and 430) The Prime Minister indicated that effectively he would check his e-mails himself, and if there are attachments he would normally forward it to staff to download. (T 5730 S – 5731 B) In any event, the fact that the Prime Minister was overseas did not excuse him from failing to produce the e-mails in accordance with the summons. Because the Prime Minister was overseas during part of May 2009, the dates of some of the e-mails may not be in accordance with the dates in Tonga.

6.137 On about 18th May 2009, an e-mail was sent by, Mrs. Kalesita Taumoepeau, the Personal Assistant to the Minister of Transport to Mr. Rob Solomon. (Exhibit 353) Mr. Solomon is the economic adviser to the Prime Minister. (T 5731 H) The e-mail and attachments were copied to the Prime Minister, Minister for Transport and Mr. Jonesse of SCP. The e-mail stated relevantly:

“Please find attached two documents (MV Princess Ashika 1 and MV Princess Ashika 2) comprising of documents relevant to purchase of the respective vessel.” (Exhibit 353)

6.138 The e-mail had a number of important documents attached to it, including an unsigned Sale and Purchase Agreement. The agreement had been signed by Mr. Karalus on 8th May 2009.

6.139 On about 18th May 2009, Mr. Karalus sent an e-mail to the Prime Minister which stated as follows:

“PM
Dominic advises that the deadline to include the vessel in end of year financing from residues has passed. However, he advises to take it up with the Minister. He also advises they intend to include it in next year’s budget, but on being asked if it can be retrospective as we have to pay to effect delivery (after sea trials in Fiji over the next two weeks) he said they cannot fund retrospectively but again to take it up with the Minister. No further word from AusAID due Debbie on leave.

Paul.” (Exhibit 429)

6.140 On the same day, Mr. Solomon from the Prime Minister’s office, sent an e-mail to Mr. Karalus and copied it to the Prime Minister. The subject of the e-mail was “NZAid re vessel”. The contents of the e-mail was as follows:

“Hi Paul
Ignore Dominic’s stuff about next year. Please send me all info on the boat, when it was surveyed etc. We can meet on Wednesday to discuss what we need to send to NZAid. PM had asked me to discuss with Craig Hawke this funding and he has given verbal approval based on the ship having current survey, etc Malo
Rob” (Exhibit 429) (Underlining added)

6.141 Mr. Karalus instructed his Personal Assistant to follow up the e-mail with Mr. Jonesse and scan and e-mail the information to Mr. Solomon. (Exhibit 429)

6.142 On about 18th May 2009, Mr. Karalus forwarded an e-mail to Mr. Jonesse, Mr. Solomon and his Personal Assistant. It was also copied to the Prime Minister. The e-mail stated:

“John
What do you have in electronic form on the survey etc of the vessel? Ideally bring the relevant parts of the file and Sita here can scan and email them to Rob this morning.
Paul” (Exhibit 429)

6.143 On about 19th May 2009, the Prime Minister promptly responded to the e-mail of 18th May 2009, which had been copied to him. The exact terms of the e-mail sent by the Prime Minister to Mr. Karalus were as follows:

“Paull

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6.144 On about 20\textsuperscript{th} May 2009, Mr. Karalus responded to the e-mail from the Prime Minister which had provided to the effect that he had thought that Mr. Karalus had personally seen all relevant survey results and that “we don’t want any nasty surprises”. The response by Mr. Karalus was:

“PM
The query to John was to find out what was in electronic form for forwarding to Rob as he seemed to need it in a hurry. I had seen all the hard copies. In the end we scanned all the hard copies and forwarded to Rob.
Paul” (Exhibit 429) (Underlining added)

6.145 The Prime Minister said, during the course of his evidence, that he could not remember raising specifically with Mr. Karalus prior to the vessel coming to Tonga in July, the need to ensure that the vessel was properly surveyed. He said however that he raised the issue in Cabinet when the submission from Mr. Karalus and the Minister of Finance was tabled on 23\textsuperscript{rd} April 2009. (T 5487 J)

6.146 The Prime Minister believed, at the very least, that he had been told by Mr. Karalus that he had personally seen all relevant survey results. The Prime Minister correctly accepted that if the survey results had been properly checked there would have been no nasty surprises. Dr. Sevele accepted that if Mr. Karalus had not seen all the hard copies of the survey results then he had been misled. In such case, the Prime Minister properly acknowledged that the magnitude of such misleading conduct would ultimately lead to the inescapable conclusion that he would have to call for Mr. Karalus to resign. (T 5734 – 5735) Mr. Karalus accepted that even to the time of his giving evidence on 25\textsuperscript{th} February 2010, he had not seen any survey documents in relation to MV Princess Ashika. (T 6037 – 6038)

6.147 Mr. Karalus misled the Prime Minister in his e-mail of 20\textsuperscript{th} May 2009 as he had not seen hard copies of all relevant survey results. (T 6037 – 6038) Significantly, the Prime Minister in his e-mail of the 19\textsuperscript{th} May 2009 was alerting Mr. Karalus to the importance of seeing all relevant survey results to avoid “any nasty surprises”.

6.148 On about 21\textsuperscript{st} May 2009, Mr. Karalus sent an e-mail to the Prime Minister and Mr. Solomon, which was copied to the Minister for Finance. The subject of the e-mail was “vessel update”. (Exhibit 430) The e-mail was also sent to Mr. Solomon of the Prime Minister’s Department. The e-mail provided:
“PM and Minister

Re the MV Princess Ashika. We have a First Mate and Motorman travelling to Fiji tomorrow for one week of sea trials with the vessel while it conducts normal runs to Levuka. Then next Friday we plan to send a Master and a further crew to assist the Fiji crew for the delivery over that weekend. This means we need to try for settlement by the end of next week. Settlement is required before the vessel is released as the owners are not interested in a lease arrangement as there are other interests.

In the Bid of Sale Agreement the deposit is refundable if there is no settlement.

The amount of settlement is FJD 510,000. There will also be bunker costs for the delivery as well and probably a few other costs. The modifications we will do here spread over a couple of voyages.

There is a cargo being put together for the delivery and with something over a week left we are keen to carry as full a load as possible.

Rob.

Do you think we can have NZAid on board by next Friday?

If not, do we have alternative funding available?

Paul.” (Exhibit 430)

6.149 The contract for the purchase of MV Princess Ashika was signed by Mr. Karalus on the 8th May 2009. The contract was a cash unconditional contract. (Exhibit 417) The deposit of FJD$90,000 was paid on 8th May 2009. The balance FJD$510,000 was paid by telegraphic transfer to Fiji on 5th June 2009. There was no Bill of Sale Agreement signed, as stated by Mr. Karalus in his e-mail. There was no legal basis to suggest that the deposit was refundable if there was no settlement.

6.150 On about the 21st May 2009, the Prime Minister responded to the e-mail of Mr. Karalus on the same day. The e-mail was sent to Mr. Solomon and copied to the Minister for Finance, the Chief Secretary and Secretary for Cabinet and the Deputy Secretary for Foreign Affairs. (T 5740) The e-mail stated:

“What is FJD510 K in NZD? About NZD500 K?”
Rob, what is the latest feedback from NZAid? Pls let me know asap. We will be seeing the NZders tomorrow at Hokkaido –Craig H, Chris Seed and McCully and would like to have it finalized one way or other before we leave here.

The only other source of funding is for the Min of Fin to advise us on. In the meantime, Paul, Shipping Corporation of Polyn should be asked to give us/Fin a projected cash flow as they will have to pay for it; additionally there should be a plan for them to start putting away some funds from the word go for repairs etc.

PM” (Exhibit 430)

On about 21st May 2009, the Minister for Finance (Hon. ‘Otenifi ‘Afu’alo Matoto) responded by e-mail to the Prime Minister (which was also sent to the Minister for Transport, Mr. Solomon and the Chief Secretary). The e-mail provided:

“Dear PM

If NZAid cannot assist then we can use funds from the China grant in relation to Tongasat and we have almost Top$9.0m left after the transfer of Top$15.0m to start the Disaster and Emergency Find. I understand that there are already plans for the management and operations of the boat. The Government will own the boat and will lease it to SCP at say T$125,000pa payable monthly and SCP can still operate the boat at a profit. The Minister for Transport has all these information.

Afu” (Underlining added) (Exhibit 430)

The Prime Minister responded promptly to the e-mail from the Minister for Finance, which was also sent to the Minister of Transport, Mr. Solomon and the Chief Secretary and Secretary for Cabinet. The e-mail stated:

“Dear Afu

Thanks very much for that info – great to know we can do it without too much trouble, and thanks for the forward planning on that..I will push for the NZders to fund it, and lets hope they will be able to do it

Fred/PM”
On about 25th May 2009, Mr. Karalus sent an e-mail to the Prime Minister and to Mr. Solomon. The e-mail was copied to the Minister of Finance and the Chief Secretary and Secretary for Cabinet. The e-mail was in the following terms:

“PM

SCP have provided this to MPE and have perused it and agreed that this purchase is the best option. I am not so sure of the lease rate, Minister of Finance suggested something in the region of 175,000 p.a. and I think this is realistic, though SCP would obviously prefer a lower rate; however, they need to start looking at revenue opportunities that this vessel can generate.

I presume u got the exchange rate from Rob; my email address is only now back in action.
Paul.” (Exhibit 431) (Underlining added)

Notwithstanding the reference to a lease rate of “say T$ 125,000 p.a.” payable monthly and a “realistic” figure of $175,000 p.a. in the e-mails sent to the Prime Minister by Mr. Karalus, he personally sent an e-mail to Mr. Jonesse on 2nd July 2009 stating:

“Dear John

As per our on-going discussions please be advised that the Ministry of Transport agrees to the operation of the MV Princess Ashika for the month of July for the fee of $5,000. During this period the full terms and conditions of a lease agreement are to be conducted and concluded. During this month the SCP is to ensure full compliance with the laws of the sea and port management and the operation of the vessel as per the survey documentation. This interim will also allow us to negotiate a charter rate

Happy sailing!!

Paul” (Exhibit 29 page 68)

In the affidavit sworn by the Prime Minister on 8th February 2010, he deposed:

“After the decision taken by Cabinet on 23 April 2009, I had nothing further to do with the purchase of the MV Princess Ashika. I did not know that no survey documents had been supplied by the Fiji Ministry, that Mr Jonesse had put Mr Shaw’s name to the report said to be provided by him and that there had been no survey conducted of the vessel by the Ministry of Transport or any independent surveyor on behalf of the Ministry to establish its seaworthiness. I only became aware of these matters after evidence had been heard about
them in the Royal Commission.” (Underlining added) (Exhibit 408 paragraph 20)

6.156 The Prime Minister rightly accepted that the e-mails sent to him by Mr. Karalus demonstrated that Mr. Karalus played an active role in relation to the prospective purchase of the MV Princess Ashika. (T 5742) Dr. Sevele gave evidence in relation to various e-mails in relation to the MV Princess Ashika (T 5730 – 5745)

6.157 On about 6th August 2009, Commander Lupeti Vi forwarded an e-mail to the Prime Minister in relation to the tragedy. It was in Tongan. The translation of the e-mail was as follows:

“Honourable Prime Minister

I respectfully inform you of the tragedy of the vessel Princess Angelica.

After consultation with Shipping Corporation and the Navy, it is now clear that there was a total of 93 passengers including crew that were onboard the vessel. There were 31 crew and 62 passengers. It has been confirmed that 25 passengers, 28 crew, 53 in total were rescued and have been transported to Pangai on board the Pulupaki. Search is still continuing.

Respectfully,
Commander Lupeti Vi” (Exhibit 170)

6.158 On the same day, the Prime Minister e-mailed his response which stated:

“Lupeti

Thanks for info. Sad tragedy Let’s hope they will pick up some more survivors. Pls keep me posted

PM” (Exhibit 170; T 5754)

6.159 The Prime Minister departed Tonga on the 1st August 2009 and returned on the evening of 8th August 2009. (Exhibit 432) He was in Cairns, Australia at the time of the tragedy. He had been attending the 40th Pacific islands Forum Leaders meeting. (Exhibit 408 paragraph 25; T 5752)
On about 10th August 2009, the Prime Minister forwarded an e-mail to his economic advisor, Mr. Rob Solomon which stated:

“Rob

I was told this evening that Gerard Winter came here, whilst I was meeting with the Manukau Mayor and his team, insisting to see me to give me a message from you that I should force Paul to resign or sack him or words to that effect.

I was far from happy at this and I want simply to say that this kind of advice, if it did come from you, and the manner in which it was to be conveyed to me, is totally out of order. I cannot force ministers or anybody for that matter to resign until I am satisfied that he/she has clearly transgressed. I do value your advice almost always, but not this kind of advice.

Fred” (Exhibit 436; T 5764 – 5765) (Underlining added)

The Prime Minister accepted that on the basis of the evidence, Mr. Karalus clearly transgressed in relation to the circumstances surrounding the purchase of the MV Princess Ashika. (T 5765 K – P) He was the Minister for Transport responsible for preparing and submitting the Memorandum to Cabinet of 20th April 2009 in relation to MV Princess Ashika wherein he stated that the vessel “had been very well maintained”. He signed the contract for the purchase of the vessel and was instrumental in ensuring that the vessel was in fact purchased and operated in the Kingdom of Tonga. At least 74 people died from the tragedy. The Prime Minister was fully aware that Mr. Karalus played a very active role in relation to the prospective and actual purchase of the vessel. (T 5724 J – L) Despite the very stern e-mail of 10th August 2009, by the Prime Minister, the advice seemingly given by Mr. Solomon, to be conveyed by Mr. Winter, that he should force Mr. Karalus to resign or sack him, was understandable in the circumstances. Mr. Karalus clearly had no other reasonable option but to resign.

It is apparent from Exhibits 170; 353, 429, 430; 431 and 436 that it was incorrect for Dr. Sevele to depose in paragraph 22 of his affidavit that “after the decision taken by Cabinet on 23rd April 2009, he had nothing further to do with the MV Princess Ashika”. Dr. Sevele clearly had involvement in relation to trying to ensure that funding was available to enable the purchase of the MV Princess Ashika. Critically, he was also aware of the fact that it was important that the ship had a current survey and that all relevant survey results should be seen. (Exhibit 429)
The Contract for the Purchase of MV Princess Ashika and the Government Procurement Committee

6.163 The Government Procurement Committee has been in existence for a number of years and was established to ensure that contracts were not entered into that were disadvantageous to the Government. (T 5711 – 5712) The members of the Committee were Hon. ‘Afu’alo Matoto (Minister of Finance and Planning/Chairman), Mr. Sione Taumoepeau (Director of Works and Deputy Chairman), Mr. Pohiva Tu’ionetoa (Auditor General), Mr. Sefita Tangi (Commissioner of Revenue), Mr. ‘Aminiasi Kefu (Solicitor General) and Mr. ‘Aisaike Eke (Secretary for Finance and Planning). Dr. Sevele properly conceded, one time during his evidence, that the Procurement Committee should have considered the prospective purchase of the vessel prior to the contract being signed and made their recommendations prior to the signing of it. All Cabinet members knew this and it was part of the process of good governance. (T 5535 P – 5536 G) The Procurement Committee was part of the required “checks and balances” and part of the due diligence process. (T 5606)

6.164 The Prime Minister acknowledged that as part of the completion of due diligence in relation to the decision by Cabinet of 23rd April 2009, “there was no suggestion that normal procedures including approval by the Government Procurement Committee would not be followed.” (Exhibit 408 paragraph 19) This implies that the Prime Minister well knew that normal procedures, including approval by the Government Procurement Committee, needed to be attended to before the purchase was entered into. He obviously was so aware from his evidence.

6.165 The Prime Minister accepted that the Government has to be accountable for the payment of public funds and that the payment of the FJD$90,000 deposit was a substantial amount of money for the Government to pay. Those funds were public funds. (T 5716)

6.166 The contract for the purchase of MV Princess Ashika was signed by Mr. Karalus and at his request, Ms. ‘Eleni Mone the Acting Secretary for Transport on 8th May 2009. (Exhibit 477) By 8th May 2009, the contract had also been signed on behalf of Patterson Brothers Shipping Company Limited, who were the vendors under the contract. (Exhibit 417) The FJD$90,000 initial deposit was paid on 8th May 2009 by telegraphic transfer to the trust account of the lawyers of the vendors in Fiji. The balance FJD$510,000 was paid on the 5th June 2009.

6.167 The contract, as signed on 8th May 2009, was a cash unconditional contract. It was clear from the terms of the contract that there was a contractual obligation on the Government of the Kingdom of Tonga to purchase the vessel for FJD$600,000, made
up of initial deposit of FJD$90,000 and the balance of FJD$510,000 on the settlement date. (Exhibit 417) The contract expressly provided in the terms of conditions, by clause “c” as follows:

“The Purchaser acknowledges and declares that it has fully inspected the ship on an “as-is-where-is” basis and that it relies entirely on its own judgment without any warranty or representation (save as herein mentioned) and that no error or mis-description of the “condition, “merchantability”, “fitness for purpose”, and “state of repair” of the Ship shall annul this agreement or entitle it to any damages or compensation or abatement of the Price.

The Purchaser will take the Ship on the Settlement Date on an “as-is-where-is/walk-in-walk-out” basis but without any liabilities (unless expressed in this Agreement)” (Exhibit 417) (Underlining added)

6.168 Counsel for the Prime Minister in his written submission, at paragraph 44, said that it was accepted that the Sale and Purchase Agreement signed by the Minister of Transport and the Acting Secretary of Transport on 8th May 2009 was inadequate to protect the interests of the Government of Tonga. He correctly submitted that the agreement was completely one-sided in that the vendors expressly denied any warranty or representation as to the vessel’s condition, fitness for purpose or state of repair. The Prime Minister rightly acknowledged that it would be intolerable that a responsible Minister, in Mr. Karalus’s position, would commit the Government of Tonga to the purchase of Ashika irrespective to the condition of the vessel. (T 5523) Of course, the evidence establishes that Mr. Karalus did commit the Government of Tonga to the purchase of the vessel irrespective of its condition.

6.169 In terms of the payment obligation, the balance of FJD$510,000 was required to “be paid by the Purchaser to the Vendor by such means as agreed at the Settlement Date.” The expression “the Settlement Date”, pursuant to the contract, meant “the date of this agreement or such other earlier or later date as the parties may mutually agree in writing.” There was no other date mutually agreed in writing until, at the earliest, the 4th or 5th June 2009. On that date Mr. Jonnesse was in Fiji with Mr. George Patterson. At that time, they inserted on the contract which had been entered into on 8th May 2009 against “settlement date” the 5th June 2009. Counsel for the Prime Minister correctly submitted in paragraph 46 of his written submissions dated 9th March 2010, that a date “earlier or later” than the date of the agreement had not been mutually agreed in writing. Accordingly he correctly submitted that the balance of the purchase price, as well as the deposit, was payable on the 8th May 2009 being the date of the agreement.
6.170 Dr. Sevele was asked questions about the contract having been signed prior to it being submitted to the Government Procurement Committee. The Prime Minister refused to assume, although it had been clearly established in evidence and he had been asked by Counsel Assisting to assume it to be a fact, that the contract was signed on the 7th or 8th May 2009. (T 5715) The Prime Minister also sought to suggest that the contract was not valid because it did not have a date on it. (T 5714 M) His own Counsel conceded the contract was valid.

6.171 It was suggested to Dr. Sevele that one would not normally pay a substantial deposit unless a contract is signed. The Prime Minister did not accept this obvious proposition. (T 5715 – 5716) Given his immense business experience, his refusal to accept this was an indication of what, in many cases, reflected his attempts to deny reality. Ultimately the Prime Minister accepted that a contract in some form, even by an exchange of letters, would have to have been entered into prior to the purchase of the deposit. (T 5717)

6.172 On any rational and reasonable construction of the contract, as of 8th May 2009, there was a contractual obligation on the Government of the Kingdom of Tonga to:

- pay the entire FJD$600,000 by the 8th May 2009;
- pay the purchase price irrespective of the condition, merchantability or fitness for purpose of the vessel

6.173 The Prime Minister gave evidence to the effect that the balance purchase price should not have been paid if the contract had not been approved by the Government Procurement Committee. (T 5525 – 5527) Consistent with this, Counsel for the Prime Minister in paragraph 43 of his written submissions of 9th March 2010 contended:

“The last member of the Government Procurement Committee to sign the circular as approving the purchase was the Minister of Finance on 29 May 2009, a number of days before payment of the balance of the purchase price on 5 June 2009. The Ministry of Finance would not have paid the balance of the purchase price if the purchase had not been approved by the Government Procurements Committee. To that extent, the Government did not seek to usurp or bypass the normal procurement processs.”

6.174 The contract for the purchase of MV Princess Ashika entered into by Mr. Karalus and Ms. Mone on behalf of the Government was entered into contrary to the Government Procurement Instructions, which was produced by the Prime Minister during the course of his evidence. He was thus familiar with it. Clause 19 of the
Government Procurement Instructions appears under the heading “Contractual Agreement”. It provides:

“All form of contract or agreement including any for development projects shall be submitted to the Government Procurement Committee for review and endorsement before signing by all relevant parties” (Exhibit 428) (Underlining added)

6.175 It is most disturbing that the Prime Minister and the Government would contemplate, let alone take the attitude that, notwithstanding the clear terms of the contract entered into on behalf of the Government that they would simply ignore the clear contractual obligations to pay the purchase price.

6.176 As Counsel for the Prime Minister accepted in paragraph 37 of his submissions, the Government Procurement process “broke down”. The contract should never have been entered into without it having been submitted to the Government Procurement Committee for their consideration and recommendation. This was not done.

6.177 Dr. Sevele rightly accepted that it was imperative that proper due diligence be conducted prior to the purchase of the MV Princess Ashika and that included an evaluation by the Government Procurement Committee. (Exhibit 393 attachment Exhibit 6; T 5532 I – M) The circular sent to the members of the Government Procurement Committee was only circulated by the Secretariat on the 13th May 2009. The process was that it was sent to one member of the Procurement Committee, who would look at the matter and then forward it to another member.

6.178 The Minister for Finance was of the opinion that it would, “probably be a fair judgment” on their part, of those members of the Procurement Committee to have formed the view that Cabinet had already decided to purchase the vessel based on the Cabinet decision. (T 5225; T 5239 A – C)

6.179 The evidence clearly establishes that despite the cash unconditional contract being signed on 8th May 2009 and the FJD$90,000 deposit being paid on the same date, the members of the Government Procurement Committee only made their recommendations in respect of the purchase between the 20th and 29th May 2009. By the time the matter had been sent to the Government Procurement Committee, the Government had a clear legal obligation to pay the FJD$600,000 irrespective of any recommendations from the Government Procurement Committee and irrespective of the condition or value of the MV Princess Ashika. Although the Prime Minister would not concede the obvious clear legal obligation, the Minister for
Finance (who was on the Government Procurement Committee) had no difficulty accepting that this was so. (T 5281)

Parliamentary Debate on 9\textsuperscript{th} June 2009

6.180 On 9\textsuperscript{th} June 2009, the Legislative Assembly was in session at Nuku’alofa, Tongatapu. (Exhibit 402 and 403) The Prime Minister was present in Parliament that day. (T 5745) The Prime Minister remembers that concerns were raised by the People’s representative, Mr. ‘Akilisi Pohiva, about the replacement vessel. Another People’s representative, Mr. Teisina Fuko, said in Parliament something like:

“Just some assistance Mr. Speaker. I have heard that Fiji is very happy about this very old vessel being bought. Because they don’t have a vessel. They hire vessels from other countries to operate in Fiji. But they are glad that Tonga came over and bought what is to be taken for scrap metal. To leave this but do that.” (Exhibit 403)

6.181 The Prime Minister said that he heard what the Member, Mr. Fuko said in Parliament. (T 5746) The Prime Minister stated that he had “always been mindful of the need to maintain a safe and reliable ferry service between Tongatapu and the other Tongan islands.” (Exhibit 408 paragraph 10) The Prime Minister valued Mr. Fuko’s judgment and opinions. (T 5747) His respect for Mr. Fuko was such that Mr. Fuko was made a Minister after the MV Princess Ashika sank on 5\textsuperscript{th} August 2009.

Visit by the Prime Minister to Fiji in June 2009

6.182 The Prime Minister deposed to his visit in Fiji in his affidavit and also gave oral evidence on the subject. (Exhibit 408) In paragraphs 21 – 24 (inclusive) the Prime Minister deposed:

“21. I note that on 10 December 2009 when he was giving evidence to the Royal Commission (page 1942) the Captain of the MV Princess Ashika, Viliami Tuputupu, said that he had met Mr. George Patterson in Fiji in June when he went to pick up the vessel. He said he was told by Mr Patterson that I was going to St John’s the following week for the school centenary. Later (page 1972) he said he was also told by Mr Patterson that when I came to St John’s, I always came and sailed on the MV Princess Ashika from Natovi to the island on which St John’s was located.
22. I am also aware of comments on public websites such as 3 News in New Zealand to the effect that Mr George Patterson is a long term school friend of mine from Fiji. However, I do not know George Patterson and have had no dealings with him or was involved in any way in the negotiations for the purchase of the MV Princess Ashika.

23. As noted above, I spent four years between 1958 and 1961 in Fiji as a student at the St John’s College, a Roman Catholic secondary school located in Cawaci on the island of Ovalau, 60 kilometres northeast of the capital Suva and 20 kilometres off the east coast of Viti Levu. Levuka, Fiji’s former capital, is the largest of 24 towns and villages in the island. The island is serviced by ferry which runs between Levuka, Natovi and Suva.

24. I confirm that I travelled to Fiji in mid-June 2009 for the purpose of attending a reunion of former students at St John’s College. I sought and obtained leave from Cabinet to be absent from Tonga for that purpose. I departed Tonga on Thursday 11 June 2009 on flight NZ27 to Auckland. From Auckland I travelled to Nadi and then on to Suva in the evening of 11 June 2009. That evening I met with Commodore Frank Bainimarama in the Holiday Inn at Suva. Early the next morning, 12 June 2009, I travelled to Natovi where I and hundreds of former students caught a ferry to Levuka. I am advised that the ferry I travelled on was the MV Spirit of Harmony. I did not travel on the MV Princess Ashika and have never travelled on board the MV Princess Ashika. I was then the chief guest at the school reunion. On Monday, 15 June 2009, I flew to Nasouri to catch a flight to Tonga. I arrived back in Tonga on 15 June 2009 on flight FJ271.”

6.183 Dr. Sevele said in his evidence that he had not met any George Patterson at school and he did not go to the same school as him. (T 5479; T 5595) The Prime Minister had heard of the Patterson Brothers. He first heard of them when he was a student in the late 1950s or 1960s in Fiji and knew who they were at the time. (T 5594 – 5595)

Causes of the Disaster and Proposals to Prevent the Future Occurrence of a Similar Disaster

6.184 The Prime Minister was given an opportunity to state what he considered was the cause or causes of the disaster. He said:
“The - some of the causes would include the fact that the vessel was not seaworthy, that there were failings at various levels, and carrying out all the necessary due diligence, the failure to conduct the proper assessment as required by the procurement policies. They’re some of the reasons.” (T 5518 N – P)

6.185 When asked about the “various levels” referred to, Dr. Sevele answered:

“I’m talking about the levels who were responsible for undertaking the various due diligence as to the seaworthiness of the vessel, as to the value of the vessel, as to its suitability to Tonga, proper valuation. (T 5518 R – S)

6.186 The Prime Minister accepted that this would include “the various levels of Shipping Corporation” and the Ministry for Transport. (T 5519; T 5779)

6.187 Dr. Sevele did not agree that there was a systemic failure which caused in anyway the disaster. He said:

“I wouldn’t say it’s a systemic failure. The system was there. The laws were there. The policies were there, procedures were there. It was human failures of people not complying with the responsibilities they had to undertake under those laws, policies, procedures.” (T 5520 L – N)

6.188 There was clearly a systemic failure which, had it not occurred, would have resulted in the MV Princess Ashika not having been purchased and not operated in Tonga.

6.189 In the case of MV Princess Ashika the Prime Minister acknowledged that the mistakes associated with its purchase, including the failure to conduct due diligence, unfortunately had horrendous consequences. (T 5779 D – F) He considered that those who were supposed to have done things did not do what they were supposed to have done. (T 5792 E) He accepted that at the end of the day, the Government must accept responsibility in part for the purchase of the vessel and the subsequent disaster.

6.190 It was “obvious” to the Prime Minister that there were a lot of mistakes that seemed to follow the fact that due diligence was not carried out. (T 5798 S – 5799 B) This supports the fact that the Prime Minister, as Chairman of Cabinet, given also that he was aware of the importance of due diligence being conducted prior to purchase, should have insisted that a report was tabled to Cabinet dealing with due diligence issues relating to the MV Princess Ashika. The Cabinet decision of 23rd April 2009 expressly provided that there was a requirement for “a report be later tabled in Cabinet”. (Exhibit 408 annexure “F”)
When it was suggested to the Prime Minister that in the future, if the Government was considering the purchase of another vessel, he would be more rigorous in ensuring that proper due diligence was in fact conducted, his response was:

“I guess all of us would in government and other government-owned enterprises” (T 5779 J – M)

Dr. Sevele indicated that it was “logical” that he would be more rigorous in assessments and requirements in the future. (T 5780) He would support the Secretariat of the Pacific Communities auditing the Marine and Ports Division of the Ministry of Transport and the Tonga Maritime Polytechnic Institute (TMPI) as soon as reasonably possible. (T 5522 A – G)

The Prime Minister acknowledged the failings which had happened at various levels of Government and at the Shipping Corporation of Polynesia. (T 5806 Q – S) He stated:

“As has been said time and again, the tragedy should never have happened. I do believe that government did and do have clear laws, policies and procedures which, if faithfully complied with, would have resulted in the Ashika not having been bought and thus prevented the tragedy. Further, I do believe that everyone acted with the best of intentions and no one intended this tragedy to occur. But occur it did due to human failings.” (T 5807 A – C)

Moving forward, the Prime Minister acknowledged that one needed to assess what the problems are before they could be addressed. (T 5522) This obviously requires a realistic and detailed examination and analysis of all matters pertaining to the prospective and actual purchase of the MV Princess Ashika, as well as the operation of the vessel in Tonga.

On 4th September 2009, Ms. Mone signed a Memorandum to Cabinet, as did the Acting Minister for Transport (Lord Nuku). It sought Cabinet approval on recruitment relating to critical staffing and resources, said to be essential to the functions of the Ministry of Transport. It had an appendix attached to it which set out resources urgently required for the Ministry of Transport operation. (Exhibit 366; T 4760 – 4762; T 4769; T 4770)

On 8th September 2009, Ms. Mone received a Savingram from Chief Secretary and Secretary to Cabinet (Mr. Busby Kautoke). The Savingram was in response to the Cabinet submission relation to “Critical Staffing and Resources for the Ministry of Transport”. The Savingram stated that:

“Please be advised that your above submission to the Cabinet meeting of this week has been taken out from the Agenda by the Hon. Prime Minister and
has requested that your office kindly take this matter up with the Public Service Commission and the Ministry of Finance, in the usual way.

Similar direction was made to an earlier similar submission from the Ministry of Lands, Survey and Natural Resources. You may also look up the change of policy of staff management by financial allocations.” (Exhibit 366)

6.197 Within a couple of weeks of the preparation of the 4th September 2009 Memorandum to Cabinet, Ms. Mone raised concerns about the matters contained in the Cabinet Memorandum not being attended to. The response from Lord Nuku was that he would raise it in Cabinet and with his Ministerial colleagues. Apart from Lord Nuku telling Ms. Mone in September 2009 that he had spoken to his Ministerial colleagues, no further response was forthcoming to the urgent request for assistance. (T 4760)

6.198 It is clear that the Ministry of Transport is under-resourced and it is regrettable that request for urgent assistance has effectively been ignored. That does not mean of course, that all the requests made by Ms. Mone should be met. However, it is at least deserving of consideration and discussions with her, given that it is a recommendation by the Secretary for Transport and Acting Minister for Transport. We accept that one of the great challenges facing Dr. Sevele is obtaining sufficient revenue to properly operate various Ministries. (T 5766)

6.199 The Prime Minister also accepted that members of a Board of a public or State-owned enterprises who abuse the process for their own benefit should be removed from the Government Board or State-enterprise. (T 5791 L – N) The evidence is compelling that Lord Dalgety QC has abused a process for his own in relation to SCP and also the Electricity Commission. This will be dealt with when considering the evidence of Lord Dalgety QC in a separate section of the Report. However, we note that Counsel for the Prime Minister, on express instructions from Dr. Sevele, submitted in closing submissions in effect, that the Commission could not consider matters pertaining to Lord Dalgety QC and his dealings as Chairperson at the Electricity Commission because it was not relevant to the terms of reference. (T 6422)

Press Conferences and Interviews after the MV Princess Ashika sank

6.200 The Prime Minister participated in a number of interviews and press conferences after the MV Princess Ashika sank. The press conference, which was published on Television Tonga, shortly after the tragedy is Exhibit 434 (see also Exhibit 433).

6.201 In one interview, Dr. Sevele stated in relation to MV Princess Ashika:
“It was tested, it was passed and therefore they were able to get the seaworthy certificate.” (Exhibit 435)

6.202 The Prime Minister was asked questions about this interview and the seaworthy certificate that he had referred to. (T 5557 – 5560)

6.203 Dr. Sevele said that he had been told by Mr. Karalus that the vessel was seaworthy and that it had a current insurance policy. When asked whether he was told this before or after the vessel sank he said that he thought it was after the vessel sank and also on his return to Tonga. He thought that he had seen a certificate of seaworthiness after he got back from Australia (on the evening of 8th August 2009).

However, a copy of any certificate of seaworthiness was not attached to his affidavit nor produced in any of the documents provided to the Royal Commission from the Prime Minister’s office. The Prime Minister had no copy of any “certificate of seaworthiness” in his file. (T 5559) If he had been given a copy he accepted that it should have appeared in the Prime Minister’s office documents. It did cross Dr. Sevele’s mind that such a document was an important document. He was asked whether, accordingly, he should have taken a copy of the document. His response was “I guess at the time, yes. I didn’t think of it that way.”

6.204 The strong likelihood is that Dr. Sevele never saw any “certificate of seaworthiness” in relation to the MV Princess Ashika either before or after the vessel sank. Rather, it is most likely that he relied on mere assertions made by Mr. Karalus to the effect that there was a “seaworthy certificate”. In one of the press interviews, when asked whether he was still confident that the vessel was seaworthy, his response was “well that’s what I was told.” (Exhibit 435) Given the magnitude of the tragedy, one would have expected the Prime Minister to have made sure he was given a copy of any so called “certificate of seaworthiness”.

Cabinet Decision dated 22nd December 2009 in relation to the MV Pulupaki

6.205 At the last meeting of Cabinet on 22nd December 2009, Cabinet was advised that the Ports Authority had advised the public that it was not safe to travel on the MV Pulupakai. The Prime Minister addressed this Cabinet meeting in paragraphs 39-42 (inclusive) sworn 8th February 2010. (Exhibit 408) Those paragraphs state:

“39. As to the seaworthiness of the MV Pulupaki, at the last Cabinet meeting of the year on 22 December 2009, after dealing with the agenda items, I asked my colleagues whether there was any general business. The Minister of Finance and Public Enterprises indicated that we needed to discuss radio announcement(s) he had heard that morning to the effect that the Ports Authority was advising the public
that it was not safe to travel on the MV Pulupaki and that it would not
be permitted to berth in Nuku’alofa on return from the outer islands.

40. There was then some discussions in Cabinet. The collective view was
that the Ports Authority should not be taking unilateral action to
advise the public about the safety of any vessel by means of a radio
report. If there were issues about the seaworthiness of the MV
Pulupaki then the proper procedures should be followed which would
involve the Ministry of Transport as the maritime regulatory agency.
In light of the fact that the MV Pulupaki was then returning to
Nuku’alofa with a large number of passengers on board, Cabinet was
also of the opinion that the passengers should be able to disembark
and not be left in limbo on the vessel which would then be anchored
outside port.

41. Cabinet therefore directed the Secretary to Cabinet to write to the
General Manager of the Ports Authority about these three issues.
Annexed hereto and marked “K” is an unsigned copy of the letter
dated 22 December 2009. The letter did not direct the General
Manager of the Ports Authority to ignore his safety concerns, but
instead directed him to work closely with the Ministry of Transport.
Although it also directed that the MV Pulupaki be permitted to berth
and the passengers be free to disembark, Cabinet did not either
expressly or by implication make a decision about the seaworthiness
of the MV Pulupaki or direct that it be permitted to sail again.

42. Apart from taking part in a discussion about the MV Pulupaki at the
end of the Cabinet meeting on 22 December 2009, I have had no
further involvement with the MV Pulupaki. In particular, I had no
knowledge of the detention of the MV Pulupaki on Tuesday 19 January
2010 nor the subsequent sailing of the vessel on the weekend 23/24
January 2010. In fact, I was overseas on business and on leave from 14
January 2010 to 29 January 2010.” (Exhibit 408) (Underlining added)

6.206 The Cabinet decision No.1187 of 22nd December 2009 provided:

“With reference to RE: Public Announcement Concerning MV Pulupaki

I have the honor to inform you that His Majesty’s Cabinet Decision on 22nd
December 2009 was as follows:

That the Chief Secretary & Secretary to Cabinet to write, as a matter of
urgency to Ports Authority and to direct them:-
1. That the public announcement with respect to the movement and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2. That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature;

3. That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its current trip, for usual loading and unloading purposes.”

(Exhibit 331; T 5769)

6.207 On 22\textsuperscript{nd} December 2009, the Chief Secretary and Secretary to Cabinet sent a letter to the General Manager of the Ports Authority Tonga (Commander Lupeti Vi) stating:

“Dear Lupeti,

Re: Public Announcement Concerning MV Pulupaki

Please be advised that the public announcement made this morning by the Ports Authority Tonga over the air with respect to the MV Pulupaki, has come to the notice of His Majesty’s Cabinet at their meeting this morning, Tuesday 22\textsuperscript{nd} December, 2009. Because of the severity of this matter, His Majesty’s Cabinet has directed that the following directives be informed to your office today, Tuesday 22\textsuperscript{nd} December, 2009:-

1) That the public announcement with respect to the movement and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2) That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature

3) That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its (sic) current trip, for usual loading and unloading purposes.

I hope the above Cabinet directives are clear and that they be implemented in the usual way.

Yours Sincerely

Busby Kautoke” (Exhibit 408 annexure “K”; T 5672 E – H)

6.208 It was clear that at the Cabinet meeting on the 22\textsuperscript{nd} December 2009, Ports Authority had sufficient concerns about the safety of travelling on the MV Pulupaki that the authority was prepared to advise the public that the vessel was not safe to travel and
that it would not be permitted to berth in Nuku’alofa on its return from the outer
islands. In paragraph 10 of Dr. Sevele’s affidavit, he stated:

“As Prime Minister, I have always been mindful of the need to maintain a safe
and reliable ferry service between Tongatapu and the other Tongan islands.”
(Exhibit 408)

6.209 Dr. Sevele was aware that unseaworthy ships should not be allowed to sail in Tonga
and that it was contrary to law. (T 5519 R – T; T 5552 I – M; T 5557) The Prime
Minister accepted that this was an eminently sensible law and one that should be
enforced. (T 5557 E – I) The MV Princess Ashika sank, as the Prime Minister accepted
he became aware after the tragedy, because it was unseaworthy and unsafe. The
deliberations and decisions made by Cabinet on 22 December 2009 should have
been made against this backdrop, as well as the concerns raised by the Ports
Authority about the safety of the MV Pulupaki.

6.210 There was no discussion, let alone any rigorous discussion or report, at the Cabinet
meeting on 22nd December 2009 as to what the safety concerns were that had been
raised by the Ports Authority which triggered the Ports Authority to advise the public
that it was not safe to travel on the MV Pulupaki. This is most troubling. Of course,
the MV Pulupaki is a RoRo vessel, as was the MV Princess Ashika. It travels from
Nuku’alofa to a number of the same islands that the MV Princess Ashika travelled to.

6.211 The Prime Minister indicated that the “primary purpose” of Cabinet’s “concern” was
for the vessel “to come in and unload the people”. However, there was no discussion
of the location of the vessel when the Cabinet meeting made its decision at the
Cabinet meeting which was completed by about 12:30pm on the 22nd December
2009. He said that what came out of the discussion was that the vessel was on its
way to Nuku’alofa. (T 5772)

6.212 The radio communications in relation to MV Pulupaki for the 22nd December 2009
indicates that the vessel departed Neiafu at 0530 hours, bound for Pangai and that it
was due to arrive at Pangai in 1100 hours. The records indicate that the vessel
reported at 1641 hours that it departed Pangai at 1545 hours, bound for Ha’afeva
and was due to arrive at Ha’afeva at 1720 hours. The MV Pulupaki reported at 2013
hours that it had departed Ha’afeva at 1755 hours, bound for Nuku’alofa and would
arrive at Nuku’alofa at midnight with 111 passengers and 23 crew. The wind speed
was recorded at 15 – 20knots with a sea swell height of 1 metre. The MV Pulupaki
departed on the 23rd December 2009 at 2245 hours, bound for Ha’afeva. It also
sailed on the 24th, 25th, 30th and 31st December 2009. (Exhibit 437, 438 and 439) It
was also allowed to sail in January 2010 until it was detained. However, even after it
was decided in January 2010 that the vessel was unseaworthy and should be
detained it was nevertheless allowed to sail for an alleged “emergency”. This will be dealt with in more detail in another part of the Report.

6.213 At the Cabinet meeting on the 22\textsuperscript{nd} December 2009, the MV Pulupaki had departed Neiafu and was bound for Pangai. It did not depart Pangai until 1545 hours. It could therefore have been stopped at Pangai. However, the effect of the Cabinet decision was effectively to allow a vessel which the Ports Authority had determined that it was not safe for the public to travel on, to sail.

6.214 The Prime Minister was asked whether, in light of the knowledge he had, that the vessel was a long way from Nuku’alofa, would he agree that it would have been more prudent not to allow the vessel to come all the way to Nuku’alofa, but stop at one of the earlier ports. The response by the Prime Minister was:

“\textit{It’s-it’s a moot point. One would have to know where it was and the number of passengers that it had coming to Tongatapu.”} (T 5772 G – I)

6.215 When advised on the number of passengers, Dr. Sevele was asked whether that would affect his decision on whether now in hindsight the vessel should have been allowed to come back into the port of Nuku’alofa. His response was:

“I\textit{ guess it could have. I can’t say for sure, there were other considerations, other issues in the minds of Cabinet that morning and its main concern was the effect on the people who were on board and on their relatives waiting in Tongatapu for them to come and one needs to remember that this was just before Christmas.”} (T 5772 R – U)

6.216 One could understand that there may be political pressure to allow the vessel to sail to Nuku’alofa. However, as Dr. Sevele acknowledged in his evidence it “\textit{comes with the territory}” (T 5501 E – G) that sometimes he had to make difficult decisions despite the fact that it may alienate some members of the public. Additionally, given the concerns about the safety of the vessel, it is most disconcerting that the safety of the passengers was not of paramount consideration to Cabinet. It should have been.

6.217 The Cabinet decision provided that the Ports Authority Tonga was to work closely with the Ministry of Transport in matters of this nature. The Ports Authority Tonga, prior to the vessel departing Nuku’alofa on the 23\textsuperscript{rd} December 2009, the very next day after the Cabinet decision, expressed concerns about the safety and seaworthiness of the MV Pulupaki and did not want it to sail. However the Ministry of Transport allowed it to sail, even in circumstances where it was overloaded with passengers.

6.218 Dr. Sevele said he had no knowledge of the detention of MV Pulupaki on January 2010, nor the subsequent sailing of the vessel on the weekend 23\textsuperscript{rd}/ 24\textsuperscript{th} January
2010. He was overseas on business and on leave from 14th January 2010 to 29th January 2010. (Exhibit 408 paragraph 42)

6.219 The Prime Minister became aware that the MV Pulupaki had been detained in January 2010 at sometime subsequent to the detention. He was told that the vessel had been allowed to sail to Fiji to tow an oil tanker. He was also told, at that time that the vessel had been detained and determined to be unseaworthy. (T 5773)

6.220 The Prime Minister was asked whether he accepted that it appeared to be an absurd decision to allow a vessel that had been determined to be unseaworthy to sail over 250 miles to tow an oil tanker. His response was:

“Not in the circumstances that were explained to me after” (T 5773 N)

6.221 This is despite the fact that the Prime Minister was told the vessel was unseaworthy and that a sea tanker or oil tanker was in trouble and needed to be towed. He thought he must have been told this by Lord Nuku (Acting Minister for Transport) and he had also heard it from a number of people. When asked if he was told that it was an emergency to go and tow this oil tanker, his response was:

“That is what I was told. It was a question of damned if you do, damned if you don’t, I mean, that’s what – the way it was put to me.” (T 5774 A)

6.222 It is extraordinary how such an approach can seemingly be adopted. If such an attitude is taken, it gives one no confidence that a maritime disaster will not inevitably happen in Tonga in the future.

Placing Commander Lupeti Vi on Leave

6.223 Commander Lupeti Vi was the General Manager of the Ports Authority Tonga. He was responsible for the day to day operations of the ports of Nuku'alofa. He held the position as General Manager of the Authority since 1999. He previously spent 28 years in the Tonga Navy and held the position of Commander of the Navy at the time of his retirement. (Exhibit 384 paragraph 1 and 2)

6.224 The Prime Minister was Chairman of the Ports Authority since 2006. The Ports Authority has a Board of directors.

6.225 In January 2010, Commander Lupeti Vi was directed to take 3 months leave, which was to commence from 4:30pm Friday 15th January 2010. (Exhibit 384 paragraph 1 and annexure “19”) The Prime Minister takes issue with any assertions that Commander Lupeti Vi was placed on 3 months leave as a result of comments he made about the seaworthiness of MV Pulupaki. Dr. Sevele says that he was not placed on this leave because of any public comments he made. The Prime Minister sets out the background and reasons why Commander Lupeti Vi was placed on leave.
in paragraphs 27 – 38 of his affidavit. (Exhibit 408) Commander Lupeti Vi deals with the issue in his affidavit sworn 5th February 2010, especially paragraph 31 – 41. (Exhibit 384)

6.226 The Prime Minister was of the view that the Ports Authority was not managing the authority as it should and that there might need to be a new Board altogether. The matter was raised in Cabinet and the Prime Minister said that Cabinet expressed a lot of dissatisfaction of what it considered to be the poor performance of the Ports Authority. As Chairman of the Ports Authority, the Prime Minister admitted the shortcomings and accepted the need for a thorough review.

6.227 Commander Lupeti Vi had, as previously indicated, been the General Manager since 1999. He was in 2009 and 2010 ex officio the Secretary of the Ports Authority. He would therefore normally not only attend the meeting but also distribute the agendas and Board papers for the meetings. He would also be responsible for taking the minutes of the meetings. However Commander Lupeti Vi was not given any notice of the Board meeting of the Ports Authority on 12th January 2010. He had no idea that the meeting was occurring. (T 5803) The Prime Minister accepted that Commander Lupeti Vi was not given any prior notice that it was intended to discuss at the meeting of the Ports Authority that he be asked to take 3 months leave.

6.228 The Prime Minister said that Commander Lupeti Vi was not suspended. (T 5805 J) The refusal of the Prime Minister to accept this was just one of many instances during the course of his evidence when he failed to accept the obvious. The normal meaning of suspend would include to officially stop something for a time; to prevent something from being active for a time; to officially prevent somebody from doing their job for a time. Commander Lupeti Vi was suspended. The decision to suspend Commander Lupeti Vi was made by the Board without any input from him. (T 5804 – 5805) Commander Lupeti Vi was therefore not able to address any concerns that would justify the requirement for him to take 3 months leave as General Manager. Dr. Sevele acknowledged that he had respect for Commander Lupeti Vi in terms of his knowledge of shipping and that he had a lot of knowledge about the Ports Authority which could assist the new members of the Board. (T 5578)

PART B - HON. ‘OTENIFI AFU’ALO MATOTO

Overview of Evidence

6.229 Since October 2006, Hon. ‘Otenifi ‘Afu’alo Matoto has been the Minister for Public Enterprises. He has also been the Minister for Finance and National Planning since March 2008.

6.230 As Minister for Public Enterprises, Shipping Corporation of Polynesia was obliged as a public enterprise to provide various reports under the Public Enterprises Act to him.
They failed to comply with many of these statutory requirements. He has known for a number of years that there have been problems with the governance of SCP.

6.231 The Minister was aware that the MV Olovaha, an inter island ferry, needed to be replaced urgently as it was operating even though it was unseaworthy and unreliable.

6.232 On the 20th April 2009 he signed a Memorandum to Cabinet, at the request of Mr. Karalus, in relation to a recommendation to purchase the MV Princess Ashika. The Minister said he was misled by Mr. Karalus into signing the Memorandum as it made statements which were false.

6.233 Mr. Karalus took a very active and personal role, to the knowledge of the Minister for Finance, in trying to find the replacement vessel for the MV Olovaha and ensuring the actual purchase of the MV Princess Ashika.

6.234 On 23rd April 2009, Cabinet made a decision in relation to the purchase of the MV Princess Ashika. Subsequent to the Cabinet decision, the Minister for Finance had certain discussions with Mr. Karalus and received certain documents from him, including Savingrams. Some of these documents were sent by Mr. Karalus in order to ensure that the Minister for Finance facilitated the payment for the purchase of the MV Princess Ashika. The Savingram from Mr. Karalus stated “we are satisfied that the vessel meets our seaworthiness and mechanical requirements”. To the “eternal regret” of the Minister for Finance, he took Mr. Karalus’s word that due diligence had been carried out to endorse the transaction to purchase the MV Princess Ashika. The Cabinet decision 23rd April 2009 made reference to “a report be later tabled to Cabinet”. No report was ever tabled in Cabinet in conformity with the Cabinet decision.

6.235 The Minister for Finance understood that the due diligence required to be undertaken would be an independent survey, an independent valuation and an assessment of documents in relation to the vessel (including survey documents). He accepted that no proper due diligence was conducted on behalf of SCP or on behalf of the Government (including the Ministry of Transport). If the due diligence had been attended to, the Minister properly conceded that the MV Princess Ashika should never have been purchased.

6.236 The Minister for Finance frankly conceded that right up until the time that the MV Princess Ashika sank, he had not been supplied with sufficient information to enable him to make an informed decision on whether the vessel should be purchased or not.

6.237 The contract of 8th May 2009 signed by Mr. Karalus for the purchase of the MV Princess Ashika was rightly acknowledged by the Minister for Finance as being a cash
unconditional contract requiring the State to pay FJD$600,000 irrespective of the value or condition of the vessel.

6.238 On 29th May 2009, the Minister signed a recommendation as a member of the Government Procurement Committee recommending the purchase of the vessel. He signed this even though he was not aware of whether any valuation had been prepared in connection with the vessel.

6.239 On May 2009, the Minister was involved in a number of e-mail communications with the Prime Minister and Mr. Karalus concerning the MV Princess Ashika and in particular accessing fundings for the purchase of the vessel. Although the cash unconditional contract signed by Mr. Karalus on 8th May 2009, funding was still not in place by the 21st May 2009.

6.240 The Minister for Finance was correctly of the view that if the necessary due diligence had been done on the MV Princess Ashika, it would have proven that it was not suitable for purchase. He again frankly conceded, that if he had insisted on viewing the evidence of the due diligence that was required before he acted on facilitating the payment for the purchase of the vessel, it would have prevented the purchase of it. In future, the Minister said he would ensure that all the necessary due diligence in every level is ruthlessly exercised and ensure that no “short cuts” are taken.

6.241 The Minister correctly accepted that the vessel should never have been purchased in the first place because it was unseaworthy and unfit, and secondly, once it arrived in Tonga, it should not have been allowed to sail.

6.242 On 22nd December 2009, Cabinet was advised that the Ports Authority had made a public announcement that it was not safe to travel on the MV Pulupaki and that it would not be allowed to return to the Port of Nuku’alofa. Cabinet seemed more concerned to allow the vessel to return to port, rather than safety issues.

**Substantive Evidence of Hon. ‘Otenifi Afu’alo Matoto**

**Educational Background, Qualifications and Experience**

6.243 In 2009, Hon. ‘Otenifi Afu’alo Matoto was the Minister for Finance and National Planning and the Minister for Public Enterprises. He was appointed the Minister for Public Enterprises in October 2006, and he became the Minister for Finance and National Planning in March 2008.

6.244 Hon. ‘Otenifi Afu’alo Matoto obtained a Bachelor of Arts degree in Geography and History from the University of Auckland and an MA in Social Science from the University of Durham. He was employed in the Ministry for Finance for twelve years from 1971 to 1983, the latter six years as Secretary for Finance. He then worked as a manager in the Bank of Tonga for sixteen years from 1983 to 1998. Between 1999
6.245 The Shipping Corporation of Polynesia Limited (SCP) is and has for a number of years been fully owned by the Government of Tonga. The sole shareholder of the company is the Government of the Kingdom of Tonga. It is a public enterprise listed in the First Schedule of the Public Enterprises Act. Although fully owned by the Government, it is run by an independent Board of Directors appointed by the Government. As Minister of Finance, he did not control its affairs nor was he involved in any operational aspects of its business. SCP has reporting requirements to the Ministry of Public Enterprises and the Government has a general duty of oversight. (Exhibit 393 paragraph 2; T 5117 – 5118) The Minister was aware that Lord Dalgety QC continued as the Company Secretary, after the Minister and the new board was appointed. (T 5131 O – S)

6.246 The Public Enterprises Act requires, by section 19 of the Public Enterprises Act, the delivery to the Ministry of Public Enterprises of a report of the operations of the public enterprise within 2 months after the end of the first half of each financial year. Section 20 of the same Act provides:

“(1) The Chairman of the Board shall deliver to the Minister--

(a) a report of the operations of the public enterprise and the consolidated financial statements for that financial year consisting of statements of financial position, financial performance, changes in financial position, and any other necessary statements within 3 months of the end of each financial year; and

(b) an audit report on the financial statements within 6 months of the end of the financial year.

(2) The reports under subsection 1(a) shall—

(a) contain such information as is necessary to enable an informed assessment of the operations of the public enterprise including a comparison of the performance of the public enterprise with the relevant statement for corporate intent; and

(b) state the dividend payable to the Government by the public enterprise for the financial year to which the report relates.”
6.247 Section 22 of the Act is entitled “Information to be presented to the Legislative Assembly”. It provides:

(1) The Minister shall table in Privy Council and the Legislative Assembly, within 28 days of receiving them and if the Legislative Assembly is not in session forthwith at the next ensuing session, the following documents in respect of each public enterprise—
   (a) the annual report; and
   (b) the half yearly report.

(2) The Minister shall within 1 week of tabling them before the Legislative Assembly publish a notice in the Gazette where the documents can be inspected and the prescribed fee.”

6.248 Sections 19, 20 and 22 of the Public Enterprises Act are just three sections dealing with accountability issues associated with public enterprises, such as Shipping Corporation.

6.249 Notwithstanding the clear statutory obligations imposed on SCP, to the best of recollection of the Minister, he never received any half yearly reports from SCP from the time that he was appointed the Minister for Public Enterprises in 2006. (T 5122 – 5123) In terms of annual reports, sometimes the reports were received but they were usually late. Not all the reports were provided to the Minister as required.

6.250 Not surprisingly, the Minister formed the view early in his appointment that SCP was not operating properly, and in fact operating poorly. He has continued to hold such view from that time to the present. (T 5124 – 5125) He was aware that there were problems with governance. Management and some directors were not happy themselves. There were differences between the officers of Shipping Corporation, including the Company Secretary. Because the relationship was not harmonious, it created massive instability. He was not satisfied with the Board and the Company Secretary working in the best interests of the company and has held that concern during his whole term as Minister of Public Enterprises. Letters sent to SCP from the Ministry were, in many instances, ignored. (T 5130)

6.251 SCP was not held accountable for their actions, including for their financial performance. (T 5128 – 5130)

6.252 As a Government owned entity, SCP is subject to a policy that should return 10% on its equity to the Government as a dividend on an annual basis but it never did so. (Exhibit 393 paragraph 2) Section 21 of the Public Enterprises expressly provides that “a board shall pay dividends to the Government”. The Minister was aware that SCP always had cash flow problems to the extent that they were never able to pay any dividend to the Government. (T 5121 – 5122; T 5131)
6.253 On about 19th March 2007, the Minister received a Memorandum from the Company Secretary, Ramsay R. Dalgety QC, in relation to the engagement of a new CEO. The Memorandum stated that Mr. Jonesse was selected for the post after extensive advertisement within Tonga and overseas. It stated that the Board’s Appointment Committee (which Ramsay Dalgety was a member of) prepared for the Board a report unanimously recommending the appointment of Mr. Jonesse. It went on to state that on 2nd February 2007, the SCP Board of Directors unanimously resolved, amongst other things that Mr. Jonesse be appointed, subject to satisfactory completion of contractual arrangements. The Memorandum sought the “blessing” to the arrangements from the Minister. The Minister relied on Lord Dalgety to submit what he and the Board considered to be an appropriate person as CEO. (Exhibit 270; T 5118 – 5119)

6.254 On 24th April 2007, the Minister indicated he was happy to confirm the appointment of Mr. Jonesse as the CEO for Shipping Corporation. However, the Minister pointed out that SCP should ensure that annual targets are set, referring to section 26 of the Public Enterprises Act. (Exhibit 394) To the knowledge of the Minister, there was never any review of the performance targets. (T 5102 S)

6.255 The contract of employment with Mr. Jonesse was required, by reason of section 26 of the Public Enterprises Act, to be a written performance based contract of employment which contained certain minimum provisions, including the objectives expected to be achieved by the Public Enterprise, the performance expected of the Public Enterprise and a review of the performance of the Chief Executive Officer. These provisions were not contained in the employment contracts prepared by Lord Dalgety QC. The two contracts, prepared by Lord Dalgety QC, in 2007 and 2009, were therefore in contravention of the provisions of the Public Enterprises Act and were therefore void as a matter of law by reason of section 30 of the Public Enterprises Act. (Exhibits 268 and 274)

6.256 Shipping Corporation of Polynesia Limited has had for many years a 40% shareholding in Ocean Pacific Limited. The Minister for Finance only recently became aware of this. He properly acknowledged that he should have been given a report in relation to this. It was clearly unacceptable, as the Minister appreciated that SCP never informed him about the fact that it had a 40% interest in Ocean Pacific. Although SCP is a public enterprise under the Public Enterprises Act, the Minister knew “very little” about Ocean Pacific Limited or Ocean Royal Shipping Company Limited. He had no idea who the Company Secretary was. Of course, Shipping Corporation of Polynesia, as a Government owned entity was supposed to return 10% on its equity to the Government as a dividend on an annual basis. It never returned any dividend. The financial performance of Ocean Pacific would impact on the ability for SCP to pay a dividend. It should be appreciated that the Chairperson
and Rev. Haukinima knew very little about Ocean Pacific Limited. The evidence indicates that Lord Dalgety QC was the inaugural Company Secretary of Ocean Pacific, as well as the Company Secretary of SCP. Lord Dalgety QC was also signing cheques in December 2009 and January 2010 in relation to bank accounts in the name of Ocean Pacific Limited, although he gave sworn evidence to the effect that he did not know that the company had any bank accounts. Lord Dalgety’s evidence will be dealt with in a separate section of this report, which deals specifically with the evidence of Lord Dalgety QC.

The MV Olovaha

6.257 The MV Olovaha was a ferry operating from Nuku’alofa to the outer islands. By 2008, concerns had been raised about the MV Olovaha at Cabinet level, including the reliability and safety of the vessel. In 2008, Cabinet was in fact aware that there were very serious concerns about the safety of the MV Olovaha. (T 5135; T 5176) Despite concerns being raised in 2008 about the seaworthiness of the vessel, the former Minister of Transport (Mr. Karalus) and the Chairperson of SCP (Mrs. ‘Alisi Taumopeau) assured that MV Olovaha was still considered seaworthy. (T 5136) The Minister was aware of stories of the MV Olovaha having problems with some of her voyages. (T 5136 S) He had also heard of the vessel stopping in mid-ocean and the events where it would end up with only one engine working. (T 5137)

6.258 Notwithstanding this, the Minister of Finance was aware that the MV Olovaha was operating in Tonga even though it was unseaworthy. He was concerned, because the vessel was unsafe and unseaworthy, that it was continuing to operate. (T 5209 – 5210) The replacement of the vessel was therefore urgent. Every day that a replacement vessel was not found and the MV Olovaha operated, it would mean that the vessel was operating in an unseaworthy condition. The Minister was aware that this was contrary to the law. (T 5210)

6.259 The Minister knew that the service provided by the MV Olovaha and any replacement vessel was required to provide an essential service to the people of Tonga, which essential service could not be compromised. He therefore understood that any replacement vessel needed to be reliable and safe. (T 5138)

6.260 On or about 19th March 2009, Hon. ‘Otenifi Afu’alo Matoto received a letter from Mr. John Jonesse on behalf of SCP advising him that the probable delay in the replacement of the MV Olovaha to early 2011 stretched the capabilities of service beyond realistic control and SCP’s ability to provide an essential service. (The letter of 19th March was originally dated 17th March 2009, but the date of it was changed by Mr. Jonesse) The Minister was advised for the first time of a possible replacement option for the MV Olovaha. Exhibit 1 attached to the Minister of Finance’s affidavit, was the letter from Mr. John Jonesse with attached material. The copy exhibited is
from the SCP’s file as at the date of his affidavit, his staff were not able to locate the original of the letter. (Exhibit 393 paragraph 3) The letter to the Minister indicated that:

“As you are aware, the continuing service of the MV Olovaha has been based on increasing issues of maintenance, reliability and safety …

It is our objective to continue to deliver the essential service expected of us but this ability is becoming seriously compromised.”

6.261 The letter of 19th March 2009 had a report attached to it. The report referred to the fact that “the Olovaha was due for replacement six years ago with no significant maintenance since 1993 and a PMP (Planned maintenance programme) initiated in 2007”; “the Olovaha is in a rapidly declining state”; “all structures are badly rusted”. It also indicated that:

“Marine Certification is required annually by ‘Marine and Ports’ with associated compliance and current certification is under review. In the strictest jurisdiction compliance will be increasingly difficult to achieve.”

6.262 It is difficult to understand why the original of this letter sent to the Minister could not be located. The Minister could not explain why it was not on the files held at the Ministry of Public Enterprises in relation to SCP. (T 5145)

6.263 Even if the Hon. ‘Otenifi Afu’alo Matoto did not read the report he said that he “was aware of the situation”, including that “it had safety problems and it was still issued a certificate to continue operation as being seaworthy at this time.” (T 5146 R – 5147 F) He was asked what he understood of the remark “in the strictest jurisdiction, compliance will be increasingly difficult to achieve.” The Minister said that “it means that if the rules were applied strictly then Olovaha should not get a certificate to continue operation”. (T 5147 I)

6.264 It should be appreciated that the Director of Marine and Ports until 8th June 2009, Captain William Johnson, accepted that the MV Olovaha was operating in an unseaworthy condition. (T 2713; T 2725 – 2727) Captain Johnson made a conscious decision, notwithstanding his position as Director of Marine and Ports, to ignore the Legislation which made it an offence to send a ship to sea which was unseaworthy. (T 2714 – 2715)

6.265 Even prior to receipt of the letter, the Minister of Finance had heard that the MV Olovaha was not safe. (T 5134 R – T) When asked as to whether Mr. Jonesse had spoken to him in 2008 raising concerns about the MV Olovaha, the Minister said:

“Well, he - since they started talking about the replacement from Japan, then it had - came up quite frequently - the fact that whether the Olovaha would
be able to continue to service the requirements of inter-island shipping until the replacement comes. And, as the replacement was delayed from Japan, there was concern whether the Olovaha would continue to provide the necessary service until the replacement comes.” (T 5135 F – H)

6.266 By April 2009, an investment analysis prepared by officers at the Ministry of Public Enterprises had formed the view that the MV Olovaha was unseaworthy and in such a condition that it should be sold for scrap value. (T 5208)

Letter of Advice Regarding Acquisition of Replacement Vessel

6.267 On 2nd April 2009, the Minister received a letter from Mr. Bruce McQueen of Business and Government Strategies International, a consultant and economist at the Ministry of Public Enterprises. (Exhibit 396) The Minister held Mr. McQueen in high regard. At the time of receiving the letter, the Minister was aware that SCP was not complying with its statutory obligations to provide half yearly reports; was dissatisfied with the operations of the company; was concerned about the financial viability of the company; was aware of problems within the Board and that the company had failed in its obligations to return a dividend to the Government.

6.268 The letter of 2nd April 2009 made a reference to Mr. Jonesse being “impressed at how well the vessel, built in 1972, (had) been maintained by its Fijian owner”. In relation to the vessel ownership, Mr. McQueen averted to “the on-going financial burdens and uncertainties related to the Captaine Tasman crewing contract”. The letter made the following recommendations:

“Recommendation actions:

1. That a new public enterprise be established immediately to own and operate the replacement vessel.

2. That the GOT capitalize the new company with TOP200,000 TO 300,000.

3. That management of the new enterprise be instructed to seek commercial financing for the remaining amount needed to finance the vessel, presumably secured by the vessel.

4. That the GOT be prepared to lend the additional amount required if commercial financing is not available.

5. That all subsidies or CSO payments to SCP in the pipeline be suspended.” (Exhibit 396)

6.269 The letter anticipated that the current SCP management would have similar roles in the new enterprise. This was notwithstanding concerns validly held by the Minister
related to SCP, including the failure of the company to comply with its statutory obligations.

6.270 None of the five recommendations were adopted or followed. (T 5189) The Minister considered that the recommendations were reasonable and rational. He had no problems with the recommendations. He in fact agreed with the recommendations. However, he did not agree with the amount of involvement of Public Enterprises and thought that the recommendations were outside that of which was required. (T 5187 – 5196) The Minister nevertheless accepted that it was within his jurisdiction, when he put forward the Cabinet Memorandum of 20th April 2009 to in fact put forward all or any of the recommendations contained in the letter of 2nd April 2009 from Mr. McQueen. Although he accepted this was quite correct, he said that “unfortunately the disaster came before we had time to deal with that”. (T 5199 P)

Cabinet Decisions Regarding the Purchase of the MV Princess Ashika and the Requirement for Due Diligence to be Conducted

6.271 On 16th April 2009, the Cabinet decided (by Cabinet Decision No. 292), in a meeting Chaired by the Prime Minister, to approve the following recommendations:

“That the Hon. Minister for Transport to kindly, i.e.:

i. arrange the advice of Government and the public of the travel details of the subsidized ship for Niuafou’ou and Niuatoputapu scheduled for the week beginning Monday 20th April, 2009;

ii. submit to Cabinet the plan for the replacement of the MV Olovaha

iii. submit to Cabinet the air services and maintenance/repair plan of the airports of Niuafou’ou and Niuatoputapu.” (Exhibit 408 annexure “C”) (Underlining added)

6.272 There was no paper presented in relation to the Cabinet decision of 16th April 2009, although it is normal practice for a paper to be presented. (T 5151 – 5152) Usually in Cabinet, at the end of its meeting, the Prime Minister as Chair of Cabinet asks if there is a member who has anything to raise. Very often this is when issues are raised which are not supported by a Memorandum. This is what likely occurred in the case of the Cabinet meeting on 16th April 2009. (T 5155 N)

6.273 The decision of 16th April 2009 resolved that the Minister of Transport was required to submit to Cabinet a plan for the replacement of the MV Olovaha because, according to the Hon. ‘Otenifi Afu’alo Matoto, “the subject was too important just to be discussed without the submission of (a) proper proposal”. (T 5155 N – R) We agree
that a proper proposal was required, because the replacement of the MV Olovaha was a very important matter and one that had to be thoroughly investigated.

6.274 Hon. ‘Otenifi Afu’alo Matoto said that in relation to Cabinet decisions he did not know whether the Secretary to Cabinet took minutes of Cabinet meetings. However, no minutes are distributed. (T 657 J – L) When asked whether he considered whether it would be helpful if some records were kept of material matters that people said at the Cabinet meetings, the Minister answered:

“Well, that’s entirely up to the Prime Minister and the Cabinet, and this has been the practice for a long time that no detailed records of Cabinet meetings are being kept.” (T 5153 D)

6.275 We accept that this has been the practice for a long time, including in other jurisdictions. Only the resolutions of the Cabinet meeting are recorded in Tonga, again, consistent with what is done in some other jurisdictions. Of course, the Minister accepted that because of this, one cannot determine accurately who said what at the Cabinet meeting. (T 5152 – 5154)

6.276 The Minister co-signed a Memorandum to Cabinet dated 20th April 2009 with the former Minister for Transport in relation to a recommendation to purchase the MV Princess Ashika. (T 657) The Memorandum had already been signed by Mr. Karalus when it was submitted to the Minister for Finance for signing on the morning of 20th April 2009. The former Minister had told him that he needed his support to advance a proposal to Cabinet to purchase a replacement vessel for the MV Olovaha. He said that he had identified a vessel which appeared to be suitable. It was a little bit older than the MV Olovaha but it had been well maintained and that it was in a better seaworthy condition than the MV Olovaha. He also told the Minister that the asking price for the vessel was affordable. Mr. Karalus spoke in very positive terms about the MV Princess Ashika. Hon. ‘Otenifi Afu’alo Matoto told Mr. Karalus that he hoped that they had identified the right boat and was reassured by Mr. Karalus that it was the right boat. (Exhibit 393 paragraph 5; T 5156 – 5162)

6.277 The Minister of Finance was relying on the advice of the former Minister of Transport, Mr. Karalus, who stated that the MV Princess Ashika had “been very well maintained and had come out of a December 2008 survey” and that “an Australian engineering company was preparing the vessel for sail to ensure full serviceability”. The Hon. ‘Otenifi Afu’alo Matoto had no independent knowledge of the maintenance of the vessel. (Exhibit 393 paragraph 6)

6.278 Hon. ‘Otenifi Afu’alo Matoto said that he was misled by Mr. Karalus into signing the Cabinet submission. (T 5163 N – P) The Minister of Finance had nothing to do with the preparation of the Memorandum, nor did any of his officers. (T 5163 – 5164) He
correctly accepted that the material attached to the Memorandum to Cabinet was insufficient to form the conclusion that the MV Princess Ashika was well maintained. The Minister based his decision to sign the Memorandum on the oral assurances by the Minister for Transport and the trust he placed on these assurances. (T 5174 – 5177)

6.279 Mr. Karalus gave the Minister for Finance an assurance, prior to the signing of the Memorandum to Cabinet on the 20th April, that every aspect of due diligence would be taken care of. (T 5198 D) The Minister for Finance was relying on the Minister for Transport and, in particular, the Minister for Transport to ensure that complete due diligence was conducted and that the vessel was seaworthy. (T 5197) This was not unreasonable. That does not mean that the Minister for Finance should not have been more proactive and ensured that due diligence was in fact completed under the direction of the Minister for Transport.

6.280 Hon. ‘Otenifi Afu’alo Matoto was aware from his conversations with Mr. Karalus, that Mr. Karalus would regularly have discussions with Mr. Jonesse about Shipping Corporation matters. Mr. Karalus and Mr. Jonesse had been involved in discussions about a replacement vessel. Mr. Karalus was very approachable as a Minister, including with stakeholders such as representatives of SCP. Mr. Karalus was proactive “as a Minister”. (T 5237) Mr. Karalus took an active role in ensuring that the transaction for the purchase of the MV Princess Ashika progressed to completion. He took a very personal role in not only preparing the Cabinet submission of 20th April 2009, signing the contract on 8th May 2009 and ensuring that the finance was available to enable the transactions for the purchase of the vessel to be completed. (T 5261) The Minister for Finance had found Mr. Karalus to be fairly thorough in what he normally produced, which led him to believe that he could trust what was produced. (T 5325)

6.281 The Minister for Finance was not involved in discussions with officials at the Ministry of Transport, except for the Minister of Transport himself. He never saw any documents passing between Mr. Karalus and officials at the Ministry of Transport. He never saw Mr. Karalus talking to officers in relation to the MV Princess Ashika. Mr. Karalus never told the Minister of Finance that he relied on any advice from any of his staff at the Ministry in relation to the MV Princess Ashika; the possible purchase of it; any due diligence; any matters associated with the MV Princess Ashika, or the possible replacement vessel for MV Olovaha. We are of the view that the evidence overwhelmingly establishes that the Minister for Transport, Mr. Karalus, never relied on any advice from his staff in relation to the MV Princess Ashika or the other matters just referred to (such as due diligence).

6.282 The Hon. ‘Otenifi Afu’alo Matoto worked with Mr. Karalus on a number of different projects. Mr. Karalus took a very hands-on approach in relation to his Ministry.
Because of the population, the Minister for Finance correctly accepted that, by necessity Ministers in Tonga play a very active role in their Ministries and are much more across issues than a Ministers in, say, Australia or New Zealand. (T 5344)

6.283 The Minister for Finance observed that Mr. Karalus took a very active and personal role in trying to find the replacement vessel for MV Olovaha. He put submissions to Cabinet in relation to the replacement vessel; he approved and signed the contract for the purchase; he gave instructions to ensure the deposit and balance price was paid and ensured that the vessel came to Tonga and was operated by SCP in Tonga. (T 5335)

6.284 We accept the evidence of the Minister for Finance that Mr. Karalus “was negotiating and conducting the purchase of the vessel and that’s why he (was) signing the contract”. It was clear to the Minister, as it is to us, that Mr. Karalus was intimately involved in negotiating and conducting the purchase of MV Princess Ashika. (T 5280)

The Memorandum of 20th April 2009 provided:

“The mechanical state of the M.V. Olovaha has been of increasing concern over the past six months.

While the ship remains seaworthy it is becoming increasingly difficult to maintain any reliability in its service to the outer islands.

The delivery of the new ferry to be provided by grant aid from the Government of Japan will not be before late 2010. In the meantime it is estimated that up to TOP 800,000 needs to be spent on the existing M.V Olovaha to keep it in service. The attached financial summary (attachment one) from the Shipping Corporation of Polynesia and the Ministry of Public Enterprises and Information compares the cost of continuing services with the existing ship against the cost of purchasing a ship that has been sourced in Fiji. It is clear that the financial outlay for a replacement ship to fill the gap until the arrival of the new ferry is the preferred option as there is also the residual value of the replacement ship once the new ferry arrives.

The Ministry of Transport has sought full technical data to allow for due diligence to be completed on the replacement vessel, the M.V. Princess Ashika (some detail is provided as attachment two).

In summary, the vessel is surveyed to carry 390 passengers and 370 tonnes of cargo (c.p. Olovaha, 400 passengers and 140 tonnes of cargo). It has both
bow and stern loading capability, cruises at 10 knots (Olovaha 8 knots), has similar draft to the Olovaha to allow safe entry and exit to all ports (it is suggested that the vessel can also service ‘Eua though this is to be substantiated) and burns 30 per cent less fuel. The vessel is both bow and stern loading and is of the “roll on, roll off” (Ro-Ro) type. While the vessel is older than the Olovaha it has been very well maintained and has come out of a December 2008 survey. An Australian engineering company is preparing the vessel for sale to ensure full serviceability.

The SCP has put in a purchase option to expire at the end of this month for FJD 600,000 (this is now TOP 580,000) and has sourced cargo to cover the cost of positioning the ship in Tonga.

Both the Ministry of Transport and the Ministry of Public Enterprises and Information recommend that the ship be purchased by the Government of Tonga and leased to the Shipping Corporation of Polynesia and that this be affected (sic) without delay once all the necessary documentation is completed. The ship can enter service in Tonga during May, 2009, in time for the major Church conferences. This vessel can also be used to test new scheduling and loading procedures in readiness for the entry of the new ferry from Japan in late 2010. The total funding to be sought is expected to be within TOP 750,000.

Recommendations:-

1. That the Ministry of Transport complete due diligence on the technical suitability and sea worthiness of the M.V. Princess Ashika.
2. That, subject to the successful completion of (1.) above, the Ministry of Finance and National Planning source funding for the purchase of the vessel and for any requirements to ensure rapid deployment into service.
3. That, subject to the successful completion of (2.) above, the Ministry of Public Enterprises and Information and the Ministry of Transport determine the ownership and on-lease of the vessel to the Shipping Corporation of Polynesia.” (Underlining added)

6.285 The Memorandum to Cabinet had attached to it the following documents:
(a) Letter from Mr. Jonesse to Mr. Karalus and Mr. MacQueen c/o Ministry of Public Enterprises dated 17th April 2009;
(b) Investment analysis regarding retaining Olovaha versus buying a replacement vessel;
(c) Cash Flow Projections;
(d) A photograph of the MV Princess Ashika taken from a distance;
(e) A document entitled “Princess Ashika...Survey December 2008 valid to December 2010- Fiji Marine Board- Rusiate Waqa”. (Exhibit 393 exhibit 3 to the affidavit)

6.286 There were no other documents provided to Cabinet in relation to the proposed decision. (T 5167)

6.287 There also were no documents to support the investment analysis or the cash flow projections. According to the investment analysis, if interest was to be paid and there was no Government subsidy, the operation of the MV Princess Ashika was projecting a loss. (T 5210 – 5218) In terms of the document entitled “Princess Ashika...Survey December 2008 valid to December 2010” submitted to Cabinet, the document was effectively useless. There were large gaps in the document and it was very incomplete. It was clear, from even a very preliminary look at the document that it had not been issued by the Fiji Marine Board. This is because, for example, it made references to SCP (Shipping Corporation of Polynesia) and numerous references to MV Olovaha including that certain equipment was “recoverable from new equipment on Olovaha”. It should also be noted that the document was not signed or dated. It was also not on any letterhead or under the cover of any letter. (T 5168 – 5172) The Minister rightly accepted that little comfort could be drawn from the document. (T 5170) What happened was that Hon. ‘Otenifi Afu’alo Matoto accepted what the Minister for Transport told him without carefully looking at the documents attached to the Memorandum to Cabinet. (T 5173) He based his ability to sign off on the Cabinet submission largely upon the oral advice by the former Minister for Transport, particularly in relation to the representation that the vessel had “been very well maintained”. (T 5167; T 5173)

6.288 The Memorandum to Cabinet of 20th April 2009 states that “SCP had put in a purchase option to expire at the end of this month for FJD$ 600,000”. No purchase option was ever entered into. The Hon. ‘Otenifi Afu’alo Matoto never asked to see the purchase option, although he accepted that he should have. Mr. Karalus advised the Minister that because of the purchase option, if the Government decided not to proceed with the purchase then it may lose a deposit, but the purchase would not proceed. (T 5177) We accept that there was no basis for Mr. Karalus to make any such statement to the Minister for Finance. It was just one of many false statements made by Mr. Karalus to the Minister for Finance.

6.289 On 23rd April 2009, there was a Cabinet meeting at which it considered whether the MV Princess Ashika should be purchased. (T 657 B – E) Those present at the meeting were the Prime Minister (Hon. Dr. Sevele), Deputy Prime Minister and Minister for
Health (Hon. Dr. Viliami Tangi), Minister for Police, Prisons and Fire Services (Hon. Siaosi T ‘Aho), Minister for Training, Employment, Youth and Sports (Lord Tu’ivakano), Minister for Works (Lord Nuku), the Attorney General and Minister for Justice (Hon. ‘Alisi Taumoepeau), Minister for Transport (Hon. Paul Karalus) and the Minister for Finance and National Planning, Public Enterprises and Information (Hon. ‘Otenifi Afu’alo Matoto). (Exhibit 427) The Minister for Finance knew it was critical to ensure that the new vessel was well maintained, reliable and safe. (T 5143 N – Q)

6.290 The signed Cabinet Decision No. 300 of 23rd April 2009 (Appendix 44) records that Cabinet decided:

1. That the report from Ministry of Transport on the Vessel to Replace the MV Olovaha be noted.

2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposits and other financial arrangements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.

3. That discussions with the Government of Japan to continue to ascertain that there are no further delays on the delivery of the new ferry to replace the MV Olovaha.” (Exhibit 393 exhibit 7 to the affidavit)

6.291 Cabinet did not consider in detail the attached documents to the Cabinet submission of 20th April 2009. Hon. ‘Otenifi Afu’alo Matoto, initially in his evidence, indicated he could not recall what was said at the Cabinet meeting. However, he said that normally the Minister who submits the Memorandum would go through the proposal. Hon. ‘Otenifi Afu’alo Matoto said he could not recall saying anything. (T 5219) The recollection of the Minister as to what was or was not said at the Cabinet meeting on the 23rd April 2009 was very poor. (T 5219 – 5221) He said that the Prime Minister raised that aid funds, if at all possible, were to be sourced for the purchase of the vessel. The Prime Minister, according to Hon. ‘Otenifi Afu’alo Matoto also indicated he wanted to ensure that due diligence was being done and being done properly. (T 5221) Mr. Karalus is said to have reassured Cabinet that it would be done as required. There was no discussion as to what due diligence was contemplated to be done or any details about the due diligence required. (T 5221)
6.292 In paragraph 7 of the Minister of Finance’s affidavit he deposed:

“I was present at the Cabinet meeting on 23 April 2009 when our joint memorandum of 20 April 2009 was discussed. It was accepted by the Cabinet acting on the advice of the consultants to the Ministry of Public Enterprises that the better financial option was to purchase a replacement vessel rather than continue to maintain the MV Olovaha. The Prime Minister wanted to know if the replacement vessel could be purchased with aid funds. He was of the view that the Government should only resort to using its own funds if aid money was not available. He also emphasized that all due diligence had to be carried out before the vessel was purchased.”

6.293 The Minister for Finance had extensive commercial experience in the financial sector. He had worked as Manager in the Bank of Tonga for sixteen years, and as the Managing Director of the Tonga Development Bank. (Exhibit 393 paragraph 1) He was thus aware that as part of any investment decision for a major asset, including a ship, that proper due diligence needed to be conducted prior to purchase. It was correctly accepted by him that it is an elementary and fundamental principle of good governance that, whether it be a Government or other organisation, there should not be a commitment to a major purchase without proper due diligence being conducted. (T 5117; T 5237)

6.294 The purchase of MV Princess Ashika was a major acquisition and the normal process would dictate that as part of the due diligence process, a valuation would be obtained. (T 5117 K; T 5283) No valuation was ever obtained in relation to MV Princess Ashika let alone an independent valuation. (T 5283 – 5284) The Minister for Finance understood that the due diligence required to be undertaken would be an independent survey, an independent valuation and an assessment of documents in relation to the vessel (including survey documents). He fully appreciated that it was important that the due diligence be independent and that the due diligence needed to be conducted by both SCP and the Government. (T 5139 – 5144) The importance of separate due diligence was because SCP and the Government had separate duties and obligations. The Hon. ‘Otenifi Afu’alo Matoto was aware that the Government, including the Ministry of Transport, could not simply rely on a recommendation by SCP to buy the vessel. It was up to the Government to conduct its own due diligence, in addition to that conducted by SCP, so as to decide whether the Government should purchase the vessel. (T 5142) The due diligence, if properly conducted by SCP and the Government, would have determined whether the vessel had been well maintained, whether it was reliable and whether it was safe. (T 5143 R) Hon. ‘Otenifi Afu’alo Matoto knew this. Unfortunately, no due diligence was conducted as required. It was important that safety was not be compromised. (T 5144 A) The Minister was fully aware that sea conditions in Tonga could become quite torrid. This
was a far cry from the stillness of the water shown in the photograph taken of MV Princess Ashika in Fiji, as provided by Mr. Karalus to him. (T 5230 L – T) The failure to conduct due diligence resulted in a compromise of safety.

6.295 In paragraphs 8 and 9 of the Minister’s affidavit he stated:

“I attached as Exhibit 4 the Cabinet memorandum NO. 300 which records the decision of the Cabinet and directed that the former Minister for Transport assisted by the Attorney General and Minister for Justice “to proceed with the arrangements to do with MV Princess Ashika” and because of the urgency of the matter that necessary deposit and other financial arrangements be finalised with me. I was specifically authorised “to endorse or otherwise the proposed transaction”.

“While the Cabinet memorandum No. 300 does not specifically refer to the completion of due diligence, it does make reference to “the arrangements to do with the MV Princess Ashika”. It was accordingly assumed that the normal procedures such as completion of due diligence and approval by the Government Procurement Committee would be followed.” (Underlining added)

6.296 The Cabinet decision of 23rd April 2009 made no reference to due diligence being required. This was so even though the Cabinet submission on 20th April 2009 specifically recommended that the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika. Additionally, the agenda for the Cabinet meeting also recommended that this due diligence be completed. (Exhibit 427) It would have been a simple decision to adopt the recommendations contained in the Cabinet submission and in the agenda, rather than reformulate the recommendations which resulted in no references to due diligence being required. (T 5225 – 5226) Normally, the wording of the Cabinet decision would be looked over by the Prime Minister to make sure that it was exactly what was agreed on in Cabinet. (T 5222 – 5223)

6.297 The Minister for Finance frankly admitted that the Cabinet decision did not make any reference to due diligence. He appreciated that if anyone read the Cabinet decision they would rightly conclude that Cabinet did not by its decision require due diligence to be conducted. (T 5224 Q – 5225 B) The Minister was of the opinion that it would “probably be a fair judgment”, on their part, of those members on the Procurements Committee to have formed the view that Cabinet had already decided to purchase the vessel based on the Cabinet decision. (T 5225; T 5239 A – C) We agree with this assessment. It should be noted that the Minister was the most senior member of the
Government Procurement Committee. He knew all the members. He was thus in a
good position to express a view in this issue.

6.298 The Minister assumed that normal procedures such as completion of due diligence
would be followed because it was fundamental to good governance and good
Government that it be completed prior to purchase. He assumed that because it was
just so obvious that no decision should be made to purchase the vessel without prior
due diligence being conducted. (T 5239) They were elementary and basic
requirements. (T 5248) The Minister properly accepted that no responsible person,
entity or Government could recommend the purchase a vessel, or in fact purchase a
vessel such as MV Princess Ashika without due diligence being conducted. (T 5240; T
5255)

6.299 Hon. ‘Otenifi Afu’alo Matoto correctly
acknowledged that no responsible Board and
Company Secretary of Shipping Corporation could recommend the purchase of MV
Princess Ashika or operate the vessel without having conducted prior and proper
due diligence. (T 5240 A – E; T 5139 – 5140) He rightly accepted that no proper due
diligence was conducted on behalf of Shipping Corporation or on behalf of the
Government (including the Ministry of Transport). If the due diligence had been
attended to, the Minister properly conceded that MV Princess Ashika would never
have been purchased. (T 5175; T 5248)

6.300 The Minister for Finance rightly accepted that Cabinet (including himself) did not
have sufficient information before it to make an informed decision to purchase or
recommend the purchase of MV Princess Ashika. (T 5175 S – 5176 B; T 5231 O) The
Hon. ‘Otenifi Afu’alo Matoto frankly conceded that right up until the time that the
vessel sank he had not been supplied with sufficient information to enable him to
make an informed decision on whether the vessel should be purchased or not. (T
5231 L – N) His frankness, in this regard, is to be applauded.

6.301 The Cabinet decision specifically authorised the Minister for Finance “to endorse or
otherwise the transaction”. As the Minister understood the decision, “the obligation
placed on me is to make sure that there are funds available to proceed with the
transaction, provided the other requirement of due diligence had been complied
with.” (T 5224 I) He also understood that the reference to “endorse or otherwise the
transaction” that it needed “to be fully indicated to me that all the necessary due
diligence had been taken. And on that basis to authorise the transaction and if they
had not been taken, then the transaction would not be authorised”. (T 5238 L) The
Minister understood that effectively he could veto the transaction. If he was not
satisfied that proper due diligence was conducted he could have decided that the
transaction not go ahead. (T 5238 P – 5239 A)
6.302 The Cabinet decision of 23rd April 2009 made reference to “a report be later tabled to Cabinet”. The Minister correctly accepted that no report was ever tabled in Cabinet in conformity with the Cabinet decision. He therefore acknowledged that the Cabinet decision had not been complied with. Normally, the Minister says that there is a reminder that there is an outstanding report. However, in the case of the report which was required to be tabled in Cabinet in relation to MV Princess Ashika, there was no reminder ever given. The Prime Minister, as the Chairman of Cabinet, should have ensured that the Cabinet decision was complied with and that the report was tabled. This was a very important matter which, for very good reason, Cabinet had resolved on the 23rd April 2009 required a report. (T 5226) If a report had been insisted upon, and it had been properly prepared and considered, the vessel should never have been allowed to operate. Cabinet met on at least a weekly basis from the 23rd of April 2009 until the sinking on the 5th August 2009. It is unacceptable that no report was ever tabled during this time.

Communications after Cabinet Decision of 23rd April 2009 regarding the Purchase of MV Princess Ashika

6.303 On 24th April 2009, the Minister for Finance had a meeting with the former Attorney General, who was also the Chairperson of SCP, and the Secretary for Finance. (T 5234) He could not recall during part of his evidence if Mr. Jonesse was present (T 5234 T – 5235 A; compare T 5204), although from other evidence we conclude that he was. The meeting was called by Mr. Karalus. The fact that he called the meeting is consistent with the lead role that Mr. Karalus was taking in relation to the prospective purchase of the vessel. The purpose was primarily to discuss the Cabinet decision of 23rd April 2009. According to the Minister for Finance it was:

“It’s primarily to make sure that they will be doing what is required of them, particularly the former Minister of Transport, making sure that the due diligence would take place, all the necessary documentation would be made available to him, to confirm to us that all the requirements of due diligence have been done and for us to make the necessary deposit for the boat on his confirmation and then to proceed after that.” (T 5235 J – M)

6.304 The Minister of Finance understood that all necessary required documentation, particularly in relation to the seaworthiness of the vessel would be produced. Mr. Karalus agreed that it would be taken care of. (T 5235) It was not.

6.305 On 27th April 2009, the Minister for Finance sent a letter to Mr. Jonesse of SCP referring to the letter from Mr. Jonesse of 17th March 2009 (which was in fact changed to 19th March). It noted that the Board of SCP had unanimously decided to
recommend the replacement option as the only viable choice for the MV Olovaha. The letter also provided in paragraph two as follows:

“This matter has been submitted to Government through the Hon Minister of Transport and it is currently receiving the attention of Government. You are currently involved in the necessary actions required by Government in order to progress this to the desired outcome.” (Exhibit 393, exhibit 2 to the affidavit)

6.306 The “desired outcome” was, according to the Minister for Finance, “to make sure that due diligence is fully completed satisfactorily and once that is done and completed, then we could progress to the payment of the deposit and eventually the purchase of the boat”. (T 5237 R)

6.307 On 7th May 2009, the Minister for Finance received a Savingram directly from the former Minister for Transport seeking the payment of the deposit on the purchase of the MV Princess Ashika. Attached was a legal opinion from the Solicitor General dated 7 May 2009 and the Cabinet Memorandum No.300. In his legal opinion the Solicitor General stated:

“4. Furthermore, we are concerned that the Marine and Ports division of your Ministry has not conducted the auditing of the vessel. They are the Government’s shipping experts, who should at the least endorse the audit conducted by the consultants.

5. Moreover, there seems to have been no due diligence carried out at all by the consultants or Government on the financial viability to Government in purchasing this vessel. The Ministry of Finance and National Planning should at least have carried out or endorsed the findings of any consultants who were given that task.” (Exhibit 393 paragraph 11)

6.308 The former Minister for Transport, Mr. Karalus, advised the Minister for Finance in the Savingram dated 7 May 2009:

“For points 4 and 5 be advised that we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted that latest dry docking report (scope of works). We have also taken note of the further reports as provided by Engineers Shaw and Bennett.”

We are satisfied that the vessel meets our seaworthiness and mechanical requirements.” (Exhibit 393 paragraph 12)
6.309 To the “eternal regret” of the Minister for Finance, he took Mr. Karalus’s word that due diligence had been carried out and endorsed the transaction. He would not have endorsed the proposed transaction had he known for instance that no survey documents had been supplied by the Fiji Ministry, that Mr. Jonesse had signed Mr. Shaw’s name to the report said to be provided by him and that there had been no survey conducted of the vessel by the Ministry of Transport or any independent surveyor on behalf of the Ministry to establish its seaworthiness. The Minister said he only became aware of these matters after the evidence had been heard about them before the Royal Commission. (Exhibit 393 paragraph 13)

6.310 The Minister was not provided with any documentation with the Savingram of 7th May 2009 to support the conclusion that the vessel was seaworthy. In fact, at the time of the Savingram the Minister for Finance had not received any documents to support the conclusion that due diligence had been conducted in relation to the MV Princess Ashika or the prospective purchase of the vessel. (T 5264) He agreed with the advice from the Solicitor General. (T 5262 – 5263)

6.311 On 7th May 2009, Hon. ‘Otenifi Afu’alo Matoto wrote a note, on the Savingram from Mr. Karalus, to the Acting Secretary for Finance Tiofilusi Tiueti which provided:

“For further action on this to forward the money to the Trust A/c by tomorrow. Any concerns can be discussed with me.” (Exhibit 393 paragraph 14)

6.312 On 8th May 2009, the Ministry of Finance went ahead and paid the deposit of FJD$90,000 in accordance with the request of Mr. Karalus. The Minister for Finance says that even though the deposit was paid, he believed that the Government was not obliged to proceed with the purchase if, for some reason, the vessel was subsequently found to be unsuitable. (Exhibit 393 paragraph 14) The Minister never saw a copy of the contract until about the 29th May 2009. He says that he was not aware of whether the contract had in fact been signed on the 8th May 2009. (T 5266) The deposit of FJD$90,000 was not a small sum. The Minister said that “my belief at the time was that the deposit was just to keep our interest on the vessel” (T 5267). Having not seen any contract or other documents warranting the payment of the FJD$90,000, the payment of the deposit should not have been authorised.

6.313 It would have been normal practice, because the Ministry of Finance was committing funds for the purchase of MV Princess Ashika, for an official from the Ministry of Finance to sign the contract. When the Minister for Finance was asked why this normal practice was not adopted in the case of the purchase of the MV Princess
Ashika his response was, “Well, in this particular case, the Minister of Transport was negotiating and conducting the purchase of the vessel and that’s why he is signing the contract”. (T 5280)

6.314 The Minister of Finance accepted that the contract signed by Mr. Karalus had a number of unusual features. Unlike the Prime Minister, the Minister of Finance, properly accepted that the entire FJD$600,000 was required, pursuant to the contract signed on 8th May, to be paid by the date of the signing of the contract. (T 5281) That being the case, it would obviously not allow for proper due diligence to be conducted after the contract was signed. The Minister also frankly conceded that the effect of the agreement signed by Mr. Karalus was that the State was obliged to pay the FJD$600,000 irrespective of the value or condition of the vessel. (T 5281) He understood that the whole purpose of due diligence was to avoid something like that happening. (T 5282)

6.315 On about 27th May 2009, Mr. Samuela ‘Akilisi Pohiva and Mr. ‘Uliti Uata, both members of Parliament, had a meeting with the Minister for Finance. They raised concerns about the replacement vessel. He said that the main purpose of the meeting was to discourage Government from proceeding with the purchase because it would compete with private sector enterprise. However, questions were raised with the Minister about whether there had been any technical requirements satisfied regarding the seaworthiness of the vessel. The Minister said that all those matters were being taken care of by the Minister for Transport. He was asked whether the Minister for Transport had taken a survey. The Minister said that he was not aware of the Minister for Transport having done that, but policy issues on Transport rested with his portfolio and therefore he was the one who determined what goes on in the Transport sector. (T 5289 – 5292) It was accepted by the Hon. ‘Otenifi Afu’alo Matoto that it was validly raised at the meeting whether a survey had been conducted. (T 5296)

6.316 Mr. ‘Akilisi Pohiva, representative number one of the people of Tongatapu to the Tonga Legislative Assembly swore an affidavit relating to his meeting with the Minister for Finance. (Exhibit 401) He also gave evidence before the Commission. (T 5361 – 5377) Mr. ‘Uliti Uata also swore an affidavit in relation to this meeting. (Exhibit 404) Although we accept that Mr. Uata was seeking to discourage the Government from proceeding with the purchase, probably because it would compete with the shipping interest of Mr. Uata, we nevertheless consider that questions were raised about whether technical requirements had been satisfied regarding the seaworthiness of the vessel.
The Hon. ‘Otenifi Afu’alo Matoto, was a member of the Government Procurement Committee together with the Director of Works, the Auditor General, the Commissioner of Revenue, the Solicitor General and the Secretary for Finance. The Minister of Finance was Chair of the Procurement Committee and the most senior member of the Committee. Well after the contract was entered into on 8th May 2009 and the payment of the initial deposit in relation to the purchase of MV Princess Ashika, the Minister for Finance received a circular from the Secretariat for the Government Procurement Committee dated 13th May 2009 which sought approval of the sale and purchase agreement between the Ministry of Transport and Patterson Brothers Shipping Company Limited in respect of the purchase of the MV Princess Ashika. The circular was not received by the Minister, for consideration by him, until about the 29th May 2009. (Exhibit 393 paragraph 15)

To the best of the Minister’s recollection, the circular was accompanied by a reference file containing:

   (a) Memorandum number 300 from Chief Secretary and Secretary to Cabinet dated 23 April 2009.
   (b) Savingram from Minister for Transport to Crown Solicitor dated 6 May 2009.
   (c) Savingram from Solicitor General to Minister of Transport dated 7 May 2009.
   (d) Savingram from Minister of Transport to Minister of Finance dated 7 May 2009.
   (e) Memorandum to Cabinet from Minister for Transport dated 20 April 2009.
   (f) Document entitled “With regards to the contents of this reference file”.
   (g) Seven pages of photographs.
   (h) Two pages list of items and comments.
   (i) One page document entitled “Review by John Jonesse with George Patterson w/e 26/04/09”.
   (j) Two page document entitled “Audit completed 6-8 April 2009”.
   (k) Sale and purchase agreement undated but said to be “Faxed to Fiji 8th May 2009”.
   (l) Blank Kingdom of Tonga bill of sale
   (m) One page document entitled “Note and summary of costs”. (Exhibit 393 paragraph 16)

The Minister also received a copy of a document entitled “Purchase of MV Princess Ashika (IMO No. 385168). The document pointed out that there was no evidence
that the Government had inspected and satisfied itself that the vessel was fit for the purpose or that it was satisfied as to the state of repair or condition of the vessel. It provided that “the minimum would be a comprehensive report of the condition of the vessel with an assessment of “fitness for purpose” by persons competent to do so acting solely on behalf of the purchaser”. (Exhibit 393 paragraph 17) The Minister for Finance agreed with the comments recorded in the document. FJD$600,000 was not a small amount of money and a report on its condition was very important. (T 5282)

6.320 At the time the Minister received the circular it had already been signed by all other members of the Committee. He noted that both the Solicitor General and the Auditor General had also relied upon the advice given by the Minister of Transport that due diligence had been completed in approving the transaction. If due diligence had not been completed, the Auditor General made it quite plain that the transaction would not be approved. Having received a similar assurance from the former Minister for Transport, the Minister for Finance signed the circular on 29th May 2009. (Exhibit 393 paragraph 18) The Procurement Committee decision was not valid until it was signed by the Minister on 29th May 2009. (T 5286)

6.321 The Minister for Finance was aware that he was not aware of any valuation when he signed the recommendation, as part of the Government Procurement Committee, on 29th May 2009. No valuation was ever produced to the Minister in relation to MV Princess Ashika. He knew however that part of the proper due diligence process was to ensure that an independent valuation was obtained in relation to the vessel prior to purchase. None of the information supplied to the Minister pertained to the valuation of the vessel. (T 5283)

6.322 The Minister accepted that he could have done better in carrying out his duties to ensure that an independent valuation was obtained in relation to the MV Princess Ashika prior to the purchase of the vessel. If he “was doing this all over again” he would make sure “that every sufficient evidence of all due diligence is being provided”. (T 5284)

6.323 The Hon. ‘Otenifi Afu’alo Matoto frankly accepted that by the time he received a circular from the Government Procurement Committee it was, effectively, too late for the Government to extricate itself from the purchase. This was in part because the contract which Mr. Karalus had signed on behalf of the Government had committed the Government to the purchase of the vessel for FJD$600,000 irrespective of the condition of the vessel. The Minister for Finance appreciated that by the time the matter was submitted to him on the 29th May 2009 he was in an unenviable position. If he had seen the draft contract prior to it coming to the
Procurement Committee he would most likely not have signed it or have allowed any Government official to sign it. (T 5285)

6.324 After the Government Procurement Committee had approved the purchase of the MV Princess Ashika, the Minister for Finance received another Savingram from the former Minister for Transport (Mr. Karalus) requesting assistance in remitting the balance of the purchase price to the vendors of the vessel in Fiji. He initially signed and dated the Savingram as having been received and read by him on 3rd June 2009. The Savingram from the former Minister for Transport advised him that prior to settlement, John Jonesse would fax confirmation that the documentation was in order including insurance cover of the vessel. (Exhibit 393 paragraph 19)

6.325 The Ministry of Finance and Planning subsequently received a six page facsimile from John Jonesse from Fiji. Although the facsimile which was addressed to the former Minister for Transport is said to have been copied to the Ministry of Finance, he has no recollection of receiving it. Attached to the Minister of Finance’s affidavit is the facsimile obtained from the Ministry’s files. He noted that he did not initial the facsimile as having received and read it, which is his normal practice. In the facsimile, Mr. Jonesse confirmed that he had sighted copies of the Fiji Marine certified documents required for the Ministry of Transport in Tonga and also confirmed that insurance had been arranged with SCP’s current brokers British Marine Managers Limited to cover the full value of the vessel. On that basis, Hon. ‘Otenifi Afu’alo Matoto understood that the Ministry of Finance went ahead and arranged to pay the balance outstanding on the purchase of the vessel to the vendors of the vessel through the National Reserve Bank of Tonga. He had earlier discussed the purchase of the vessel with both the Secretary for Finance (Mr. Eke) and the Deputy Secretary for Finance (Mr. Tiueti), so when the request for payment was received, they or their staff would action the request once they were satisfied that all the documentation was in order.

**E-mail Communications**

6.326 The Minister for Finance was served personally with a summons to appear and produce documents to the Commission. He said that “we have produced all the documents that we can produce”. (T 656) He indicated that as far as he knew, he was satisfied that all documents had been produced. (T 657 A) The Minister understood that he was required to produce any e-mail sent by him or to him. He said that he checked all his e-mails and what was relevant had been produced. He could not find any e-mails which he considered were relevant. The Minister in fact did not produce any e-mails sent either to him or by him in relation to MV Princess Ashika. The reason given for this was that to the best of his knowledge, there were none. (T 5114
P – 5115 J) It should also be noted that other important documents went missing from the files held by the Ministry of Public Enterprises in relation to Shipping Corporation. (T 5145; T 5228)

6.327 The Hon. ‘Otenifi Afu’alo Matoto correctly accepted that e-mail communications in relation to the funding or possible funding of the MV Princess Ashika would be relevant. He said however that there were none in his computer. When asked whether they had been deleted he said:

“I have no idea because my computer has been - have undergone some repairs and, in fact, I have also changed computers and my old emails were supposed to be transferred to my new computer, but it is - it appears that some of the emails have been lost in the transfer” (T 5252)

6.328 Apart from the repairs being done in 2009 the Minister could not recall when they were done. (T 5252)

6.329 E-mails should have been produced pursuant to the summons served on the Minister.

6.330 On about 21st May 2009, Mr. Karalus sent an e-mail to the Prime Minister and Mr. Solomon, which was copied to the Minister for Finance. The subject of the e-mail was “vessel update”. (Exhibit 430; T 5254) The e-mail was also sent to Mr. Solomon, a consultant at the Prime Minister’s Office. The e-mail provided:

“PM and Minister
Re the MV Princess Ashika. We have a First Mate and Motorman travelling to Fiji tomorrow for one week of sea trials with the vessel while it conducts normal runs to Levuka. Then next Friday we plan to send a Master and a further crew to assist the Fiji crew for the delivery over that weekend. This means we need to try for settlement by the end of next week. Settlement is required before the vessel is released as the owners are not interested in a lease arrangement as there are other interests.
In the Bill of Sale Agreement the deposit is refundable if there is no settlement.
The amount of settlement is FJD 510,000. There will also be bunker costs for the delivery as well and probably a few other costs. the modifications we will do here spread over a couple of voyages.
There is a cargo being put together for the delivery and with something over a week left we are keen to carry as full a load as possible.

Rob.
Do you think we can have NZAid on board by next Friday?”
If not, do we have alternative funding available?

Paul.” (Exhibit 430)

6.331 The contract for the purchase of MV Princess Ashika was signed by Mr. Karalus on the 8th May 2009. The contract was a cash unconditional contract. (Exhibit 417) The deposit of FJD$90,000 was paid on 8th May 2009. The balance FJD$510,000 was paid by telegraphic transfer to Fiji on 5th June 2009. There was no Bill of Sale Agreement signed, as stated by Mr. Karalus in his e-mail. There was no legal basis to suggest that the deposit was refundable if there was no settlement. It was fair to say that as at the 21st May 2009, finance for the purchase of the vessel had not been secured. Notwithstanding this, the Minister for Transport was seeking to have the settlement of the transaction consummated early. There was great haste by the former Minister of Transport to ensure that the transaction was entered into was in fact completed. The Minister for Finance did not know what the hurry was for the Minister for Transport to ensure that the settlement of the transaction was completed by the week after the 21st May 2009.

6.332 The Minister for Transport, Mr. Karalus, was taking an active role in ensuring that the transaction for the purchase progressed to completion. He was taking a personal role in ensuring that the finance was available and that the transaction was completed for the purchase of the vessel. Mr. Karalus was not communicating with the Minister for Finance via officers from the Ministry of Transport. (T 5621)

6.333 The Hon. ‘Otenifi Afu’alo Matoto properly acknowledged that it was important for the Government to ensure that finance was in place and available prior to the signing and purchase of the MV Princess Ashika. (T 5260) However, the contract was signed on the 8th May 2009. Funding was still not in place on the 21st May 2009. (T 5255 – 5260) In relation to the purchase of the MV Princess Ashika there was no budget allocation and no subsequent attempt to authorise any expenditure out of the budget of the Government. The Minister for Finance said this was not required because the expenditure came from aid funds. As it transpired, the balance purchase price of FJD$510,000 came from monies which were received in September 2008 from the People’s Republic of China. In excess of TOP$15 million was received. The Minister said that the purpose of the money was in respect of arrangement between the Government and the People’s Republic of China with respect to the purchase of an orbital slot from TONGASAT by the People’s Republic of China. The Minister for Finance communicated with the Prime Minister advising that if NZAID could not assist, the Government could use funds obtained in relation to TONGASAT. (T 5253 – 5254; T 5330 – 5333) The People’s Republic of China was not consulted about the use
of the money as the Minister said there was no reason for consultation. (T 5184 –
5188 B) It is difficult to understand how one can regard the moneys provided from
China, based on the evidence given by the Minister for Finance, was “aid funds”. The
Minister in paragraph 10 of his affidavit proposed to the effect:

“I was advised that the subsequent investigations determined that aid funds would
not be available within the time frame required and I therefore confirmed, in response
to a specific request from the Minister for Transport, that the Government had
sufficient funds available to purchase the MV Princess Ashika.” (Exhibit 393 paragraph
10) (Underlining added)

6.334 As it transpired, “in the final analysis there was no other source but the funds from the
Republic of China”. They were the only funds available. (T 5198 S - 5199 G) Mr.
Karalus, when he signed the cash unconditional contract for the purchase of MV
Princess Ashika on 8th May 2009, was taking an extraordinary risk on behalf of the
Government when funding had not even been arranged.

6.335 On about the 21st May 2009, the Prime Minister responded to the e-mail of Mr.
Karalus on the same day. The e-mail was sent to Mr. Solomon and copied to the
Minister for Finance, the Chief Secretary and Secretary for Cabinet and the Deputy
Secretary of Foreign Affairs at the time. (T 5740) The e-mail stated:

“Dear All

What is FJD510 K in NZD? About NZD500 K?

Rob, what is the latest feedback from NZAid? Pls let me know asap. We will
be seeing the NZders tomorrow at Hokkaido –Craig H, Chris Seed and McCully
and would like to have it finalized one way or other before we leave here.

The only other source of funding is for the Min of Fin to advise us on. In the
meantime, Paul, Shipping Corporation of Polyn should be asked to give us/Fin
a projected cash flow as they will have to pay for it; additionally there should
be a plan for them to start putting away some funds from the word go for
repairs etc.

PM” (Exhibit 430)

6.336 On about 21st May 2009, the Minister for Finance (Hon. ‘Otenifi Afu’alo Matoto)
responded by e-mail to the Prime Minister (which was also sent to the Minister for
Transport, Mr. Solomon and the Chief Secretary). The e-mail provided:
“Dear PM

If NZAid cannot assist then we can use funds from the China grant in relation to Tongasat and we have almost Top$9.0m left after the transfer of TOP$15.0m to start the Disaster and Emergency Fund. I understand there are already plans for the management and operations of the boat. The Government will own the boat and will lease it to SCP at say T$125,000pa payable monthly and SCP can still operate the boat at a profit. The Minister for Transport has all these information.

Afu” (Exhibit 430) (Underlining added)

6.337 The Prime Minister responded promptly to the e-mail from the Minister for Finance, which was also sent to the Minister of Transport, Mr. Solomon and the Chief Secretary and Secretary for Cabinet. The e-mail stated:

“Dear Afu

Thanks very much for that info – great to know we can do it without too much trouble, and thanks for the forward planning on that..I will push for the NZders to fund it, and lets hope they will be able to do it

Fred/PM”

6.338 On about 25th May 2009, Mr. Karalus sent an e-mail to the Prime Minister and to Mr. Solomon. The e-mail was copied to the Minister of Finance and the Chief Secretary and Secretary for Cabinet. The e-mail was in the following terms:

“PM
SCP have provided this to MPE and have perused it and agreed that this purchase is the best option. I am not so sure of the lease rate, Minister of Finance suggested something in the region of 175,000p.a. and I think this is realistic, though SCP would obviously prefer a lower rate; however, they need to start looking at revenue opportunities that this vessel can generate.
I presume u got the exchange rate from Rob; my email address is only now back in action.
Paul.” (Exhibit 431)

6.339 Notwithstanding the reference to a lease rate of $175,000 p.a., Mr. Karalus in an e-mail to Mr. Jonesse, on 2nd July 2009, agreed to a rate of $5000. (Exhibit 29 page 68)
6.340 Attempts to obtain aid from AusAID and NZAID for the purchase of the vessel MV Princess Ashika by Mr. Karalus were unsuccessful. It is noteworthy that Mr. Karalus wrote the letters on 30th April 2009 seeking funding, not the Minister for Finance. (Exhibits 350, 351 and 400; T 5287 – 5288) This again shows the personal role he was taking.

Parliamentary Debate on 9th June 2009

6.341 On 9th June 2009, concerns were raised about the MV Princess Ashika. (Exhibit 402) The Prime Minister, Minister of Finance and Mr. Karalus were all present in Parliament on that day. A Member of Parliament, Mr. Teisina Fuku, who was made the Minister of Revenue Services after the MV Princess Ashika sank, said in Parliament that he had just “heard that Fiji is very happy about this very old vessel being bought. Because they don’t have a vessel. They hire vessels from other countries to operate in Fiji. But they are glad that Tonga came over and bought what is to be taken for scrap metal.” Member of Parliament, Mr. Samuela ‘Akiilisi Pohiva, also raised concerns about the proposed replacement vessel and mentioned that he had inquired with the Minister for Finance whether any survey had been carried out. (Exhibit 403; T 5294 – 5296)

6.342 Regrettably, Mr. Karalus informed Parliament that a survey of the vessel had been conducted. (Exhibit 403)

Cause of the Disaster

6.343 The Hon. ‘Otenifi Afu’alo Matoto said he had reflected on the cause or causes of the disaster. He expressed his view as follows:

“Well, certainly I would think that if the necessary due diligence had been done on the MV Princess Ashika, it would have proven that it was not suitable and the purchase would not have proceeded and I think if, say, for example, we - I on my part if I had insisted on viewing the evidence of the due diligence that was required before I acted on the payment, that would certainly have prevented the purchase of the boat. But at the same time it was also possible that, given the fact that the boat had been purchased without all the necessary due diligence as it appears to have emerged in this Commission, it is quite possible that the tragedy may not have happened. If, say, for example, the operators of the boat had taken the necessary responsibility, and found that the boat was not suitable to be operating and had made the necessary decision not to sail the boat, it could mean, of course, a loss on the part of the Government but at the same time, it would mean that it need not have sailed because it was not safe to sail or reliable to sail. So I would think
that on reflection there has been a failure at different levels to take the necessary responsibility, and all those failures have resulted in the tragedy which I said could have been prevented, even though the boat had been purchased, but could still be prevented had responsibility been taken not to sail a boat that was considered not safe and not reliable.” (T 5297) (Underlining added)

6.344 When asked by Counsel Assisting if he would agree that the tragedy resulted from a systemic failure, as well as individual failings he said:

“Well, not so much a systemic failure, I think, much more individual failures at different levels to take the necessary responsibility to make sure that everything has been done properly because a lot of work is based on trust and we relied because of the responsibilities of portfolios, responsibilities, in other areas. Really a lot of the work relies heavily on each person fulfilling his part of whatever is required to be done, and certainly it’s - in my view it’s more a personal failure in responsibility, much more than a systemic failure.”

6.345 It is clear on the evidence that the tragedy resulted in part, from a systemic failure in the Maritime industry in Tonga.

6.346 The Minister for Finance correctly accepted that people need to take responsibility for their decisions and actions. They need to be accountable. (T 5298) He said that he would probably “not be too trusting as I have been, and would certainly take more time to dig more deeply into things to satisfy myself before I accept them”. He would make a more robust assessment of any proposed recommendation put to him or any resolutions he was asked to vote on in Cabinet. The Minister said, which we accept, that after the tragedy:

“I would ensure that all the necessary due diligence at every level is ruthlessly exercised and ensure that proper attention is given to ensuring that the due diligence at every level is being attended to, and that no shortcuts are being taken.” (T 5299)

6.347 The Hon. ‘Otenifi Afu’alo Matoto said that:

“the Government has a responsibility in the fact that they were responsible for purchasing of the vessel, but as I mentioned earlier, purchasing of the vessel is not the main cause of the tragedy. The main cause of the tragedy was that the vessel which was not safe and unreliable was allowed to operate and sail.” (T 5299)
6.348 The Minister correctly accepted that the vessel should never have been purchased in the first place because it was unseaworthy and unfit, and secondly, once it arrived in Tonga, it should not have been allowed to sail. (T 5299)

Insurance Claim

6.349 By about September 2009, it was suggested to the Minister for Finance that the MV Princess Ashika was insured. However, he did not, and does not know what stage the insurance claim had reached. It was indicated to him by Mr. Karalus that a claim was in process. The Minister for Finance however was not told whether a claim had in fact been lodged or not. Even at the time of giving evidence on 18th February 2010, Hon. ‘Otenifi Afu’alo Matoto did not know whether a claim had been lodged.

Cabinet Decision date 22nd December 2009 in relation to MV Pulupaki

6.350 On the 22nd December 2009, Cabinet was advised that the Ports Authority had made a public announcement that it was not safe to travel on the MV Pulupaki and that it would not be allowed to return to port in Nuku’alofa. The radio announcement was discussed at Cabinet. (T 5306 - 5312) The Prime Minister, in his affidavit, indicated that in general business “the Ports Authority was advising the public that it was not safe to travel on the MV Pulupaki and that it would not be permitted to berth in Nuku’alofa on return from outer islands.” (Exhibit 408 paragraph 39)

6.351 The Minister said he could not recollect whether anyone raised the point that the public was advised that it was not safe to travel on the MV Pulupaki. (T 5308) We consider that Cabinet was advised that an announcement had been made by the Ports Authority that it was not safe to travel on the MV Pulupaki. There were no written reports or other documents given at the Cabinet meeting on the 22nd December 2009. The Minister did not know whether the vessel was about to sail. (T 5312)

6.352 The Cabinet decision No.1187 provided:

“With reference to RE: Public Announcement Concerning MV Pulupaki

I have the honor to inform you that His Majesty’s Cabinet Decision on 22nd December 2009 was as follows:

That the Chief Secretary & Secretary to Cabinet to write, as a matter of urgency to Ports Authority and to direct them:-

1. That the public announcement with respect to the movement
and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2. That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature;

3. That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its current trip, for usual loading and unloading purposes.”

(Exhibit 331)

6.353 On 22nd December 2009, the Chief Secretary and Secretary to Cabinet sent a letter to the General Manager of the Ports Authority Tonga (Commander Lupeti Vi) stating:

“Dear Lupeti,
Re: Public Announcement Concerning MV Pulupaki

Please be advised that the public announcement made this morning by the Ports Authority Tonga over the air with respect to the MV Pulupaki, has come to the notice of His Majesty’s Cabinet at their meeting this morning, His Majesty’s Cabinet has directed that the following directives be informed to your office today, Tuesday 22nd December, 2009:-

1) That the public announcement with respect to the movement and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2) That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature

3) That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its (sic) current trip, for usual loading and unloading purposes.

I hope the above Cabinet directives are clear and that they be implemented in the usual way.

Yours Sincerely
Busby Kautoke” (Exhibit 408 annexure “K”)

6.354 It was clear that at the Cabinet meeting on the 22nd December 2009, Ports Authority had sufficient concerns about the safety of travelling on the MV Pulupaki that the authority was prepared to advise the public that the vessel was not safe to travel and that it would not be permitted to berth in Nuku’alofa on its return from the outer islands.
The Hon. ‘Otenifi Afu’alo Matoto was aware that unseaworthy ships should not be allowed to sail in Tonga. The MV Princess Ashika sank because it was unseaworthy and unsafe. The deliberations and decisions made by Cabinet on 22nd December 2009 should have been made against this backdrop, as well as the concerns raised by the Ports Authority about the safety of the MV Pulupaki.

It appears that there was no discussion, let alone any rigorous discussion or report, at the Cabinet meeting as to what the safety concerns were that had been raised by the Ports Authority which triggered the Ports Authority to advice the public that it was not safe to travel on the MV Pulupaki. This is most troubling. Of course, the MV Pulupaki is a RoRo vessel, as was the MV Princess Ashika. It travels from Nuku’alofa to a number of the same islands and on the same route as that which the MV Princess Ashika travelled on.

The radio communications in relation to MV Pulupaki for the 22nd December 2009 indicates that the vessel departed Neiafu at 0530 hours, bound for Pangai and that it was due to arrive at Pangai in 1100 hours. The records indicate that the vessel reported at 1641 hours that it departed Pangai at 1545 hours, bound for Ha’afeva and was due to arrive at Ha’afeva at 1720 hours. The MV Pulupaki reported at 2013 hours that it had departed Ha’afeva at 1755 hours, bound for Nuku’alofa and would arrive at Nuku’alofa at midnight with 111 passengers and 23 crew. The wind speed was recorded at 15 – 20 knots with a sea swell height of 1 metre. The MV Pulupaki departed on the 23rd December 2009 at 2245 hours, bound for Ha’afeva. It also sailed on the 24th, 25th, 30th and 31st December 2009. (Exhibit 437, 438 and 439) It was also allowed to sail in January 2010 until it was detained. However, even after it was decided in January that the vessel was unseaworthy and should be detained it was nevertheless allowed to sail for an alleged “emergency”. This will be dealt with in more detail in another part of the report.

At the Cabinet meeting on the 22nd December 2009, the MV Pulupaki had departed Neiafu and was bound for Pangai. It did not depart Pangai until 1545 hours. It could therefore have been stopped at Pangai. The Minister was aware that the effect of the Cabinet decision would be to allow the vessel to come back into the Port of Nuku’alofa. (T 5311) That is, sail.

PART C - MR. PAUL DAVID KARALUS

On 13th May 2006, Mr. Paul David Karalus was appointed by His late Majesty King Taufa’ahau Tupou IV as Minister of the Crown (until 10th August 2009, when he tendered his resignation as a Minister). Although Mr. Karalus tendered his resignation on 10th August 2009, he acknowledged continuing to work at the Ministry of Transport office until 17th, 18th or 19th August 2009. (T 5907 I)
Mr. Karalus was appointed as a Minister of the Crown on 13th May 2006. On 5th August 2009, while he was the Minister of Transport, the MV Princess Ashika sank resulting in the tragic loss of at least 74 lives.

Mr. Karalus played a pivotal role in relation to the purchase of the vessel. He personally prepared the Cabinet Memorandum dated 20th April 2009 in respect of the purchase of the MV Princess Ashika; was a Member of Cabinet that considered and supported the purchase of the MV Princess Ashika at a Cabinet meeting on 23rd April 2009; personally signed on 8th May 2009 the cash unconditional contract for the purchase of the vessel; ensured the deposit of FJD$90,000 was paid on 8th May 2009 by telegraphic transfer to Fiji; ensured the balance purchase price of FJD$510,000 was paid on 5th June 2009 by telegraphic transfer to Fiji; had numerous conversations with Mr. Jonesse (the CEO of SCP) regarding the prospective and actual purchase of the vessel and personally retained in his office, documents in relation to the MV Princess Ashika.

The former Minister for Transport, who was an experienced businessman and been involved in the civil aviation industry for over 20 years, was fully aware that proper and thorough due diligence needed to be conducted prior to the purchase of the vessel. This included, as he acknowledged, an independent survey, independent valuation and the obtaining and inspection of documents (including survey documents) in relation to the MV Princess Ashika. He was aware none of this was ever done. The Solicitor General advised Mr. Karalus the day before he signed the contract to purchase the vessel that there should be an “audit” conducted of the vessel. Notwithstanding this advice, Mr. Karalus proceeded to sign the contract.

Regrettably, the evidence establishes that Mr. Karalus committed to purchasing the MV Princess Ashika and allowed it to operate in Tonga irrespective of the condition or suitability of the vessel. He made unsubstantiated and inaccurate statements to His Majesty, the Legislative Assembly, Cabinet, the Prime Minister, the Minister of Finance, the Solicitor General and the Media in relation to the vessel. He was aware that many of the positive statements and representations he made in relation to MV Princess Ashika were obviously false.

Mr. Karalus conceded that he had read parts of the transcript before the Commission. That became evident not only because of his admission that he had done so, but also from a number of the answers he gave which sought to distance himself from any responsibility for the tragedy. We found Mr. Karalus, in many respects, to be an untruthful witness. His evidence often lacked any credibility or plausibility.
If Mr. Karalus had properly carried out his duties and responsibilities as the Minister of Transport, the MV Princess Ashika should never have been purchased. Having arrived in Tonga on 1st July 2009, if Mr. Karalus had acted responsibly, the MV Princess Ashika should never have been allowed to sail. Mr. Karalus cannot avoid his duties and responsibilities as Minister by simply saying that Mr. Jonesse misled him or that he relied on others. If he had properly carried out his duties, independent due diligence would have been conducted on behalf of the Government. It would thus have been patently obvious that any statements made by Mr. Jonesse to the Minister as to the favorable condition of the vessel or the maintenance of it, were false, just as were many of the statements Mr. Karalus made to others.

Substantive Evidence of Mr. Paul David Karalus

Educational Background, Qualifications and Experience

Mr. Karalus was born in 1948 in Inglewood in Taranaki, New Zealand to dairy farming parents. He is from a large family and is the second eldest of ten children. Mr. Karalus completed Primary schooling at Tariki Primary School and then undertook five years of secondary schooling at Francis Douglas Memorial College in New Plymouth.

In 1967, having not determined the University or the course of study he would undertake, Mr. Karalus joined the New Zealand Volunteer Service Abroad scheme as a school leaver volunteer. He was posted to St. John’s High School (now part of ‘Apifo’ou College) in Ma’ufanga, Tonga, as a junior secondary school teacher. Mr. Karalus was eighteen years of age at the time.

1967 was the year in which his late Majesty King Taufa’ahau Tupou IV was Crowned. One of the highlights in this year for Mr. Karalus was his participation in a leading role in the traditional dance, the soke performed by the village of Ma’ufanga, Nuku’alofa, the village which Mr. Karalus lived.

During that year Mr. Karalus travelled throughout the Ha’apai and Vava’u groups of Tonga as well as the entire island of Tongatapu.

In 1968, upon his return to New Zealand, Mr. Karalus made it a point that Tonga would feature in his future studies and he had, by this time, determined that Geography would be his major for a BA degree that was to be undertaken at Victoria University of Wellington. These studies commenced in 1968 and were completed in the minimum three years after which he continued on to do BA Honours in Geography with a paper also in Anthropology in 1971.
6.371 In 1972 Mr. Karalus obtained a Diploma in Secondary School Teaching from the Auckland Secondary Teacher’s Training College. There followed, six years of college teaching at Opotiki College in the Bay of Plenty, New Zealand.

6.372 In 1970, while at university, Mr. Karalus married Tafolosa Kaitapu from Ha’apai and upon their return to Tonga in January 1979, they had three girls of aged 7, 6 and 4 years. Mr. Karalus once again taught at St. Johns High School and St. Marys High School.

6.373 Mr. Karalus spent about 23 years in the civil aviation industry.

6.374 In September 1980, he was appointed the Regional Manager for Tonga for South Pacific Islands Airways, a small airline based in Pagopago, American Samoa, but which also provided domestic service for Tonga.

6.375 Mr. Karalus spent 23 years in the airline industry, completing “active service” in April 2002, although he continued for a year in an advisory capacity.

6.376 During his 23 years in the airline industry Mr. Karalus served with South Pacific Island Airways (from 1980-1985), Friendly Island Airways (the forerunner to Royal Tongan Airlines) as General Manager (from about 1986) and Polynesian Airlines as Regional Manager for Tonga. (From about 1990-2002)(Exhibit 64, pages 2-4 and T 5820-5821)

6.377 From April 2002 to May 2006, Mr. Karalus managed the family business which was involved in the agricultural sector. In particular, Mr. Karalus had a farm and goods store, a tissue culture laboratory and a privately owned “coffee industry of Tonga”. (See Exhibit 64, paragraph 23)

6.378 Mr. Karalus in his evidence initially indicated that he was involved in the businesses of coffee, tissue culture and agriculture supply “only to the extent that we are endeavoring to improve the financial position of those businesses as at present” (T 5812 P). These businesses were conducted by other companies all “run under the umbrella of a holding company, Karalus Enterprises Group Limited”. (T 5813 I)

6.379 Although he did not disclose in his affidavit, during the course of examination by counsel assisting, Mr. Karalus accepted that in 2009 he had serious financial difficulties owing an amount of $1.1 million to the ANZ Bank. Due in part because of the economic climate and the nature of the industry Karalus Enterprises Limited was unable to make repayments.

6.380 On 28th May 2009, the Supreme Court of Tonga ordered that the Company, Karalus Enterprises Limited be put into liquidation. Mr. Karalus was a director and shareholder of such company on incorporation (T 6352-6353).
6.381 Subsequent to the liquidation of Karalus Enterprises Limited, in 2009, proceedings were commenced against Mr. Karalus and other guarantors by the ANZ Bank (T 6354 E). Curiously, there is no bankruptcy legislation in Tonga. Therefore a person in the position of Mr. Karalus could not have been declared bankrupt. In 2009, Mr. Karalus thus faced numerous serious financial difficulties, but took a very active and personal role in the purchase of MV Princess Ashika.

Role as Minister of Transport

6.382 On the 13th of May 2006 Mr. Karalus was appointed, as stated above, a Minister of the Crown.

6.383 At the time of his appointment Mr. Karalus was fully aware, given his considerable experience in the civil aviation industry, that safety in any transport business was always “the paramount consideration” (T 5822 P) He said he had no hesitation in supporting unairworthy aeroplanes being grounded and was not during his time in civil aviation prepared to compromise the safety of the crew and the passengers. (T 5823)

6.384 This was so, even if it meant there may be some public dissent or disquiet because of the decision to ground the plane. (T 5823)

6.385 Mr. Karalus viewed his role as a Cabinet Minister as a leader of his Ministerial portfolio and that he was the one who represented the plans and concerns of the Ministry to Cabinet as the central governing body of Government. The former Minister correctly considered that an important part of his Ministerial function was to ensure that there was a safe, secure and adequate transport infrastructure for the country’s transport system. (Exhibit 64, paragraphs 28 and 29) This included the operation of inter-island ferries. (T 5833 A)

6.386 Mr. Karalus expressed the obvious view that unseaworthy vessels should not be allowed to sail and that the position should never be compromised. (T 5823 T, T 5935 E) He was fully aware that it was unlawful to send a ship to sea which was unseaworthy. (T 5831 N) Part of the duties and responsibilities the former Minister of Transport accepted were to ensure unseaworthy vessels were not allowed to sail and he accepted that the “buck stopped with (him)” (T 5824)

6.387 In terms of safety, Mr. Karalus was well aware from when he visited Tonga in 1967 that the seas in Tonga could be “very treacherous” and that vessels had been lost at sea or sunk. (Exhibit 64, page 3) As Mr. Karalus put it, the domestic maritime industry operates in the context of an archipelago of many islands of small populations stretched over a relatively large area of ocean “marked by the
turbulence of its seas”. He was of the view that the sea conditions were “often times extremely rough” and the “conditions...could change quite dramatically in a short time” (Exhibit 64, page 11) (T 5901 R). It was always known during his time as Minister, that the MV Olovaha and then subsequently the MV Princess Ashika was going to have to travel on occasions in turbulent conditions. (T 5901 O)

6.388 Mr. Karalus considered that the regulatory function of the Ministry of Transport was the prime, critical and most important function and that if the regulatory system was properly working, then only safe vessels should be allowed to sail in Tonga. (T 5829, 5850, 5857, 5882) The regulatory functions included the functions in relation to the issuing of licenses and the carrying out of surveys. (T 5830 A-D) As part of the duties and obligations as regulator, Mr. Karalus accepted that this included ensuring that vessels were surveyed at appropriate intervals; they were competently surveyed; appropriate certificates were issued in relation to vessels; and if vessels were unseaworthy they be detained. (T 5897 Q - 5898 G)

6.389 It was conceded correctly, that there could be a position of conflict or potential conflict in surveyors or other officials at the Ministry of Transport making decisions that may affect Shipping Corporation (which had as the only shareholder, the Government). (T 5852-5853) Mr. Karalus also accepted that potentially the relationship between the Government and Shipping Corporation would put the surveyors in a very embarrassing position. (T 5854 L) As Mr. Karalus put it, “the police are also the policed”. (T 5849- 5850)

6.390 The former Minister of Transport did not have the technical expertise in relation to shipping matters, but said he would only rely on experts. He said he would act on advice if he considered it reasonable, such as experts at the Ministry of Transport or independent consultants. (T 5837) Mr. Karalus accepted it was appropriate, proper and highly beneficial from time to time to retain experts and consultants. (T 5844 K-5845 C) Consistent with this, Mr. Karalus engaged in services of an external consultant, Mr. Russell Kilvington. Mr. Kilvington visited Tonga on a number of occasions, including in early May 2009 and July 2009. (T 5864-5865) One of his “main tasks” was to “look at the survey of vessels” and the “whole process of surveys”. (T 5864 – 5866)

Allowing Unseaworthy Vessels to Sail

6.391 Even before Mr. Karalus became the Minister, he was aware there were serious difficulties in the Maritime industry, in particular “fractions”. (T 5873 T – 5874 F)

6.392 From the time Mr. Karalus was appointed the Minister of Transport in 2006, or shortly thereafter, he became aware that unseaworthy vessels were being allowed to sail. (T 5936 and Exhibit 448) Notwithstanding this, during the time Mr. Karalus
was Minister he was not aware of any prosecutions for contravening any of the provisions of the *Shipping Act* or Regulations. (T 5877 L - 5878 B) He nevertheless accepted that if there had been contraventions of the *Shipping Act* or Regulations in relation to the MV Princess Ashika, those involved should be prosecuted as part of due process. (T 5879 A-L)

6.393 Mr. Karalus was aware, even prior to his signing of the contract to purchase the vessel on about 8th of May 2009, that unseaworthy vessels were being allowed to sail. In some instances, after he became the Minister, he did something positive to deal with the problems, while on other occasions he did not properly carry out his duties to prevent unseaworthy vessels from sailing. (Exhibit 448)

6.394 Mr. Karalus deposed to the fact that the MV Pulupaki was “not designed for Tonga’s waters”. (Exhibit 64 paragraph 133)

6.395 The provision of the ferry service from Nuku’alofa to the islands was an essential service and Mr. Karalus was conscious of the fact that it was politically important for the Government to have this service operating as soon as possible. (T 5860 D – G) In fact, if one considers the economics and geography of Tonga, Mr. Karalus was aware that the actual availability of a safe, reliable and regular service by ferry is absolutely critical to the people of Tonga. (T 5898 S – T 5899 M-O)

6.396 On the 15th of August 2009, Mr. Karalus sent an e-mail to His Majesty where he said he felt he had to resign in order that there be a full and open investigation. The former Minister went on to state in the e-mail:

> “It is so cruel that such a disaster had to happen but it may assist in bringing the maritime industry to its senses in changing what is now ‘a culture of non-compliance’ into one of compliance as exhibited in the aviation industry”.  
> (Exhibit 486) (Underlining added)

6.397 On the 18th of August 2009, Mr. Karalus sent an e-mail expressing similar views as those in the e-mail to His Majesty of 15th August 2009. In this subsequent e-mail, to Mr. Nick Thomas, Mr. Karalus stated relevantly:

> “Thank you very much for your e-mail. This has been a dreadful experience, but I hope the loss of the lives has not been in vain (sic) in that it may go some way to changing the current maritime industry environment from one of non-co-operation and non-compliance to one of co-operation and compliance.

> This was always a huge battle as there are some very large egos out there and all ‘know it all’.”
There is a very large gulf between the respective industries of aviation and maritime and this will become very apparent in the enquiry.

I look forward to the results.” (Underlining added)

6.398 The e-mails of 15th and 18th August 2009 are consistent with his view formed shortly after he became the Minister, of a reluctance of those in the maritime industry in Tonga to accept new standards and comply with those standards. (T 5875 F) Mr. Karalus was also aware that some shipping companies did not even keep essential documents such as manifests. (T 5876) Of course, in the case of the MV Princess Ashika the manifest kept in relation to the trip on the 5th August 2009 (when the vessel sank) was totally inaccurate.

The MV Olovaha

6.399 As it transpired, the MV Princess Ashika was purchased by the Government because of a failure to properly maintain the ferry MV Olovaha, over a number of years, such that it had become unreliable and very costly to maintain. (Exhibits 369 and 469)

6.400 On 10th November 2008, Mr. Karalus provided a Memorandum to Cabinet in relation to the MV Olovaha. (Exhibit 449) Such Memorandum indicated that “a full report on the mechanical state of the MV Olovaha will be tabled at the Cabinet meeting”.

6.401 On 11th November 2008, Mr. Jonesse forwarded to Mr. Karalus an e-mail. The e-mail message was “Hope this is helpful”. The attachment was a report on the MV Olovaha. (Exhibit 369)

6.402 On 12th November 2008, the former Minister of Transport provided a report to Cabinet about the MV Olovaha (Exhibit 419), which was identical to that forwarded on 11th November 2008 by Mr. Jonesse to Mr. Karalus. The report stated, in the first two sentences, under the heading “General Overview”:

“While deterioration is a factor in any vessel of this age, with the Olovaha it is compounded by historic failure to maintain any rational programme of R&M (repairs and maintenance) to the extent of gross negligence and any failure resulting in injury would have been deemed to be criminal negligence.

With this in mind we have set up a PMP (preventative maintenance programme) that has proven its worth over the last two years.” (Exhibit 419)

6.403 The Prime Minister, Dr. Sevele, had been aware by December 2008 that MV Olovaha had to be replaced because it was unsafe and unseaworthy. (T 5572 F – I and T 5573 E – G) The Minister of Finance knew by April 2009 that the MV Olovaha was unsafe and unseaworthy, but nevertheless still operating. (T 5208 Q – 5209 I) We find that
Mr. Karalus was also aware by December 2008 that MV Olovaha had to be replaced because it was unsafe, unseaworthy and unreliable. (T 5938 A, T 5943 H, T 5946 E – P, T 5948 M, T 5949 I) Notwithstanding this, the MV Olovaha operated and was allowed by Mr. Karalus to continue to operate in Tonga until shortly before MV Princess Ashika arrived in Tonga on 1st July 2009, in contravention of the Shipping Act. Mr. Karalus accepted, as he should, that if he was aware that an unseaworthy or unsafe vessel was operating in Tonga, he should ultimately take responsibility. (T 5948 H)

6.404 Given that the MV Olovaha had become unsafe, unseaworthy and unreliable the Government decided it needed to be replaced as soon as possible. This was obvious to the Prime Minister (T 5572 – 5573) and we find obvious also to Mr. Karalus.

6.405 The Government of Japan had, by June 2008 agreed to fund a replacement vessel for the MV Olovaha. From 26th February 2007 to 19th March 2007 a design team from Japan worked with a local team on the design stage for the new ferry. The initial time frame was for the vessel to be delivered in late 2008 or early 2009. (Exhibit 64 page 16)

6.406 On 12th December 2008, the Government was advised by the Ambassador of Japan to the Kingdom of Tonga that the delivery of the replacement vessel from Japan would be further delayed until the end of the Japanese fiscal year 2010, instead of the Japanese fiscal year 2009. (Exhibit 422) This advice understandably created “extreme concern and disappointment” to the Prime Minister and the Government. (Exhibit 408 attachment “B”)

6.407 It was made clear to Mr. Karalus by 17th January 2009, that with the delay and the completion of the new vessel from Japan, it was not financially viable nor technically feasible to keep MV Olovaha operating, without there being long down times and huge expense (over TOP 800,000). Mr. Karalus considered, even after this expenditure, the vessel would have little further life and little residual value. Substantial downtime to carry out repairs and maintenance was also a major factor in the growing unreliability of the MV Olovaha. (Exhibit 64 page 17)

Association between Mr. Karalus and Mr. Jonesse

6.408 Mr. Karalus knew Mr. Jonesse prior to Mr. Jonesse being appointed as CEO of SCP in April 2007. He had some dealings with him in 2005 in relation to the provision of some seeds to Mr. Karalus for growing in Tonga and met him on few occasions in Tonga prior to 2007. (T 5887 R – 5890 H)

6.409 Lord Dalgety QC contacted Mr. Karalus and asked him if he had been put up as a referee and if he had any particular recommendation. (T 5891 A – C) Mr. Karalus told Lord Dalgety QC that he understood that Mr. Jonesse had a “wide background” and
“wide experience”. (T 5891 G and 5893 B) Nevertheless he knew that Mr. Jonesse did not have any experience in shipping (T 5892 E), and could not make an informed opinion on whether Mr. Jonesse would make a good CEO of SCP. (T 5892 R)

6.410 From April 2007, Mr. Karalus would talk to Mr. Jonesse “very regularly, on a whole range of issues”. Most of the times Olovaha departed Nuku’alofa or came back into port, Mr. Karalus would talk to Mr. Jonesse, including about how many passengers were onboard and how much cargo was taken. Mr. Karalus would talk to Mr. Jonesse “almost daily” and it “(could) easily be the case” that he would meet with Mr. Jonesse in face-to-face meetings or have discussions on the telephone with him several times a day. (T 5950 – 5952 D, T 5955)

6.411 Shortly after Mrs. Kalesita Taumoepeau commenced employment with the Ministry as Personal Assistant to Mr. Karalus, she met Mr. John Jonesse, who occasionally showed up at the Ministry office (located at the time at the former Frisco Building), to meet with Mr. Karalus, particularly on matters relating to the Olovaha. However, following the relocation of the Ministry of Transport from the former Frisco Building to Dupincia Lodge at Ma’ufanga in November 2008, Mr. John Jonesse was a frequent visitor to the office of the Ministry of Transport. (Exhibit 349 paragraphs 21 and 22) The office of Shipping Corporation of Polynesia Limited was less than 100 metres from the office of the Ministry of Transport (and less than 400 metres from where MV Princess Ashika was berthed).

6.412 By late June, early July 2009, Mrs. Taumoepeau noticed that Mr. Jonesse (the CEO of SCP) was frequently seen within the office of the Ministry of Transport, including in the offices of Mr. Karalus. Mrs. Taumoepeau noticed that “about this time John Jonesse was like rushing around the office, not only to the Minister, but to Marine and Ports. He appeared to be in a real hurry walking in and out” and seemed to be “a bit panicky”. He was in the office a number of times each day and speaking to Mr. Karalus on a couple of times a day. (Exhibit 349 paragraph 83; T 4573)

**Quest for a temporary replacement vessel for the MV Olovaha**

6.413 Mr. Karalus, by 17th January 2009, formed the view that there needed to be a search for a temporary replacement vessel. He strongly encouraged Shipping Corporation of Polynesia to search for a short-term replacement vessel to operate until the arrival of the new vessel from Japan. He states that his long-term hope was to possibly see a vessel utilised as a “special projects vessel for use within the island group”, after the new vessel from Japan had arrived. (Exhibit 64 page 17)

6.414 During the period February and March 2009, Mr. Jonesse, the CEO and Managing Director of SCP advised Mr. Karalus to the effect that the cost of a temporary
replacement vessel from afar was more than could be afforded and that there would be considerable time involved in the delivery of such a vessel.

6.415 In March 2009, prior to 19th March, Mr. Karalus was in New Zealand with Mr. Jonesse in relation to meetings about Pacific Forum Line and a pending purchase option. During the course of meeting in New Zealand, Mr. Jonesse told Mr. Karalus that he was going to Fiji. (T 5957) Mr. Karalus knew that Mr. Jonesse had met with a shipbroker in Auckland. The broker informed Mr. Jonesse, who in turn told Mr. Karalus, that there was a vessel or some vessels that Mr. Jonesse could look at in Fiji. Mr. Karalus knew Mr. Jonesse was going to Fiji to try and look for a temporary replacement vessel. (T 5960 A – E) This is despite the fact that Mr. Karalus was aware that Mr. Jonesse had no technical expertise in relation to ships. (T 5892 E)

6.416 On 19th March the SCP Board resolved unanimously to recommend to His Majesty’s Government that the Olovaha be replaced without delay. (Exhibit 307)

6.417 In March 2009, on Mr. Jonesse’s return from Fiji, Mr. Karalus was informed by Mr. Jonesse that a vessel had been suggested, but that vessel was not suitable. However, Mr. Jonesse told Mr. Karalus that there was another vessel and that vessel might be suitable. (T 5961 C)

6.418 During the periods 14th March to 24th March and again from 6th April to 14th April 2009, Mr. Karalus was away overseas on Ministerial business. However, he was in a position to communicate by telephone. (Exhibit 64 pages 18 – 19)

6.419 In light of the knowledge of Mr. Karalus as to the sea conditions in Tonga and the problems with Olovaha, it became very important when the Government was looking for a temporary replacement vessel, that the replacement vessel was seaworthy and of appropriate design. As it transpired the MV Princess Ashika was clearly unseaworthy and clearly of an unsuitable design for Tongan waters (having been designed in Japan for smooth waters).

Cabinet Decisions regarding the purchase of MV Princess Ashika

6.420 On 16th April 2009, the Cabinet decided (by Cabinet Decision No. 292) to approve the following recommendations:

“That the Hon. Minister for Transport to kindly, i.e.:

i. arrange the advice of Government and the public of the travel details of the subsidized ship for Niuafo’ou and Niuatoputapu scheduled for the week beginning Monday 20th April, 2009;

ii. submit to Cabinet the plan for the replacement of the MV Olovaha”
iii. submit to Cabinet the air services and maintenance/repair plan of the airports of Niuafo’ou and Niuatoputapu.”

6.421 As to the Cabinet meeting on 16th April 2009, Mr. Karalus recalls there was no written paper presented to the Cabinet. There was consensus at the Cabinet meeting, which was Chaired by the Prime Minister, that there needed to be a serious look taken at shipping and air services into the Niuaus and that was subject of the Cabinet discussion. (T 5961 P – 5963)

6.422 On about 17th April 2009, Mr. Karalus received a letter from Mr. Jonesse regarding the proposal for the replacement of the MV Olovaha. The letter stated relevantly:

“With regards to the proposal for the replacement of the MV Olovaha.

... The replacement vessel currently under evaluation with regards to purchase by the Government of Tonga and leased to the Shipping Corporation of Polynesia is after thorough an independent survey, both from a mechanical and from the financial aspect a sensible and financially viable option given the time frame to the delivery of the new vessel from Japan. The opportunity is enhanced by availability and delivery and the beneficial currency circumstance.

... It is clear that Ownership by Government is the best option with the lease arrangement that reflects the position of SCP.

... If the Olovaha is disposed of a scrap value there is potential recovery opportunity yet to be proven and a sale of at least 50% of the purchase price as no other options were available.

All aspects of an International vessel sale have been considered including the NMOU (Norwegian Memorandum of Understanding), Flag status, Survey considerations etc.” (Exhibit 64 attachment “H”) (Underlining added)

6.423 On 20th April 2009, Mr. Karalus prepared a Memorandum to Cabinet (Exhibit 64). A copy of the Memorandum, with the handwritten notations made by the former Minister of Transport on page 2, is Appendix 52 to this report. The handwritten notations made reference to “independent assessment”, “survey documents”, “Fiji”, “deferred payment: 20%”, “MOF, A.G, MOT, as Chairperson” (T 4537 – 4538)

6.424 Mr. Karalus sought the support of the Minister of Finance and National Planning and Minister for Public Enterprises and Information (Hon. ‘Otenifi Afu’alo Matoto), by requesting the Minister to also sign the Memorandum to Cabinet.
The Memorandum of 20th April 2009 provided:

“The mechanical state of the M.V. Olovaha has been of increasing concern over the past six months.

While the ship remains seaworthy it is becoming increasingly difficult to maintain any reliability in its service to the outer islands.

The delivery of the new ferry to be provided by grant aid from the Government of Japan will not be before late 2010. In the meantime it is estimated that up to TOP 800,000 needs to be spent on the existing M.V Olovaha to keep it in service. The attached financial summary (attachment one) from the Shipping Corporation of Polynesia and the Ministry of Public Enterprises and Information compares the cost of continuing services with existing ship against the cost of purchasing a ship that has been sourced in Fiji. It is clear that the financial outlay for a replacement ship to fill the gap until the arrival of the new ferry is the preferred option as there is also the residual value of the replacement ship once the new ferry arrives.

The Ministry of Transport has sought full technical data to allow for due diligence to be completed on the replacement vessel, the M.V. Princess Ashika (some detail is provided as attachment two).

In summary, the vessel is surveyed to carry 390 passengers and 370 tonnes of cargo (c.p. Olovaha, 400 passengers and 140 tonnes of cargo). It has both bow and stern loading capability, cruises at 10 knots (Olovaha 8 knots), has similar draft to the Olovaha to allow safe entry and exit to all ports (it is suggested that the vessel can also service ‘Eua though this is to be substantiated) and burns 30 per cent less fuel. The vessel is both bow and stern loading and is of the “roll on, roll off” (Ro-Ro) type. While the vessel is older than the Olovaha it has been very well maintained and has come out of a December 2008 survey. An Australian engineering company is preparing the vessel for sale to ensure full serviceability.

The SCP has put in a purchase option to expire at the end of this month for FJD$ 600,000 (this is now TOP 580,000) and has sourced cargo to cover the cost of positioning the ship in Tonga.

Both the Ministry of Transport and the Ministry of Public Enterprises and Information recommend that the ship be purchased by the Government of
Tonga and leased to the Shipping Corporation of Polynesia and that this be affected (sic) without delay once all the necessary documentation is completed. The ship can enter service in Tonga during May, 2009, in time for the major Church conferences. This vessel can also be used to test new scheduling and loading procedures in readiness for the entry of the new ferry from Japan in late 2010. The total funding to be sought is expected to be within TOP 750,000.

Recommendations:-

1. That the Ministry of Transport complete due diligence on the technical suitability and sea worthiness of the M.V. Princess Ashika.

2. That, subject to the successful completion of (1.) above, the Ministry of Finance and National Planning source funding for the purchase of the vessel and for any requirements to ensure rapid deployment into service.

3. That, subject to the successful completion of (2.) above, the Ministry of Public Enterprises and Information and the Ministry of Transport determine the ownership and on-lease of the vessel to the Shipping Corporation of Polynesia.” (Underlining added)

6.425 The Memorandum to Cabinet had attached to it the following documents:

(a) Letter from Mr. Jonesse to Mr. Karalus and Mr. MacQueen c/o Ministry of Public Enterprises;

(b) Investment analysis regarding retaining Olovaha versus buying a replacement vessel;

(c) Cash Flow Projections;

(d) A photograph of the MV Princess Ashika taken from a distance;

(e) A three page document entitled “Princess Ashika…Survey December 2008 valid to December 2010- Fiji Marine Board- Rusiate Waqa”.

6.426 There were no documents to support the investment analysis or the cash flow projections. In terms of the document entitled “Princess Ashika…Survey December 2008 valid to December 2010” submitted to Cabinet, the document was effectively useless. There were large gaps in the document and it was very incomplete. We find that the document entitled “Princess Ashika…Survey December 2008 valid to December 2010” consisted of three pages, not two pages as annexed to the affidavit of Mr. Karalus. (Exhibit 64 appendix “H”) The three pages are annexed to the affidavit of the Minister for Finance (Hon. ‘Afu’alo Matoto), the Chief Secretary and
Secretary to Cabinet (Busby Kautoke) and the Prime Minister (Hon. Dr. Feleti Vaka’uta Sevele). (Exhibits 393; 408 and 424) It was clear, from even a very preliminary look at it that document, that it had not been issued by the Fiji Marine Board. This is because, for example, it made references to SCP (Shipping Corporation of Polynesia) and numerous references to MV Olovaha including that certain equipment was “recoverable from new equipment on Olovaha”. It should also be noted that the document was not signed or dated. It was also not on any letterhead or on the cover of any letter.

6.427 On 23rd April 2009, there was a meeting of Cabinet. Those present at the meeting were the Prime Minister (Hon. Dr. Sevele), Deputy Prime Minister and Minister for Health (Hon. Dr. Viliami Tangi), Minister for Police, Prisons and Fire Services (Hon. Siaosi T ‘Aho), Minister for Training, Employment, Youth and Sports (Lord Tu’ivakano), Minister for Works (Lord Nuku), The Attorney General and Minister for Justice (Hon. ‘Alisi Numia A Taumoepeau), Minister for Transport (Hon. Paul Karalus), Minister for Finance and National Planning, Public Enterprises and Information (Hon. ‘Otenifi Afu’alo Matoto). (Exhibit 427)

6.428 The signed Cabinet Decision No. 300 of 23rd April 2009 (Appendix 44) records that Cabinet decided:

1. That the report from Ministry of Transport on the Vessel to Replace the MV Olovaha be noted.

2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposits and other financial agreements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.

3. That discussions with the Government of Japan to continue to ascertain that there are no further delays on the delivery of the new ferry to replace the MV Olovaha.” (Underlining added)

6.429 Cabinet relied on the Memorandum to Cabinet and attached documents provided by Mr. Karalus to make the Cabinet Decision of 23rd April 2009. Mr. Karalus obtained the supporting documents from Mr. Jonesse, with the exception of perhaps the Investment analysis and Cash Flow Projections which had been prepared by the Ministry of Public Enterprises, albeit with input from Mr. Jonesse. (Mr. Karalus had
asked his Personal Assistant on 20th April 2009 to make a copy of the documents to make a submission to Cabinet.) (Exhibit 64 appendix “H”)

6.430 Mr. Karalus rightly accepted that when submissions are made to Cabinet, one has a duty and responsibility of ensuring that the information put to Cabinet is accurate and reliable. Accordingly, he acknowledged correctly that Cabinet should not be misled. (T 5942 O – U) Despite his written advice to Cabinet that MV Princess Ashika had been “very well maintained”, Mr. Karalus accepted that none of the documents he had at the time would have supported such conclusion. (T 6021 D –F, T 6043) Of course, the MV Princess Ashika was in an appalling condition and had not been well maintained.

Requirement for Due Diligence prior to the Purchase of the MV Princess Ashika

6.431 Mr. Karalus was fully aware of the importance of making sure proper and thorough due diligence was completed prior to the purchase of MV Princess Ashika. The recommendation to Cabinet in the Memorandum to Cabinet dated 20th April 2009 itself provided “that the Ministry of Transport complete due diligence on the technical suitability and seaworthiness of the MV Princess Ashika” and effectively the vessel should not be purchased without this due diligence being successfully completed. (Exhibit 64 attachment “H”)

6.432 Mr. Karalus understood from the Cabinet Decision of 23rd April that the decision “charged the Ministers for Transport and Finance and the Attorney General with the respective roles to further the procurement process. For the Ministry of Transport, this meant completion of due diligence on the technical suitability and the seaworthiness of MV Princess Ashika.”. (Exhibit 64 page 18, T 6008 I – M, T 6023 O)

6.433 The former Minister of Transport correctly accepted that the Government should never have purchased MV Princess Ashika without conducting thorough and proper due diligence. It was fundamental that, under no circumstances, as Mr. Karalus acknowledged, should the Government have ever contemplated the purchase of MV Princess Ashika without thorough and proper due diligence being conducted. (T 6008 P, T 6022 A –B)

6.434 The due diligence should have been conducted by both Shipping Corporation of Polynesia Limited (who was the proposed and eventual operator of the vessel) and the Government (who was the proposed and the eventual owner of the vessel) prior to purchase. (T 6010) By early 2009, Mr. Karalus knew that there was “disharmony and friction” within the Board of Shipping Corporation. (T 5985) He also was aware that as the shipping operator, SCP came under the regulatory control of the Ministry
of Transport and considered that the Ministry had duties and obligations as a regulator. (T 5896 P – 5897 C) Mr. Karalus therefore, in all the circumstances, would have clearly appreciated the importance of the Ministry of Transport having organised due diligence to be conducted on behalf of the Government, in relation to the prospective purchase of MV Princess Ashika, independent of any due diligence conducted on behalf of SCP.

6.435 The due diligence required, as Mr. Karalus was fully aware, should have included an independent survey, independent valuation and obtaining copies of all relevant documents including survey documents and analysing those documents. (T 6010 – 6012 A, T 6055 – 6066)

6.436 The due diligence required to be completed included due diligence on the technical suitability and seaworthiness of the vessel. (T 6022) If the vessel was in poor condition, Mr. Karalus was, not surprisingly, of the opinion that it would not be technically suitable. (T 6022 L)

6.437 Mr. Karalus correctly understood that as the Minister of Transport he was responsible for ensuring that due diligence was properly conducted prior to purchase. (T 6043 G)

6.438 It was of considerable importance that all the due diligence to be carried out was independently conducted. (T 6041 K – 6047) Any independent survey should have, as Mr. Karalus accepted, very carefully looked at the vessel, prepared a report as to the condition (including listing the deficiencies) and indicating the importance of rectifying the deficiencies. (T 6047 O – 6048 B)

6.439 Mr. Karalus was familiar with principles of good governance, as he should have given his business background and position as a Minister. He thus understood that decisions should only be made if they were based on sound and reliable material. (T 5822 J – L)

6.440 It is clear from the evidence that there was no proper or thorough independent due diligence ever conducted by either SCP or the Government prior to the purchase of MV Princess Ashika. In fact, there was no independent due diligence ever conducted in relation to the MV Princess Ashika even up to the time that it sank on 5th August 2009. There was never any independent survey of the vessel, nor an independent valuation, nor the obtaining of all relevant documents in relation to the vessel and analysis of them.
6.441 The failure to carry out due diligence, for which Mr. Karalus must accept considerable responsibility for, is nothing short of scandalous.

6.442 The importance of ensuring that an independent survey and an independent valuation were carried out was a point not lost on Mr. Karalus. He fully appreciated, for good reason, that an independent survey could not be conducted by the Ministry of Transport officials, who should have been involved in analysing the independent survey and valuation. (T 6011)

6.443 Mr. Karalus “most certainly” considered, for safety reasons, it would have been appropriate for Ministry of Transport officials to examine or survey the vessel themselves. (T 6011 T) He was aware that the Government never had carried out any independent survey or independent valuation. (T 6026, T 6055)

6.444 Mr. Karalus correctly understood that one carries out due diligence to ensure that vessels which are unfit for the purpose are not purchased and avoid purchasing vessels which are worthless. (T 6031 S – 6032 D)

6.445 Clearly the MV Princess Ashika was unseaworthy every time it sailed in Tonga. In fact, Mr. Karalus properly accepted, it was unseaworthy from the time it departed Fiji until it sank and that it should never have been given a certificate certifying it was seaworthy by the Ministry of Transport. (T 5855 P, T 5861 L – S) He also accepted that given the condition of the vessel it should never have left Fiji for Tonga. (T 6031 P)

6.446 Mr. Karalus was also correctly of the opinion that the MV Princess Ashika was worthless or had a negative value when it was purchased. (T 6010 C –G) This is supported by the Valuation Report from the New Zealand Marine Brokers dated 9th December 2009 prepared by Mr. James B. Lewis. (Exhibit 226)

Failure of Mr. Karalus to Seek and Obtain Advice from Ministry of Transport Officials

6.447 Mr. Karalus swore in his affidavit that the Director of Marine and Ports, Captain Johnson “was instructed by (him) to work with the SCP to ensure the documentation of the vessel was complete and to provide for the delivery process. The Director of Marine and Ports was the focal point for the Ministry’s technical consideration of the vessel. During the period 14th March to 24th March and then again 6th April to 14th April, 2009, I was away overseas on Ministerial business and I only occasionally spoke to the CEO of the Shipping Corporation about the pursuit for a replacement vessel.”. (Exhibit 64 paragraph 162 – 163)
It should be appreciated that the CEO and Secretary of the Ministry of Transport (Ms. E. Mone), the Director of Marine and Ports (Captain William Johnson), the Acting Director of Marine and Ports (Mr. Viliami Tu’ipulotu) and the surveyors employed at the Ministry all work in the same relatively small office building, Mr. Karalus worked from. He would “bump into” the staff in the building and talk to them. (T 5859 L – T) Mr. Karalus also had regular meetings with the senior staff, including at Mexco meetings which were Chaired by him.

Captain Johnson never told Mr. Karalus that the Ministry of Transport had conducted an independent survey or independent valuation. Similarly, Mr. Karalus was never informed that SCP had ever conducted an independent survey or an independent valuation. (T 6025 A – N)

Mr. Karalus had concerns about Captain Johnson; had expressed dissatisfaction about him to Ms. Mone by late 2008 and was happy when he heard he was going to retire. (T 6028 N- 6029) Having said that, Mr. Karalus sought to insist in his evidence that, in effect, he never had any concerns about his competency when it came to technical matters, but was not happy with his managerial skills. (T 6028 S, T 6030 E) Captain Johnson retired from his position as Director of Marine and Ports on Monday 8th June 2009. (T 5904 R) Mr. Karalus was aware of this well beforehand.

Mr. Karalus could not produce one single document in terms of a letter or an e-mail from Captain Johnson in relation to any advice about the MV Princess Ashika. In fact, Captain Johnson never gave any written advice to Mr. Karalus in relation to the MV Princess Ashika. Additionally, Mr. Karalus never sent any letter or e-mail to Captain Johnson asking for any advice in relation to the MV Princess Ashika. (T 6032)

After Captain Johnson retired on 8th June 2009, Mr. Tu’ipulotu became the Acting Director of Marine and Ports. Again, Mr. Tu’ipulotu never sent any letter, e-mail or other document to Mr. Karalus in relation to MV Princess Ashika (including any advice). (T 6032 M – 6033 C)

Remarkably, Mr. Karalus, who said he needed to rely on expert advice, says he never sought any advice from Mr. Tu’ipulotu in relation to the MV Princess Ashika or the prospective purchase. Mr. Tu’ipulotu, according to Mr. Karalus, never submitted any advice, letter or anything about the MV Princess Ashika to him as Minister. (T 6033)

Ms. ‘Eleni Mone was the Secretary for Transport and the CEO of the Ministry of Transport. Counsel Assisting at transcript page 6033 S asked Mr. Karalus:
“MR. VARITIMOS: Now, is it correct to say that you never sought any advice from her in relation to Ashika or the prospective purchase of a replacement vessel?”

The answer by Mr. Karalus was as follows:

“MR. KARALUS: That would be true in that you will appreciate this happened with a sense of urgency and over a very short period of time.”

6.455 It is nonsense to suggest, as Mr. Karalus does, that there was insufficient time or such urgency that he could not have sought advice from Ms. Mone and other senior officials at the Ministry of Transport.

6.456 Mr. Karalus said, and we accept that at no time did Ms. Mone ever offer him any advice, orally or in writing, in relation to the purchase of the MV Princess Ashika or the prospective purchase of MV Princess Ashika. (T 6044 M)

6.457 Counsel Assisting asked Mr. Karalus at transcript 6035-6036 about what advice or opinion had been given to him about MV Princess Ashika. The transcript of evidence is as follows:

“MR VARITIMOS: But what I’m suggesting is, or asking you, is it correct to say that you never sought from Mr Tu’ipulotu any advice in relation to Ashika.

MR KARALUS: Yes, that’s correct, because as I say, the ship was to be leaving, it was to - and it didn’t arrive until 1 July, so in that point it was a period of transit.

MR VARITIMOS: But I’m saying even in July and August you never sought any advice from Mr Tu’ipulotu about the vessel Ashika, is that right?

MR KARALUS: Well, I was away for a good part of that period.

MR VARITIMOS: Well - - -

MR KARALUS: And - - -

MR VARITIMOS: - - - is the answer to the question you never sought any advice - - -

MR KARALUS: I never sought - I never went and sought advice, no. We talked about marine, but you’ll appreciate also that at that time, particularly around the mid-July period, was when we were going through the detention and the
breaking of that detention by Ports Authority by their operation of a ship while under detention. So that was more the issue and in the discussion at the time, or - we could well have talked of the Ashika in some sort of vein or fashion, but not in any detail, no.

MR VARITIMOS: Well, is it correct to say that Mr Tu’ipulotu never gave you any advice or expressed any opinion about Ashika?

MR KARALUS: That’s correct, yes.

MR VARITIMOS: So neither Mr Johnson, nor Mr Tu’ipulotu gave you any opinion about Ashika.

MR KARALUS: That’s correct.

MR VARITIMOS: Or the condition.

MR KARALUS: That’s correct.

MR VARITIMOS: Which would include the condition.

MR KARALUS: That’s correct.

MR VARITIMOS: So it’s a case that you relied in terms of the condition of the vessel and its suitability on what Mr Jonesse had, effectively, verbally told you.

MR KARALUS: Yes.

MR VARITIMOS: And you accept that there were no documents that Mr Jonesse ever gave you which would have supported the conclusion that Ashika was in very good condition, or very well maintained, do you accept that?

MR KARALUS: Yes. The only thing we got was pictures.

MR VARITIMOS: Well, you got some - - -

MR KARALUS: And his general description, yes. But then - - -

MR VARITIMOS: So, what I’m suggesting is Mr Jonesse at no time gave you documents that could - would enable you to make any informed decision as to the condition or seaworthiness of the vessel, is that right?

MR KARALUS: That correct, and I would not have been able to make on - I mean, that’s a professional competence that would be required, yes.
MR VARITIMOS: So, at the end of the day I’m suggesting that right up until the date that the Ashika sank, the only information you had to rely on as to the condition of Ashika was some verbal or oral information given by Mr Jonesse to you.

MR KARALUS: And Captain Johnson.

MR VARITIMOS: But Captain Johnson hadn’t seen the vessel.

MR KARALUS: No, but he had seen the documentation.

MR VARITIMOS: Well, what documentation did he tell you he’d seen?

MR KARALUS: Well, what I understood was that he was provided with documentation by Mr Jonesse on a return from Fiji.”

The documents seen by Captain Johnson that had been supplied by Mr. Jonesse and did not include any independent survey or any independent valuation.

Astonishingly, Mr. Karalus never asked for any written report from any officials at the Ministry of Transport in relation to MV Princess Ashika. (T 6038 P) There was never even any mention or discussion about obtaining a valuation. (T 6038 T, T 6039 T) Mr. Karalus accepted the obvious, namely, that if an independent valuation had been obtained the vessel should never have been purchased and that as the Minister of Transport he had a part to play in ensuring an independent valuation had been or was conducted. (T 6040) Accordingly, if an independent valuation had been conducted, Mr. Karalus accepted that it would have avoided potentially the death of 74 people. (T 6040 M − N)

Even more astonishingly, not only does Mr. Karalus say that he never asked for any report about the MV Princess Ashika, but says he never spoke to Mr. Tu’ipulotu or any surveyors at the Ministry of Transport about the condition of MV Princess Ashika either before or after it arrived in Tonga. This is despite the fact that they all worked in the same building and he “bumped into” the staff.

We accept the evidence of Mr. Lisiate Vuni Latu (Surveyor at the Ministry of Transport) to the effect that he told Mr. Karalus at a meeting, in the presence of Mr. Tu’ipulotu after the vessel arrived on the 1st July at the office of Mr. Karalus that the MV Princess Ashika was “no good”. (T 1240-1244)

In accordance with the evidence, including the admissions made by Mr. Karalus, Ms. Mone accurately stated, insofar as it related to Mr. Karalus in an e-mail of 28th April
2009 to the Solicitor General (Mr. ‘Aminiasi Kefu) concerning the purchase of the MV Princess Ashika:

“Aminiasi,

I understand my Minister has been involved in this from day one and my understanding is both Prime Minister and Minister of Finance are aware of process so far. My Minister submitted the details to Cabinet last week although I’m not sure whether it was formally or informally. Anyway please let me know where I can assist. “(Exhibit 129 attachment “B”)

6.463 When asked about the contents of this e-mail in evidence, Mr. Karalus accepted he had been involved in the “purchasing process” of the new vessel from day one and “was actively involved”. (T 6342 M – U) In fact, Mr. Karalus played a major and pivotal role in the purchase of MV Princess Ashika. If it were not for his efforts and involvement in the whole process the vessel would never have been purchased.

Events Subsequent to Cabinet Decision of 23rd April 2009 until Arrival of the MV Princess Ashika on 1st July 2009

6.464 Although the Cabinet Decision of 23rd April 2009 expressly provided that “a report be later tabled in Cabinet”, no such report was ever tabled. It clearly should have been, not only because the Cabinet Decision required it, but so did good governance. This was a very major and important acquisition by the Government.

6.465 Mr. Karalus said that Mr. Jonesse had effectively told him that Lord Dalgety QC said that the proposed contract for the purchase of the MV Princess Ashika was “garbage” and that he should use the standard Norwegian Memorandum of Understanding. (T 6288) It should be appreciated that by letter dated 8th April 2009, in relation to a purchase option for the “Capitaine Tasman/ Fua Kavenga” Mr. Karalus stated that the exercise of the purchase option would be “based on the Norwegian Sales Form or later editions as may be applicable”. (Exhibit 479) The letter from Mr. Jonesse to Mr. Karalus of 17th April 2009 also made reference to “the NMOU” (Norwegian Memorandum of Understanding). (Exhibit 64 attachment “H”) As it transpired, the NMOU was not used or suggested for use to the Solicitor General.

6.466 The sworn evidence by Mr. Karalus that he knew “nothing at all” and could not say he had ever heard anything about the Norwegian Memorandum of Understanding is obviously incorrect. (T 6292 – 6295 A) The NMOU would have provided much greater protection for the Government as purchaser of the vessel than the contract signed by Mr. Karalus on about 8th May 2009. For example, the contract signed on 8th May
2009, was a cash unconditional contract requiring the Government to purchase the vessel irrespective of the condition.

6.467 On 24th April 2009, there was a meeting involving Mr. Karalus, the Finance Minister (Hon. ‘Otenif Afu’alo Matoto), the then Attorney General and Chairperson of SCP (Hon. ‘Alisi Taumoepeau), the Secretary of Finance (Mr. ‘Aisake Eke) and Mr. Jonesse. (T 5204, T 5402, T 6067) (Exhibit 29, paragraph 41)

6.468 The meeting was called by Mr. Karalus. The fact that he called the meeting is consistent with the lead role that Mr. Karalus was taking in relation to the prospective purchase of the vessel. The purpose was primarily to discuss the Cabinet decision of 23rd April 2009. According to the Minister for Finance it was:

“It’s primarily to make sure that they will be doing what is required of them, particularly the former Minister of Transport, making sure that the due diligence would take place, all the necessary documentation would be made available to him, to confirm to us that all the requirements of due diligence have been done and for us to make the necessary deposit for the boat on his confirmation and then to proceed after that.” (T 5235 J – M)

6.469 On 28th April 2009, there was a Mexco meeting in the office of Mr. Karalus which he Chaired. The Acting CEO (Ms. Mone), as was the Director of Marine and Ports (Captain Johnson) were also present. (Exhibit 141) At that meeting, Captain Johnson simply stated that the new ship (being the temporary replacement for the Olovaha) was due to arrive in June 2009. (Exhibit 141) Mr. Karalus showed those present a picture of the MV Princess Ashika. Mr. Karalus advised that the new ship would be better than the Olovaha as although old, was looked after and would be making trips to the Niuas. There was no other discussion with regards to the MV Princess Ashika and nothing else was said. (Exhibit 349 paragraph 55 and T 4541 – 4542; T 4625)

6.470 On 30th April 2009, Mr. Karalus sent a letter to the NZAID Manager regarding the “urgent need for a temporary replacement of the MV Olovaha”. (Exhibit 400) The letter provided:

“Dear Dominic,

Re: Urgent need for temporary replacement of the MV Olovaha

With the delivery of the new Olovaha from Japan now delayed until the second half of 2010 there is a very real need to consider the current state of the existing ship and the essential nature of shipping services to the outer islands.
While every effort has been made to keep the existing vessel operational the projected spending on maintenance to carry the vessel through to the end of 2010 is over TOP 800,000. And this is no guarantee the vessel will be maintained in a state of sea-worthiness. This has necessitated an urgent search for a vessel to maintain services to the outer islands.

The results of that search has meant that the MV Princess Ashika has been thoroughly checked out to ensure compliance and currency of all survey and maintenance requirements, including a dry docking survey conducted in December, 2008.

The vessel is immediately available at an all up cost with TOP 750,000. A full dossier on the vessel is attached for your consideration.

It is planned for the Government of Tonga to purchase the vessel for leasing to the Shipping Corporation of Polynesia to operate. Once the new vessel arrives it is planned that the vessel be on-sold to a private operator for services to ‘Eua and other outer islands as required.

We wish to request the immediate consideration for NZ Aid for funds for the purchase of this vessel under any allocated (sic) of the 2008-2009 aid allocation.” (Exhibit 400) (Underlining added)

6.471 The letter to NZAID had the following attachments:

(a) A document entitled “With regards to the Contents of this Reference File”
(b) 8 photographs of MV Princess Ashika
(c) 2 page tabled document entitled “Princess Ashika”
(d) 2 page Audit of the MV Princess Ashika
(e) Document entitled “Note Re Audit 6-8 April 2009”
(f) Document entitled “Review by John Jonesse with George Patterson W/E 26/04/09”

6.472 Mr. Karalus correctly accepted that he had no (reliable) documents to support the conclusion that the vessel had been dry docked. Nor did he have any documents to support the fact that the vessel had been surveyed. (T 6060 – 6061) The vessel had not been thoroughly checked out to ensure compliance and currency of all survey and maintenance requirements. The statements made to NZAID and AusAID were false.
6.473 A letter in the same terms as the letter sent to NZAID on 30th April 2009 was also sent to AusAID. Neither NZAID nor AusAID were prepared to provide aid for the purchase of MV Princess Ashika.

6.474 A matter of only a few days prior to 6th May 2009, Mr. Karalus received from Mr. Jonesse a document (Exhibit 478), in the following terms:

“Paul,

As the Government of Tonga is (sic) the Buyer of the Vessel what documentation do you want to proceed with.

1. The Norwegian ‘Memorandum of Understanding’ is the usual Marine document and we have copies available that we will update with the relevant information.
2. I have further information to either validate or update as attached that will also contribute to the MOU and Standard Sale and Purchase Agreement.
3. I suggest that I assemble the rest of the information and prepare the MOU and S&P A and forward to you. In this instance Ramsay is actually very good so I will ensure all the i/t etc and submit so that Crown Law can validate is so required.
4. I need a mandate to act as the Buyers Agent to complete the MOU but as the Seller is not too phased this is not critical, would determine limits of authority.
5. The MOU/S&P A will of course need a signatory from the Buyer/Seller but this is a faxable issue.” (Underlining added)

6.475 On 6th May 2009, Mr. Karalus sent a Savingram marked with urgent priority to the Solicitor General. (Exhibit 129 Annexure “C”) It provided:

“The Government is giving urgent consideration to the purchase of the M.V. (sic) Princess Ashika from the Patterson Brothers in Fiji.

Attached is the full dossier on the vessel.

We request your urgent perusal (sic) of the Sale and Purchase Agreement to advise on its legal status.

We are planning to make the deposit through the Ministry (sic) of Finance on Friday, 8th May, 2009.” (Exhibit 129 attachment “C”) (Underlining added)
The 6th May 2009 Savingram enclosed an unsigned Sale and Purchase Agreement and a Memorandum of Agreement ("MOA"). One of the documents provided to the Solicitor General stated that “MOA Standard Agreement revised with Lord Dalgety”.

On 7th May 2009 the Solicitor General sent a Savingram in reply to the Minister of Transport. It provided a number of suggested typographical corrections to the draft Sale and Purchase Agreement. It also stated:

“We refer to your saving dated 6 May 2009 requesting legal advice regarding the above matter.

We advise as follows:

1. No references has been made to any Government authorization to purchase this vessel. In accordance with established Government practice, there should be authorization from Cabinet or Privy Council before the vessel is purchased. For example, has the Secretary of Finance been authorized to sign for this purchase?

2. The existence of such authorization would also be required for auditing purposes.

3. If there is no such authorization then this purchase cannot proceed.

4. Furthermore, we are concerned that the Marine and Ports division of your Ministry has not conducted the auditing of the vessel. They are the Government’s shipping experts, who should at the least endorse the audit conducted by the consultants.

5. Moreover, there seems to have been no due diligence carried out at all by the consultants or Government on the financial viability to Government in purchasing this vessel. The Ministry of Finance and National Planning should at least have carried out or endorsed the findings of any consultants who were given that task.” (Exhibit 129 attachment “D”) (Underlining added)

Mr. Karalus agreed that the advice from the Solicitor General was eminently sensible and that the Marine and Ports Division needed to conduct an audit of the vessel. (T 6073 A – 6074 A) Notwithstanding this, no officers from the Ministry of Transport ever saw the vessel prior to its arrival in Tonga on 1st July 2009. (Mr. Karalus was instrumental in organising the payment of the deposit and the balance purchase price, which were paid on the 8th May 2009 and 5th June 2009 respectively.)
On the morning of 7th May 2009 the Solicitor General spoke to Mr. Karalus at the opening of a legal workshop on maritime security at which both the Minister and the Solicitor General were invited. The Minister asked the Solicitor General about his request for legal advice and the Solicitor General advised that he had issued the advice that morning. The Solicitor General briefly advised Mr. Karalus that he had concerns that there was “no Government approval and that no survey of the seaworthiness or commercial viability study had been done in relation to the vessel.” Mr. Karalus responded to the Solicitor General by indicating that those concerns had already been addressed. (T 2494 – 2495 and Exhibit 187) Of course, notwithstanding the assurances by Mr. Karalus, the concerns had not been adequately addressed and Mr. Karalus misled the Solicitor General.

When the Solicitor General was asked by Counsel for Mr. Karalus as to whether he was right to say that the Solicitor General was entitled to rely on the Minister and his standing and trust, the Solicitor General responded by saying that “he had no place to question him or go behind him and ask him to justify what he’s saying”. (T 2525 F) In addition, the Solicitor General accepted, as correct, the questions put to him by Counsel for Mr. Karalus that “in essence you relied on the Minister of Transport communicating to you verbally and on paper” and “that due diligence and all proper checks for safety and seaworthiness had been completed”. (T 2525 A – F)

On the 7th May 2009, after receipt of the Savingram from the Solicitor General of the same date, Mr. Karalus in an urgently marked Savingram to the Minister of Finance copied to the Solicitor General stated:

“I am in receipt of the legal opinion from the Solicitor General. My comments follow. CD300 of 23rd April, 2009, is attached in answer to points 1, 2, and 3. For points 4 and 5 be advised that we have carried out due diligence on the survey documents supplied from the Fiji Ministry, latest survey of December, 2008. We have also sighted that latest dry docking report (scope of works). We have also taken note of the further reports as provided by Engineers Shaw and Bennett.

We are satisfied that the vessel meets our seaworthiness and mechanical requirements.

We agree that the Sale and Purchase agreement is the preferred document and the corrected version is attached.

Should you be in agreement the deposit of FJD 90,000 is payable by Friday 8th May, 2009, to:-
6.482 Mr. Karalus rightly accepted that he misled the Minister for Finance and the Solicitor General on his Savingram of 7th May 2008 that “we have carried out due diligence on the survey documents” (T 6078 S – E) Mr. Karalus had not seen any documents to support the remarks made. (T 6079, T 6359, T 6373 - 6374 L) There was absolutely no basis for Mr. Karalus to represent that “we are satisfied that the vessel meets our seaworthiness and mechanical requirements”.

6.483 On 8th May 2009, Mr. Karalus signed the contract for the purchase of the MV Princess Ashika by the Government of the Kingdom of Tonga. (Exhibit 477) He crossed out the reference on the signing page to “Secretary for Finance” and changed it to “Acting Secretary for Transport”. Mr. Karalus asked Ms. Mone to sign the contract in his office and for Mr. Jonesse to witness the signatures. It was clear that the contract was a cash unconditional contract. In other words the contract signed by Mr. Karalus required the Government to pay $600,000 irrespective of the “condition”, “merchantability”, “fitness for purpose” and “state of repair”. Additionally, unless the parties mutually agreed in writing, the entire FJD$600,000, represented by the deposit of FJD$90,000 and the balance of FJD$510,000 had to be paid on the date of the agreement.

6.484 Mr. Karalus directed on 8th May 2009, his Personal Assistant, Mrs. Kalesita Taumoepeau, to fax the contract to Patterson Brothers Shipping Company Limited. This was faxed at approximately 1:52pm on 8th May 2009. Mr. Karalus gave the fax number to Mrs. Taumoepeau (Exhibit 349 paragraph 65, 66 and attachments 14, 15 and 16; T 4546 – 4549)

6.485 Mr. Karalus, as Minister of Transport, was aware that a contract should not be entered into without the prior approval of the Government Procurement Committee. The Procurement Instructions provided in clause 19 under the heading “Contractual Agreement”, to the knowledge of Mr. Karalus, as follows:

“All form of contract or agreement including any for development projects shall be submitted to the Government Procurement Committee for review and endorsement before signing by all relevant parties.”(Exhibit 428)
Mr. Karalus knew that when he signed the contract on about 8\textsuperscript{th} May 2009, it was in defiance and contrary to the Procurement Instructions. He also knew that the Procurement Instructions were there to safeguard the expenditure of public money and to ensure that the Government did not enter into a service of goods and service which were inappropriate. (T 6302) Mr. Karalus was taking an extraordinary and unacceptable risk in signing the cash unconditional contract. Funding was still not in place for the purchase on the 21\textsuperscript{st} May 2009. (T 5255 – 5260)

As stated earlier, Mr. Karalus organised for the Acting Secretary for Transport to sign the contract for the purchase of the vessel in addition to him, despite the fact that the contract was originally to be signed by the Secretary for Finance. Mr. Karalus was aware that the Secretary for Finance was a member of the Procurement Committee and if he had been asked to sign the contract, he should have refused as the contract had not been submitted to the Procurement Committee. We do not accept the evidence of Mr. Karalus as to the reason why he had Ms. Mone sign the contract instead of the Secretary for Finance. (T 6304)

Mr. Karalus was correct in accepting that the Procurement Committee did not have enough information before them to make any informed decision. He was also correct in acknowledging that members of the Procurement Committee could reach the reasonable conclusion that Cabinet had already resolved to purchase the vessel by the Cabinet Decision of 23\textsuperscript{rd} April 2009 (which was well before the proposal was submitted to the Procurement Committee). (T 6369 N – 6371 C)

By 8\textsuperscript{th} May 2009, the contract had also been signed on behalf of Patterson Brothers Shipping Company Limited, who were the vendors under the contract. (Exhibit 417) (Mr. Jonesse was in Fiji in early June 2009 and purported to make some handwritten amendments to the contract, and in particular nominate the settlement date to be 5\textsuperscript{th} June 2009. [Exhibit 284]) The amendments made by Mr. Jonesse were never initialed by Mr. Karalus or Ms. Mone.

Consistent with the Savingram of 7\textsuperscript{th} May 2009 from Mr. Karalus to the Minister of Finance, the FJD$90,000 initial deposit was paid on 8\textsuperscript{th} May 2009 by telegraphic transfer to the trust account of the lawyers for the vendors in Fiji.

On about 10\textsuperscript{th} May 2009, Mr. Karalus sent an e-mail to His Majesty in relation to the MV Princess Ashika. It is with great regret that the e-mail to His Majesty was false and misleading, particularly as to the statement that “we have completed due diligence on the technical aspects of the vessel” and that “the vessel is very well
maintained”. There was no rational basis whatsoever for Mr. Karalus to make such statements. The e-mail provided in full as follows:

“Your Majesty

It has become increasingly obvious that while the current Olovaha remains seaworthy it has become thoroughly unreliable and the costs of maintaining it in a mechanical state to continue to operate scheduled services exceeds revenues. We have negotiated an interim replacement vessel for purchase from the Patterson Brothers in Fiji, viz. the MV Princess Ashika. We offered FJD 600,000 and this offer was accepted just days before the 20 per cent devaluation of the Fijian dollar. We have secured this vessel at TOP 580,000 and have completed due diligence on the technical aspects of the vessel. We have paid a deposit of FJD 90,000 and we will now conduct sea trials in Fiji before completing the purchase. It is hoped to have this vessel in Tonga before the end of May. The vessel is 50m long, is 11m wide and is of gross tonnage 680 tonnes. It has capacity for 390 passengers, a crew of 15 and cargo capacity of 370 tonnes. The ship has both bow and stern ramps and as a roll through vessel for both vehicles and cargo between Suva and Levuka. The draught of the vessel at 3.5m allows it to service Ha’afeva, Pangai, Neiafu and Niuatoputapu. By lowering the bow ramp a lighter can be used when it cannot berth in Niuafou.

With this purchase we plan to have the Shipping Corporation of Polynesia commence a schedule which will be continued until the new ferry from Japan arrives. This is to include a monthly service to the two Niuas. The vessel is very well maintained and the comfort it affords passengers will allow for the develop of the passenger trade to the outer islands.

A dossier on the vessel is being prepared for you to peruse.

I trust, your Majesty, that this will improve greatly the shipping services to the two Niuas.” (Underlining added)

6.492 At the time of the e-mail to His Majesty, not one single officer of the Ministry of Transport had inspected the vessel. Additionally there had been no independent survey or independent valuation commissioned, let alone completed. Mr. Karalus well knew this, yet was prepared to deliberately mislead His Majesty. He accepted that the Ministry of Transport had not completed any due diligence on the technical aspects of the vessel. (T 6359)
On 12th May 2009, Mr. Karalus sent a Memorandum to all staff at the Ministry of Transport confirming that Captain Johnson would be retiring from his post as Director of Marine and Ports on Monday 8th June 2009 and that Mr. Viliami Tu’ipulotu would assume the role of Acting Director from the following day. The Memorandum also advised that Mr. Russell Kilvington would be working as a consultant for approximately 30 days per annum and that his key role was as a mentor and advisor. (Exhibit 349 paragraph 70 and attachment 17)

On about 14th May 2009, Mr. Karalus received an e-mail from Ms. Mone, which enclosed an e-mail of 12th May 2009 from the Secretary of the Government Procurement Committee. The e-mail from Ms. Mone asked whether she should go to Mr. Jonasse for the documents. Obviously, in the mind of the Secretary for Transport, Ms. Mone, she did not consider that any officers in the Ministry of Transport would have the relevant documents. The e-mail of 12th May 2009 provided:

“Procurement Division has received an informal request passed on by Makeleta Siliva (Senior Accountant Treasury) to circulate the attached two documents to the Government Procurement Committee for their approval.

Copy of Cabinet Decision reference MAR 2/2/2 v5 of 23rd April 2009 Sales & Purchase agreement for MV “Princess Ashika”

The object of submitting a contract for GPC approval is to allow is to allow the GPC to check that stipulated procurement procedures have been followed and that any other procurement procedures necessary to protect the interests of the Government of Tonga have been carried out.

In this case the procurement is the decision of Cabinet. The decision of Cabinet must have been based on a report from the Ministry of Transport. This report is not included for the information of the GPC.

The Sales & Purchase Agreement is on the basis of “as is where is/ walk in walk out” with no guarantees of fitness for purpose, state of repair or condition. It is the stated responsibility of the purchaser to inspect and satisfy themselves in this respect. No evidence that this has been done is included. The minimum would be a comprehensive report of the condition of the vessel with an assessment of “fitness for purpose” by persons competent to do so acting solely on behalf of the purchaser.

There should also be a comprehensive inventory of the vessels fittings and loose equipment as examined and agreed and endorsed by the vendor at the
time of inspection. Such reports may possibly be part of the MoT report to Cabinet but have not been presented to PD for the GPC.

We would appreciate receiving these documents to circulate together with the Sales & Purchase Agreement, your assistance is much appreciated”

(Underlining added)

6.495 On 15th May 2009, AusAID confirmed that they were unable to assist with funding for the purchase of MV Princess Ashika. (Exhibit 349 attachment 19)

6.496 On about 18th May 2009, Mr. Karalus sent an e-mail to the Prime Minister wherein he made reference to “sea trials in Fiji over the next two weeks”. On the same date Mr. Karalus received an e-mail from an advisor to the Prime Minister, Mr. Rob Solomon (which was copied to the Prime Minister). In the e-mail Mr. Solomon asked Mr. Karalus:

“to please send me all info on the boat, when it was surveyed etc. We can meet on Wednesday to discuss what we need to send to NZAID. PM had asked me to discuss with Craig Hawke this funding and he has given verbal approval based on the ship having current survey, etc”(Exhibit 416)

(Underlining added)

6.497 On 18th or 19th May 2009, Mr. Karalus sent an e-mail to Mr. Jonesse, in consequence of the e-mail from Mr. Solomon asking what he had in electronic form on the survey et cetera of the vessel, he asked him to bring relevant parts of the file so his secretary could scan them and e-mail them to Mr. Solomon.

6.498 Significantly, despite Mr. Karalus in effect suggesting that Captain Johnson had relevant documents in relation to the MV Princess Ashika and was handling the matter with Mr. Jonesse, Mr. Karalus never requested the provision of the documents from Captain Johnson. We find that Mr. Karalus well knew that Captain Johnson was not playing any active role in relation to the prospective purchaser of the MV Princess Ashika and had never been asked by Mr. Karalus to do so.

6.499 On about 18th or 19th May 2009, in response to the e-mail from Mr. Karalus to Mr. Jonesse enquiring as to what he had in electronic form on the survey etcetera of the vessel, the Prime Minister stated that he thought that Mr. Karalus had personally seen all relevant survey results. The Prime Minister indicated in the e-mail that “we don’t want any nasty surprises.” (Exhibit 429)

6.500 Mr. Karalus responded by e-mail to the Prime Minister in the following terms:

“PM
The query to John was to find out what was in electronic form for forwarding to Rob as he seemed to need it in a hurry. I had seen all the hard copies. In the end we scanned all the hard copies and forwarded to Rob.” (Exhibit 429) (Underlining added)

6.501 In his sworn evidence on 25th February 2010, Mr. Karalus, at transcript page 6037, the following questions by Counsel Assisting and answers are of significance given his statement in the e-mail above to the Prime Minister:

“MR VARITIMOS: So is it the case that to this day you haven’t seen any survey documents in relation to Ashika.

MR KARALUS: That’s correct.

MR VARITIMOS: And you never saw a survey certificate or anything in relation to the survey of Ashika prior to it sinking.

MR KARALUS: That’s correct.”

6.502 Counsel Assisting asked Mr. Karalus some further questions about survey certificates in relation to the MV Princess Ashika. In this context, the questions and answers at transcript page 6038 I – L are noteworthy. They are as follows:

“MR VARITIMOS: But you never saw that certificate.

MR KARALUS: I never, ever saw that certificate.

MR VARITIMOS: Did anyone ever tell you they had such a certificate?

MR KARALUS: No, but I assumed they did because it was their job.”

6.503 We find that Mr. Karalus, as he swore on oath (at T 6037 O) never saw any survey documents in relation to the MV Princess Ashika. He thus deliberately and misled the Prime Minister that he effectively had.

6.504 On about 21st May 2009, Mr. Karalus advised the Prime Minister and Minister of Finance by e-mail “we have a First Mate and Motorman travelling for Fiji tomorrow for one week of sea trials with the vessel while it conducts normal runs to Levuka. Then next Friday we plan to send a Master and a further crew to assist the Fiji crew for the delivery over that weekend. This means we need to try for settlement by the end of next week... In the Bill of Sale Agreement the deposit is refundable if there is no settlement.” (Exhibit 430) Despite the e-mail from Mr. Karalus there was never any document which entitled the FJD$90,000 deposit to be refundable. Also,
significantly, Mr. Karalus never recommended or suggested that any officials from the Ministry of Transport travel to Fiji to look at the vessel.

6.505 Mr. Karalus had regular meetings with staff at the Ministry of Transport. (T 5828) These were part of the Mexco meetings chaired by Mr. Karalus as the Minister. Divisional Heads of the Ministry of Transport attended such meetings, including the Marine and Ports Division.

6.506 On 2nd June 2009, at a Mexco meeting held at the Minister of Transport’s office, Mr. Karalus Chaired a meeting at which he and other senior Ministry of Transport official were present, including Ms. Mone and Captain Johnson. Captain Johnson simply reported at the meeting that “the MV Princess Ashika is to be expected in Tonga shortly”. (Exhibit 141) There were no questions asked about the MV Princess Ashika, including whether any surveys had been done, due diligence conducted or whether the matter had been submitted to the Government Procurement Committee. (T 4558)

6.507 On 3rd June 2009, Mr. Karalus sent a Savingram, typed and prepared by him to the Minister of Finance and copied to Secretary of Finance. (T 4558 – 4559) It provided as follows:

“The Procurements Committee has approved the purchase of the vessel M.V. Princess Ashika.

The CEO of the SCP is travelling to Fiji (via NZ) today to be in Suva early tomorrow to complete verification of all documentation. Remembering tomorrow is a Public Holiday we plan to make Friday, 5th June, 2009, the settlement date.

Prior to settlement John Jonesse will fax the confirmation that documentation is in order, including the insurance cover of the vessel. The settlement date will also be appended to the existing agreement.

On receipt of this fax we are to send the balance of FJD 510,000 to the account specified in the sale /purchase agreement.

The Telegraphic Transfer receipt is to then be faxed to Patterson Brothers as confirmation of the settlement.

The receipt of this TT receipt will release the vessel for the voyage to Tonga to commence that same day; viz. Friday, 5th June, 2009.

I trust this procedure meets with your approval.”

6.508 Following the Savingram of 3rd June 2009, Mr. Jonesse urgently faxed a six-page document to Mr. Karalus on 4th June 2009 (which was said to be copied to the
Minister of Finance). Importantly, it was not sent to any other officers of the Ministry of Transport. This is yet a further illustration of the key role Mr. Karalus personally played in relation to purchase of the MV Princess Ashika. The fax was signed by Mr. John Jonesse “for the Minister of Transport” with the authority and permission of Mr. Karalus. (Exhibit 374) The fax stated that the documents listed in it, which included allegedly “Fiji Marine certified documents”, had been sighted as correct and supplied to Mr. Jonesse. However, the documents were never sighted by Mr. Karalus at any time, nor it would seem, any officers at the Ministry of Transport. (T 6287) What is clear is that, on 5th June 2009, the deposit of FJDS10,000 was paid on behalf of the Government by a telegraphic transfer to Fiji without Mr. Karalus or any officers at the Ministry of Transport having sighted the documents which Mr. Jonesse says he sighted in Fiji on 4th June 2009. (Exhibit 349 paragraph 76 and attachment 23; T 4561 P – 4563) This should never have occurred, as Mr. Karalus should have clearly appreciated.

On 6th June 2009, concerns were raised about the MV Princess Ashika in Parliament. (Exhibit 402) The Prime Minister, Minister of Finance and Mr. Karalus were all present in Parliament on that day. A Member of Parliament, Mr. Teisina Fuko, who was made the Minister of Revenue Services after the MV Princess Ashika sank, said in Parliament that he had just “heard that Fiji is very happy about this very old vessel being bought. Because they don’t have a vessel. They hire vessels from other countries to operate in Fiji. But they are glad that Tonga came over and bought what is to be taken for scrap metal.” Member of Parliament, Mr. ‘Akilisi Pohiva, also raised concerns about the proposed replacement vessel. (Exhibit 403)

6.510 Regrettably, Mr. Karalus informed Parliament that a survey of the vessel had been conducted. (Exhibit 403)

6.511 On 11th June 2009, Mr. Karalus received an e-mail from NZAID referring to the letter of Mr. Karalus of the 30th April requesting funding from NZAID to purchase the Ashika. The letter referred to a request also being conveyed to New Zealand’s Foreign Minister, by Prime Minister Sevele during their recent meeting in Japan. The letter from NZAID advised that a decision had been made that New Zealand would not be able to fund the replacement vessel. At the top right hand corner of the letter the words “File Princess Ashika” were written on it by Mr. Karalus. (Exhibit 349 paragraph 80 and attachment 26; T 4566 – 4568)

6.512 On 12th June 2009, Mr. Karalus was contacted by the Principal Coast Watch Officer of the Meteorological Division of the Ministry of Transport (Mr. Soane Haseli) and was informed that the MV Princess Ashika was damaged and had to return to Fiji from its attempted voyage to Tonga. Mr. Karalus was told, according to him, that there had been some damage to the bow ramp. (T 6341 – 6342) Despite this, Mr. Karalus did not suggest that any officers from the Ministry of Transport should visit Fiji to inspect
the vessel or that any experts should examine the vessel in Fiji. The vessel clearly should have been inspected in Fiji, by an independent expert, after the Minister had been informed that the vessel had been damaged and probably also an appropriately qualified expert from the Ministry of Transport. This was inexplicably not done or requested to be done.

6.513 As previously stated, by late June, early July 2009, Mrs. Kalesita Taumoepeau noticed that Mr. Jonesse (the CEO of SCP) was frequently seen within the office of the Ministry of Transport, including in the offices of Mr. Karalus. Also as noted earlier, Mrs. Kalesita Taumoepeau noticed that “about this time John Jonesse was like rushing around the office, not only to the Minister, but to Marine and Ports. He appeared to be in a real hurry walking in and out” and seemed to be “a bit panicky”. He was in the office a number of times each day and speaking to Mr. Karalus on a couple of times a day. (Exhibit 349 paragraph 83; T 4573)

6.514 Ms. ‘Ofa Finau stated that on 26th June 2009, Mr. Jonesse had come to the office of the Ministry of Transport, which was the original date set to open the bid documents for the Niua Shipping Service, with two copies of certificates saying that they were the Survey Certificates for the MV Princess Ashika. The two certificates provided by Mr. Jonesse were in fact a Safe Manning Certificate and a Radio Survey Certificate issued in Fiji. Ms. Finau informed Mr. Jonesse that the Certificate he had provided were not Certificates of Survey. (Exhibit 343 paragraph 24)(T 4462 - 4463 P-T)

6.515 On 29th June 2009, Ms. Finau gave Mr. Karalus a copy of the amended Draft Charter Agreement for his information. However Mr. Karalus told Ms. Finau that the Board of Directors of Shipping Corporation did not like the Draft Charter Agreement as amended by Ms. Finau and after contacting Lord Dalgety QC the Minister told her that the Shipping Corporation is referring the matter to maritime lawyers in New Zealand. (Exhibit 343 paragraph 21) Ms. Finau indicated that Mr. Karalus called Lord Dalgety QC on the phone while she was still in his office, and Mr. Karalus told her that Lord Dalgety QC told him that the Board of Directors have referred the matter to maritime lawyers in New Zealand. (T 4472- 4474 H-I)

6.516 Ms. Finau in paragraphs 22 and 23 of her affidavit deposed to the effect that negotiations between the Ministry of Transport and Shipping Corporation of Polynesia Limited in relation to the Charter Agreement for the MV Princess Ashika had reached a stalemate. The Minister of Transport proposed to Ms. Finau that a general meeting will be called which will be attended by Mr. Jonesse to discuss the Charter Agreement. She stated that by “the time Princess Ashika sank the meeting which the Minister was going to arrange had not been held”. (Exhibit 343) No written Charter Agreement was entered into by the Ministry of Transport and the Shipping Corporation of Polynesia Limited before the MV Princess Ashika sank.
Arrival of MV Princess Ashika in Tonga

6.517 On Wednesday 1st July 2009, a Memorandum to Cabinet was prepared by the Mr. Karalus and Ms. ‘Ofa Finau (Assistant Secretary Legal at the Ministry of Transport). Mr. Karalus signed the Memorandum. The Memorandum was submitted to Cabinet with, in short, the following relevant recommendations:

- Mr. Viliami Tu’ipulotu, Mr. Lou Pale, Mr. Lisiate Vuni Latu be appointed surveyors under the Shipping Act;
- That Mr. Tu’ipulotu be appointed Acting Director of Marine and Ports;
- That Mr. Viliami Tu’ipulotu be appointed Registrar of Ships and Ms. ‘Ofa Finau be appointed Deputy Registrar of Ships (Exhibit 349 paragraph 86 and attachment 29, T 4575-4576)

6.518 On 3rd July 2009, Cabinet approved the recommendations contained in the Memorandum to Cabinet. (Exhibit 349 paragraph 87 and attachment 30; T 4576) As it transpired Mr. Pale and Mr. Latu surveyed MV Princess Ashika on 2nd July 2009, before they were appointed surveyors under the Shipping Act. However, we accept that they were issued with certificates of appointment as surveyors before 2nd July 2009, signed by Mr. Karalus but it was undated.

6.519 Even after the vessel arrived in Tonga on 1st July 2009, Mr. Karalus says he never asked for any report to be provided to him in relation to the MV Princess Ashika.

6.520 We accept that Mr. Lisiate Vuni Latu (Surveyor at the Ministry of Transport), told Mr. Karalus at a meeting after the vessel arrived in Tonga, in the presence of Mr. Tu’ipulotu, that the MV Princess Ashika was “no good”. (T 1240-1243) Mr. Karalus denied this was ever said (T 6327). We did not accept Mr. Karalus as being honest in this regard. Mr. Karalus nevertheless accepts that he was told by Mr. Latu “in a very brief crossing of ways” in response to a question in Tongan “What’s our ship?” that “quite a number of things” were missing (T 6327 R – T 6328 A). Mr. Karalus says he talked to Mr. Jonesse about missing documents in relation to the MV Princess Ashika, but was assured that these documents were in hand and that it had been squared away with Mr. Viliami Tu’ipulotu the Acting Director of Marine. However, Mr. Karalus never raised the subject with any officers at the Ministry of Transport. (T 6328) If one of the surveyors raised concerns about documents being missing, which is probably the case, Mr. Karalus should have followed up with his officers and Mr. Tu’ipulotu to ensure that they could be and were obtained. He never did so.

6.521 Sometime around the end of June and when the vessel sank on 5th August 2009, Mrs. Taumoepeau saw Mr. Tu’ipulotu and Mr. Vuni Latu go into the Mr. Karalus’s office. (T 4577 L – 4578 G) She did not know anything about the meeting. Having said that, Mrs. Taumoepeau recalls that when she was passing downstairs at the office,
Mr. Mafi Kavaliku (a Marine officer at the Ministry of Transport) and she believes Mr. ‘Onesi Tu’ifua (a Marine Surveyor at the Ministry of Transport), made comments that the vessel was old. She also recalls Mr. Tu’ifua mentioning something about “holes in the vessel”. It was clear to Mrs. Taumoepeau, the Personal Assistant to Mr. Karalus, that the surveyors were not impressed with the vessel. (T 4578) We do not accept that Mr. Karalus did not also know this.

6.522 Mr. Karalus went on the vessel on three separate occasions before it tragically sank on 5th August 2009.

6.523 On 1st July 2009, Mr. Karalus swore that he could have been on the MV Princess Ashika for as long as 30-45 minutes because he was conducting a news interview or press conference. (T 6348 T – 6349) He walked around the vessel, including going to the passenger deck and engine room. From the front of the passenger deck on can look down onto the port of the cargo deck.

6.524 On 1st July 2009, the day the MV Princess Ashika arrived in Tonga, Mr. Karalus said in a media interview:

“It’s an old ship with the latest technology and equipment and caters for larger capacity. With the arrival of Princess Ashika it is expected to provide better and safer services for passengers. According to a study done on this vessel it can sail in seas three meters deep and it can dock in shallow ports such as those in Ha’afeva, Pangai and Neiafu, Nuku’alofa and Niuatoputapu. On top of that there is also enough space to fit smaller boats...to transport passengers if the vessel anchors further away from the wharf. The vessel can carry up to 396 passengers but only....baggage.” (Underlining added)

6.525 There was absolutely no basis for Mr. Karalus to state that the ship had “the latest technology and equipment”. Such statement was clearly false. The vessel had been poorly maintained and run down over many years and was in an appalling condition. This would have been apparent to Mr. Karalus when he went onto the vessel on 1st July 2009.

6.526 On 2nd July 2009, Mr. Karalus emailed Mr. Jonesse and Ms. Finau the following:

“Dear John

As per our on-going discussions please be advised that the Ministry of Transport agrees to the operation of the MV Princess Ashika for the month of July for the fee of $5,000. During this period the full terms and conditions of a lease agreement are to be conducted and concluded. During this month the SCP is to ensure full compliance with the laws of the sea and port
management and the operation of the vessel as per the survey documentation. This interim will also allow us to negotiate a charter rate

Happy sailing!!

Paul” (Exhibit 29 page 68)

6.527 On 3rd July 2009, Mr. Karalus was again on the vessel for “maybe 40 minutes”, “because the main purpose was to talk about the vessel”. (T 6349) Mr. Karalus had time to talk to the media and others, but seemingly, on his evidence, no time to talk to the surveyors at the Marine and Ports Division about the MV Princess Ashika.

6.528 On the 3rd of July the vessel sailed from Nuku’alofa for the first time. On that day, prior to the vessel sailing, Mr. Karalus met with the Board members of the Shipping Corporation and the Company Secretary Lord Dalgety QC. Mr. Karalus sought to downplay the significance of the meeting by referring to it as “a discussion” (T 6329 D) Mr. Karalus says he discussed his concerns about the fact that a Charter Party was not in place, but he did not discuss any issue about the seaworthiness of the vessel or whether any “certificate of seaworthiness” had been issued. This is despite Mr. Karalus not knowing that a Certificate of Survey had been issued. (T 6329) As it transpired, there was no demonstrated urgency shown in signing a Charter Party, as there was not one signed, even when the vessel sank on 5th August 2009. (T 6037 – 6038)

(Above: Photograph taken of Mr. Karalus on MV Princess Ashika on 3rd July 2009 with a journalist)

6.529 On 22nd July 2009, Mr. Karalus went onto the vessel with Mr. Kilvington for “probably three/four minutes”. Mr. Karalus saw the MV Princess Ashika at the wharf and asked Mr. Kilvington on their way back from lunch to “come, let’s have a quick look at it”. (T 6349 R – 6350) Mr. Kilvington was, as previously stated, an expert maritime consultant that Ministry of Transport have retained at the initiative of Mr. Karalus. It
is again unacceptable that Mr. Karalus did not use the expertise of Mr. Kilvington in relation to the MV Princess Ashika. It should be appreciated that the Ministry of Transport office was within walking distance of where MV Princess Ashika was berthed at the Queen Salote Wharf. It was less than 400 metres. Also, the offices of SCP were only about 100 metres from the offices of the Ministry of Transport. (T 4524)

Photographs were tendered of Mr. Karalus on the MV Princess Ashika in Tonga. (Exhibit 482 and 483) Mr. Karalus correctly accepted that from the photograph of the vessel it was clearly evident that the vessel had considerable rust on it. (T 6358 N – O) The extensive corrosion would have been even more self evident when he went onto the vessel on 1st, 3rd and 22nd July 2009, even if the “main purpose was to talk about the vessel” or to “have a quick look at it”.

The evidence as to the condition of the vessel, including photographs, clearly demonstrates that the MV Princess Ashika had considerable rust and corrosion which would have been evident to Mr. Karalus. He should have been immediately put on alert having seen the vessel in person. He should have insisted on the Acting Director of Marine and the surveyors providing an urgent report to him on the condition of the vessel. He should also have insisted, having regard to his duties and obligations as the Minister of Transport, in asking to be urgently provided with an independent survey, independent valuation and documents in relation to the vessel. Even if he did not so insist, he should have required the independent survey, independent valuation and documents to be provided to the Acting Director of Marine for review. Of course there was never any independent survey or independent valuation ever done in relation to the MV Princess Ashika prior to the vessel sinking.

Events after MV Princess Ashika sank

Shortly after the vessel sank on the 5th August 2009, Mr. Karalus was involved in an interview with a Journalist, Nanise Fifita. During the course of the interview, Mr. Karalus stated:

“She had a certificate of survey from Fiji and it was clear that she had been Dry Docked in December last year and she was surveyed when Shipping Corporation sent two people from New Zealand to survey the ship and we also carried out survey. One was an engineer and the other a naval architect and again upon her arrival she was again surveyed because she was a vessel from Fiji coming to Tonga and a certificate had to be used so that she could sail in the Tongan waters. Even those certificates have to be assessed. This vessel was surveyed whether she could carry 396, which would be both
passengers and crew and that she could carry 400 tons but it was clear that her load was less than half that figure.” (Exhibit 487) (Underlining added)

6.533 In the same interview with Nanise Fifita, Mr. Karalus was asked “What makes you satisfied that the vessel was safe to sail?” Mr. Karalus responded as follows:

“This ship has been surveyed. Not only in Fiji. It had been Dry Dock in Fiji as late as December. It had been surveyed. It has also been further surveyed by an engineering team from New Zealand and architect to check out the vessel and its current state. And this was in June of this year. The vessel then when it came to Tonga was again surveyed by our Ministry to ensure that the vessel was seaworthy.”

6.534 On 7th August 2009, Mr. Karalus in an e-mail to Mr. Alfred Soakai, from the Ministry of Communications and Information stated that he advised Radio NZ and Radio Australia:

“that the vessel was in survey and that this was very recently conducted as the vessel entered service in the last eight weeks and that the load (at 117 souls and 141 tonnes of cargo) was well within the surveyed limits of 396 souls and 400 tonnes of cargo and that it carried a more than adequate crew.” (Exhibit 446)

6.535 As referred to above, Mr. Karalus gave sworn evidence before the Commission that he had not even seen any survey documents in relation to the MV Princess Ashika at the time of his giving evidence on the 25th February 2010. One would have expected any competent Minister for Transport, particularly in circumstances where there had been a major maritime tragedy; statements made by him to His Majesty, the Legislative Assembly, the Prime Minister and the media about the condition of the vessel and the survey of it; the establishment of the Commission of Inquiry; to have requested in the strongest possible terms the production of survey documents for production to him relating to the vessel.

6.536 On 7th August 2009, arrangements were made for Mr. Michael Eno (a Marine Consultant) to urgently come to Tonga to investigate a tragedy and prepare a report.

6.537 On 11th August 2009, Mr. Karalus issued a Press release expressing the reasons of his resignation. In the press release, Mr. Karalus stated:

“The gravity of the disaster of the sinking of the MV Princess Ashika and the huge loss of life is deeply mourned by all of us in Tonga and beyond, and especially by all families who lost loved ones.

It is essential that a complete and full investigation into this tragedy be made as soon as possible; and that this be carried out thoroughly and transparently.
Government had moved to appoint a Royal Commission of Inquiry to conduct this investigation; and this Commission needs total freedom of access to all information relating to the ferry and its loss.

Although I as Minister for Transport and my ministry and Staff know that we performed our duties with due care and diligence; the overall interests of Tonga must be taken into account at this difficult time. It is for this reason that I have considered and taken the decision to resign from my Ministerial post. I have thus submitted my resignation as Minister for Transport to the Princess Regent, Princess Salote Mafile’o Pilolevu Tuita; and to the Prime Minister, Dr the Hon Feleti Vaka’uta Sevele.

I stand ready to render full assistance, where and when required, to the Royal Commission of Inquiry, and, in this spirit, no further public comments will be made by me in relation to the tragedy.

I wish to thank all who have assisted me and my Ministry in my term as Minister for Transport. We have carried out our duties to the best of our abilities, and I extend my sincere apologies for any shortcomings we might have had.

I extend my sincere gratitude to the Hon Prime Minister and Hon Members of Cabinet for their advice and support during my ministerial term, and I offer my most sincere condolences and prayers to the families who lost loved ones.” (Underlining added)

6.538 Mr. Karalus said during the course of his evidence, in substance, that statements made by him as to the “good condition” of the vessel or that it had been “well maintained” turned out to be “totally incorrect” and that he was “very highly embarrassed” and “sadly embarrassed” by these statements. (T 6405 P) The vessel was, as Mr. Karalus accurately acknowledged, unsafe and unseaworthy during the entire time that the vessel was in Tonga. (T 6358 O – Q) The statement and representations, which were made by him, were for the purpose of others relying on them. He well knew they were baseless and should never have been made.

Causes of the Disaster

6.539 Counsel Assisting provided Mr. Karalus with an opportunity to state what he considered to be the cause or causes of the disaster. The transcript records at page 6360 L – 6361 K as follows:

“MR VARITIMOS: What do you say is the cause of this disaster or causes of the disaster?
MR KARALUS: Very, very clearly those who were charged or who had the responsibilities to carry out full due diligence had not, in fact, done so, that I as the Minister whose roles and responsibilities were to my mind to do with policy and to represent that Ministry at the highest levels, that I would rely upon the technical abilities of those people who would carry it out. I was, sadly, very badly misled and so this has attributed to the vessel not being fully and properly surveyed and properly looked at - shall we say.

...

MR KARALUS: The - because of this, the vessel as it transpires after seeing all the evidence, hearing all the evidence, the vessel could only be said to be unseaworthy, and yet it was continued to be operated by the company, by the crew, and also too with the knowledge of, if they believed it to be unseaworthy, of those others in the industry.

This was not brought to my attention. If it had have been brought to my attention, that vessel would never have left port, because I would have expected that it would be detained and, if it was detained, without any compunction, that vessel would have remained detained until it was seaworthy - if it were possible to get it into that position.

So, thereafter, given that this vessel is one that is not unseaworthy and given that it carried out voyages carrying people and cargo and given too that it was - took on water and subsequently it sank with the loss - tragic loss - of those lives, this could have all been avoided. You asked for the cause. I suspect the cause is multi-faceted and it’s so sad that all the dots were not joined, the “T”s crossed, the “I”s dotted, and that one’s faith in those who were to carry respective functions, has been seriously eroded. It was my position to encourage, to orchestrate, to conduct and to ensure that this particular division of the industry, of the Ministry, would be subjected to, as part of the growing together of the various aspects of the Transport Ministry into one, and we had started the process of going through and bringing people in to endeavour to change that culture. And this is what I suspect is the very, very real issue, is that the culture in the maritime industry is one - as I’ve said somewhere else - one of non-compliance, noncooperativeness, one without - one with complacency, one that is captained by and operated by people who believe that they know what they’re doing, whereas, in fact, if they were subjected to proper audit, proper checking, this would be found not to be the case. There may have been other circumstances that also contributed. These may have been natural in the fact that a ship is a ship, a vessel that travels by sea, so the intrusion or ingress of water was obviously a cause, and also that this was not corrected, or that this was not - did not lead
to that vessel to return, that this did not lead that vessel to be laid up and fully repaired, or decided whether it should ever sail again, is an issue that should have been considered. I think that covers, or answers your question.”

(Underlining added)

6.540 We do not accept that Mr. Karalus was unaware of the poor condition of the vessel. He criticises Shipping Corporation and the crew. However, he had the responsibility of ensuring that the vessel was not purchased without proper and thorough due diligence being conducted. Mr. Karalus also had jurisdiction and responsibility to ensure that the MV Princess Ashika was not allowed to sail in Tonga given the unseaworthy condition of the vessel. Despite his sworn statements that safety “should never ever be compromised” (T 6361 P), Mr. Karalus was prepared to do so in the case of the MV Princess Ashika, which resulted in a completely unnecessary tragedy.

6.541 Mr. Karalus accepted that the Ministry of Transport was one of those entities charged with carrying out due diligence and ensuring that independent due diligence was conducted. He also accepted some responsibility as Minister, for the failure of due diligence to be carried out. (T 6362 L – P)

6.542 When asked by Counsel Assisting as to whether he accepted that he should have been more proactive in requesting the production of documents in relation to the condition of the vessel, the response by Mr. Karalus was:

“I have said, and will say again, that that maybe is the case, but I would warn very much against a minister getting directly involved, and if that’s what you’re saying, that we actually look at documents, because at the end of the day most of us as ministers would not be capable or would not be competent, and we should ensure and separate ourselves from that. And that’s what I talk about faith: we have to continue to have faith in the people who are doing this job, and it is to ensure that we have the right people there. What is more perhaps, rather than proactive and looking at the documentation, is ensuring that there are people in the Ministry would are competent and that are carrying out that job correctly. I think the failure is really one where resource - sufficient resource - is not being put in to ensuring that there is competence and that there are people properly trained, and that the organisation is there to carry that out.”

6.543 In terms of the MV Princess Ashika, the evidence indicates that Mr. Karalus had no concerns about getting very much directly involved. As a Minister signing a contract for a considerable amount of money and in relation to the purchase of a vessel which was to provide a critical and essential service, it defies any sense of responsibility for the Minister not to have sought any written advice from officials at
the Ministry of Transport about the prospective purchase of the MV Princess Ashika and the operation of it in Tonga.

6.544 Mr. Karalus rightly accepted that if Shipping Corporation had done their job, the vessel should never have left Fiji. Similarly, Mr. Karalus conceded that if the Government had done their job, again, the vessel should never have left Fiji; the vessel should never have been given a clearance to sail. At the end of the day, Mr. Karalus accepted that Cabinet and the Government could have been more vigilant.

**Deliberate Failure of Mr. Karalus to Disclose Vital Documents to the Commission of Inquiry**

6.545 Mr. Karalus deliberately failed to produce vital documents to the Commission of Inquiry which he should have produced pursuant to a summons served on him under the Royal Commission’s Act. (T 5906 – 5931) Mr. Karalus was served with a summons dated 23rd of October 2009 on the 27th October 2009.

6.546 When Mr. Karalus gave evidence on 10th November 2009, he was asked if there were any other documents that he was aware of which he had not produced to the Commission, but which would be relevant and should be produced. (T 927 U – 928 A)

Mr. Karalus responded by answering:

“Not at this point, no, sir.” (T 928 B)

6.547 When Mr. Karalus gave evidence on the 24th February 2010, he acknowledged that he failed to produce documents notwithstanding that he knew that they should have been produced in response to the summons. (T 5922, 5925 - 5926) He agreed that despite documents being pivotal to the Commission he failed in his responsibilities and obligation in producing vital e-mails. (T 5927 Q)

6.548 During the time Mr. Karalus was the Minister, he used a Toshiba laptop, he took the laptop after he resigned and only reluctantly returned it after he was effectively told he would not receive his retirement benefits unless it was returned.

6.549 Mr. Karalus became aware in 2009 from his former Personal Assistant, Mrs. Kalesita Taumoepeau, that she had been asked to produce the laptop to the Commission. He advised his former Personal Assistant in effect that “they won’t get anything off that” (T 5914 J) Mr. Karalus said he “did say that, meaning that – not to the extent that there would be nothing on the hard drive on the laptop, no. What I meant was that everything that I have that I did not believe would be anything incriminating or in any way – I meant it in that vein. Not in the vein that they won’t find anything on that.” (T 5914 K) However, Mr. Karalus accepted that there was nothing on the hard drive because someone had deleted everything from it. (T 5914 P)
As it transpired, Mr. Karalus well knew that all the information on the hard drive of the laptop had been deleted. (T 1594 P) He says it was deleted by his nephew. Mr. Karalus was aware that the information on the laptop was “vital” and says he was concerned that if the information was returned to the Ministry it may be “tampered with”. (T 5915 H)

Mr. Karalus “thought it was vital that it not be in any way tampered with”. (T 5915) He said that “if I return the laptop to the Ministry and someone could, perhaps, maliciously take out any information that might pertain, and I would have no way of knowing that”. (T 5920 P)

Mr. Karalus correctly accepted that there were a lot of documents on his laptop which related directly to the MV Princess Ashika, none of which were produced by him pursuant to the summons. (T 5906 Q) In response to the question by Counsel Assisting asking for him to give an explanation as to why they were no produced earlier, Mr. Karalus answered as follows:

“{\textit{The ones that were directly related to Ashika, I thought - and I - most of them were in that they were emails from me to others, some of those coming inward are often forwarded on. There’s no real reason why they - they were not. I mean, I think you have the entire - whatever the entire - everything that’s on that laptop.}” (T 5907 A)

Counsel Assisting gave Mr. Karalus a further opportunity of asking him why he said the documents were not produced. In response to the question “And why do you say they were not produced?” Mr. Karalus answered as follows:

“{\textit{Well, I think, the main thing was the enormity. I guess what should have happened is that those discs should have been given in their entirety, which would have been a lot easier, except of course the task then of separating out would still have to be determined.}}” (T 5925 O)

We do not accept Mr. Karalus’s sworn evidence that there was no intention that the documents not be produced. (T 5927) Mr. Karalus failed to produce vital documents pursuant to the summons served on him.

PART D - MR. BUSBY KAUTOKE

Overview of Evidence

Mr. Kautoke was appointed the Chief Secretary and Secretary to Cabinet in early April 2009.

He was well aware, prior to taking up his role in 2009, that there were problems with the MV Olovaha. On becoming the Secretary to Cabinet, he became aware from the
Cabinet meetings that the vessel needed to be urgently replaced because it was “not up to the standard required to cover the outer islands” and had deteriorated.

6.557 On 16th April 2009, Cabinet resolved that Mr. Karalus, as the Minister for Transport needed to submit to Cabinet the plan for the replacement of the MV Olovaha.

6.558 On 20th April 2009, Mr. Kautoke received a Memorandum to Cabinet signed by Mr. Karalus and the Minister for Finance (Hon. ‘Otenifi A. Matoto). The Memorandum stated that “the Ministry of Transport has sought full technical data to allow for due diligence to be completed on the replacement vessel, the MV Princess Ashika.” It also represented “while the vessel is older than the Olovaha, it had been very well maintained and has come out of a December 2008 survey.” (In fact, the evidence before the Commission is that the MV Princess Ashika had been very poorly maintained.) The Memorandum recommended that the Ministry of Transport complete due diligence on the technical suitability and the seaworthiness of the MV Princess Ashika.

6.559 After the 20th April 2009, Mr. Busby Kautoke prepared a draft agenda for the Cabinet meeting on 23rd April 2009. The agenda contained the same recommendations as those in the Memorandum to Cabinet on 20th April 2009, including the recommendation for due diligence to be completed. The Prime Minister, Dr. Sevele, approved the agenda prior to circulation to the Cabinet Ministers.

6.560 The Cabinet made a decision on 23rd April 2009. The decision provided as follows:

1. That the report from Ministry of Transport on the Vessel to Replace the MV Olovaha be noted.

2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposits and other financial agreements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.

3. That discussions with the Government of Japan to continue to ascertain that there are no further delays on the delivery of the new ferry to replace the MV Olovaha.”

6.561 The Secretary to Cabinet assumed that normal procedures such as the completion of due diligence and approval by the Government Procurement Committee would be
followed prior to purchase. (In actual fact, no due diligence was completed. There was, for example, no independent survey conducted and no independent valuation.)

6.562 On 22\textsuperscript{nd} December 2009, the subject of a radio announcement issued by the Ports Authority in relation to the MV Pulupaki not being allowed into the Queen Salote wharf because of safety concerns was discussed in Cabinet. Cabinet considered that the main issue was to allow people to come ashore. No proper regard was given by Cabinet to safety issues. The MV Pulupaki was not only allowed to sail on the 22\textsuperscript{nd} of December, but also on the 23\textsuperscript{rd}, 24\textsuperscript{th}, 25\textsuperscript{th}, 30\textsuperscript{th} and 31\textsuperscript{st} December 2009.

Substantive Evidence of Mr. Busby Kautoke

Educational Background, Qualifications and Experience

6.563 Mr. Kautoke was appointed the Chief Secretary and Secretary to Cabinet in early April 2009.

6.564 Mr. Kautoke obtained a Bachelor’s Degree in Science from the University of Hawaii in about 1975. He subsequently obtained a Master’s degree in public administration from the University of Tasmania. (T 5621)

6.565 He commenced employment in the Prime Minister’s office in 1975, but did not work continuously there. He worked as Deputy Secretary to Cabinet during part of the 1990s. (T 5619 – 5620)

6.566 Mr. Kautoke had periods of employment with the Ministry of Health and with the Tonga Communications Corporation, before rejoining the Prime Minister’s office in 2009 as Chief Secretary and Secretary to Cabinet. (Exhibit 424, paragraph 2) He also gained extensive administrative experience working for Caritas in Rome, Sydney and Tonga. (T 5620)

Processing Documents in Relation to Cabinet Meetings

6.567 Documents in relation to Cabinet meetings, such as Memorandums to Cabinet are normally required to be submitted by Mondays for the normal Cabinet meeting commencing 10:00am on Wednesdays. The agenda and Cabinet documents are normally distributed on Monday evenings. In some cases there are additional urgent Cabinet meetings called, in addition to the normal Wednesday Cabinet meetings. The Cabinet meetings normally finish by noon. (T 5622 – 5624) Sometimes Ministers bring along papers to Cabinet late. In those cases, a “clearance” is required from the Prime Minister, as Chairman of Cabinet for the matters to be dealt with immediately. (T 5628 I; T 5634)

6.568 Mr. Kautoke prepares agendas for the Cabinet meetings in consultation with the Prime Minister. A draft agenda, with the papers, is submitted to the Prime Minister
from Mr. Kautoke for approval, before it is finalised and distributed. (T 5629 – 5630)
The Prime Minister gives approval either verbally or by correspondence. If the Prime
Minister gives approval then Mr. Kautoke prepares the final agenda and the papers
which are distributed. (T 5630)

6.569 There is a Registry Unit of the Prime Minister’s Office and the Cabinet Office. There
is a senior Registry officer who collates the documents. The Cabinet office keeps all
documents related to Cabinet meetings and records and files them. (T 5628) There is
a Cabinet Manual. Although there are a number of different documents relevant to
Cabinet matters, the Cabinet Manual was only compiled into one document and
published towards the end of 2009. (Exhibit 425; T 5626 – 5627)

6.570 Mr. Kautoke produced documents to the Commission, under cover of an index from
the Prime Minister’s Office. (Exhibit 121) He did not look at the Prime Minister’s
personal files in preparing the list of documents. (T 5622 N – P) Mr. Kautoke however
looked at the index kept at the Prime Minister’s office with the assistance of staff.

6.571 The documents produced by Mr. Kautoke (Exhibit 121) did not include a paper
presented to Cabinet at Cabinet meeting No.52 of 2008 in relation to Cabinet
meeting of 12th November 2008. (Exhibit 419; T 5633 – 5634) That document
provided under General Overview:

“While deterioration is a factor in any vessel of this age, with the Olovaha it is
compounded with historical failure to maintain any rational programme of
R&M to the extent of gross negligence and any failure resulting in injury
would have been deemed to be criminal negligence.

With this in mind we have set up a PMP that has proven its worth over the
last 2 years.”

6.572 Mr. Kautoke said he did not recount seeing this document. He was not the Secretary
to Cabinet in November 2008 at the time of the meeting. (T 5633) Having said that,
the Prime Minister accepted that the paper was presented at the Cabinet meeting.

Problems with the MV Olovaha

6.573 The report to Cabinet presented on 12th November 2008 obviously indicated that
there had, at least in the past, been serious problems associated with the MV
Olovaha. (Exhibit 419)

6.574 Mr. Kautoke well knew, prior to taking up his role in April 2009, that the provision of
a safe and reliable ferry service for the outer islands of Tonga was very critical and
essential. He knew that it was essential to do something about the MV Olovaha as in
his words it “couldn’t make the schedule” and sometimes “water comes in”. (T 5634)
In early 2009, Cabinet, according to Mr. Kautoke, was generally aware of the difficulty of maintaining the ferry service to the outer islands of Tonga using the MV Olovaha until the projected arrival in later 2010 of a new purpose built ferry to be provided by the grant aid from the Government of Japan. (Exhibit 424 paragraph 5)

The Secretary to Cabinet says that when he took the position in April 2009 there was the general feeling that something urgent needed to be done to replace the Olovaha. This was often the subject of Cabinet meetings. It was often raised that the MV Olovaha needed to be replaced for it was “not up to the standard required to cover the outer islands” and had deteriorated. It was very clear to Mr. Kautoke from the Cabinet meetings that the MV Olovaha had to be replaced urgently. Questions were directed to Mr. Karalus at the Cabinet meetings, as he was the Minister for Transport in relation to the MV Olovaha and was “the main Minister responsible”. (T 5634 – 5637; T 5643 – 5645; T 5675)

Cabinet Decisions Regarding the Purchase of the MV Princess Ashika and the Requirement for Due Diligence to be Conducted

There was a Cabinet meeting held on the 16th April 2009.

On 16th April 2009, the Cabinet resolved (by Cabinet Decision No. 292), in a meeting Chaired by the Prime Minister, to approve the following recommendations:

“That the Hon. Minister for Transport to kindly, i.e.: 

i. arrange the advice of Government and the public of the travel details of the subsidized ship for Niuafo’ou and Niuatoputapu scheduled for the week beginning Monday 20th April, 2009;

ii. submit to Cabinet the plan for the replacement of the MV Olovaha

iii. submit to Cabinet the air services and maintenance/repair plan of the airports of Niuafo’ou and Niuatoputapu.”

(Exhibit 408 annexure “C”) (Underlining added)

There was no paper submitted in respect of this Cabinet Decision. (T 5638 I) The Chief Secretary recalls that it is likely that Mr. Karalus made the recommendations. (T 5642 O) In any event, the Cabinet Decision certainly resolved that it was Mr. Karalus who was required to submit to Cabinet the plan for the replacement of the MV Olovaha as it was “within his portfolio, his responsibility.”(T 5642 R)
At the time of the Cabinet Decision, it was clear, given concerns that has been raised about the standards and reliability of the MV Olovaha, that there needed to be an urgent plan for the replacement of the vessel. (T 5642 – 5645)

On 20th April 2009, Mr. Kautoke received a Memorandum to Cabinet signed by Mr. Karalus and the Minister for Finance (Hon. ‘Otenifi A. Matoto) for the Cabinet meeting on 23rd April 2009. (T 5645) On receipt of the Memorandum the stamp of the Cabinet office was placed on it, dated 20th April 2009. The Memorandum related to the “Vessel Purchase to Replace the M.V. Olovaha”.

The Memorandum to Cabinet of 20th April 2009 provided:

“The mechanical state of the M.V. Olovaha has been of increasing concern over the past six months.

While the ship remains seaworthy it is becoming increasingly difficult to maintain any reliability in its service to the outer islands.

The delivery of the new ferry to be provided by grant aid from the Government of Japan will not be before late 2010. In the meantime it is estimated that up to TOP 800,000 needs to be spent on the existing M.V Olovaha to keep it in service. The attached financial summary (attachment one) from the Shipping Corporation of Polynesia and the Ministry of Public Enterprises and Information compares the cost of continuing services with existing ship against the cost of purchasing a ship that has been sourced in Fiji. It is clear that the financial outlay for a replacement ship to fill the gap until the arrival of the new ferry is the preferred option as there is also the residual value of the replacement ship once the new ferry arrives.

The Ministry of Transport has sought full technical data to allow for due diligence to be completed on the replacement vessel, the M.V. Princess Ashika (some detail is provided as attachment two).

In summary, the vessel is surveyed to carry 390 passengers and 370 tonnes of cargo (c.p. Olovaha, 400 passengers and 140 tonnes of cargo). It has both bow and stern loading capability, cruises at 10 knots (Olovaha 8 knots), has similar draft to the Olovaha to allow safe entry and exit to all ports (it is suggested that the vessel can also service ‘Eua though this is to be substantiated) and burns 30 per cent less fuel. The vessel is both bow and stern loading and is of the “roll on, roll off” (Ro-Ro) type. While the vessel is older than the Olovaha it has been very well maintained and has come out of
a December 2008 survey. An Australian engineering company is preparing the vessel for sale to ensure full serviceability.

The SCP has put in a purchase option to expire at the end of this month for FJD 600,000 (this is now TOP 580,000) and has sourced cargo to cover the cost of positioning the ship in Tonga.

Both the Ministry of Transport and the Ministry of Public Enterprises and Information recommend that the ship be purchased by the Government of Tonga and leased to the Shipping Corporation of Polynesia and that this be effected without delay once all the necessary documentation is completed. The ship can enter service in Tonga during May, 2009, in time for the major Church conferences. This vessel can also be used to test new scheduling and loading procedures in readiness for the entry of the new ferry from Japan in late 2010. The total funding to be sought is expected to be within TOP 750,000.

Recommendations:-

1. That the Ministry of Transport complete due diligence on the technical suitability and sea worthiness of the M.V. Princess Ashika.

2. That, subject to the successful completion of (1.) above, the Ministry of Finance and National Planning source funding for the purchase of the vessel and for any requirements to ensure rapid deployment into service.

3. That, subject to the successful completion of (2.) above, the Ministry of Public Enterprises and Information and the Ministry of Transport determine the ownership and on-lease of the vessel to the Shipping Corporation of Polynesia.” (Underlining added)

6.582 The Memorandum to Cabinet had attached to it the following documents:

(a) Letter from Mr. Jonesse to Mr. Karalus and Mr. MacQueen c/o Ministry of Public Enterprises dated 17th April 2009;

(b) Investment analysis regarding retaining Olovaha versus buying a replacement vessel;

(c) Cash Flow Projections;

(d) A photograph of the MV Princess Ashika taken from a distance;

(e) A document entitled “Princess Ashika...Survey December 2008 valid to December 2010- Fiji Marine Board- Rusiate Waqa”. (Exhibit 424 attachments 2,3,4,5)
6.583 There were no documents to support the investment analysis or the cash flow projections. According to the investment analysis, if interest was to be paid and there was no Government subsidy, the operation of the MV Princess Ashika was projecting a loss. (T 5602 – 5603) In terms of the document entitled “Princess Ashika…Survey December 2008 valid to December 2010” submitted to Cabinet, the document was effectively useless. There were large gaps in the document and it was very incomplete. It was clear, from even a very preliminary look at it that the document had not been issued by the Fiji Marine Board. This is because, for example, it made references to SCP (Shipping Corporation of Polynesia) and numerous references to MV Olovaha including that certain equipment was “recoverable from new equipment on Olovaha”. It should also be noted that the document was not signed or dated. It was also not on any letterhead or under the cover of any letter.

6.584 Mr. Kautoke prepared the agenda for the Cabinet meeting of 23rd April 2009 in consultation with the Prime Minister. The Prime Minister approved the agenda prior to circulation of it. (T 5701 – 5702) The agenda and papers were distributed on Monday 20th April. (T 5647) The relevant agenda for the meeting on 23rd April 2009 was as follows:

“300. MAR 2/2/2 V5  Vessel Purchase to Replace the MV Olovaha

Recommendations

1. That the Ministry of Transport complete due diligence on the technical suitability and sea worthiness of the MV Princess Ashika.

2. That, subject to the successful completion of (1) above, the Ministry of Finance and national planning source funding for the purchase of the vessel and for any requirements to ensure rapid deployment into service.

3. That, subject to the successful completion of (2) above, the Ministry of Public Enterprises and Information and the Ministry of Transport determine the ownership and on-lease of the vessel to the Shipping Corporation of Polynesia.” (Exhibit 427) (Underlining added)
6.585 The agenda was not originally produced to the Commission. (T 5651) It was produced by Mr. Kautoke after Counsel Assisting ascertained during questioning of Mr. Kautoke that an agenda was not produced.

6.586 It was pointed out to Mr. Kautoke that the Secretary for Transport and CEO (Ms. ‘Eleni Mone), said she did not know anything about the Memorandum to Cabinet signed by Mr. Karalus. He correctly considered that this could be a shortcoming of the Minister not to advise his CEO, as well as a shortcoming by Ms. Mone. (T 5664) Mr. Kautoke considered it usual practice for a Minister and his CEO to work together. He considered that it would have been beneficial and wise for Mr. Karalus to have consulted with Ms. Mone. However, he thought that in the case of the MV Princess Ashika “the Minister, in his right mind decided to work with other people”. (T 5667) The evidence establishes that Mr. Karalus sought no advice from Ms. Mone whatsoever nor did he work with her in relation to the MV Princess Ashika. He should have done so.

6.587 On 23rd April 2009, Cabinet met and discussed the Memorandum to Cabinet date 20th April 2009. Those present at the meeting were the Prime Minister (Hon. Dr. Sevele), Deputy Prime Minister and Minister for Health (Hon. Dr. Viliami Tangi), Minister for Police, Prisons and Fire Services (Hon. Siaosi T ‘Aho), Minister for Training, Employment, Youth and Sports (Lord Tu’ivakano), Minister for Works (Lord Nuku), The Attorney General and Minister for Justice (Hon. ‘Alisi Numia A Taumoepeau), Minister for Transport (Hon. Paul Karalus), Minister for Finance and National Planning, Public Enterprises and Information (Hon. ‘Otenifi Afu’alo Matoto). (Exhibit 424 paragraph 7; Exhibit 427) There were only 8 of 14 Ministers present. (T 5650)

6.588 Mr. Kautoke stated in paragraph 8 of his affidavit as follows:

“As recommended by the Minister for Transport, Cabinet decided to proceed with the purchase of MV Princess Ashika. This was recorded by me in Memorandum NO. 300 signed by me and distributed to the Hon. Cabinet members, the Secretary for Finance, the Secretary for Public Enterprises, the Secretary for Transport and the Private Secretary to His Majesty [attachment 6].” (Underlining added)(Exhibit 424)

6.589 The Secretary to Cabinet sought to summarise the position in paragraph 13 of his affidavit in the following terms:

“In summary, the Cabinet had no reason to believe the MV Princess Ashika was unseaworthy when it authorised its purchase.” (Underlining added) (Exhibit 424)
6.590 The signed Cabinet Decision No. 300 (Appendix 44), which was signed by Mr. Kautoke, records that Cabinet decided:

“1. That the report from Ministry of Transport on the Vessel to Replace the MV Olovaha be noted.

2. That the Hon. Minister for Transport, assisted by the Hon. Attorney General & Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposits and other financial agreements be finalised with the Hon. Minister of Finance, National Planning and Information, who is hereby authorized to endorse or otherwise the proposed transaction, and a report be later tabled in Cabinet.

3. That discussions with the Government of Japan to continue to ascertain that there are no further delays on the delivery of the new ferry to replace the MV Olovaha.”

6.591 It will be observed that the wording of the decision made on 23rd April 2009 neither follows the wording of the recommendations contained in the Cabinet Memorandum of 20th April, nor does it follow the recommendations contained in the agenda for the meeting. Both the Cabinet Memorandum and the agenda clearly provided that the Ministry of Transport was to complete due diligence on the technical suitability and the seaworthiness of the MV Princess Ashika. This should be contrasted with the terms of the Cabinet decision. Mr. Kautoke acknowledges this in paragraph 11 of his affidavit.

6.592 In paragraph 11 of Mr. Kautoke’s affidavit he states:

“While Memorandum No.300 [attachment 6] does not specifically refer to due diligence, it does make reference to “the arrangements to do with MV Princess Ashika”. Authority was also specifically given to the Hon. Minister for Finance “to endorse or otherwise the proposed transaction”. It was accordingly assumed that normal procedures such as the completion of due diligence and approval by the Government Procurements Committee would be followed.” (Exhibit 424) (Underlining added)

6.593 Rather than simply having to assume that normal procedures such as the completion of due diligence and approval by the Government Procurement Committee would be followed, it should have been made clear when the Cabinet made the resolution on 23rd April 2009. The requirement to carry out due diligence was critical. Cabinet resolved to adopt different wording to that contained in the recommendations put
before them. This resulted in Mr. Kautoke noting the words “new wordings” on the copy of the agenda. (Exhibit 427) It would have been a very simple exercise for Cabinet, if it wished, to adopt the written recommendations put before it. It chose not to do so.

6.594 There were no other papers or documents presented to Cabinet in relation to the Cabinet decision made on 23rd April 2009. (T 5649)

6.595 There were no notes taken by the Cabinet Secretary of who says what at the Cabinet meetings. After the meetings, Mr. Kautoke is charged with responsibility of having the actual resolutions typed up. He obtains the approval of the Prime Minister before the Cabinet decision is signed. (T 5652 – 5654) The resolution from the Cabinet decision is effectively a “summary of the discussion” or “result of that meeting”. (T 5654)

6.596 Mr. Kautoke’s recollection is that on the 23rd April 2009 Cabinet decided to proceed with the purchase of the MV Princess Ashika but “there were conditions”. (T 5649; T 5668 – 5669) While the Cabinet decision provide that the Minister “is hereby authorized to endorse or otherwise to proposed transaction, and a report be later tabled in Cabinet” there is no reference to any condition such as due diligence being required to be completed.

6.597 The Secretary to Cabinet correctly accepted that prior to the Government purchasing the vessel, the Government should conduct due diligence. This was sound business management and in accordance with good governance. He appreciated that due diligence would normally need to be independent. This would include an independent survey and an independent valuation to ensure that the Government was not wasting public funds. He understood that the Government Procurement Committee had existed for a number of years to ensure that the Government did not commit to public expenditure which was wasteful or improper. Mr. Kautoke correctly understood that the Procurements Committee was established to ensure that goods or services are not acquired unless or until proper due diligence had been conducted as to the fitness for the purpose and suitability of the goods or services. In short, he appreciated that the Government Procurement Committee ensured that the Government was getting value for money. The Government Procurement Committee was, as Mr. Kautoke correctly acknowledged, very important in terms of the whole process of ensuring accountability and transparency. (T 5655 – 5656; T 5670)

6.598 Mr. Kautoke assumed that normal procedures such as completion of due diligence and approval by the Government Procurement Committee would be followed because it was critical. In his mind, he took for granted that those things would be done prior to purchase. (T 5665 – 5666)
Although the Cabinet decision of 23rd April 2009 expressly provided that a report be later tabled, we conclude that no such report was ever tabled, certainly not in relation to whether any due diligence had been completed and the results of such due diligence. Mr. Kautoke understood that the reports were to deal with results of work that were undertaken in relation to the purchase of MV Princess Ashika. He does not recall any concerns being ever expressed concerning the vessel between those dates. He could not recount any written submissions or oral submissions in terms of any reports tabled in Cabinet. Mr. Kautoke could not recall any Cabinet decision in relation to MV Princess Ashika between 23rd April 2009 and 5th August 2009. Although he said there may have been verbal reports, he could not remember any.

Mr. Kautoke never saw the contract for the purchase of the MV Princess Ashika prior to it being entered into on 8th May 2009. (T 5658) He considered that due diligence should have been conducted prior to the purchase. (T 5665) The deposit of FJD$90,000 was paid on the 8th May 2009. He took the view that, in effect, if the results of due diligence were not favorable prior to the final payment being made on 5th June 2009, he considers that the Government could have “stopped there”. In other words, as he understood it, the Government would lose or forfeited the deposit. (T 5659) Unfortunately, the contract signed on behalf of the Government was a cash unconditional contract. Therefore, the Government had an obligation to pay the FJD$600,000 irrespective of the results of any due diligence. (Exhibit 417)

Cabinet Decision 22nd December 2009 in relation to MV Pulupaki

On 22nd December 2009, there was a Cabinet meeting Chaired by the Prime Minister. The MV Pulupaki was raised at the meeting. The Acting Minister for Transport (Lord Nuku) was present as was the Deputy Prime Minister and also the Minister for Finance (Hon. ‘Oteni A. Matoto). (T 5671) Mr. Kautoke recalls that it was raised at Cabinet that there had been announcements on the radio about the MV Pulupaki. It was considered by Cabinet that the vessel should be allowed to come into the Queen Salote wharf and that the decision by the Ports Authority not to allow that to happen was not a good decision. He recalls that although there was “some level of unsafety on the boat”, “the main issue was to allow people to come ashore”. (T 5673 P) The issue of safety was raised in the announcement. (T 5673) There was no rigorous discussion or report addressing the safety concerns raised by the Ports Authority. Cabinet seemed more interested in ensuring that passengers who wished to travel to Nuku’alofa were allowed to do so. (T 5671 – 5674)

The resolution of Cabinet, by decision No. 1187, made on 22nd December 2009 was as follows:

“With reference to RE: Public Announcement Concerning MV Pulupaki
I have the honor to inform you that His Majesty’s Cabinet Decision on 22\textsuperscript{nd} December 2009 was as follows:

That the Chief Secretary & Secretary to Cabinet to write, as a matter of urgency to Ports Authority and to direct them:

1) That the public announcement with respect to the movement and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2) That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature;

3) That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its current trip, for usual loading and unloading purposes.”

(Exhibit 331; T 5796)

6.603 On 22\textsuperscript{nd} December 2009, the Chief Secretary and Secretary to Cabinet sent a letter to the General Manager of the Ports Authority Tonga (Commander Lupeti Vi) stating:

“Dear Lupeti,

Re: Public Announcement Concerning MV Pulupaki

Please be advised that the public announcement made this morning by the Ports Authority Tonga over the air with respect to the MV Pulupaki, has come to the notice of His Majesty’s Cabinet at their meeting this morning, Tuesday 22\textsuperscript{nd} December, 2009. Because of the severity of this matter, His Majesty’s Cabinet has directed that the following directives be informed to your office today, Tuesday 22\textsuperscript{nd} December, 2009:-

1) That the public announcement with respect to the movement and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2) That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature

3) That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its current trip, for usual loading and unloading purposes.

I hope that above Cabinet directives are clear and that they be implemented in the usual way.

Yours Sincerely
Busby Kautoke” (Exhibit 408 annexure “K”; T 5672 E – H)
As it transpired, the MV Pulupaki was allowed to enter the Queen Salote Wharf on the 22\textsuperscript{nd} December 2009. The MV Pulupaki departed again on the 23\textsuperscript{rd} December 2009 at 2245 hours, bound for Ha’afeva. It also sailed on the 24\textsuperscript{th}, 25\textsuperscript{th}, 30\textsuperscript{th} and 31\textsuperscript{st} December, 2009, notwithstanding the safety concerns raised by the Ports Authority Tonga. (Exhibit 437; 438; 439)
Overview of Evidence

7.1 Ms. Siueli ‘Eleni Mone had a long career in the Ministry of Police, reaching the rank of Deputy Police Commander. She also worked at the Palace Office as the Late King’s Private Secretary. Ms. Mone therefore had an administrative background when she was appointed, in about August 2008, as the Director of the Land Transport Division of the Ministry of Transport. In October 2008, Ms. Mone was appointed as the Acting Secretary for Transport and Acting CEO. She held that position at the time the MV Princess Ashika sank on 5th August 2009 and was formally appointed on 1st October 2009 as the Secretary for Transport and CEO of the Ministry for Transport.

7.2 In 2008, Mr. Karalus informed Ms. Mone that there were a lot of problems with the MV Olovaha and the reliability of the vessel. However, he did not seek any advice from her in relation to any replacement vessel or the MV Princess Ashika, nor did she offer any advice. Mr. Karalus was a very “hands-on” Minister who “ran things by himself”. “He made decisions himself, he carried out things himself”. Despite this, we are of the opinion that Ms. Mone should have been more proactive and offered or sought advice in relation to the replacement vessel.

7.3 In April 2009, Ms. Mone heard for the first time about a replacement vessel for the MV Olovaha at a meeting of officials at the Ministry of Transport. All she was told was by Captain Johnson indicating that a new ship was being brought to replace the MV Olovaha and it was expected in around a month. Also in April 2009, Mr. Karalus, in discussing other issues with Ms. Mone, said he was going to put to Cabinet a submission for the purchase of the MV Princess Ashika. He seemed excited.

7.4 On 28th April 2009, Mr. Karalus Chaired a Mexco meeting of senior officials from the Ministry of Transport. At that meeting Mr. Karalus said that the new ship would be better than the MV Olovaha and was a good vessel. He showed one photograph of the vessel taken from a distance.

7.5 Also on 28th April 2009, Ms. Mone received an e-mail from the Solicitor General raising concerns to ensure that the purchase of the new vessel was done by the correct authority and in accordance with Government procedure. Ms. Mone responded the same day advising that “I understand my Minister had been involved in this from day one and my understanding is both Prime Minister and Minister of Finance are aware of process so far”.

7.6 On 8th May 2009, Ms. Mone was told by Mr. Karalus to sign the contract for the purchase of MV Princess Ashika. By that time, it had already been signed by Mr.
Karalus. Ms. Mone appreciated that due diligence should have been conducted when the contract had been given to her by Mr. Karalus for signing and she assumed this had been done. It had not.

7.7 Ms. Mone was involved in attending other Mexco/Exco meetings in June at which MV Princess Ashika was mentioned. However, the meetings provided no details or reports in relation to the vessel, even though they should have if properly conducted. If they had been properly conducted the vessel should never have been purchased.

7.8 Ms. Mone had been aware of concerns raised about unseaworthy vessels being allowed to sail in Tonga and that it was unlawful to send ships to sea which are unseaworthy. Notwithstanding this, unseaworthy vessels, including the MV Princess Ashika and the MV Pulupaki were allowed to sail. The MV Pulupaki was allowed to sail in January 2010, by the Director of Marine and Ports (Mr. Tu’ipulotu) after approval was given by the Acting Minister for Transport (Lord Nuku) for the vessel to allegedly sail into Fiji waters about 260 miles from Nuku’alofa to tow the MT Punalei. This was despite Ms. Mone, Mr. Tu’ipulotu and Lord Nuku accepting in mid-January 2010 that the MV Pulupaki should be detained as it was unseaworthy.

7.9 It is clear that Ms. Mone failed in her duties and responsibilities as the Acting Secretary for Transport and Acting CEO of the Ministry. For example, she should have asked questions at the Exco and Mexco meetings about the MV Princess Ashika; sought advice in relation to the prospective purchase and condition of the vessel; given advice in relation to the prospective purchase and condition of the vessel; ensured that due diligence was conducted prior to purchase and ensured that the contract was submitted and considered by the Government Procurement Committee prior to her signing the contract on 8th May 2009.

Substantive Evidence of Ms. ‘Eleni Mone

Educational Background, Qualifications and Experience

7.10 In 1975, Ms. Mone graduated with a Bachelor of Arts degree from the University of the South Pacific in Education, History and English. In 1988, she obtained a Master’s degree in Criminology. Ms. Mone was a Police Officer for over 20 years, rising from the rank of cadet officer to Deputy Police Commander. In about 1998, Ms. Mone worked at the Palace Office (for about 2 years) as the Late King’s Private Secretary. After working as the Private Secretary, she returned to work at the Ministry of Police for a short time until about 2001. On completing service at the Ministry of Police, Ms. Mone travelled to America, working in different organisations, but mainly with domestic violence victims and troubled youth. In January 2008, she returned to
Tonga and taught English at Tupou College for about 6 months until she commenced employment at the Ministry of Transport.

7.11 Ms. Mone thus had considerable administrative experience before commencing employment at the Ministry of Transport. This included over 15 years working at the senior executive level at the Ministry of Police and as “Head of Department” at the Palace Office. The duties undertaken by Ms. Mone at the Palace Office included “looking after His Majesty’s vast estates, his finances, his meetings, his overseas travels, Privy Council records, royal projects…and also looking after employment…so it covered a wide range of duties”. (T 4605 – 4606 C)

7.12 Ms. Mone, even at the time of giving evidence in February, demonstrated she knew very little about important maritime related matters. She attended an International Maritime Organisation conference in November and December 2009. Ms. Mone departed Tonga on 19th November 2009 and returned on 8th December 2009. (Exhibit 362) Ms. Mone could not recall if anything was mentioned about SOLAS, an important International Convention for the Safety of Life at Sea. She was not even sure if Tonga was a signatory to the Convention. (T 4676 – 4678 C) Ms. Mone, on 22nd of December 2009, was aware that the MV Pulupaki departed Nuku’alofa without a port clearance. When asked by Counsel Assisting whether she was also aware that departing without a port clearance is unlawful or illegal she replied, “I’m not sure about that”. (T 3614 I – P)

Role at Ministry of Transport

7.13 In about August 2008, Ms. Mone was appointed as the Director of the Land Transport Division of the Ministry of Transport. At that time, there was no Chief Executive Officer or Secretary for Transport at the Ministry of Transport. Mr. Karalus was the Minister of Transport. (Exhibit 316 paragraph 3)

7.14 In about October 2008, Ms. Mone was appointed the Acting Secretary for Transport and Acting Chief Executive Officer. The position was filled at the Ministry of Transport as a result of a requirement by the World Bank, which was assisting the Ministry of Transport. On 1st October 2009, Ms. Mone was appointed to the position of Secretary for Transport and Chief Executive Officer.

7.15 Ms. Mone says that before filling the post of Acting Secretary for Transport, the Directors from the Land Transport, Civil Aviation, Marine and Ports and Corporate Service Division of the Ministry of Transport, were responsible directly to the Minister of Transport. When Ms. Mone became the Acting Secretary for Transport, Captain William Leslie Johnson was the Director of Marine and Ports. The practice of Directors communicating directly with the Minister, even as Ms. Mone became the Acting Secretary, continued. Ms. Mone took the view that she would only act “when
directed by the Minister in matters communicated directly to him by respective Directors.” (Exhibit 356 paragraphs 6, 8 and 9)

7.16 The position of Acting CEO of the Ministry of Transport was not advertised. Mr. Karalus asked Ms. Mone whether she would be interested in being the Acting CEO, to which she agreed. (T 4611 F – O) However, the substantive position, not the Acting position of CEO and Secretary for Transport, was advertised. The substantive position was intended to commence on 1st July 2009, but the appointment was delayed. The responsibilities of the Secretary for Transport and CEO included the following responsibilities:

“Responsibilities:

- Strategic planning, economic policy, and program development of the transport sector
- Leading implementation of the organisational and system changes in the consolidation of the Ministry of Transport and improve Ministry productivity and efficiency
- Provision of executive direction to professional, technical and operational teams to ensure that government is aware of its international obligations and emerging issues, and is in compliance with its safety and security obligations
- The Secretary is also responsible for the overall direction, management and administration of the Ministry, and the management of assets and available resources” (Exhibit 356 annexure “A”)

7.17 As part of the job description for the position of Secretary for Transport and CEO, the requirements included:

- Provision of high quality policy advice to the Minister of Transport relating to the adequacy, efficiency, regulation, monitoring and safe operation of operations of the air, sea and land transport industries within Tonga;
- Drive strategic planning, long term planning, and research management across the transport sector, taking into account the adequacy, efficiency, regulation, monitoring and safer operation of the sector, in accordance with government policy and goals;
- Ensure that sufficient personnel are properly trained and legally certified to provide all the regulatory services required by the industry;
- Prepare and submit reports as required by government. (Exhibit 356 annexure “A”)
7.18 In terms of key performance indicators for the position of Secretary for Transport and CEO, to be negotiated with the Public Service Commission and the Minister of Transport upon appointment it was relevant to ensure:

“Safety and Security

- The Ministry continues to satisfy its international safety and security requirements necessary to maintain the Licenses and approvals for the transport sector.
- No safety or security deficiency to be sustained without proper remedial action.” (Exhibit 356 annexure “A”) (Underlining added)

7.19 Ms. Mone accepted that she was expected to fill the responsibilities and duties set out in the advertisement for the position of Secretary for Transport and CEO, a number of which are set out above. Even during the time when Ms. Mone was the Acting Secretary for Transport and Acting CEO she acknowledged that the responsibilities and duties cast upon her in the substantive position of Secretary and CEO should have been the same. However, the actual practice within the Department, at least during the time that Mr. Karalus was the Minister, was different to that set out in the Position Description. (Exhibit 356 annexure “A” for the “Position Description” and T 4612 – 4613)

7.20 Ms. Mone accepted that one of the main roles of the Marine and Ports Division of the Ministry of Transport is to regulate the Maritime Sector in Tonga. This included carrying out timely surveys, accurate and reliable surveys and ensuring that vessels which are unseaworthy are not allowed to sail. (T 4614 G – O)

7.21 As part of the responsibilities of Ms. Mone, she accepted that it included the giving of appropriate, timely and accurate advice to the Minister and employees (including surveyors) of the Ministry. Ms. Mone was answerable to Mr. Karalus as the Minister and she accepted that he could ask her to do things including giving advice on issues. (T 4615 – 4616) In practice, however, Mr. Karalus rarely asked for any advice. He was “very much a hands-on Minister”. His “hands-on” approach was much greater than one would expect of a Minister in a country that had a larger population. He took an active role in the Ministry and knew effectively everything that was going on, including in the Marine and Ports Division. (T 4815 – 4816) When asked by Counsel Assisting to explain how Mr. Karalus operated her response was:

“In my opinion he was a very enthusiastic person who ran things by himself. He was very much a go-getter. He would do things with very little advice to people. He seemed to know what to do and what to be done. He more or less ran things by himself...He made decisions himself, he carried out things himself. Really in my position as Acting Secretary for Transport, I was rarely
asked my opinion or my assistance in most things that had been running before I had entered the Ministry of Transport. That was my opinion of what the whole process system was when I was there, when he was there, sorry.”

(T 4616 S – 4617 D)

7.22 Ms. Mone observed that Mr. Karalus carried out the duties of not only those that one would normally expect of a Minister, but many of the duties that normally would be carried out by a CEO and Secretary of Transport. Mr. Karalus was very proactive in taking control himself on certain issues, thus relieving her of many of her duties. Consistent with this, Ms. Mone was never asked for any advice about MV Princess Ashika from any person, including Mr. Karalus. Unless Mr. Karalus asked for advice, Ms. Mone did not proffer it. Ms. Mone provided Mr. Karalus advice on any issues he asked for and never refused to provide advice. (T 4617 – 4619, T 4815 – 4816) She had the reasonable expectation when appointed as the Acting Secretary of Transport, given her experience as Head of Department in the Ministry of Police, that if the Government was going to make a major decision (such as the purchase of a large vessel) she would have had some input into advising. However, things were done differently in the Ministry of Transport when Mr. Karalus was Minister. (T 4617 S – 4618) We are of the opinion that Ms. Mone should have sought to be more proactive and offered advice on important issues, including to Mr. Karalus, irrespective of whether it was asked for. Similarly, Mr. Karalus should have asked for advice and assistance from Ms. Mone. He chose not to do so.

7.23 Ms. Mone described her role and that of the Minister at transcript 4619 G – K as follows:

“My active role was in bringing staff together, in trying to make the Ministry come together – come together emotionally, morally, whatever, as one Ministry. Because when I entered there was, sort of, separate little entities so my take was just bringing staff together and trying to get the Ministry together, to feel they were part of something that was a whole. The actual directives and activities and what was happening in each division was more or less continued to be run by my former Minister. So my take was, I was very proactive in getting staff together as a whole, and my task was to look after staff issues, equipment issues, but the major task of what each activities and action within the divisions was really managed and supervised and run by my minister.”

7.24 We are of the opinion that Ms. Mone is correct in her assessment that Mr. Karalus took a very hands-on approach to his position as Minister. He therefore did many things that one would normally have expected a General Manager or a CEO of an organisation to do, including his involvement in relation to the prospective and actual purchase of MV Princess Ashika. This however did not excuse her in one of her
key roles, namely to advise the Minister in making reasonable and rational decisions.

(T 3743 I)

Observations Concerning William Leslie Johnson

7.25 Captain William Leslie Johnson was the Director of Marine and Ports at the time Ms. Mone became the Acting Secretary for Transport and Acting CEO in October 2008. In 2008, Ms. Mone and Mr. Karalus had discussions about Captain Johnson. They both had concerns that he lacked professionalism, was unreliable and that any advice he gave could not properly be relied on. Such were the concerns about the competency of Captain Johnson, that they were both of the view that it would be best for the Ministry if Captain Johnson left. That view continued from 2008 into 2009 and they regularly raised concerns with each other about Captain Johnson’s poor performance and the need to replace him in the interest of the proper performance of the Ministry. It was clear to both Ms. Mone and Mr. Karalus, by the end of 2008, that Captain Johnson needed to be replaced as soon as possible. (T 4810 K – 4811 R)

7.26 Captain Johnson informed Ms. Mone that he had an offer from Papua New Guinea for other employment. She encouraged him to take the position. Ms. Mone spoke to the Minister about Captain Johnson taking another job. Ms. Mone and Mr. Karalus were both happy about him leaving. When Ms. Mone told Mr. Karalus that Captain Johnson was going to leave he said “that would be really good”. (T 4812) We accept that both Ms. Mone and Mr. Karalus were happy about Captain Johnson leaving as they both had serious concerns and had formed the view that he lacked professionalism, was unreliable and that any advice he gave could not properly be relied on. These concerns undermine any suggestion by Mr. Karalus that he could or should rely on any advice from Captain Johnson in relation to the MV Princess Ashika. Of course, Captain Johnson ceased employment at the Ministry of Transport on 8th June 2009, which was about three weeks before the vessel even arrived in Tonga. Captain Johnson never saw MV Princess Ashika.

The MV Princess Ashika

7.27 In 2008, Ms. Mone heard that there were problems with the MV Olovaha. Mr. Karalus in fact told her that the MV Olovaha was going through a lot of problems. He mentioned to her that there were problems with the engine and the reliability of the vessel. However, Mr. Karalus, despite mentioning about problems concerning the MV Olovaha, never discussed with her how the problems were going to be resolved or that he wanted to replace the vessel. (T 4628 – 4629 B)

7.28 Mr. Karalus never asked Ms. Mone for any opinion or any advice in relation to a replacement vessel or the prospective purchase of the MV Princess Ashika. (T 4632 G – H) The fact that Ms. Mone was never asked anything by Mr. Karalus about the
replacement vessel is consistent with the level of personal control and involvement he took in relation to the prospective replacement of a vessel for the MV Olovaha. Peculiarly, despite Mr. Karalus not consulting Ms. Mone, Mr. Jonesse (CEO of SCP) would regularly meet Mr. Karalus at the former Minister’s office. (T 4802; T 4814 H – 4815 G)

7.29 Ms. Mone has no knowledge of whether Mr. Karalus sought or asked for any advice from Captain Johnson or Mr. Tu’ipulotu in relation to MV Princess Ashika. Likewise, she is not aware of whether Mr. Karalus ever sought any advice or assistance from any of the surveyors of the Marine and Ports Division of the Ministry of Transport. Ms. Mone proceeded on the assumption that Mr. Karalus, as Minister, acting responsibly would ensure that proper due diligence was conducted prior to purchase of the vessel. Having said that, Mr. Karalus never told her anything about whether due diligence had been conducted. (T 4632 – 4633 G)

7.30 Although Ms. Mone had dealings with Mr. Jonesse, it was in the context of a World Bank project and his involvement was outside his capacity as Managing Director and CEO of SCP. Ms. Mone had no dealings with Mr. Jonesse in relation to the MV Princess Ashika. (T 4804) Ms. Mone, despite having regular contact with Mr. Jonesse, and therefore being in a position to raise questions about a new replacement vessel for the MV Olovaha and MV Princess Ashika, never did. (T 4730 – 4731) Mr. Jonesse was in fact a referee put forward by Ms. Mone for her position as Secretary for Transport and CEO. (T 4730) As Acting Secretary for Transport and Acting CEO, Ms. Mone clearly should have raised questions about MV Princess Ashika in the proper discharge of her duties and responsibilities.

7.31 Ms. Mone attended regular Exco and Mexco meetings at which senior officials at the Ministry of Transport attended. She usually Chaired the Exco meetings and Mr. Karalus Chaired the Mexco meetings. The Heads of each of the Divisions of the Ministry of Transport attended the meetings.

7.32 On 7th April 2009, there was an Exco meeting held at the Ministry of Transport office. Ms. Mone Chaired the meeting. Captain Johnson made reference to a new ship being brought to replace the MV Olovaha and said it was expected in around a month. Nothing else was said by Captain Johnson about the “new ship” and no written report or other documents were presented in respect of Captain Johnson’s remarks. That was the first time that Ms. Mone became aware that a replacement vessel was being purchased or sought to be purchased. Mr. Karalus had never told Ms. Mone anything about this issue. (Exhibit 141; Exhibit 349 attachment 8; T 4624)

7.33 In April 2009, Ms. Mone had a conversation with Mr. Karalus in his room, probably after the 7th April 2009 Exco meeting. They were discussing something other than MV Princess Ashika. Mr. Karalus said, during the conversation, that he was going to
put to Cabinet a submission for the purchase of the MV Princess Ashika. He did not say anything else and did not give any documents to Ms. Mone in relation to the vessel. Ms. Mone was not asked for any advice in the preparation of the paper; had no involvement in the preparation of the paper and did not offer any advice in the preparation of the paper. Mr. Karalus was observed to be excited about it. (T 4636 – 4637) Ms. Mone recalls Captain Johnson saying during a conversation that Mr. Jonesse had gone overseas to look for a vessel to replace MV Olovaha. (Exhibit 355 paragraph 5; T 4623)

7.34 On 28th April 2009, there was a Mexco meeting. It was again Chaired by Mr. Karalus at his office. Ms. Mone and Captain Johnson were also present. At that meeting, Mr. Karalus showed one picture of the MV Princess Ashika, which had been taken from a distance. One could not tell from the photograph, the condition of the vessel. We accept that Mr. Karalus advised that the new ship would be better than the MV Olovaha, was a good vessel and that it would do all the trips to the Niuas. He was very happy about the new vessel. (T 4625) Ms. Mone cannot recall whether he said anything about whether the vessel had been looked after or not. As with the meeting on the 7th April 2009, no documents were presented at the meeting (apart from the single photograph of MV Princess Ashika). There were no questions asked by anybody about the purchase of the replacement vessel or MV Princess Ashika. This is despite the fact that Ms. Mone appreciated that the Government was going to purchase the vessel to replace the unreliable MV Olovaha; it was going to be a major acquisition; the vessel needed to be reliable and the vessel was required to provide an important service. (T 4626 – 4627)

7.35 On 28th April 2009, Ms. Mone received an e-mail from the Solicitor General (Mr. ‘Aminiasi Kefu). The e-mail was also sent to the Secretary for Finance (Mr. ‘Aisake Eke). The e-mail stated:

“I have been referred to the current work done on purchasing the new MV ‘Olovaha.

My concern is to ensure that the purchase is done by correct authority and in accordance with Government procedure.

I understand that the Shipping Corporation is carrying out this work without any involvement of Government, either Transport or Finance, or Crown Law.

I am proposing that you please raise our concerns with your respective Ministers for Government to be involved in the process, particularly the Due Diligence study (Finance and Transport) and the Procurement Process (Finance and Crown Law)
I understand that at the end of the day the Government will be purchasing the vessel, and it will belong to Government, not Shipping Corporation.

I will send this in writing once you confirm your positions.

I look forward to your responses.” (Exhibit 356 annexure “B”)

7.36 On 28th April 2009 Ms. Mone responded to the e-mail from the Solicitor General in the following terms:

“I understand my Minister has been involved in this from day one and my understanding is both Prime Minister and Minister of Finance are aware of process so far. My Minister submitted the details to Cabinet last week although I’m not sure whether it was formally or informally. Anyway please let me know where I can assist.” (Exhibit 356 annexure “B”)

7.37 Ms. Mone never advised Mr. Karalus of the e-mail and never even indicated to him that she had been contacted and advised by the Solicitor General. Ms. Mone, during the course of her evidence, correctly accepted, that acting responsibly, she should have raised the Solicitor General’s concerns with the Minister. Ms. Mone also accepted that she was not aware of whether the concerns raised by the Solicitor General had been attended to. (T 4653; T 4732 – 4733)

7.38 As stated in the e-mail from Ms. Mone, she understood that Mr. Karalus had been involved in the purchase of the new vessel from day one. She understood from her earlier conversation with Mr. Karalus that he was going to present a paper to Cabinet, without any input or advice from her. (T 4654 - 4655)

7.39 The e-mail of 28th April 2008 from Ms. Mone to the Solicitor General also stated that “my understanding is both Prime Minister and Minister of Finance are aware of process so far”. In support of this remark, Ms. Mone recalls from her conversations with Mr. Karalus that he said he had spoken to the Prime Minister and Minister of Finance about MV Princess Ashika and had shown them photographs. (T 4656 – 4657 I; T 4786)

7.40 On 8th May 2009, despite the concerns raised by the Solicitor General in his e-mail 28th April 2009, Ms. Mone signed the contract for the purchase of MV Princess Ashika on 8th June 2009. (Exhibit 346 annexure “D”) Ms. Mone was not aware of whether the concerns raised by the Solicitor General had been attended to at the time of signing the contract. (T 4734 H – L)

7.41 On 8th May 2009, Mr. Karalus called Ms. Mone into his office to sign the Sale and Purchase Agreement for the MV Princess Ashika. Ms. Mone was outside his office when she was called to come into his office and sign the agreement. When she walked into the Minister’s office he had already signed the agreement and wanted
her to co-sign it. He briefly told her that this is the document for the sale of the MV Princess Ashika and that everything was going fine and if she could co-sign it. After a brief look at the contract, Ms. Mone was satisfied with it and signed it. (Exhibit 356 paragraph 13; T 4638 – 4639) Mr. Karalus requested that she signed the contract because it was urgently needed. (T 4649) Ms. Mone cannot recall if Mr. Jonesse was present at the time she signed it, although it is clear that Mr. Jonesse was the witness to the signing of the contract. (Exhibit 356 annexure “D”; T 4638) Mr. Karalus crossed out “Finance”, where it appeared on the signing page of the contract, and changed it to “Acting Secretary for Transport” for signing by Ms. Mone instead of the Secretary for Finance. (T 4643)

7.42 On 8th May 2009, at the time of signing the contract, Ms. Mone had not seen any documents in relation to the MV Princess Ashika apart from the single photograph shown to her by Mr. Karalus at the Mexco meeting on 28th April 2009. She had no idea as to whether or not the vessel had been surveyed or whether due diligence had been conducted or whether any advise had been obtained in relation to the contract. (T 4639; T 4644)

7.43 Ms. Mone had no idea as to whether the contract had been submitted for recommendation to the Government Procurement Committee when she was asked by Mr. Karalus to sign it on the 8th May 2009. Ms. Mone was aware from her experience that there was a Government Procurement Committee and that the purpose of such Committee was to ensure that any prospective purchases were for prices which were reasonable and that the goods were adequate for the proposed services. (T 4639 – 4641) Despite this, Ms. Mone never asked Mr. Karalus any questions about whether due diligence had been conducted or whether the matter had been submitted to the Government Procurement Committee. Ms. Mone simply “assumed that everything had been properly done and everything was in place”. (T 4640 H) Ms. Mone was never informed by anyone of any requirement to send surveyors from the Ministry of Transport in Tonga to survey the MV Princess Ashika in Fiji before arrival in Tonga. (Exhibit 356 paragraph 15) However she was aware that due diligence needed to be conducted. The matter of the Procurement Committee was raised in relation to another matter with the Secretary for Transport in a Savingram on 9th July 2009 addressed to her. (T 4737 J) Ms. Mone was aware that the Secretary for Finance was a member of the Procurement Committee. Given that the matter had not been submitted to the Government Procurement Committee by 8th May 2008 for consideration, if the Secretary for Finance had been asked to sign the contract by Mr. Karalus, rather than Ms. Mone, he should have refused to do so.

7.44 Ultimately, during her evidence, Ms. Mone accepted that she failed in her duties and responsibilities to recommend that Ministry of Transport officials travel to Fiji to
inspect the vessel; actually inspect the vessel; advise that independent due diligence needed to be conducted and ensuring that this independent due diligence was in fact conducted. (T 4650 – 4652)

7.45 In Ms. Mone’s affidavit, she states:

“I DID not, as Acting Secretary for Transport, get involved in the negotiations and other actions required in respect of the purchasing of the MV Princess Ashika because the former Director of Marine, Mr. Johnson, was dealing directly with the former Minister for Transport and, furthermore, John Jonesse from the Shipping Corporation also dealt directly with the former Director for Transport and also the former Minister. As such, I trusted everything was in order.” (Exhibit 356 paragraph 14)

7.46 However, the statements made by Ms. Mone in paragraph 14 of her affidavit sworn 2nd February 2010 should be contrasted with her evidence to the effect that she was not aware of whether or not Captain Johnson had any conversations or communications with Mr. Karalus in respect of the MV Princess Ashika. (T 4649) Additionally, given the concerns that Ms. Mone had as to the competency of Captain Johnson, it was clearly not appropriate for Ms. Mone to be prepared to accept that Mr. Karalus could rely on Captain Johnson to give any advice in relation to the MV Princess Ashika. Furthermore, given that Ms. Mone was unaware as to what Mr. Jonesse and Mr. Karalus were discussing; the lack of expertise of Mr. Jonesse and his lack of independence, it was clearly not appropriate for Ms. Mone, given her position, to “trust that everything was in order”. Having said that, Ms. Mone clearly trusted Mr. Karalus and accepted, as was the case, that he effectively played a pivotal role in the prospective and actual purchase of MV Princess Ashika. He attended to matters which a CEO and Secretary of Transport would ordinarily attend to. (T 4816)

7.47 Ms. Mone did not even know whether Mr. Jonesse and Mr. Karalus had any conversations in relation to MV Princess Ashika. She simply assumed that the Minister of Transport was taking responsibility for communicating and dealing with others associated with the purchase. (T 4649) Remarkably, Ms. Mone never sought to speak to Captain Johnson or Mr. Jonesse to see what communications were taking place, if any, between them and the Minister in relation to the MV Princess Ashika. (T 4650)

7.48 On 2nd June 2009, Mr. Karalus Chaired, yet again, another Mexco meeting held at his office. Ms. Mone and Captain Johnson were present. Captain Johnson blandly reported that “the MV Princess Ashika is to be expected in Tonga shortly”. (Exhibit 141) There were no questions asked about the MV Princess Ashika or suggestions made by anyone at the meeting. (Exhibit 141; T 4558)
7.49 On 23rd June 2009 there was an Exco meeting Chaired by Ms. ‘Eleni Mone. Mr. Viliami Tu’ipulotu was present in his capacity as Acting Director of Marine and Ports. Mrs. Kalesita Taumoepeau took the minutes. The minutes record in relation to MV Princess Ashika the following oral report by Mr. Tu’ipulotu:

“The arrival to Tonga of the MV Princess Ashika (vessel purchased from Fiji to assist with transportation to the Niua’s etc…) has been delayed due to rough seas (between Fiji and Tonga)”

7.50 Nothing else was said at the meeting on 23rd June 2009 about the MV Princess Ashika. Not one single question was asked about MV Princess Ashika. Mr. Tu’ipulotu simply made the statement and the meeting just accepted it and went to the next item. (Exhibit 349 paragraph 81 and attachment 27; T 4568 H – 4570 L; T 4629)

7.51 On 30th June 2009, there was a further Exco meeting. Mr. Tu’ipulotu, the Acting Director of Marine and Ports simply stated at the meeting that the MV Princess Ashika had still not left Suva, Fiji. No indication was given as to why MV Princess Ashika had been delayed and no mention was made as to repairs having to be made to the vessel. (Exhibit 349 paragraph 82 and attachment 28; T 4571 D – 4572 D; T 4629)

7.52 Ms. Mone when asked about the Exco and Mexco meetings said:

“I regarded both meetings were good meetings- that we discussed the issues. Both meetings were comfortable meetings where all participants participated fully- whether it was my meeting or the Minister’s meeting, they were both very- very active meetings where persons present at that meeting were comfortable to talk about whatever was happening in their divisions. There was no difference really.”(T 4803 H – J)

7.53 The Exco and Mexco meetings, at least in relation to the Marine and Ports Division, particularly in relation to the issue of the replacement vessel and the purchase of MV Princess Ashika were, despite Ms. Mone’s view about being “good meetings”, farcical. Detailed reports should have been presented and questions asked, for example, in relation to due diligence. The issue of due diligence was never raised at any of the Exco or Mexco meetings. There was no useful discussion on the issues raised, let alone any robust discussion. This is totally unacceptable. If properly conducted, the Exco/Mexco meetings were a forum where it should have become abundantly apparent that the MV Princess Ashika should never have been purchased and never operated in Tonga.

7.54 Ms. Mone now accepts that people (including herself) at the Exco and Mexco meetings should have been more proactive and asked questions about the MV
Ms. Mone was fully aware, including from her vast experience in the Ministry of Police, that Government should not purchase a major acquisition without prior due diligence being conducted. In terms of the prospective purchase of MV Princess Ashika, Ms. Mone understood that the due diligence required was to ensure that the price being paid was fair and reasonable. The due diligence required, as Ms. Mone was aware included an *independent* survey of the vessel, *independent* valuation and obtain appropriate documentation in relation to the vessel. Ms. Mone never suggested to Mr. Karalus or any other person that due diligence should be conducted, as she assumed that the Minister would have ensured that this had been attended to. (T 4630 – 4632) Mr. Karalus was seen by her in April and May 2009, not surprisingly, having discussions with representatives of the Marine and Ports Division of the Ministry of Transport. However, Ms. Mone was not a party to the discussions and does not know what was raised.

It was incorrect for Ms. Mone to have assumed that the Minister would have ensured that due diligence had been attended to and *she should have, and could have* easily, checked before signing the contract on the 8th May 2009 that all due diligence matters had been properly and thoroughly conducted. Checking such matters were squarely within the responsibilities placed upon her as Secretary for Transport and CEO. Having said that, Mr. Karalus should clearly not have signed such contract as no due diligence had been conducted and the matter had not been submitted to the Government Procurement Committee, which was contrary to the Procurement Instructions issued by the Government. (Exhibit 428 clause 19)

**Mr. Karalus’s Laptop**

During the time that Mr. Karalus was Minister, he had access to a Toshiba laptop. It was a Government laptop. Mr. Karalus knew this, but nevertheless took the Government laptop with him after he left the Ministry office. Although he gave a press release issued on 11th August 2009 that he had taken the decision to resign from his Ministerial post, Mr. Karalus continued to work in his office for at least a week after that date. He told Ms. Mone that he was tidying up his matters because he had a lot of personal files, as well as official files. Mr. Karalus was very conversant with the use of computers and used to type a lot of his own documents. He was very
In late August or early September 2009, Ms. Mone contacted Mr. Karalus requesting that he bring the laptop back, because she had a letter from the Ministry of Finance that unless he returned all Government property they would not pay him his retirement benefits. Mr. Karalus responded that the laptop was old, ready to be replaced and was not worth anything. He also said that the laptop had some problems. Ms. Mone took it that Mr. Karalus did not want to return the Government laptop. She therefore stressed to Mr. Karalus that she still wanted the laptop returned. Mr. Karalus did not say anything about data being erased from the laptop or whether he had instructed any person to attempt to erase data from the laptop. Not long after the request to return the laptop, Mr. Karalus returned the laptop, probably to his former Personal Assistant (Mrs. Kalesita Taumoepeau). It was put in a filing cabinet in Ms. Mone’s room and locked. There was no other person who had access to the laptop. Ms. Mone never attempted to open the laptop or knew of anyone who tried to do so. (T 4753 – 4756)

Concerns about Seaworthiness of Vessels

Ms. Mone was fully aware that unseaworthy vessels should not be sent to sea, both prior to and subsequent to the sinking of MV Princess Ashika on 5th August 2009 and it was unlawful to do so. (T 3597) Representatives of the Ports Authority had raised concerns with Ms. Mone, for example, in relation to the MV Pulupaki being allowed to sail when it was considered unseaworthy. These included serious concerns relating to the load line of the vessel. Despite Ms. Mone accepting the safety concerns raised and that “we all agreed safety of lives was uppermost” Ms. Mone agreed to give, by letter dated 7th October 2009, the operators of the MV Pulupaki 2 to 3 months to work on the issues. (Exhibit 286; T 3621 – 3627) Given the close proximity to the MV Princess Ashika tragedy, it is most disconcerting that the Secretary for Transport and CEO was prepared to treat safety concerns with such distain. (Exhibit 390; T 3624 – 3626; T 4756 – 4759 G)

The MV Pulupaki is an inter-island ferry, over 25 years old. It travels on the same or similar route that the MV Princess Ashika travelled on. The MV Pulupaki is a Ro-Ro ferry, as was the MV Princess Ashika.

On about 23rd December 2009, it was intended that the MV Pulupaki sail from Nuku’alofa. Representatives from the Ministry of Transport, including the surveyors and the Director of Marine and Ports (Mr. Tu’ipulotu), were at the wharf at Nuku’alofa. The Ports Authority did not want the vessel to sail as they were of the firm view that the vessel was unseaworthy and unsafe. Ms. Mone considered that the opinions of the Ministry of Transport should be followed, rather than
representatives from the Ports Authority. (T 3605) One should remember that Mr. Tu’ipulotu was the officer who, despite forming the opinion on 3rd July 2009 that the MV Princess Ashika was unseaworthy and unsafe and that he would not allow his immediate family to travel on it, signed a certificate on the very same day certifying that the vessel was considered to be seaworthy. Ms. Mone subsequently ascertained, from Mr. Tu’ipulotu, that the number of passengers travelling on the MV Pulupaki on 23rd December 2009 far exceeded the permitted number. (T 3605 – 3607)

7.62 In January 2010, according to surveyors at the Ministry of Transport, it had been decided that the MV Pulupaki was unseaworthy by the same officials that had determined it was seaworthy and could sail on 23rd December 2009. (T 3607 – 3608) Ms. Mone said she became aware of this the week before she gave evidence on 21st January 2010. She correctly accepted that many of the deficiencies that existed in January 2010 must have inevitably existed on 22nd December 2009. (T 3618 S)

7.63 Ms. Mone said that she orally advised the Minister for Transport, Lord Nuku, at a meeting in January 2010 that the MV Pulupaki should be detained because it was unseaworthy and unsafe. (T 3597 H – U) Lord Nuku responded by indicating that “we should carry out what the law tells us”. Ms. Mone accepted that if she received information to suggest that the MV Pulupaki was unseaworthy and unsafe she had a duty and obligation to advise the Minister.

7.64 When Ms. Mone gave evidence on 25th January 2010, she accepted that it was recently determined by the Ministry of Transport that the MV Pulupaki was unseaworthy and should be detained. In fact, a letter was delivered on 19th January 2010 by the Acting Director of Marine and Ports, Mr. Tu’ipulotu, to the operators of the MV Pulupaki advising that the Certificate of Survey was suspended until further notice. (Exhibit 294)

7.65 On 25th January 2010, when giving evidence before the Commission, Ms. Mone said that she was not aware that the MV Pulupaki had sailed from Nuku’alofa on Saturday 23rd January. (T 3602 – 3604) As it transpired, the vessel did depart Nuku’alofa on 23rd January 2010 under bizarre circumstances. It should be appreciated that Ms. Mone left for New Zealand on the morning of Thursday 21st January 2010 and did not return until Saturday 23rd January 2010. She was not contacted about allowing the MV Pulupaki to sail. (T 3610 – 3611) Ms. Mone accepted that on 23rd January 2010, the MV Pulupaki was unseaworthy.

7.66 Ms. Mone said she made inquiries at the Ministry of Transport after giving evidence before the Commission, on 25th January 2010. She was informed by Mr. Tu’ipulotu that the MV Pulupaki was permitted to sail in accordance with an emergency trip to the seas between Tonga and Fiji, in order to tow the MT Punalei which was said to
be undergoing some problems due to its rudder not working. (T 3730 S – U) Mr. Tu’ipulotu (Acting Director of Marine and Ports) said that he had spoken to Lord Nuku (the Acting Minister of Transport). Accordingly, Ms. Mone organised a meeting to talk to Mr. Tu’ipulotu and Lord Nuku. Ms. Mone raised the fact that she had not been informed of the decision to let the MV Pulupaki sail. Ms. Mone said that she needed to know what happened. Mr. Tu’ipulotu explained that:

“he had received the request from the ship owner and this request - and he had spoken to the Minister and the Minister had directed Viliami Tu’ipulotu to work with it and that they had agreed and approved that in the nature of the request and due to the emergency of the request that the MV Pulupaki should sail with only the crew, only in terms of distress to help tow in the Punalei, which was drifting between Fiji and Tonga. That is my recollection of the conversation that was held.” (T 3734 B – E)

7.67 At the meeting on 25th January 2010, Lord Nuku confirmed that he had approved the action to be taken to allow the vessel to sail. (T 3734 E – H) This is despite the fact that Lord Nuku had been provided by that time with an internal Memorandum from Mr. Viliami Tu’ipulotu dated 14th January 2010 raising deficiencies which “has given us great concerns about safety issues” relating to MV Pulupaki. (Exhibit 294; T 3734 – 3735) There was no doubt from the evidence given by Ms. Mone, which we accept, that Lord Nuku gave authority for the MV Pukupaki to sail. (T 3734 E – H; 3735 T – 3736 A; T 4663 – 4665) The diary entry taken by Ms. Mone on 25th January 2010, records in relation to the MV Pulupaki, “Min. authorise decision by A/D M &P”. There was no basis whatsoever to justify the approval of a vessel, which had been determined by the Ministry of Transport to be unseaworthy and required to be detained, “due to the distress and emergency in saving lives of the MV Punalei” to sail. (T 3735) As it transpired the MT Punalei was over 260 miles from Nuku’alofa and 100 miles closer to Suva than Nuku’alofa.

7.68 A report entitled “Follow up survey of MV Pulupaki” prepared by Mr. ‘Onesi Tu’ifua, a surveyor at the Ministry of Transport, was produced to the Commission bearing dates 28th January 2010 – 29th January 2010. It recommended that:

“According to the follow up survey at the M.V Pulupaki more that 80% of the deficiency list has been rectified. Therefore I do recommend the M.V Pulupaki to continue her service with Limited number of passengers of only 272 south bound until they have the appropriate figures of life raft.

The rest of the deficiencies to be rectified in 1 month time.”

7.69 On 8th February 2010, Mr. Mosese Fakatou, a Marine surveyor, provided a report entitled “Pulupaki follow up survey report”. The concluding paragraph stated “This
report is issued without prejudice”. The report was based on an in-water inspection of the vessel made on 5th February 2010. Regrettably, there are no slipways in Tonga enabling vessels of the size of the MV Pulupaki to be checked out of the water. This is a serious shortcoming in the ability to properly survey vessels in Tonga.

7.70 It is apparent when one reads the reports of Mr. Tu’ifua and Mr. Fakatou, and analyses the contents, that as at 5th February 2010 the MV Pulupaki remained as it had been determined earlier in January 2010, unseaworthy. (T 4669 – 4674) Having said that, it appears that a number of the concerns raised earlier had been subsequently addressed.

After the Tragedy of 5th August 2009

7.71 Ms. Mone was overseas in Singapore at a conference when the MV Princess Ashika sank. She departed on 3rd August and arrived back on 10th August 2009. (Exhibit 140; Exhibit 362) Ms. Mone remained at the Conference after being advised of the sinking and did nothing constructive during this time to deal with the tragedy in her capacity as Secretary for Transport and CEO. (T 4723 – 4728; T 4742 – 4745) Even if she was unable to return earlier than the 10th August, Ms. Mone could have engaged in phone calls and e-mail communication whilst overseas. (Exhibit 365)

7.72 One questions the necessity for Ms. Mone to travel as frequently as she did and for the duration of her overseas trips. (Exhibit 362) This is particularly so given that when Ms. Mone returns from overseas conferences and trips, including the IMO conference in London in November and December 2009, she does not apparently provide any papers or reports to the Ministry of Transport officials about the conference. The conference in London cost at least TOP$10,000. Ms. Mone accepted that she had not prepared any report in relation to the conference. She understood that the purpose of attending was not only to impart knowledge on her, but for her to come back to Tonga and impart knowledge in Tonga. As part of the process of imparting knowledge, it would entail her presenting or preparing a paper to others in Tonga. At the time of giving evidence on 11th February 2010, Ms. Mone said that she had started preparing a paper, having prepared about three quarters of the paper (which was about 3 pages in length). Apart from this, the only briefings that Ms. Mone gave in relation to the IMO conference in London, was to tell the Prime Minister in verbal briefings about the conference. When asked what Ms. Mone had told the Prime Minister about the conference she said:

“That the conference proceeded in accordance with the agenda and most of it was satisfactory. That the countries that I was briefed that we vote for was done in accordance to that. The major issues of the conference were concentrated on the piracy, and the other issues discussed were pollution
Ms. Mone, understandably, has serious concerns about the professionalism of Mr. Viliami Tu’ipulotu. One of the major responsibilities of Mr. Tu’ipulotu, as the Acting Director of Marine and Ports is to ensure the safety of lives at sea of those travelling in Tonga. In relation to MV Princess Ashika, Ms. Mone acknowledged that the deficiencies list in relation to the vessel supported the conclusion that the vessel was unseaworthy and clearly should never have been allowed to sail. (Exhibits 17 and 19) Despite this, she became aware after the vessel sank that Mr. Tu’ipulotu effectively certified on 3rd July 2009 that the vessel was to be considered seaworthy. (T 4658 N – 4659 H)

The Secretary for Transport, for good reason, recommended to Lord Nuku that Mr. Tu’ipulotu be suspended. Lord Nuku said in the first week of February 2010, he did not agree with this because he thought that “we needed Tu’ipulotu with his expertise”. This was so even though Ms. Mone had explained to Lord Nuku that Mr. Tu’ipulotu had signed the deficiencies list in relation to MV Princess Ashika; had indicated in his opinion the vessel was unseaworthy; had given evidence that he would not have allowed members of his immediate family to sail on the vessel because it was unseaworthy, but nevertheless signed a document certifying the vessel was seaworthy. (T 4659 – 4660) It is most troubling that anyone, particularly an Acting Minister of Transport, so shortly after the MV Princess Ashika tragedy, could have any confidence in the integrity, competency or professionalism of Mr. Tu’ipulotu and would not support the recommendation by the Secretary of Transport, to suspend Mr. Tu’ipulotu. Eventually, Ms. Mone convinced the Minister in February 2010 that Mr. Tu’ipulotu should take his 65 days vacation leave, with the intention of him coming back to his current position. (T 4665 T – 4666 M) It is also disturbing that the officer in charge, during the time that Mr. Tu’ipulotu is on vacation leave is Ms. ‘Ofa Finau. Ms. Finau does not have the expertise, qualifications or experience to act in this role. (Exhibit 343)

On 4th September 2009, Ms. Mone signed a Memorandum to Cabinet, as did the Acting Minister for Transport (Lord Nuku). It sought Cabinet approval on recruitment relating to critical staffing and resources, said to be essential to the functions of the Ministry of Transport. It had an appendix attached to it which set out resources urgently required for the Ministry of Transport operation. (Exhibit 366; T 4760 – 4762; T 4769; T 4770)

On 8th September 2009, Ms. Mone received a savingram from the Chief Secretary and Secretary to Cabinet (Mr. Busby Kautoke). The savingram was in response to the Cabinet submission in relation to “Critical Staffing and Resources for the Ministry of Transport”. The savingram stated that:
“Please be advised that your above submission to the Cabinet meeting of this week has been taken out from the Agenda by the Hon. Prime Minister and has requested that your office kindly take this matter up with the Public Service Commission and the Ministry of Finance, in the usual way.

Similar direction was made to an earlier similar submission from the Ministry of Lands, Survey and Natural Resources. You may also look up the change of policy of staff management by financial allocations.” (Exhibit 366)

7.77 Within a couple of weeks of the preparation of the 4th September 2009 Memorandum to Cabinet, Ms. Mone raised concerns about the matters contained in the Cabinet Memorandum not being attended to. The response from Lord Nuku was that he would raise it in Cabinet and with his Ministerial colleagues. Apart from Lord Nuku telling Ms. Mone in September 2009 that he had spoken to his Ministerial colleagues, no further response was forthcoming to the urgent request for assistance. (T 4760)

7.78 It is clear that the Ministry of Transport is under-resourced and it is regrettable that a request for urgent assistance has effectively been ignored. That does not mean of course, that all the requests made by Ms. Mone should be met. However, it is at least deserving of consideration and discussions with her, given that it is a recommendation by the Secretary for Transport and Acting Minister for Transport.

Cause of the Disaster

7.79 Ms. Mone was given a number of opportunities by Counsel Assisting to indicate what she considers to be the cause or causes of the disaster in relation to MV Princess Ashika. On 25th January 2010, her answer was that it was “a whole combination of factors” and that it was “a multitude of factors-human error”. Effectively, Ms. Mone was of the opinion that people who were supposed to make decisions did not do so. (T 3628 – 3629) We certainly agree that the cause of the disaster was due to a multitude of factors, including people who should have made decisions not doing so or making very poor decisions.

7.80 In answer to the same question as to the cause or causes of the disaster, on 11th February 2010, Ms. Mone stated:

“I’ve seriously thought about that. I would state that unfortunately a combination of many factors attributed to the cause of the tragedy beginning from the sea captain and his crew to the operators - Shipping Corporation of Polynesia, my staff in the breakdown to lines of communication that we, at senior level, were not informed of the deficiencies, of the permission to sail a vessel that was unseaworthy, of the due diligence that was supposed to be in place, of my non-proactive in making more questions. So, for me this morning,
it’s just a total combination of all the sad things that happened that caused this tragedy.” (T 4775 O – R)

7.81 Ms. Mone agreed, quite properly, that there was a systemic failure as well as individual failings which caused the disaster. (T 4775 R – 4776 B) To help address this problem, Ms. Mone accepted that there need to be a radical reform in the Maritime sector in Tonga. As part of this there needs to a major injection of funds and appropriately qualified and competent staff employed at the Ministry of Transport. In this regard, she accepted, as we do, that there needs to be staff brought from overseas who are highly qualified to help improve the standards of the Marine Division, including acting as mentors. (T 4776 – 4779) One of the difficulties is that many qualified Tongans leave Tonga for more highly paid positions overseas, which counsel for Mr. Karalus described as a “brain drain”. This is obviously a matter which needs to be addressed with a view seeking to persuade qualified individuals in the Maritime Industry to stay in Tonga. It is noteworthy that the Marine Division of the Ministry of Transport does not, and did not in 2009, employ any person with a current Master Class One Certificate. We have serious concerns about the available depth of expertise and qualifications of those employed in the Marine Division of the Ministry of Transport.

7.82 We have no confidence that officials at the Ministry of Transport, particularly the Acting Director of Marine and Ports (Mr. Tu’ipulotu) and the three surveyors within the Marine Division are prepared to consistently give objective, independent and fearless advice. Unless they are prepared to do so, sadly, it is almost inevitable that Maritime disasters will occur in the future in Tonga.

Audit of the Marine and Ports Division of the Ministry of Transport

7.83 On 5-6 May 2009 the Marine and Ports Division of the Ministry of Transport was audited by auditors from the Secretariat of the Pacific Community (SPC), Regional Maritime Programme. The audit report, dated 1 June 2009, issued a large number of improvement notices which was a damning condemnation on the administration. (Exhibit 333 pages 36-60) (T 4334 G-H) Captain John Patrick Hogan, Manager for Transport Programme, Secretariat for the Pacific Community, gave evidence before the Commission, and stated that despite an evaluation in 2003, the Marine and Ports Division did nothing to implement the matters raised. Secondly, critical manuals such as the quality manual have not been reviewed for over 10 years. (T 4335 L-T) Significantly, Captain Hogan indicated that SPC has no obligation or duty to forward the audit report to the International Maritime Organisation (IMO) in London which is the duty of Government. Additionally, if the improvement notices issued in relation to the Marine and Ports Division were not complied with then the administration should lose their IMO white list status with the IMO. (T 4339 H-N) They did not because the results of the audits appeared never to have been reported to the IMO.
Ms. Mone indicated that she would be willing to invite a full audit of the Marine and Ports Division of the Ministry of Transport by SCP.

PART B - MRS. KALESITA MAFI TAUMOEP EAU

Overview of Evidence

Mrs. Taumoepeau was effectively the Personal Assistant to Mr. Karalus, the former Minister of Transport from 12th May 2008 until he left office on about 17th August 2009. She was an extremely loyal employee, most reluctant to criticise him in any way during her evidence and keen to portray him in the best possible light.

The evidence of Mrs. Taumopeau established that Mr. Karalus was very actively involved in the potential temporary replacement of the MV Olovaha and the purchase of the MV Princess Ashika. Mr. Karalus very much took a personal interest in ensuring that the MV Princess Ashika was urgently purchased. Mr. Karalus was involved in giving instructions and directions to Mrs. Taumoepeau which facilitated the signing of the contract by the Patterson Brothers Shipping Company Limited (as vendors) and the payment of the FJD$510,000 balance purchase price on 5th June 2009 by telegraphic transfer to Fiji. He also personally typed submissions to Cabinet, Savingrams, letters and other important documents relating to the prospective and actual purchase of MV Princess Ashika.

Even Mrs. Taumoepeau was aware that surveyors at the Ministry of Transport, who worked in the same building as Mr. Karalus, were not impressed with the MV Princess Ashika. She had been told by one of the surveyors that not only was the vessel old, but also “something about holes in the vessel”.

Mr. Karalus Chaired regular Mexco meetings at which the CEO and Secretary of Transport (Ms. Mone) attended, as did the Director of Marine and Ports (Captain Johnson until he retired on 8th June 2009). The Acting Director of Marine and Ports (Mr. Viliami Tu’ipulotu), as well as other heads of Divisions also attended. Mrs. Taumoepeau was the Secretariat and was responsible for taking the Minutes.

At a meeting on 28th April 2009, Mr. Karalus showed those present a picture of the MV Princess Ashika and advised that the new ship would be better than the MV Olovaha as although old, was looked after and would be making trips to the Niuas. There was no other discussion or matters raised with regards to the MV Princess Ashika.

After the vessel sank on 5th August 2009, Mr. Karalus asked Mrs. Taumoepeau how to delete his personal e-mails from the laptop he used. On 11th November 2009, Mrs. Taumoepeau was requested to produce the laptop to the Commission. This was done. As it transpired, as Mr. Karalus acknowledged during the course of his
evidence, all the documents from his laptop hard drive were deleted after the MV Princess Ashika sank. He claims that his nephew deleted them without requesting him to specifically do so. On the same day that the laptop was produced to the Commission by Mrs. Taumoepeau, she told Mr. Karalus that she was requested to submit the laptop to the Commission. His response was, in substance, that “they would not find anything there”.

Substantive Evidence of Mrs. Kalesita Taumoepeau

Preliminary

7.91 Mrs. Kalesita Taumoepeau was the Assistant Secretary with the Ministry of Transport from 1st July 2008. Effectively, Mrs. Taumoepeau was the Personal Assistant for Mr. Karalus. (T 3852 L) From 12th May 2008 to 30th June 2008 she was working officially as a daily paid “Personal Assistant” to Mr. Karalus. One of the core responsibilities at the Ministry was to provide administrative support to the former Minister of Transport. (T 1118 S)

7.92 It became apparent during the evidence of Mrs. Taumoepeau that she was a very loyal employee to Mr. Karalus and “declared that it had indeed been an honor and privilege for me, to have worked under the leadership of the former Minister for Transport, Mr. Paul Karalus.” (Exhibit 349 paragraph 14) She considered Mr. Karalus to be “very knowledgeable, and although said to be extremely busy, was considered by her to be very approachable and always had time for staff who wished to meet with him”. (Exhibit 349 paragraph 23 and 36)

7.93 Mrs. Taumoepeau was very reluctant to criticise Mr. Karalus and it may well be that she was aware of matters critical to Mr. Karalus that were not disclosed by her to the Commission.

7.94 Mr. Karalus did a lot more in terms of administrative and secretarial type work than others might normally do in his Ministerial position. (T 4523 K) Mr. Karalus was very proactive to ensure that he knew as Minister what was going on. (T 4523 O) Most correspondence would be personally typed by Mr. Karalus. It would then usually be forwarded to Mrs. Taumoepeau for formatting before the documents were submitted, whether they were Cabinet submissions or correspondence. (T 1122 O)

7.95 Mrs. Taumoepeau was aware, as was obvious, that Mr. Karalus took an active role in relation to the potential acquisition of the MV Princess Ashika and, in fact, the purchase of the vessel. (T 4567 R – T) As to both inward and outward correspondence in relation to the MV Princess Ashika, Mrs. Taumoepeau would give those documents or copies promptly to Mr. Karalus. In fact, Mr. Karalus would keep those documents in his own office, as it was apparent that he was taking control of the matter. Because the Minister was working on the replacement vessel and the
MV Princess Ashika, Mrs. Taumoepeau did not keep copies of the documents. (T 4568; T 4599)

7.96 When Mrs. Taumoepeau commenced employment with the Ministry of Transport it became evident that the Minister had been managing his own files and that no one had been assisting him in the filing of documents. Upon recruitment, she was involved in designing a filing system for the Ministry of Transport, in addition to management of files for Mr. Karalus. She was involved in managing a delivery book specifically for official correspondence from the Minister, in which she registered all correspondence from Mr. Karalus prior to delivery of the correspondence. In certain exceptional circumstances, documents would be hand carried by the Minister to the Legislative Assembly, Cabinet, Privy Council or official meetings without registering them in the delivery book.

7.97 Shortly after Mrs. Taumoepeau commenced employment with the Ministry, she met Mr. John Jonesse, who occasionally showed up at the Ministry office (located at the time at the former Frisco Building), to meet with Mr. Karalus, particularly on matters relating to the Olovaha. However, following the relocation of the Ministry of Transport from the former Frisco Building to Dupincia Lodge at Ma’ufanga in November 2008, Mr. John Jonesse was a frequent visitor to the office of the Ministry of Transport. (Exhibit 349 paragraphs 21 and 22) The office of Shipping Corporation of Polynesia Limited was less than 100 metres from the office of the Ministry of Transport (and less than 400 metres from where MV Princess Ashika was berthed).

7.98 Captain Johnson, when he was the Director of Marine and Ports, and subsequently Mr. Viliami Tu’ipulotu, in an acting capacity, would visit Mr. Karalus. (T 4589 A – H) It should also be appreciated that Mr. Russell Kilvington, who was effectively a consultant who occasionally visited Tonga in 2009, would spend time with Mr. Karalus. Mrs. Taumoepeau understood that Mr. Kilvington was there to assist staff within the Marine and Ports Division and he would also deliver reports to the Minister, which she typed. (T 4953 A – E) Despite Mr. Karalus being “very busy” (T 4589 P) and “a very diligent and hard working individual” (T 4596 B) he had sufficient time and considered it appropriate to obtain reports from Mr. Kilvington (although not in relation to MV Princess Ashika), who was only a part-time consultant. Notwithstanding this, Mr. Karalus says he never sought any report from any of the Ministry of Transport officials regarding MV Princess Ashika. Certainly, there was never any written report prepared by any of the officials at the Ministry of Transport submitted to Mr. Karalus. This is an intolerable situation which was allowed to occur because of the failure of Mr. Karalus to properly carry out his duties and obligations as Minister of Transport. It arose because of the very personal and active role Mr. Karalus took in relation to the replacement vessel.
From May 2008 to December 2008 there were regular executive meetings (“Mexco meetings”). They were held subject to the availability of Mr. Karalus as Chairperson of the meetings.

In January 2009 the decision was made to hold regular executive meetings with Mr. Karalus. These meetings were known as “Mexco” meetings, which were Chaired by Mr. Karalus. Exco meetings would also be held Chaired by the Acting Secretary/Secretary for Transport Ms. ‘Eleni Mone. Mrs. Taumoepeau was responsible for taking minutes at the Exco and Mexco meetings. The members of the executive meetings prior to the 5th August 2009 foundering of the MV Princess Ashika were:

- Hon. Minister for Transport – Mr. Paul Karalus
- Director for Land Transport/Acting Secretary/Secretary for Transport – Ms. ‘Eleni Mone
- World Bank Project manager – Mrs. Lasale Cocker
- Deputy Secretary for Transport – Mr. Sione ‘Akau’ola
- Director for Meteorology – Mr. ‘Ofa Fa’anunu
- Director for Marine and Ports – Mr. Bill Johnson
  Acting Director – Mr. Viliami Tu’ipulotu
- Director for Civil Aviation (Mr Sean Teo)
  Acting Director for Civil Aviation – Mrs. Melaia Fia Folaumoeoa
- Senior Land Transport Officer – Mr. Poasi Fonua
- Assistant Secretary (Secretariat) – Kalesita Taumoepeau (Exhibit 349 paragraph 38)

The executive meetings provided an opportunity for those present, including Heads of Divisions, to report on immediate and pending matters relevant to their various positions. It also obviously provided Mr. Karalus with an opportunity to raise at any meetings which he was present any issues in relation to the Ministry of Transport which he considered should be raised. In 2009 there were 5 specific Divisions, which were all located at the Dupincia Lodge, under the Ministry of Transport, namely:

1. Corporate Services
2. Civil Aviation
3. Meteorology
4. Marine & Ports
5. Land Transport (Exhibit 349 paragraph 34)

By January 2009, various telephone calls and inquiries were received by Mrs. Taumoepeau, as the Personal Assistant to Mr. Karalus, from Members of Parliament and the general public querying the time and continuation of sea voyages from Nuku’alofa to Vava’u and the Niuras. Mrs. Taumoepeau would direct the public to contact the office of Shipping Corporation of Polynesia Limited advising that they
were responsible for scheduling trips made by the MV Olovaha. (Exhibit 349 paragraphs 43 and 44)

7.103 Around March 2009, Captain William Johnson, Director for Marine and Ports, submitted his resignation notice confirming that his last day at work would be Monday 8th June 2009. In about March, advice was received from the Public Service Commission that Captain Johnson would retire from the public service with effect from the 8th June 2009. (Exhibit 349 paragraphs 45 and 46)

**Acquisition of a Temporary Replacement Vessel for the MV Olovaha**

7.104 Mrs. Taumopeau produced an unsigned copy of a letter from Mr. Bruce McQueen (a consultant with the Ministry of Public Enterprises) to the Minister of Public Enterprises and the Director of the Ministry of Public Enterprises dated 2nd April 2009. (Exhibit 349 attachment 7) The copy of the unsigned letter produced contained handwritten remarks made on it by Mr. Jonesse. The letter was not addressed to anyone at the Ministry of Transport. It is not clear whether it was ever sent to the Ministry of Transport or in fact seen by the Minister. The letter referred to the fact that Mr. Jonesse had visited Fiji in the week of 16th March “to assist the vessel” and that Mr. Jonesse had been impressed at “how well the vessel, built in 1972, had been maintained by its Fijian owner”. There were no documents attached to the letter supporting these assertions. Even if the letter had come to the attention of Mr. Karalus, he would have appreciated that Mr. Jonesse had no expertise as a surveyor.

7.105 On 7th April 2009 there was an Exco meeting held at the offices of the Ministry of Transport. It was Chaired by Ms. Mone. Captain Johnson was present. Captain Johnson simply stated at the meeting that a new ship is being brought to replace the Olovaha and it was expected in around one month. (Exhibit 141 and Exhibit 349 attachment 8) There were no questions asked by anyone at the meeting, even as to the name of the vessel, or anything else raised in respect of the statement made by Captain Johnson. (T 4535) No documents were shown in relation to the vessel. (T 4537 C)

7.106 Counsel Assisting asked that if someone had asked some pertinent question, whether it would have been recorded. In response Mr. Taumopeau answered:

“It would have been, but there was no real discussion. We were all just sitting there quietly while he just sort of reported what he had to report, sir.” (T 4537 B)

7.107 On 20th April 2009, Mr. Karalus prepared the Memorandum to Cabinet which was submitted by him (countersigned by the Minister for Finance) recommending the purchase of MV Princess Ashika to replace the MV Olovaha. (Exhibit 349 attachment
9) Mrs. Taumoepeau did not type the document. It was typed by Mr. Karalus himself. The copy produced had the handwriting of Mr. Karalus on it. The handwriting contained the words “independent assessment”, “survey documents”, “Fiji”, “deferred payment: 20%”, “MOF, A.G, MOT, as Chairperson” (T 4537 – 4538)

7.108 On 28th April 2009, there was a Mexco meeting in the office of Mr. Karalus which he Chaired. The Acting CEO (Ms. Mone), as was the Director of Marine and Ports (Captain Johnson) were also present. (Exhibit 141) At that meeting, Captain Johnson simply stated that the new ship (being the temporary replacement for the Olovaha) was due to arrive in June 2009. (Exhibit 141) Mr. Karalus showed those present a picture of the MV Princess Ashika. Mr. Karalus advised that the new ship would be better than the Olovaha as although old, was looked after and would be making trips to the Niuas. There was no other discussion with regards to the MV Princess Ashika and nothing else was said. (Exhibit 349 paragraph 55 and T 4541 – 4542; T 4625)

7.109 On 30th April 2009, Mrs. Taumoepeau received an e-mail from Mr. Karalus attaching a draft letter he had prepared to be forwarded to AusAID and NZAID in relation to seeking immediate consideration for the purchase of the MV Princess Ashika. The draft letter prepared by Mr. Karalus provided that after an urgent search, “the results of that search has meant that the MV Princess Ashika has been thoroughly checked out to ensure compliance and currency of all survey and maintenance requirements”. (Exhibit 349 paragraph 56 and attachment 11; Exhibit 350; T 4542 R - 4545) In fact, the MV Princess Ashika had not been thoroughly checked out as stated by Mr. Karalus and he had no reasonable basis to make such statement. He clearly should not have made this representation to AusAID and NZAID.

7.110 On Friday 8th May 2009, Mrs. Taumoepeau became aware that Mr. Karalus and the Secretary for Transport Ms. Mone signed a contract in the office of Mr. Karalus. The contract was witnessed by Mr. Jonesse. (Exhibit 349 paragraph 64 and attachment 13)

7.111 After the contract was signed, but still on the 8th May 2009, Mr. Karalus directed Mrs. Taumoepeau to have a copy of the Sale and Purchase Agreement for the purchase of MV Princess Ashika faxed to the office of the Patterson Brothers in Fiji. At the time the contract was given to Mrs. Taumoepeau to be faxed, it had the original signatures on it of Mr. Karalus and Ms. Mone. Mr. Karalus gave the fax number to be used to fax the contract to Fiji. Mrs. Taumoepeau personally faxed the contract, which at that time had not been signed on behalf of Patterson Brothers Shipping Company Limited, at approximately 1:52pm on 8th May 2009. (Exhibit 349 paragraphs 65, 66 and attachments 13, 14 and 15; T 4546 – 4549)

7.112 On 11th May 2009, Mrs. Taumoepeau says that all her files within her computer had been accidentally deleted. This included “vital files”. (Exhibit 349 paragraphs 57, 58,
59 and 68). Around 13th May 2009 a new computer was purchased by the Ministry and installed for her use. (Exhibit 349 paragraph 69)

7.113 On 12th May 2009, Mrs. Taumoepeau received an e-mail from Mr. Karalus with an attached Memorandum to be e-mailed to all Staff. This was done. It related to “Changes within the Marine Division of the Ministry”. It advised that Captain Johnson would be retiring from the post as Director of Marine on 8th June 2009 and Mr. Tu’ipulotu would assume the role of Acting Director from the following day. It also advised that Mr. Russell Kilvington would be working as a consultant for approximately 30 days per annum and that his key role was as a mentor and advisor. (Exhibit 349 paragraph 70 and attachment 17)

7.114 On 15th May 2009, a letter had been received by Mr. Karalus from AusAID confirming that AusAID was unable to assist with funding of the temporary vessel MV Princess Ashika. (Exhibit 349 attachment 19)

7.115 On about the morning of 18th or 19th May 2009, Mrs. Taumoepeau was directed by Mr. Karalus to have various documents (consisting of about 13 pages) relating to the MV Princess Ashika scanned and e-mailed to Rob Solomon of the Prime Minister’s office. This was in response to an e-mail from Mr. Solomon to Mr. Karalus, which was copied to the Prime Minister, for Mr. Karalus to send him “all info on the boat, when it was surveyed etc”. (Exhibit 349 paragraph 73 and attachment 20, T 4551 – 4555) These documents were promptly scanned and sent to Mr. Solomon.(Exhibit 353) They included a Savingram dated 7th May 2009 from the Minister for Transport to Minister for Finance (and copied to the Solicitor General), which stated “we are satisfied that the vessel meets our seaworthiness and mechanical requirements.” The vessel was not seaworthy and there was no proper basis for Mr. Karalus to make this statement.

7.116 On 2nd June 2009, there was a Mexco meeting held at the office of Mr. Karalus, who Chaired the meeting. Ms. Mone was present, as was Captain Johnson and Mrs. Taumoepeau. As to MV Princess Ashika all that was said at the meeting was by Captain Johnson. He simply stated that the MV Princess Ashika should be in Tonga shortly. (Exhibit 349 paragraph 74 and attachment 21; Exhibit 141) Again, no documents were produced in relation to the vessel and no questions were asked about the vessel. This included not asking any questions whether any survey had been done on the vessel, whether any due diligence had been conducted or whether the matter had gone to the Procurement Committee. (T 4557 Q – 4558 I)

7.117 On 3rd June 2009, Mr. Karalus typed and prepared a Savingram to be forwarded to the Minister of Finance. In summary, it provided that:
(a) The Procurement’s Committee had approved the purchase of MV Princess Ashika;

(b) That Mr. Joness was travelling to Fiji that day to complete verification of all documentation;

(c) That Mr. Joness would fax from Fiji confirming that all documentation was “in order”;

(d) On receipt of the facsimile FJD$510,000 was to be paid by telegraphic transfer to Patterson Brothers;

(e) Upon receipt of the telegraphic transfer the vessel would be released for the voyage to Tonga to commence on 5th June 2009. (Exhibit 349 paragraph 79 and attachment 22; T 4558 I – 4560 J)

7.118 On 4th or 5th June 2009, a 6 page facsimile was received by the Ministry of Transport addressed to Mr. Karalus relating to the MV Princess Ashika. It was faxed to the number used by the Minister for Transport. The 4th June 2009 was a public holiday in Tonga. The facsimile was also addressed to the Minister for Finance. It stated at the foot of the first page that “the documents listed above have been sighted (sic) as Correct and supplied to John Joness”. The fax contained a signed copy of the contract for the purchase of MV Princess Ashika recording the settlement date as 5th June 2009. It was initialed by Mr. Joness. Upon receipt of the facsimile, Mrs. Taumoepeau gave it to Mr. Karalus. The facsimile did not contain any documents that were said to have been sighted by Mr. Joness or related in any way to the condition of the vessel. (Exhibit 349 paragraph 76 and attachment 23, T 4561 P – 4563)

7.119 On 5th June 2009, at approximately 3:12pm, Mrs. Taumoepeau received a copy of an e-mail addressed to Mr. Karalus from Ms Makeleta Siliva of the Ministry of Finance. It attached confirmation advice from the National Reserve Bank of Tonga confirming that the NRBT had instructed the Reserve Bank of Fiji to pay Parshotam & Co Trust Account with FJD$510,000. Parshotam & Co were the lawyers acting for Patterson Brothers Shipping Company Limited, the vendors of the vessel. The FJD$510,000 was the balance of the purchase price for the vessel, after deducting the FJD$90,000 deposit paid on 8th May 2009. Interestingly, the e-mail was addressed directly to the Minister for Transport, and only copied to the Minister for Finance. The response demonstrates the active involvement of Mr. Karalus in the purchase of the vessel. (Exhibit 349 paragraph 77 and attachment 24; T 4563 G – 4564 Q)

7.120 On 5th June 2009, at approximately 3:50pm, Mrs. Taumoepeau faxed a 2 page facsimile to Patterson Brothers Shipping Co Ltd (Att: Eazit Ali) at the request of Mr. Karalus. Mr. Karalus provided the name of Mr. Eazit Ali and the facsimile number
which it was to be sent. The facsimile was marked urgent and signed by Mrs. Taumoepeau for Mr. Karalus. (Exhibit 349 paragraph 79 attachment 25; T 4565) It provided that she had been:

“instructed by the Hon. Minister for Transport, Hon. Paul Karalus to have the enclosed documentation forwarded (to) you being confirmation received from the National Reserve Bank of Tonga of funds transacted into your account today, Friday 5 June 2009, for purchase of the MV Princess Ashika.”

7.121 Mrs. Taumoepeau gave the facsimile to Mr. Karalus after it was faxed. In fact, Mrs. Taumoepeau gave Mr. Karalus all documents in relation to MV Princess Ashika as she was not keeping a file. Mr. Karalus kept the documents in relation to MV Princess Ashika in his own office. (T 4567 – 4568 H)

7.122 On 11th June 2009, Mr. Karalus received an e-mail from NZAID referring to the letter of Mr. Karalus of the 30th April 2009 requesting funding from NZAID to purchase the Ashika. The letter referred to a request also being conveyed to New Zealand’s Foreign Minister, by Prime Minister Sevele during their recent meeting in Japan. The letter from NZAID advised that a decision had been made that New Zealand would not be able to fund the replacement vessel. At the top right hand corner of the letter the words “File Princess Ashika” were written on it by Mr. Karalus. (Exhibit 349 paragraph 80 and attachment 26; T 4566 – 4568)

7.123 On 23rd June 2009 there was an Exco meeting Chaired by Ms. ‘Eleni Mone. Mr. Viliami Tu’ipulotu was present in his capacity as Acting Director of Marine and Ports. Mrs. Taumoepeau took the minutes. The minutes record in relation to MV Princess Ashika the following oral report by Mr. Tu’ipulotu:

“The arrival to Tonga of the MV Princess Ashika (vessel purchased from Fiji to assist with transportation to the Niua’s etc...) has been delayed due to rough seas (between Fiji and Tonga)”

7.124 Nothing else was said at the meeting on 23rd June 2009 about the MV Princess Ashika. Not one single question was asked about MV Princess Ashika. Mr. Tu’ipulotu simply made the statement and the meeting just accepted it and went to the next item. (Exhibit 349 paragraph 81 and attachment 26; T 4568 H – 4570 L)

7.125 On 30th June 2009, there was a further Exco meeting. Mr. Tu’ipulotu, the Acting Director of Marine and Ports simply stated at the meeting that the MV Princess Ashika had still not left Suva, Fiji. No indication was given as to why MV Princess Ashika had been delayed and no mention was made as to repairs having to be made to the vessel. (Exhibit 349 paragraph 82 and attachment 28; T 4571 D – 4572 D)
7.126 The names “Exco” and “Mexco” may give the impression of something important. Those that attended the meetings should have in fact raised matters of importance. There was certainly an opportunity to do so if they chose. The meetings were attended by very senior Government officials. However, it is apparent that if one considers what was discussed at the Exco and Mexco meetings next to no useful information was given in relation to the vessel. There was no robust discussion at all about the vessel. The only statement or material relating to the condition or suitability of the vessel for Tonga was the oral statement made by Mr. Karalus on the Mexco meeting on 28th April 2009. At that meeting, Mr. Karalus showed a photograph of the vessel and advised that the new ship would be better than the Olovaha as although old, was looked after and would be making trips to the Niuas. (Exhibit 349 paragraph 55; T 4541 – 4542; T 4572) Of course, not only was the vessel very old, but in truth, the vessel was in very poor condition and very poorly maintained. Certainly in relation to matters concerning Marine and Ports, and in particular in relation to the replacement vessel and MV Princess Ashika, questions should have been asked and information sought at these meetings. The meetings, particularly in relation to Marine and Port matters, were a farce. If the meetings were properly conducted, the vessel should never have arrived in Tonga.

7.127 By late June, early July 2009, Mrs. Taumoepeau noticed that Mr. Jonesse (the CEO of SCP) was frequently seen within the office of the Ministry of Transport, including in the offices of Mr. Karalus. Mrs. Taumoepeau noticed that “about this time John Jonesse was like rushing around the office, not only to the Minister, but to Marine and Ports. He appeared to be in a real hurry walking in and out” and seemed to be “a bit panicky”. He was in the office a number of times each day and speaking to Mr. Karalus on a couple of times a day. (Exhibit 349 paragraph 83; T 4573)

7.128 In late June, early July 2009, Mr. Jonesse saw Mrs. Taumoepeau with a document which was signed by Captain Johnson. He requested that she placed the Ministry of Transport official stamp on it. Mrs. Taumoepeau noticed that it was a single page document on the letterhead of the Ministry of Transport which was dated 8th June 2009. As she was aware that Mr. Johnson retired as of 8th June 2009, Mrs. Taumoepeau refused to stamp the document requested by Mr. Jonesse. The letter related to a purported dispensation or exemption to allow MV Princess Ashika to carry out a delivery voyage from Fiji to Nuku’alofa commencing on/after 11th June 2009. (Exhibit 349 paragraphs 84 and 85; T 4574 – 4579; Exhibit 354)

7.129 On Wednesday 1st July 2009, a Memorandum to Cabinet was prepared by the Mr. Karalus and Ms. ‘Ofa Finau (Assistant Secretary Legal at the Ministry of Transport). Mr. Karalus signed the Memorandum. The Memorandum was submitted to Cabinet with, in short, the following relevant recommendations:
Mr. Viliami Tu’ipulotu, Mr. Lou Pale, Mr. Lisiate Vuni Latu be appointed surveyors under the Shipping Act;

That Mr. Tu’ipulotu be appointed Acting Director of Marine and Ports;

That Mr. Viliami Tu’ipulotu be appointed Registrar of Ships and Ms. ‘Ofa Finau be appointed Deputy Registrar of Ships (Exhibit 349 paragraph 86 and attachment 29, T 4575-4576)

7.130 On 3\textsuperscript{rd} July 2009, Cabinet approved the recommendations contained in the Memorandum to Cabinet. (Exhibit 349 paragraph 87 and attachment 30; T 4576) As it transpired Mr. Pale and Mr. Latu surveyed the MV Princess Ashika on 2\textsuperscript{nd} July 2009, before they were appointed surveyors under the Shipping Act by Cabinet on 3\textsuperscript{rd} July 2009. We appreciate that section123 of the Shipping Act provides that the Minister of Transport may appoint surveyors. Mr. Pale and Mr. Latu gave oral evidence that they were appointed as surveyors prior to 2\textsuperscript{nd} July 2009 and were both issued with Certificates of Appointment. However, the Certificates of Appointment were signed by Mr. Karalus but were not dated. (Exhibit 68 and 76)

**Events after the Foundering of MV Princess Ashika**

7.131 On 6\textsuperscript{th} August 2009, Mrs. Taumoepeau heard over the radio for the first time that the MV Princess Ashika had sunk. At the time of the sinking, the Acting Secretary of Transport and CEO (Ms. Mone) was overseas in Singapore. The Deputy Secretary for Transport (Mr. Sione ‘Akau’ola) had been temporarily transferred to the Public Service Commission. Mr. ‘Ofa Fa’anunu, Director of Meteorology was Acting Secretary of Transport. (Exhibit 349 paragraph 89 and 90)

7.132 Sometime around the end of June and when the vessel sank on 5\textsuperscript{th} August 2009, Mrs. Taumoepeau saw Mr. Tu’ipulotu and Mr. Vuni Latu go into the Mr. Karalus’s office. (T 4577 L–4578 G) She did not know anything about the meeting. Having said that, Mrs. Taumoepeau recalls that when she was passing downstairs at the office, Mr. Mafi Kavaliku (a Marine officer at the Ministry of Transport) and she believes Mr. ‘Onesi Tu’ifua (a Marine Surveyor at the Ministry of Transport), made comments that the vessel was old. She also recalls Mr. Tu’ifua mentioning something about “holes in the vessel”. It was clear to Mrs. Taumoepeau, the Personal Assistant to Mr. Karalus, that the surveyors were not impressed with the vessel. (T 4578) We do not accept that Mr. Karalus did not also know this.

7.133 On 7\textsuperscript{th} August 2009, Mrs. Taumoepeau made arrangements for Mr. Michael Lloyd Eno (a Maritime Consultant) to urgently come to Tonga on matters relating to the MV Princess Ashika.

7.134 On 10\textsuperscript{th} August 2009, Mr. Karalus received an e-mail from Captain John Hogan the Programme Manager, Regional Maritime Programme, Secretariat of the Pacific
Community. The e-mail passed on condolences and advised that the Regional Maritime Programme was available to assist. The e-mail from Captain Hogan indicated that the press had been contacting him for comments and one of his comments was that “the ferry was surveyed before it left Fiji”. (Exhibit 349 paragraph 99 attachment 37)

7.135 On 11th August 2009, Mrs. Taumoepeau received an e-mail from Mr. Karalus to which he attached his resignation statement and asking her to “on forward” it. (Exhibit 349 paragraphs 100 and 101 and attachment 38)

7.136 On 12th August 2009, Mrs. Taumoepeau received an e-mail from Mr. Karalus, with an attached draft of his resignation letter to Her Royal Highness, Princess Regent Salote Mafilo’o Pilolevu Tuita, directing her to have the correspondence printed on letterhead and copied to the Hon. Prime Minister. (Exhibit 349 paragraph 105 attachment 39)

7.137 Although Mr. Karalus “resigned” earlier he did not depart from his office, as Mrs. Taumoepeau recalls it, until around Friday 14th or Monday 17th August 2009. Certainly, Mr. Karalus stayed at his office for at least about a week after his resignation letter. (T 4581 F) Prior to the departure of Mr. Karalus “there was quite a volume of files and documents to be sorted out from his office”. (Exhibit 349 paragraphs 112 and 117; T 4581 J) Prior to Mr. Karalus departing, he advised Mrs. Taumoepeau that he would have his personal e-mails deleted from the laptop which he used. He requested Mrs. Taumoepeau to show him how to delete his personal e-mails from Microsoft Outlook on the laptop. (Exhibit 349 paragraphs 113 and 114; T 4581 L – 4582 G)

7.138 Around late August early September 2009, Mrs. Taumoepeau recalls that Mr. Karalus was contacted requesting that the Ministerial laptop he utilised during his time as Minister be returned. The laptop was eventually returned and was kept in a filing cabinet in the office of Ms. Mone. (Exhibit 349 paragraphs 127 and 128)

7.139 On 8th October 2009, Mr. Karalus requested access to documents generated by the Ministry of Transport during his 10 years as Minister. (Exhibit 349 attachment 47) On 19th October 2009, Mrs. Taumoepeau personally handed a duplicate copy of the MV Princess Ashika files, along with other documents requested. (Exhibit 349 paragraph 148) Mr. Karalus was given copies of all documents and never complained that there were any documents missing or that there should be more documents. Mrs. Taumoepeau fully co-operated with Mr. Karalus to give him the documents he required. (T 4587 I)

7.140 On around 11th November 2009, Mrs. Taumoepeau was requested to submit the laptop used by Mr. Karalus to the Commission. After seeking approval from Ms.
Mone, the laptop was submitted by her to the Commission on 11th November 2009. Whilst awaiting her vehicle outside the Convention Centre, at which the Commission was conducted, Mrs. Taumoepeau was greeted by Mr. Karalus. She told Mr. Karalus that she had been requested to have his former laptop submitted to the Commission. Mr. Karalus responded with words to the effect that “they will not find anything there”. (Exhibit 349 paragraphs 141 – 144; T 4584; T 5914 J)

PART C - MR. WILLIAM LESLIE SIMPSON JOHNSON

Overview of Evidence

7.141 Captain Johnson was the Director of Marine and Ports in the Ministry of Transport in 2009, before he retired on 8th June 2009. One of his main roles as Director was to advise the Government on shipping matters and to ensure that ships were operating safely in Tonga.

7.142 Regrettably, Captain Johnson knowingly allowed unseaworthy ships to sail, even though he was aware this was contravening the law. He made a conscious decision to do so. This was totally unacceptable, but is consistent with the attitude permeating throughout the Ministry of Transport (including Mr. Karalus) in 2009.

7.143 Mr. Karalus never asked Captain Johnson to try and find a suitable vessel to replace the unseaworthy MV Olovaha. Nor did he ask him to organise any surveyors to inspect MV Princess Ashika. Additionally, Mr. Karalus never sought advice from Captain Johnson on the condition of the MV Princess Ashika or the suitability of it for Tonga. Apart from attending Mexco meetings with senior officials of the Ministry of Transport, Chaired by Mr. Karalus, Captain Johnson had little contact with Mr. Karalus or the Secretary for Transport (Ms. Mone). He accepted that he should have recommended that surveyors from the Ministry of Transport inspect the vessel prior to purchase. Captain Johnson clearly should have been more proactive, given his position, in ensuring that the MV Princess Ashika was suitable for purchase by the Government prior to Mr. Karalus signing the contract on 8th May 2009.

7.144 Captain Johnson had regular conversations with Mr. Jonesse over coffee. However, he did not have any information from Mr. Jonesse that would have enabled him to make any informed decision that the MV Princess Ashika was in good condition or should be purchased. He accepted, given the evidence before the Commission, including a deficiency list prepared by the Ministry of Transport Marine Surveyors on 2nd and 3rd July 2009 that the MV Princess Ashika was unseaworthy and should not have been allowed to sail in Tonga. If proper and thorough due diligence had been conducted, which Captain Johnson accepted was neither recommended by him nor done prior to retiring on 8th June 2009, the vessel should never have been
purchased. He should have recommended that due diligence be conducted prior to purchase.

7.145 Captain Johnson was involved in signing documents which helped facilitate the MV Princess Ashika sailing to Tonga and the registration of the vessel. A number of these documents should not have been signed as there was insufficient material provided and, in other instances, issued on legislative provisions in the Shipping Act which had been repealed.

**Substantive Evidence of Mr. William Johnson**

**Qualifications and Experience**

7.146 Captain Johnson was born on 3rd July 1939. On 18th December 2009, at the time of giving evidence before the Commission, he was the designated person ashore under the ISM code for Bismark Maritime Shipping in Papua New Guinea, having held that position for about two months.

7.147 On 18th August 1969, Captain Johnson obtained a Certificate of Competency as a Master of a Foreign-Going Steamship from Australia. (Exhibit 204) In July 1992, there was a revalidation of that certificate. (Exhibit 394) However the certificate was not current during the time Captain Johnson was the Director of Marine and Ports. (T 2641)

7.148 In 1957, Captain Johnson commenced employment at the Maritime sector as an apprentice deck officer. He worked for various Shipping companies thereafter, as a 4th Officer, 3rd Officer and 2nd Officer until 1972. He worked in Papua New Guinea from 1972 – 1982, including as a Stevedore Supervisor and Surveyor Nautical. From 1982 – 1994 he worked as a Port Officer for BHP minerals in Western Australia. From 1998 – 2001 he worked as a Harbour Master in Nauru. In 2001 – 2002, he was a senior lecturer at the Tonga Maritime and Polytechnic Institute in Tonga. (Exhibit 205; T 2641 – 2642)

7.149 On 25th May 2004, it was published in the Tongan Government Gazette that the Minister of Marine and Ports had appointed William Johnson, who was described as Deputy Secretary (Technical) as a surveyor. (T 2643) Captain Johnson says he ceased being the Deputy Secretary “by default” and was appointed the Director of Marine and Ports a few years later. He was never officially appointed the Director and was simply “left to do the job” that became vacant when the previous Director ceased employment. (T 2643)

7.150 On 8th June 2009, Captain Johnson retired as the Director of Marine and Ports at the Ministry of Transport. Prior to retiring, he gave the Minister of Transport, and the
Ministry of Transport and the Public Service Commission at least 3 months prior notice. (Exhibit 217; T 2693; T 2709 – 2710)

7.151 Captain Johnson departed Tonga on 24th June 2009 to Papua New Guinea and arrived back on the 24th August 2009. He remained in Tonga until 16th October 2009 before returning again to Tonga on the 11th December 2009. (Exhibit 208)

Role as Director of Marine and Ports

7.152 One of the major duties of Captain Johnson was to ensure compliance with Shipping Safety Regulations and the provisions of the Shipping Act. (T 2642 L) He considered that his “duties covered every aspect of the maritime industry in Tonga and local legislation, international legislation – all aspects – including registration...surveying of vessels, pilotage, issuance of pilotage licences, issuance of all seafarer certificates, issuance of all ships documents required by the law.” (T 2646 H – M) Surveys were conducted at the Marine and Ports Division under his direction. (T 2647 K)

7.153 Captain Johnson also had a duty to advise the Government on shipping matters and to ensure the safety of ships operating in Tonga. (T 2671)

Allowing Unseaworthy Ships to Sail

7.154 Captain Johnson was aware that unseaworthy vessels should not be sent to sea. He knew, however, that the MV Olovaha “was getting beyond reasonable to repair and they were having problems with gear boxes and engines and they had a fire in one of the generators that –they were leaking oil pipes. So the thing was that the boat was in a poor condition.” Captain Johnson, who had been on the MV Olovaha between 20 and 30 times in 2009 before he retired, was of the opinion that the MV Olovaha was “past its usable life” and “unseaworthy”. He was aware of this by the commencement January 2009. (T 2648 – 2649)

7.155 Captain Johnson was in fact aware that vessels were being allowed to sail in Tonga for the last few years, apart from MV Princess Ashika, which were unseaworthy and should have been detained. (T 2713) He knew however, that it was within the jurisdiction of the Ministry to stop vessels sailing which were unseaworthy and unsafe. Captain Johnson nevertheless made a conscious decision to allow the MV Olovaha to travel on many occasions in an unseaworthy and unsafe condition. This was so even though he knew that legislation existed which, if complied with, would have meant that the MV Olovaha and other vessels should not have sailed.

7.156 Apart from the MV Olovaha, Captain Johnson was aware that the MV Pulupaki had been allowed to sail within the last two years notwithstanding that it was unseaworthy because of a problem with the life rafts being out of date. There was also a problem with the load line. (T 2725 – 2727)
7.157 The Director of Marine and Ports (Captain Johnson) was fully aware of the provisions in the *Shipping Act* that made it an offence to send a ship to sea which was unseaworthy. He nevertheless made a conscious decision, notwithstanding his position as Director of Marine and Ports, to ignore the legislation. (T 2714 – 2715) This conduct was completely unacceptable, particularly for a person in his position.

7.158 The reason Captain Johnson seemingly gave for compromising the safety of passengers and crew, in allowing unseaworthy vessels to sail, was:

> “Because if you have church conferences, school children coming on holidays—that’s what it—that’s the only way they can be transported from the North to the South” (T 2714 L)

7.159 Captain Johnson correctly accepted that he was clearly negligent in allowing the MV Olovaha to sail, given that he knew it was unseaworthy and unsafe. (T 2715 D) He also acknowledged that when it comes to maritime safety in Tonga there needs to be a radical overhaul. It was clear to Captain Johnson, as it is to us, vessels in Tonga have not been properly maintained (but nevertheless allowed to sail). He seemed to suggest that the reason for this is that owners find it difficult to meet the cost of keeping vessels up to the appropriate standards. (T 2728) We accept that properly maintaining vessels can be an expensive exercise, exacerbated if there is not any proper and regular maintenance. However, the cost is not a reason to compromise the safety of lives at sea.

7.160 It is clear that the record keeping at the Ministry of Transport was, both prior and subject to the sinking of MV Princess Ashika in disarray. This became evident from the state of the files presented to the Commission by various Ministry of Transport officials. Proper filing systems need to be put in place, including in relation to surveys of vessels. The procedure described by Captain Johnson in relation to ensuring that vessels were regularly surveyed (and thus ensuring that only seaworthy vessels sailed) was extremely disconcerting. Captain Johnson explained a system where surveyors kept records in relation to surveys, including when vessels were next due for survey, on “a white board”. When Counsel Assisting asked what would happen if the white board was rubbed out, Captain Johnson responded:

> “Well, I don’t know at the moment. It wasn’t when I was there.” (T 2720)

7.161 Although Captain Johnson says that it was kept on the computer as well, this response was only given after the ridiculous situation of keeping records regarding surveys on a white board was pointed out to him. We again emphasise that the evidence presented to the Commission demonstrated that the records kept by the Ministry of Transport are and have been in disarray for years. This basic problem needs to be addressed as a matter of urgency.
Association between Captain Johnson and Mr. Karalus

7.162 Captain Johnson said that he only discussed with Mr. Karalus a possible temporary replacement for the MV Olovaha “once or twice at the most”. On one occasion, the Minister showed him pictures on the internet of a ship in New Zealand, but it was not suitable. We accept that Mr. Karalus never gave Captain Johnson any documentation in relation to the MV Princess Ashika; never asked him to try and find a substitute vessel or asked him to organise surveyors to inspect MV Princess Ashika. (T 2650) We also find that Mr. Karalus never asked Captain Johnson for a recommendation as to whether MV Princess Ashika should be purchased. Additionally, we accept that Captain Johnson never offered any opinion to Mr. Karalus as to whether the MV Princess Ashika would be suitable for purchase. (T 2747) We are of the opinion that Captain Johnson should have been more proactive in giving advice to the Minister in relation to the prospective purchase of MV Princess Ashika, including as to the necessity of carrying out due diligence prior to the purchase. He accepted that he never gave any advice to Mr. Karalus that any substitute vessel should be surveyed because “it wasn’t the way things worked...I decided what was done. Everything was left to me as the marine side.” (T 2651 A – C) In any event, Mr. Karalus should have requested and insisted upon written advice from Captain Johnson on the suitability or otherwise of the MV Princess Ashika.

7.163 In about late March 2009, Captain Johnson recalls a very quick meeting lasting a few minutes involving Mr. Karalus, Mr. Jonesse and himself. He was not clear on what was discussed although he considers it probably involved how the ship was progressing and whether everything was in order. (T 2732 T – 2733 C)

7.164 Exco meetings were regularly held involving senior executive officers from the Ministry of Transport, including the Heads of the Divisions and the Acting Secretary and Acting CEO (Ms. Mone). There were also regular Mexco meetings attended by the senior executive officers which were Chaired by Mr. Karalus. The meetings were held at the Ministry of Transport offices. (T 2671 – 2674)

7.165 On 7th April 2009, at an Exco meeting Chaired by Ms. Mone, Captain Johnson said that a new ship was being brought to replace the MV Olovaha and that it was expected to arrive in around a month.

7.166 On 20th April 2009, Mr. Karalus prepared a Cabinet Memorandum in relation to the prospective purchase of MV Princess Ashika. (Exhibit 64) On the 23rd April 2009, the Memorandum was considered by Cabinet. Captain Johnson was not asked to, nor did he have any role in the preparation of the Cabinet Memorandum. He provided no documents to Mr. Karalus that were attached to the Cabinet Memorandum.
On 28th April 2009, Captain Johnson was at a Mexco meeting chaired by Mr. Karalus. He accepts that it was likely that he reported at the meeting that the new ship (being the temporary replacement for the MV Olovaha) was due to arrive in June 2009. By that time, he had spoken to Mr. Karalus about the replacement vessel. (T 2673 – 2674; T 2738)

On 2nd June 2009, Captain Johnson was at another Mexco meeting chaired by Mr. Karalus. At that meeting, Captain Johnson reported that the MV Princess Ashika was expected in Tonga shortly. (Exhibit 141; T 2676 H – K; T 2738)

Senior Counsel for Mr. Karalus put to Captain Johnson in cross examination that he did not have any meetings because Captain Johnson was always making excuses not to meet with Mr. Karalus. (T 2736 T) Captain Johnson agreed with the question by Senior Counsel for Mr. Karalus that he “occasionally” had meetings with Mr. Karalus. We accept that only very occasionally did Captain Johnson and the Minister have meetings. This is as much the fault of Mr. Karalus as it is of Captain Johnson. (T 2737) Most reporting by Captain Johnson to Mr. Karalus was indirectly at Exco or Mexco meetings. (T 2736)

It should be mentioned that it was obvious that Ms. Mone, the Acting Secretary for Transport and CEO, did not have a good professional relationship with Captain Johnson. It appears that other than contact at Mexco and Exco meetings, they had little contact. (T 2729) Captain Johnson sought to keep out of her way and had little respect for Ms. Mone, considering that she had what he considered as a domineering personality. When asked about her competency in relation to maritime matters his response was, “Nil…she’s a policeman”. (T 2750 – 2751) The experience of Ms. Mone was in the area of administration and it was apparent from her evidence that she lacked even the most basic understanding of maritime matters.

**Association between Captain Johnson and Mr. Jonesse**

When Captain Johnson was asked if Mr. Jonesse ever spoke to him about MV Princess Ashika he said that “he mentioned it on a couple of occasions”. (T 2651 D) However, subsequently, Captain Johnson later suggested that he probably had “half a dozen” different conversations with Mr. Jonesse about MV Princess Ashika because he used to have “morning coffee…on occasions” with Mr. Jonesse at the offices of Shipping Corporation. (T 2663 J – M) It appears that Captain Johnson and Mr. Jonesse had coffee very regularly and discussed various matters. (T 2731 H)

Captain Johnson recalls Mr. Jonesse telling him that he may have possibly found a vessel that may be suitable and he showed him some photographs. He could not make any decent judgment from the photograph as to the condition of the vessel. The only advice he recalls giving was because of the type of the vessel it might need
larger freeing ports to release water. He says that Mr. Jonesse never asked for any advice from him about the substitute vessel or MV Princess Ashika. (T 2651 – 2652)

7.173 Captain Johnson was very familiar with the area between Natovi and Buresala in Fiji and was accordingly aware that Tongan waters are more open and more influenced by the weather and wind. Accordingly he knew that the conditions in Tonga would normally be much rougher than those in Fiji. Although Captain Johnson never saw the MV Princess Ashika he was aware that if the vessel did not have large freeing ports, the vessel would be unseaworthy. (T 2653) Having being shown photographs at the Commission, after the MV Princess Ashika sank, he was of the view that the scuppers on the vessel were “completely inadequate”, which would create instability and potentially the sinking of the vessel. (T 2653 – 2654)

7.174 The recollection of conversations between Captain Johnson and Mr. Jonesse were poor. He says that he was never shown any Marine survey of the vessel and the only document showed to him were photographs. (T 2666) We accept that Captain Johnson was never shown any documents to allow him to make an informed decision on the condition of the vessel. It should be recalled that Captain Johnson retired on the 8th June 2009 and MV Princess Ashika only arrived in Tonga on 1st July 2009. He never inspected the vessel, nor did any other officers of the Ministry of Transport, prior to the purchase of the vessel and its arrival in Tonga.

7.175 Captain Johnson gave Mr. Jonesse a check list that he produced (although he was aware that Mr. Jonesse had no shipping qualifications and was not a surveyor). (T 2667 – 2670)

7.176 Mr. Jonesse was told by Captain Johnson, that as long as he had the initial survey from Fiji, as soon as the vessel arrived in Tonga a full survey would be done. He did not recommend to Mr. Jonesse or Mr. Karalus that surveyors from the Marine and Ports Division in Tonga should go to Fiji to survey the vessel. He accepted, during the course of his evidence, that it would have been prudent to have given this recommendation, but could not explain why he did not do so. He should have done so. (T 2664 – 2665) Captain Johnson accepted that he was negligent in failing to recommend that a surveyor inspect MV Princess Ashika. (T 2670 – 2671) We accept that Captain Johnson was never asked by Mr. Jonesse to send a surveyor to Fiji.

Association between Mr. Karalus and Mr. Jonesse

7.177 Mr. Jonesse and Mr. Karalus had quite regular meetings. Captain Johnson was aware of this because when Mr. Jonesse passed the door where he worked from he would say that he had some documents for upstairs or something for upstairs. (T 2733) The Minister, Mr. Karalus worked on a floor above Captain Johnson’s office.
7.178 Captain Johnson says that he signed a “Provisional Minimum Safe Manning Certificate” in relation to the MV Princess Ashika on the 8\(^{th}\) June 2009. (Exhibit 213; T 2678) He also says that he made available for Mr. Jonesse an “Application for Registration of a Tongan Vessel”. (Exhibit 112) He wrote the word “Provisional” on top of the form before it was given to Mr. Jonesse and also inserted the number “9” against the reference “Proposed date of Registration”. Captain Johnson cannot recall whether the form was given personally to Mr. Jonesse. He accepted that it was “possible” that the Application for Registration was in fact not lodged until after the vessel arrived in Tonga in July 2009 or even after the vessel sank. (T 2682 – 2683)

7.179 Captain Johnson rightly accepted that it was completely unacceptable that on the Application for Registration, next to the Applicant, “Ministry of Transport” was simply written. He also correctly accepted that a Survey Certificate should have been provided with the Application for Registration, but he could not recall one ever being provided. (T 2681) We have serious reservations as to whether the Application for Registration was in fact lodged on the 8\(^{th}\) June 2009. (T 2679 – 2683) Although a fee should have been paid with the Application for Registration, there was no fee paid in June 2009. No plausible explanation could be given as to why the fee required to be paid for registration was not paid in June 2009. (Exhibit 80; T 2702 – 2703)

7.180 A document was produced to the Commission entitled “Provisional Certificate of Registration” in relation to MV Princess Ashika. (Exhibit 113) It has recorded as the date registered the “9 June 2009”. It states that “This Provisional Certificate is granted by me pursuant to section 28 of the Shipping Act Cap 136”. It also records the owner of the vessel as the “Shipping Corporation of Polynesia Limited”. It purports, on its face to be signed by William Johnson as Registrar and be valid until 8\(^{th}\) September 2009.

7.181 A few things should be mentioned about the “Provisional Certificate of Registration”. Firstly, Captain Johnson had resigned as the Registrar by 8\(^{th}\) June 2009. He therefore would have had no authority whatsoever to issue the certificate. (Exhibit 217; T 2693 - 2694) Captain Johnson knew this, but when asked why he purported to sign the certificate on 9\(^{th}\) June 2009, said “I don’t know”. (T 2693 E)

7.182 Secondly, section 28 of the Shipping Act, pursuant to which the Provisional Certificate was purportedly granted did not authorise the issuance of any Provisional Certificate of Registration. The Provision in the Shipping Act which authorised the issuance of Provisional Certificate for Registration in Tonga had been repealed many years earlier. Captain Johnson said he was not aware of this, even though his career profile stated that he was well versed with the requirements of the Tongan legislation. (T 2703 – 2704)
Thirdly, as to the “Provisional Certificate of Registration” dated 9th June 2009, Captain Johnson said that he obtained the information for the completion from the Application for Registration which was purported to be “signed” on 8th June 2009. However, the Provisional Certificate of Registration contains information materially different to that contained in the Application for Registration. (Exhibit 113; Exhibit 213; T 2691 – 2693)

The signature of Captain Johnson appeared on a document on official Ministry of Transport letterhead dated 8th June 2009. The subject was “Exemption Princess Ashika”. It was addressed “To whom it may concern” and provided specifically as follows:

“Please be advised that under Solas regulation 4 (a) Part A of Chapter 1 of the convention a dispensation is granted for Princess Ashika to carry out a delivery voyage from Suva-Fiji to Nuku’alofa Tonga commencing on/or after 11th June 2009.” (Exhibit 214)

An unsigned copy of a letter in the same terms as that of the 8th June 2009 was produced by the Ministry of Transport to the Commission, but dated 9th June 2009 and having the name of Mr. Viliami Tu’ipulotu instead of Captain Johnson for signing. (Exhibit 215) We have serious reservations as to whether these documents were in fact prepared on the 8th and 9th June 2009. No plausible explanation was given as to why there were letters prepared on the 8th and 9th June stating the same thing. (T 2384 – 2387) Even if they were signed on the 8th or 9th June 2009, the information available to Captain Johnson and Mr. Tu’ipulotu was not sufficient to enable them to form a useful opinion that the MV Princess Ashika could travel safely from Fiji to Tonga. There was therefore no basis, as Captain Johnson accepted, for any such exemption to have been granted. (T 2688 – 2690) Captain Johnson also accepted that when he signed the exemption he was negligent because he had no basis whatsoever to come to the conclusion that the MV Princess Ashika could comply with necessary safety requirements. (Exhibit 216; T 2690 C)

Captain Johnson acted as the Registrar of Ships until he retired on 8th June 2009. Pursuant to section 8 of the Shipping Act, the MV Princess Ashika was required to be registered. By reason of section 10 of the Shipping Act, prior to the registration of the MV Princess Ashika there needed to be compliance with the appropriate provisions of the Shipping Act and the Shipping (Registration) Regulations. By force of section 13 of the Shipping Act, the Registrar is required to keep a book to be called the “Register”, and entries in the Register shall be made in accordance with the provisions of the Shipping (Registration) Regulations. Notwithstanding the fact that Captain Johnson retired on 8th June 2009, he says he completed the Register book registering MV Princess Ashika on a “Provisional” basis with a registration date of 9th June 2009. He accepted that it appeared he completed the details in the
official Register book prior to even receiving an Application for Registration. Captain Johnson could not explain why he completed the details in the Register but did not sign it. (T 2701)

7.187 A document was produced, in the form of an unsigned letter dated 28th June 2009 on the letterhead of the Ministry of Transport. Captain Johnson accepted he would have sent the letter on or about the 29th June 2009. However, he had retired from the Ministry on the 8th June 2009. He accepted that he had no authority to send a letter on the letterhead of the Ministry on the 29th June 2009. Having initially accepted that the letter was sent on or about the 29th June 2009 and Counsel Assisting having pointed out to him that he had no authority to send the letter, he suggested that he believed the date to be incorrect. Captain Johnson said that he went into the Ministry of Transport office on the request of staff after he retired on the 8th June 2009. (Exhibit 219; T 2704 – 2706) Although he departed Tonga on 24th June 2009, Captain Johnson had written communications with Mr. Tu’ipulotu in August 2009 where he indicated “will try and complete the best part of a paper war and you will hopefully persuade SCP John to be the agent.” Although the communication did not relate to MV Princess Ashika, it demonstrates that Captain Johnson was still in communication with Mr. Tu’ipulotu well after he retired. (T 2723)

The Condition of the MV Princess Ashika

7.188 Captain Johnson never saw the MV Princess Ashika. He was however shown a deficiencies list in relation to the MV Princess Ashika for the purposes of his evidence before the Commission. Captain Johnson accepted that it was apparent from the deficiencies list, which had been prepared by the Ministry of Transport surveyors in early July 2009, that the MV Princess Ashika was unseaworthy and would take a considerable period of time to rectify. Had he been the Director in July 2009, and seen the deficiencies list he would not have allowed it to sail. (T 2708) If Captain Johnson had properly carried out his duties he should have recommended that the vessel was independently surveyed prior to purchase. If this had been done, and the advice followed, it would have revealed that the MV Princess Ashika was in an appalling condition and that it should never have been purchased. When asked by Counsel Assisting whether he could proffer any opinion on the likely cause of the disaster Captain Johnson replied “an unsafe ship.” (T 2723)

Captain Johnson’s Assessment of Mr. Tu’ipulotu

7.189 Captain Johnson agreed it was highly unjustified for Mr. Tu’ipulotu, the Acting Director of Marine and Ports to sign a certificate on 3rd July 2009 certifying that he considered the MV Princess Ashika to be seaworthy. (T 2708 – 2709) The position of Mr. Viliami Tu’ipulotu was not advertised, even though Captain Johnson had given 3
months prior notice to Mr. Karalus and the Public Service Commission. (T 2709 N - 2710 I) Unfortunately there appears to be a common occurrence in people being appointed to senior positions in the Ministry of Transport without any advertising of the position. This is not conducive to engaging the best possible candidate for the position. It is a practice which should be discouraged.

7.190 Captain Johnson was of the view that Mr. Tu’ipulotu was unsuitable for the position of Acting Director for Marine and Ports and that the position was effectively beyond him. He also correctly accepted that Mr. Tu’ipulotu did not have the appropriate qualifications and expertise to proficiently carry out the duties as the Director of Marine and Ports. (T 2711 H – L)

**Measures to Help Prevent the Future Occurrence of a Similar Disaster as Suggested by Captain Johnson**

7.191 Captain Johnson, when asked for measures or ideas that would help prevent the future occurrence of a similar disaster stated:

> “Well, the Ministry of Transport has to be upgraded to a higher standard. The Marine school has to be brought back into line again, like it used to be - now it’s under Youth, Sport and Recreation and they’ve tried to integrate it into parts of the Technical College - or they have done - which doesn’t - what would you say – their intake of students is very low, their standard of education, their standard of understanding is very limited as far as the maritime industry, even for the basic seamanship”. (T 2724 A- C)

7.192 It became known to Captain Johnson, who had previously worked as a senior lecturer at the Tonga Maritime Polytechnic Institute (TMPI), that the standard of students graduating from TMPI was dropping. There had been a deterioration of discipline at TMPI. One of the problems at the TMPI is that some students have a very limited understanding of English. (T 2724 – 2725) He considered that increasing the quality of students at TMPI would be a start.

7.193 In terms of helping prevent a similar disaster, he properly accepted that regulators need to ensure that shipping laws are enforced and complied with; crew should be properly trained and supervised and that vessels should be properly maintained. (T 2728)

7.194 Captain Johnson was of the view that the Marine and Ports Division of the Ministry of Transport “was understaffed if you wanted to comply with all legislation a hundred per cent.” He made the assessment by late 2007 that there were not enough staff to ensure that the Marine and Ports Division operated professionally in ensuring that the legislation in relation to shipping in Tonga was complied with. (T
He also seemed to tentatively raise some issues about the competency of the surveyors that were under his control.

Clearly the Marine and Ports Division needs to be adequately resourced and staffed by appropriately competent and professional staff. The evidence demonstrates that when it comes to safety considerations, the Marine and Ports Division is prepared to compromise the safety of passengers and crew, irrespective of legislation in Tonga or any International Conventions. This was demonstrated, even after the MV Princess Ashika sank in relation to the MV Pulupaki, when the Acting Minister for Transport (Lord Nuku) and the Acting Director of Marine and Ports (Mr. Viliami Tu’ipulotu) approved the MV Pulupaki sailing over 260 miles from Nuku’alofa for an alleged “emergency” to tow the MT Punalei.

**PART D – MR. VILIAMI TU’IPULOTU**

**Overview of Evidence**

Mr. Tu’ipulotu had been the Acting Director of the Marine and Ports Division of the Ministry of Transport since 9th June 2009. Prior to that, Mr. Tu’ipulotu had been employed by the Tonga Maritime and Polytechnic Institute and briefly by the Ports Authority. In his capacity as Acting Director of Marine and Ports, Mr. Tu’ipulotu was responsible for maritime safety and security in Tonga. Mr. Tu’ipulotu had under his supervision, effectively the Marine Division technical staff, three marine surveyors and a trainee surveyor.

On 2nd July 2009 the Marine and Ports Division surveyors, conducted a survey of the MV Princess Ashika which had arrived in Tonga the previous day. On 3rd July 2009 a three page deficiencies list was prepared by the surveyors and presented to Mr. Tu’ipulotu for discussion. During their discussions of 3rd July 2009, Mr. Tu’ipulotu noted on the typed deficiencies list, major deficiencies identified that must be rectified, before the vessel could sail. The handwritten notation, in relation to the major deficiencies identified, which was signed and dated by Mr. Tu’ipulotu on the deficiencies list were as follows:

“Comments:

1. **The Bow and Stern Ramp must be watertight to the satisfaction of the surveyor or before departure.**

2. **Also the scuppers must be repaired to surveyors satisfaction.**

3. **Loadline must not be submerged in any case on departure.**

4. **Or any other item that may be advised by the surveyor on the spot.**”
As it transpired, the identified deficiencies were not rectified by the time the vessel sank on 5th August 2009. The evidence establishes that this failure was a major cause of the foundering of the vessel.

7.198 What happened next could only be described as inconceivable, utterly absurd and defies logic. Mr. Tu’ipulotu on 3rd July 2009, the same day he identified major deficiencies and made comments on the deficiencies list, says he signed a provisional certificate of survey certifying that the MV Princess Ashika was considered to be seaworthy with the intent of allowing the vessel to operate in Tonga. This is despite his opinion on 1st July 2009, upon inspection of the vessel, that it was totally unsuitable for Tongan waters and unseaworthy. He admitted in oral evidence that he would not have allowed members of his immediate family to travel on the MV Princess Ashika.

7.199 In late 2009, two survey reports were prepared in relation to the MV Pulupaki, a RoRo vessel such as the MV Princess Ashika and operating on the same route travelled by the MV Princess Ashika. The first report of 23rd December 2009 was prepared by the Marine and Ports Surveyor, which listed 16 major areas of deficiencies that needed to be rectified to make the MV Pulupaki seaworthy. The second report dated 29th December 2009 was prepared by Mr. Mosese Fakatou, marine surveyor. An analysis of the contents of his report suggests that the MV Pulupaki was unseaworthy. Contrary to these two reports, Mr. Tu’ipulotu under similar circumstances with the MV Princess Ashika, signed a certificate of survey on 7th January 2010, certifying and ascertaining that the MV Pulupaki was considered to be seaworthy. It is clear that Mr. Tu’ipulotu did not learn from the sinking of the MV Princess Ashika. How this could be allowed to happen again so soon after the MV Princess Ashika disaster is beyond comprehension.

7.200 On 14th January 2010, a further report was prepared on the condition of the MV Pulupaki by Mr. William Maddick, a marine surveyor from New Zealand. Mr. Maddick concluded in his report that the MV Pulupaki was unseaworthy and should be detained. On 19th January 2010, Mr. Tu’ipulotu on the instructions from the Secretary of Transport, Ms. ‘Eleni Mone advised the owner of the MV Pulupaki in writing that the current Certificate of Survey of the MV Pulupaki was suspended. On 23rd January 2010, Mr. Tu’ipulotu upon request from the owner, allowed the MV Pulupaki, the very same vessel he had effectively detained four days earlier, to travel with her crew some 260 miles from Nuku’alofa to tow the MT Punalei, an oil tanker, which was 100 miles closer to Fiji, back to the Ha’apai Island group in Tonga. We are of the opinion that Mr. Tu’ipulotu had conducted himself and his duties in a most unsatisfactory and incompetent manner and with a total disregard for safety of lives at sea.
Substantive Evidence of Mr. Viliami Tu’ipulotu

Qualifications, Experience, Roles and Responsibilities

7.201 Mr. Tu’ipulotu had spent most of his working life at sea as a seaman. Around 1972, Mr Tu’ipulotu started working as a cadet officer and had mainly sailed around the coast of Australia. In 1993, Mr. Tu’ipulotu, progressed his career as a seaman when he completed various training courses in Australia and subsequently became a Chief Mate Class 1. Mr. Tu’ipulotu has spent a substantial amount of time sailing in Australia and has extensive experience in Tongan waters. (T 1545 H- 1546 B) (Exhibit 4, paragraphs 2,3 and 4)

7.202 Prior to September 2008, Mr. Tu’ipulotu was a Senior Educational Officer of the Tonga Maritime Polytechnic Institute (TMPI). Mr. Tu’ipulotu had started working for TMPI since 1985 in various capacities. On or about 2002 Mr Tu’ipulotu was seconded to the Tuvalu Maritime Training Institute and in 2005 was again seconded to the Ports Authority. Because of the years spent at TMPI, Mr. Tu’ipulotu educated and trained most of the crew on the MV Princess Ashika including the Master, Mr. Tuputupu. Mr. Tu’ipulotu during his time at TMPI taught safety courses, seamanship, Officer’s courses, Master Class 4 and navigation. (T 1546 C- 1548 Q)

7.203 On 9th June 2009, Mr. Tu’ipulotu assumed the position the Acting Director of the Marine and Ports Division of the Ministry of Transport. Prior to his appointment on 9th June 2009, he held the post of Principal Marine Nautical Officer. As the Principal Marine Nautical Officer, Mr. Tu’ipulotu was responsible for maritime safety and security and his principal role was to ensure compliance with maritime safety and security laws. Mr. Tu’ipulotu effectively had under his supervision the marine technical staff which included Mr. Lou Pale (Senior Marine Nautical Officer), Mr. ‘Onesi Tu‘ifua (Senior Marine Engineering Officer), Mr. Lisiate Vuni Latu (Marine Nautical Officer) and Mr. Mafi Kavaliku (Marine Engineer Officer). Apart for Mr. Kavaliku, all the marine technical staff including Mr. Tu’ipulotu were certified marine surveyors appointed under the Shipping Act. (Exhibit 109) (T 1549 B- 1551 R)

7.204 Mr. Tu’ipulotu was appointed by Cabinet Decision No. 515 of 3rd July 2009 (Appendix 53) as the Registrar of Tongan Ships and Bareboat Charters under the Shipping Act. Mr. Tu’ipulotu, as Registrar of Tongan Ships, was required to properly register ships and record such registration in the official register kept by the Marine and Ports Division of the Ministry of Transport. (Exhibit 2) (T 1554 P -1555 H)

Registration of the MV Princess Ashika

7.205 The Register of Tongan Ships (Appendix 54) provides under Item No. 161 and Registration No. 260 that the MV Princess Ashika was registered on 9th June 2009. Additionally, the owner of the MV Princess Ashika was jointly recorded as the
Government of Tonga and the Shipping Corporation of Polynesia Limited. The registration was signed by Mr. Tu’ipulotu as the Registrar of Tongan Ships. (Exhibit 110)

7.206 Mr. Tu’ipulotu in oral evidence indicated that despite his appointment as Registrar of Tongan Ships on 3rd July 2009 he was only made aware of that appointment in early October 2009 when he was given a copy of the Cabinet Decision by Mrs. KalesiTaumoepeau, Personal Assistant to the former Minister of Transport, Mr. Paul David Karalus. Mr Tu’ipulotu accepted in oral evidence that prior to learning of his appointment he should have effectively taken over the responsibility of the Registrar of Tongan Ships upon the departure of the previous Director, Capt. William Johnson on 8th June 2009. (T 15 P -18 S)

7.207 Mr. Tu’ipulotu was questioned as to why his signature appears on the register of ships endorsing the registration of the MV Princess Ashika on 9th June 2009, given his evidence that he was only appointed as Registrar on 3rd July 2009 and became aware of that appointment in October 2009. Mr. Tu’ipulotu stated that the previous Director of Marine, Captain William Johnson had filled in the details in relation to the MV Princess Ashika in the register but did not sign it. Mr. Tu’ipulotu signed the register completing the registration of the MV Princess Ashika in July 2009 because he felt it was his duty since Captain Johnson had forgotten to sign. However, Mr. Tu’ipulotu did not sign or endorse the registration of the vessel Maile Sueina which was entered in the register above the Princess Ashika, which had also been filled in by Capt. Johnson and did not sign it. Mr Tu’ipulotu accepted that anyone inspecting the Register of Tongan Ships would consider that he had authorised the provisional registration of the MV Princess Ashika on 9th June 2009. (Exhibit 110)(T 1554 P-1562 R)

7.208 Mr. Tu’ipulotu in the course of his oral evidence was shown a copy of a completed Application for Registration of a Tongan Vessel in relation to MV Princess Ashika, dated 8th June 2009 (Appendix 55) and in the space provided for the applicant to place his signature the words “Ministry of Transport” was printed but not sealed. Mr. Tu’ipulotu accepted that it was not normal to fill in an official Marine and Ports Application for Registration of vessel and place “Ministry of Transport” as the applicant because one could not identify the actual applicant. (Exhibit 112) (T 1598 J-1599 N) As it transpired, Mr. Jonesse had completed the Application and placed “Ministry of Transport” as the applicant, even though he was not employed by the Ministry of Transport and as such had no authority to complete the application and enter “Ministry of Transport” as the applicant. (T 4913 D- 4919 F)

7.209 Mr. Tu’ipulotu was also shown in evidence a Provisional Certificate of Registration for the MV Princess Ashika, dated 9th June 2009 (Appendix 56) which was signed by Capt. William Johnson as the Registrar of Ships. The Provisional Certificate of
Registration was valid from 9th June 2009 until 8th September 2009. Mr. Tu’ipulotu indicated that he only saw the certificate in early July when the MV Princess Ashika arrived in Tonga. We accept that the Provisional Certificate of Registration, dated 9th June 2009, signed by Captain Johnson corresponds with the Application of Registration of Vessel dated 8th June 2009 and the date of entries in the Register of Ships for the registration of the MV Princess Ashika. We also accept that Capt. Johnson signed the Provisional Certificate of Registration despite the fact that he ceased employment with the Ministry of Transport on 8th June 2009. Capt. Johnson had no authority whatsoever to place his signature on the certificate on 9th June 2009 as the Registrar of Ships. (Exhibit 113)(T 1599 O - 1600 P)

7.210 It was established practice in the Marine and Ports Division of the Ministry of Transport that certain application forms were lodged in relation to registration or survey of vessels, they would also be accompanied by the relevant fees to warrant the issuance of the relevant certificates. It was established in evidence that no fees were paid to the Marine and Ports Division that corresponded to the Application for Provisional Registration, dated 8th June 2009 and the issuance of the certificate of Provisional Registration, dated 9th June 2009.

7.211 On 3rd July 2009, a new Provisional Certificate of Registration (Appendix 19) was issued in relation to the MV Princess Ashika which was valid until 2nd October 2009. The certificate appeared to have been signed by Mr. Tu’ipulotu but he could not specifically remember signing the document although he accepted that it could have been or is his signature. The new Certificate of Provisional Registration was issued on 3rd July 2009 whilst the prior Certificate of Provisional Registration dated 9th June 2009, signed by Captain Johnson was still valid. (Exhibit 114) (T 1601 P-1603 Q)

7.212 Both the Provisional Certificates of Registration dated 9th June 2009, signed by Captain Johnson, and 3rd July 2009, signed by Mr. Tu’ipulotu, purported to be issued under section 28 of the Shipping Act. Section 28 of the Shipping Act does not provide any authority for the issuance of a Provision Certificate of Registration. We accept that the Provisional Certificates of Survey were purported to be issued under a predecessor of section 28 of the Shipping Act which had been repealed by the Shipping (Amendment) Act 2001, Act 23 of 2001. There was in fact no authority under section 28 of the Shipping Act for either Captain Johnson or Mr. Tu’ipulotu to issue a Provisional Certificate of Registration in relation to the MV Princess Ashika.

Survey of MV Princess Ashika

7.213 Mr. Tu’ipulotu along with the surveyors of the Marine and Ports Division were informed on 1st July 2009 that the MV Princess Ashika was arriving from Fiji, and that they were to go and have a look at the vessel. He indicated that whilst he was on the vessel on 1st July 2009, Mr. Karalus was also on the bridge deck of the vessel with
a television crew. Mr. Tu’ipulotu in oral evidence stated that “he did not like the opening on the cargo areas and the ramps”, it was too exposed to the weather and water could easily enter the vessel and cause instability. Additionally, there was extensive corrosion throughout the vessel which we accept would have been evident to anyone who laid eyes on the vessel. Mr. Tu’ipulotu admitted that he was also concerned about the watertightness of the ramps of the vessel and that the scuppers on the cargo hold had to be repaired. Mr. Tu’ipulotu agreed that on 1st July 2009 he formed the view that the design of MV Princess Ashika was totally unsuitable for Tongan waters and would be a hazard and danger to her passengers and crew. (T 1563 L -1571 K) It was clear from the observations of Mr. Tu’ipulotu on 1st July 2009 that the MV Princess Ashika was unseaworthy.

7.214 Mr. Tu’ipulotu stated in paragraphs 8-12 of his affidavit that:

“8. I HAVE no knowledge of the events prior to the arrival of MV Princess Ashika (the Motor Vessel) in Tonga. All I had heard of was that a motor vessel owned by Shipping Corporation of Polynesia was coming but no confirmed date of arrival.

9. ON 1st July 2009 I received a message for me and the surveyors of the Ministry of Transport, Marine Division, to go to the wharf and have a look at the Motor Vessel.

10. AT about 12pm on 1st July 2009 I arrived at the Wharf but the three surveyors of the Ministry had already arrived.

11. ON my arrival at the Motor Vessel I had a look around her and did not leave until about one hour later.

12. I AND the said three surveyors returned to our office at about lunch time and decided to carry out the survey of the Motor Vessel the following day (02nd July 2009) because, among other things, the survey fee had not been paid.” (Exhibit 4)

7.215 On 2nd July 2009, an application for the survey of MV Princess Ashika (Exhibit 85) (Appendix 57) was lodged with the Marine and Ports Division. A survey was promptly conducted on the MV Princess Ashika by Mr. Tu’ifuia (Senior Marine Engineering Officer), Mr. Lou Pale (Senior Marine Nautical Officer) and Mr. Lisiate Vuni Latu (Marine Nautical Officer). The surveyors spent the entire morning inspecting and surveying the vessel. The surveyors on 3rd July 2009, prepared a typed deficiencies list (Appendix 18) consisting of three pages detailing a remarkable array of deficiencies on the MV Princess Ashika. (Exhibit 19)
7.216 All the surveyors gave oral evidence and stated in their affidavits that on 2\textsuperscript{nd} July 2009 they were unanimous in the opinion that the condition of the MV Princess Ashika “was very bad due to extensive rust and corrosion”. Mr. Pale took various photographs of the vessel during the course of the survey on 2\textsuperscript{nd} July 2009. The photographs supported the surveyors findings.

(Left: Picture taken on 2\textsuperscript{nd} July 2009 by Lou Pale (Marine Surveyor) showing corroded vents; Right: Picture taken on 2\textsuperscript{nd} July 2009 by Lou Pale (Marine Surveyor) showing extensive corrosion in void spaces)

7.217 On 3\textsuperscript{rd} July 2009, Mr. Tu’ipulotu, Mr. Latu and Mr. Tu’ifua met to discuss the deficiencies list. During the meeting, major deficiencies were identified which had to be rectified before the MV Princess Ashika could sail. Mr. Tu’ipulotu wrote the following comments on the deficiencies list:

“Comments:

1. *The Bow and Stern Ramp must be watertight to the satisfaction of the surveyor or before departure.*

2. *Also the scuppers must be repaired to surveyors satisfaction.*

3. *Loadline must not be submerged in any case on departure.*

4. *Or any other item that may be advised by the surveyor on the spot.*”

(Exhibit 17) (Appendix 17)

7.218 Mr. Tu’ipulotu formed the opinion that if the identified deficiencies were not rectified, the vessel should not sail. He agreed that the matters contained in the deficiencies list needed to be attended to and if that was not done, then the vessel was unseaworthy. Mr. Tu’ipulotu accepted that it would take months to rectify all the items listed in the deficiencies list. Significantly, Mr Tu’ipulotu accepted in oral evidence that it was nonsense that a Provisional Certificate of Survey can be issued because the purpose of the certificate of survey is to determine effectively whether
a vessel is fit to sail. Additionally, a vessel could not be provisionally safe, it was either safe or unsafe. (T 1574K-1580H)

7.219 On 3rd July 2009, Mr Tu’ipulotu signed two Provisional Certificates of Survey for the MV Princess Ashika, one was dated 2nd July 2009 (Appendix 20) and the other 3rd July 2009 (Appendix 19). (Exhibit 3) (Exhibit 111) According to Mr. Tu’ipulotu, the Certificate dated 3rd July 2009 was signed and issued first and then it was decided to issue a new certificate dated 2nd July 2009 to correspond with the date of the survey. (T 1584 O-1586 P) Both the Provisional Certificates of Survey certified that:

“the condition of the Hull, Rigging, Tackle, Boats and Machinery is as such as to comply with the provisions of the Shipping Act. The above named vessel as far it could be ascertained is considered to be Seaworthy.” (Underlining added) (Exhibit 111)

7.220 Although, Mr. Tu’ipulotu states that the Provisional Certificates of Survey were both signed on 3rd July 2009 and the reason for the issuance of the second certificate was to insert the date of the survey, 2nd July 2009, there were material differences between the two Certificates. The Certificate dated 3rd July 2009 states that the number of crew was “14” while in the other Certificate dated 2nd July 2009 it was increased to “18”. The tonnage of registration, “677.15T” had the “T” omitted on the Certificate dated 2nd July 2009. Significantly, the formatting and the layout, such as the Government crest on the top of both Certificates, were different. (Exhibit 3) (Exhibit 111)

7.221 Mr. Tu’ipulotu stated that he found the Provisional Certificate of Survey that he had signed and dated 2nd July 2009 sitting in an outward tray in his office together with outgoing correspondences in October 2009. The Certificate was not in a file and was kept separate from other files in relation to the MV Princess Ashika. (T 19-20 J) (T 1581 O-1582 F) We cannot understand how such an important document was kept unnoticed in an outward tray for months after it was issued, and can only find Mr. Tu’ipulotu’s explanation implausible.

7.222 The Provisional Certificate of Survey dated 2nd July 2009 that Mr. Tu’ipulotu discovered in his office was an original, a copy of which was never produced to the Commission by any official from Shipping Corporation of Polynesia Limited who should have at least had a copy of that Certificate. We accept that original Certificates of Survey of a vessel are to be given to the operators of the vessel and in fact should be kept on the vessel. Therefore an original Certificate of Survey should not have been kept in the Office of the Marine and Ports Division. More significantly, the Provisional Certificate of Survey dated 3rd July 2009, produced to the Commission by Shipping Corporation of Polynesia Limited, was never produced by any of the Ministry of Transport officials who as the issuing authority should have
in their files a copy of the Certificate. The circumstances surrounding the discovery of the original Provisional Certificate of Survey dated 2nd July 2009 and the production of a different Certificate of Survey by the Ministry of Transport from that by Shipping Corporation of Polynesia Limited, casts serious doubts over the authenticity of the Provisional Certificates of Survey.

7.223 Mr. Tu’ipulotu accepted that the MV Princess Ashika was not seaworthy at the time he signed the Provisional Certificate of Survey on 3rd July 2009 and to suggest otherwise was false and in our view dishonest. He was also told by his surveyors that the vessel was unseaworthy. (T 1582 J- 1589 H)

7.224 Mr. Tu’ipulotu states in paragraphs 18-19 of his Affidavit that:

“18. AT the time the said meeting with the surveyors was taking place the manager of Shipping Corporation of Polynesia Limited repeatedly came to me and said that we were too slow with our work because he had already ensured with the Director of Marine that everything was alright. I then told him to wait because we were discussing the matter before making our recommendation.”

19. WHILE our said meeting with the surveyors was still proceeding, and before the provisional certificate of survey together with the list of deficiencies were given to the manager of Shipping Corporation of Polynesia Limited, we were informed that the Motor Vessel has departed from Tongatapu on her first voyage to the outer-islands.” (Exhibit 4)

7.225 Mr. Tu’ipulotu indicated that on 3rd July 2009, Mr. Jonesse came to see him three times in relation to the documentation for the MV Princess Ashika. Mr. Tu’ipulotu stated that Mr. Jonesse had told him that “everything has been sorted out with former director, that we are a bit too slow in preparing the papers and all that”. Mr. Tu’ipulotu told Mr. Jonesse that there were deficiencies that had to be rectified. A copy of the deficiencies list was subsequently provided to Mr. Jonesse. (T 1590 O - 1591 E)

7.226 Mr. Tu’ifua told Mr. Tu’ipulotu when he realised that the MV Princess Ashika had left Nuku’alofa on 3rd July 2009 that it should be stopped and expressed concerns about the safety and seaworthiness of the vessel. (T 1591 F- 1592 I) Despite the insistence from Mr. Tu’ifua that the vessel should be stopped, Mr. Tu’ipulotu did not do anything.

Follow up Inspection or Survey

7.227 Mr. Tu’ipulotu stated in paragraphs 21-23 of his affidavit that:
“21. It is my understanding from the surveyors, in relation to the deficiencies identified, that the practice is for the ship-owner to attend to them and then report to the surveyors to check that they have been satisfactorily repaired. I am not aware that there was any report from the owner of the Motor Vessel that the deficiencies have been repaired.

22. On the week following our said meeting with surveyors and the issuing of the provisional certificate of survey and list of deficiencies, two of the surveyors had to take their leave. The surveyor who was still working then was Lisiate Vuni Latu became very very busy because he also had to attend to pilotage duties for foreign motor vessels arriving and departing both Nuku’alofa and Vava’u.

23. As to my work obligations after the issuing of the provisional certificate of survey and list of deficiencies, I was very very busy as well because of urgent matters requiring actions in the Ministry. In respect of the Motor Vessel I just did not think about it anymore because the owner had to repair the deficiencies and report to us for any further action that may be required from our part.” (Exhibit 4)

7.228 Mr. Tu’ipulotu indicated that he did not inspect the MV Princess Ashika after 3rd July 2009, and he did not send any of his surveyors to have a look at the vessel after 2nd July 2009. Mr. Tu’ipulotu stated that he was “so tied up with so many functions of the Ministry” from 3rd July to 5th August 2009 that he could not spare 15 minutes of his time to check if the deficiencies on the MV Princess Ashika, which was a 5 minute walk away, had been rectified. Mr. Tu’ipulotu’s position is reprehensible and unacceptable. (T 1595 C-1596 K) Having said that, we accept that the preliminary finding in the report of Mr. Michael Lloyd Eno, dated 9th September 2009, that one of the factors that contributed to the casualty was “the failure of the Acting Director of Marine and Ports to follow up with the attending surveyors on the comments that he made to their survey report”. (Exhibit 24, page 26)

Power of Director of Marine and Ports to Detain Vessels

7.229 Despite assertions made by Mr. Tu’ipulotu in oral evidence that he, the Acting Director of Marine and Ports, has the power to detain vessels under the Shipping Act, we accept that this is not the case.

7.230 Section 145(1) of the Shipping Act originally provided upon enactment that:

“Where a ship appears to be unseaworthy, the Minister or the Director may issue a certificate of provisional detention and detain the ship until it can be properly surveyed and inspected.”
7.231 Director is defined under section 2 of the *Shipping Act* as the “person appointed as Director of Marine”.

7.232 Section 2 of the *Interpretation (Amendment) Act 1994, Act No. 6 of 1994* provided that section 2 of the Principal Act (Interpretation Act, Cap 1) be amended by inserting the following:

“The styles “Director of Marine”, “Chief Harbour Master” and “Harbour Master” wherever they appear in any Act (including this Act) or in any official Government writing, are omitted and the style “Secretary for Marine and Ports” inserted in their stead; and a reference in that Act or official government writing to “Secretary for Marine”, “Chief Harbour Master” or “Harbour Master” shall be read and construed as a reference to “Secretary for Marine and Ports”.

The *Interpretation (Amendment) Act 1994* effectively replaced any reference to “Director of Marine” in the *Shipping Act* with “Secretary of Marine and Ports”.

7.233 Section 3 of the *Shipping (Amendment) Act 2008, Act No, 15 of 2008* provided as follows:

“The Principal Act is amended by deleting the words “Secretary for Marine and Ports” and the word “Secretary” wherever they appear and replaced with the words “Minister for Transport” and the word “Minister” respectfully.”

7.234 Section 145(1) as amended provides that only the Minister of Transport may issue a certificate of provisional detention for a vessel. For the purposes of the *Shipping Act* and at all material times during 2009, Mr. Tu’ipulotu in his capacity as Acting Director of Marine did not have the power to detain vessels. However we do accept that throughout 2009 the maritime industry in Tonga operated under the premise that section 145(1) of the *Shipping Act* had not been amended and that the Director of Marine and Ports had the power to detain vessels, which was not the case.

**Surveys and Detention of the MV Pulupaki**

7.235 On 23rd December 2009, a survey was conducted on the ferry MV Pulupaki by the Ministry of Transport surveyors and a report entitled “*Condition Survey RoRo Ferry Pulupaki*”. The report was seen and signed by Mr. Tu’ipulotu on 6th January 2010. The report listed 16 different areas of deficiencies that needed to be rectified before the vessel could be considered seaworthy. We appreciate that the survey report had been limited to a superficial in-water inspection and a full report on the structural condition of the vessel could not be obtained. Mr. Tu’ipulotu accepted in oral evidence that the survey report of 23rd December 2009 was a damning condemnation of the seaworthiness of the MV Pulupaki. He also agreed that by 23rd
December 2009, the MV Pulupaki was clearly unseaworthy and unsafe. (T 3853 N - 3856 N)

7.236 The surveyor, Mr. Lou Pale, during the survey of 23rd December 2009 took 36 photographs which Mr. Tu’ipulotu admitted was only given to him in late January. Mr. Tu’ipulotu agreed that the photographs showed advanced corrosion on the MV Pulupaki, serious structural deficiencies and demonstrated clearly that the vessel was unseaworthy. Mr. Tu’ipulotu accepted that the photographs suggest that it would take a lot more than one month to rectify the deficiencies on the MV Pulupaki. (Exhibit 319) (T 3976 L- 3982 L)

7.237 A further report on the condition of the MV Pulupaki was prepared by Mr. Mosese Fakatou on 29th January 2010. An analysis of the contents of the report suggest that some of the deficiencies identified by the surveyors of the Marine and Ports Division of the Ministry of Transport on 23rd December 2009 may have been rectified. However, the report suggests that the MV Pulupaki was not seaworthy as of 29th December 2009. (Exhibit 308)

7.238 On 7th January 2010, the surveyors, namely, Mr. Tu’ifua and Mr. Pale with Mr. Tu’ipulotu considered the survey report of 23rd December 2009. They recommended the following which had been handwritten by Mr. Tu’ipulotu at the end of the survey report in the same manner as he did in relation to the deficiencies list of the MV Princess Ashika:

“Recommendation

We recommend to give 1 month duration of Survey Certificate while monitoring these deficiencies to rectify within this period, considering some items may have to come from overseas” (Exhibit 308)

7.239 Mr. Tu’ipulotu agreed with the surveyors that there were serious deficiencies in the MV Pulupaki and one could see from the deficiencies that there were serious problems about the safety of the vessel. On 6th January 2010, Mr. Tu’ipulotu in all his wisdom decided, contrary to facts and logic, as he did with the MV Princess Ashika, and issued a Certificate of Survey ascertaining that the MV Pulupaki “was considered to be seaworthy”. (Exhibit 295) (Appendix 58) Mr. Tu’ipulotu accepted in oral evidence that on the 23rd December 2009 and 6th January 2010 the MV Pulupaki was clearly unseaworthy and unsafe. (Exhibit 308) (T3854J -3856L)

7.240 On 14th January 2010, a report prepared by Mr. William Maddick, a marine surveyor from New Zealand, was submitted to both the Secretary for Transport, Ms. ‘Eleni Mone and subsequently to Mr. Tu’ipulotu. Mr. Maddick stated in the summary of his report that:
“I believe that this vessel is unseaworthy and should be detained. Immediate Action must be taken to stop this vessel from further operation until the issues identified in the reports by the Ministry of Transport Marine surveyor are rectified. The reports stated that there are numerous safety issues on the condition of the vessel, superstructure, its fixture and fittings together with the condition of the machinery, life saving and fire fighting. There is a lack of official certification and documentation, health and safety requirements, crew training and management operational procedures. Any one of these safety issues relate to a very serious breach of the Tonga Shipping and Seamen Act. I strongly believe that the Ministry of Transport should take immediate action to detain this vessel. As there is no backup ship for the service of the ship was providing, emergency assistance is required.” (Exhibit 323)

7.241 Mr. Tu’ipulotu indicated that he agreed with the opinion expressed by Mr. Maddick in his report on the MV Pulupaki dated 14th January 2010. Additionally, he agreed that for all of 2009, the MV Pulupaki has been unseaworthy and unsafe. (T3784E-3785C)

7.242 On 19th January 2010, Mr. Tu’ipulotu wrote a letter to Mr. ‘Uliti Uata of Uata Shipping Line, the owner of the MV Pulupaki stating that:

“I have just been instructed now at 1515 hrs by the Secretary of Transport, Ms. ‘Eleni Mone to advise you the ship owner, NOT TO ALLOW THE “MV. PULUPAKI” to leave on her normal trips but to continue current maintenance works in order to fulfil MOT Shipping Requirements.

As such, I therefore suspend her current “Certificate of Survey” now until further notice.

Your utmost compliance is very much needed in this respect.” (Underlining added) (Exhibit 302) (Appendix 59)

7.243 On 23rd January 2010, at about 9:00am in the morning, Mr. Tu’ipulotu received a phone call from Mr. Tu’i Uata requesting permission to allow the MV Pulupaki to respond to an emergency situation involving the MV Punalei. He was informed that the MV Punalei was fully loaded with oil and was on passage from Suva to Nuku’alofa and was drifting due to steering problems towards nearby reefs. It was suggested that the MV Pulupaki should set sail to Fiji to tow the MV Punalei to Ha’apai in Tonga. Mr. Tu’ipulotu, decided that the situation constituted an emergency situation and as such, it would be reasonable to allow the MV Pulupaki, a vessel which he had suspended the Certificate of Survey four days earlier, to travel some 260 miles into Fijian waters to tow the MV Punalei to Tonga. (T 3787D – 3790K)
On 25\textsuperscript{th} January 2010, Mr. ‘Uliti Uata wrote a letter entitled “Pulupaki—Emergency Application to Leave” addressed to Mr. Tu’ipulotu and was also copied to the Secretary for Transport, Ms. ‘Eleni Mone and the Acting Minister of Transport, Lord Nuku. The letter stated that:

“We received a call from MT Punalei 22/01/10 pm that her rudder broke down at a position of LAT. 18 DEGREE, 51.7 SOUTH LONG. 179 DEGREE, 42.9 WEST drifting at about 5 miles North of Totoya island at Lau Group of Fiji about 160 miles from Suva and about 260 miles from Nuku’alofa.

They made contact again on 23/01/10 and reported that the rudder is unserviceable at sea and requested immediate emergency towing as the ship was drifting at nearby reefs of the islands.

We immediately made contact with the Honourable Minister and to yourself to consider allowing Pulupaki to carry out this emergency towing operation to save the boat and the crew onboard.

At present, the Pulupaki is towing the MT Punalei at about 7 knots per hour heading toward Ha’apai Group.” (Exhibit 303)

At about 2 o’clock on 25\textsuperscript{th} January 2010, Mr. Tu’ipulotu was involved in a meeting with the Acting Minister for Transport, Lord Nuku and the Secretary for Transport, ‘Eleni Mone at the Ministry of Works. The meeting lasted approximately 20 minutes. Mr. Tu’ipulotu in the meeting explained the circumstances of his telephone conversation with Mr. Tu’i Uata on the 23\textsuperscript{rd} January 2010 and the subsequent decision to allow the MV Pulupaki to travel to Fiji to tow the MT Punalei. Mr. Tu’ipulotu indicated that the Minister stated that “in case of emergency, to save life, property, prevention of marine pollution...he will support the idea of assisting in such situations”. (T 3790K – 3792U)

On the same day, Mr. Tu’ipulotu wrote an Internal Memo to the Secretary of Transport, Ms. ‘Eleni Mone stating the following:

“I received a call from Mr. Tu’i Uata, owner of the “MV Pulupaki” about 0800hours on the 23\textsuperscript{rd} January 2010, reporting that the vessel MV Punalei on passage from Suva to Ha’apai have met steering problems and rudder unserviceable at sea. It was also reported that the vessel was drifting at nearby reefs and immediate assistance is required and asking to consider allowing the “Pulupaki” to save the Punalei and her crew and to tow her back.

The request was considered and Administration take all emergency situation seriously. We know that the “Pulupaki” is being detained and we have considered the urgency of the situation, the present condition of the vessel,
especially no cargo and passengers involved and the allowance given by the Shipping Act Cap. 136, Sec.144(3).

After much consideration of all the facts, the Administration opinion that sending the Pulupaki to assist in this emergency is quite safe and reasonable to do so.” (Underlining added) (Exhibit 304) (Appendix 60)

7.247 Mr. Tu’ipulotu accepted that the position of the MT Punalei at the time of the request over the telephone was in Fijian waters, some 100 miles closer to Suva and was 260 miles from Nuku’alofa. He agreed that the MV Pulupaki was not designed to tow vessels. Additionally, at the time he gave permission to allow the MV Pulupaki to sail, it was in an unseaworthy condition. Mr. Tu’ipulotu stated that he did not mention to Mr. Tu’i Uata if search and rescue should be contacted. He accepted that the emergency was not such that would spark in his mind to ask the question of whether search and rescue had been contacted. (T 3793 P – 3796 C)

7.248 We accept the evidence of Capt. Sosaia Katieli Mafi the Port Master, a man of enormous seagoing experience, that the circumstances surrounding the MT Punalei were much different than suggested by Mr. Tu’ipulotu. Capt. Mafi stated that the position of the MT Punalei obtained from Coastal Radio indicated that the vessel was 293 miles from Nuku’alofa and 115 miles away from Suva. Capt. Mafi also indicated that the predominant surface currents for January to February and weather conditions from Fiji Meteorological Services indicate that the MT Punalei was positioned close to a reef but it would have been drifting in a westerly direction away from the reef and it would have taken close to two days to drift to the next reef. (Exhibit 391) (Exhibit 392) (T 5086 H - 5089 T)

7.249 We accept and adopt preliminary finding number 7 in the Michael Lloyd Eno Report, dated 9th September 2009, that one of the factors considered to have contributed to the casualty was:

“The appointment of an Acting Director for Marine without the appropriate backup from the Ministry of Transport and lack of knowledge in certain areas to be able to conduct his role effectively.” (Exhibit 24, Page 26)

PART E – MRS. ‘ALASIU TUPOU

Overview of Evidence

7.250 Mrs. ‘Alasiu Tupou is a computer operator working with the Marine and Ports Division of the Ministry of Transport. She had been working as a computer operator since 1999, for the Ministry of Marine and Ports before it was effectively brought under the “umbrella” of the Ministry of Transport. Her main roles included typing documents for Marine and Ports surveyors which included deficiencies lists and
Certificates of Registration and Survey. She became aware of the temporary replacement for the MV Olovaha when she was shown a black and white photograph of the MV Princess Ashika by the former Director of Marine and Ports, Capt. William Johnson. She understood that the photograph was given to Capt. Johnson by the Managing Director of Shipping Corporation of Polynesia Limited, Mr. John Owen Jonesse.

7.251 Mrs. Tupou was involved in the preparation of all the certificates issued by the Marine and Ports Division of the Ministry of Transport in relation to the MV Princess Ashika in Tonga. On 9th June 2009 she says she was instructed by the Acting Director of Marine to prepare a Safe Manning Certificate, a Provisional Certificate of Registration for the MV Princess Ashika and an exemption letter allowing the MV Princess Ashika to travel from Fiji to Tonga. The unsigned certificates provided for the signature of Capt. William Johnson, whom Mrs. Tupou and Mr. Tu’ipulotu knew had effectively retired and ceased employment with the Ministry of Transport on 8th June 2009. Capt. Johnson on 9th June 2009 also completed the entries for the registration of the MV Princess Ashika in the Register of Ships but did not sign it. As it transpired Mr. Tu’ipulotu, on his own admission, signed the Register of Ships in July 2009 effectively endorsing the entries made by Capt. Johnson and completing the registration of the MV Princess Ashika. It is evident that Capt. Johnson did not have any authority to sign the Provisional Certificate of Survey dated 9th June 2009. This proved to be one of the first, out of a long list of significant mistakes carried out by the officials of the Marine and Ports Division of the Ministry of Transport, concerning documentation prepared in relation to the MV Princess Ashika.

7.252 On 3rd July 2009, Mrs. Tupou says she was instructed by Mr. Tu’ipulotu to prepare a Provisional Certificate of Survey for the MV Princess Ashika and backdate it to 2nd July 2009 which Mrs Tupou found to be odd. Just a mere few hours later, she was, according to her evidence, again instructed by Mr. Tu’ipulotu to prepare a second Provisional Certificate of Survey for the MV Princess Ashika and date it 3rd July 2009. It was not contained in the original documents produced by the Ministry of Transport. There is some doubt in relation to the circumstances surrounding the issuance of these two certificates, because of inconsistencies between the evidence of Mrs. Tupou and Mr. Tu’ipulotu. Additionally, Mr. Tu’ipulotu had indicated that he discovered the original Provisional Certificate of Survey dated 2nd July 2009, which he had signed himself, sitting on a tray in his office well after the MV Princess Ashika sank. It was not contained in the original documents. Documentary evidence also suggests that signed certificates issued in relation to the MV Princess Ashika were not identical to the unsigned versions of the certificate which was prepared and presented to Marine and Ports Division officials for signing.
Substantive Evidence of Mrs. Alasiu Tupou

Documents issued by the Marine and Ports Division in relation to the MV Princess Ashika

7.253 On 16th December 2009, Mrs. Tupou appeared under summons before the Commission to produce documents. Mrs. Tupou produced seven different documents in relation to the MV Princess Ashika, that had been printed from the work computer she used to prepare them for signing on 9th June 2009. They were:

- an unsigned exemption letter to allow the MV Princess Ashika to travel from Fiji to Tonga, dated 9th June 2009 providing for Mr. Tu’ipulotu’s signature; (Appendix 61)

- an unsigned Provisional Certificate of Registration dated 9th June 2009 providing for Mr. Johnson’s signature; (Appendix 62)

- an unsigned Provisional Certificate of Survey dated 9th June 2009 providing for the signature of the Director of Marine and Ports; (Appendix 63)

- an unsigned Provisional Minimum Safe Manning Certificate dated 9 June 2009 providing for Mr. Johnson’s signature; (Appendix 64)

- an unsigned Provisional Ship Station License dated 9th June 2009 providing for Mr. Johnson’s signature; (Appendix 65)

- an unsigned Provisional Certificate of Survey dated 2nd July 2009 providing for the signature of the Acting Director for Marine and Ports; (Appendix 66)

- an unsigned Provisional Certificate of Survey dated 3rd July 2009 providing for the signature of the Acting Director for Marine / Ministry of Transport. (Appendix 67) (Exhibit 183)

7.254 We note that during the course of the hearings, no signed copy of a Provisional Certificate of Survey dated 9th June 2009 or signed Provisional Ship Station License dated 9th June 2009 were produced or referred to by any of the witnesses both from the Ministry of Transport or the Shipping Corporation of Polynesia Limited. A signed exemption letter to allow the MV Princess Ashika to travel from Fiji to Tonga was produced to the Commission. (Appendix 68) (Exhibit 214) However, it was dated 8th June 2009 and signed by Captain William Johnson. A signed Provisional Certificate of Registration was produced to the Commission (Exhibit 81), dated 9th June 2009 and signed by Captain William Johnson. A signed Provisional Minimum Safe Manning Certificate was produced to the Commission (Exhibit 213), signed by Captain Johnson.
but dated 8\textsuperscript{th} June 2009. \textit{(Appendix 69)} Two Provisional Certificates of Survey were produced to the Commission dated 2\textsuperscript{nd} and 3\textsuperscript{rd} July 2009. (Exhibit 3) (Exhibit 111)

7.255 We cannot understand why the documents prepared by Mrs. Tupou, she says were prepared on 9\textsuperscript{th} June 2009 providing for the certain signatures and all dated 9\textsuperscript{th} June 2009, as stated in her evidence, which were printed from her work computer and produced to the Commission, have either been signed by a different person or dated 8\textsuperscript{th} June 2009. These include the exemption letter to allow the MV Princess Ashika to travel from Fiji to Tonga (Exhibit 214) and the Provisional Minimum Safe Manning Certificate (Exhibit 213). Additionally, the unsigned Provisional Certificate of Survey dated 3\textsuperscript{rd} July 2009 \textit{(Appendix 67)} which Mrs. Tupou had prepared for Mr. Tu’ipulotu to sign on 3\textsuperscript{rd} July 2009 is different from the signed Provisional Certificate of Survey dated 3\textsuperscript{rd} July 2009, \textit{(Appendix 19)} produced to the Commission (Exhibit 111). The unsigned Certificate produced by Mrs. Tupou provided that the maximum number of passengers to be carried by the MV Princess Ashika was 350 whilst the signed Certificate provided for 300.

7.256 The evidence of Mrs. Tupou coupled with the evidence of Mr. Tu’ipulotu, Captain William Johnson and the numerous documents produced to the Commission in relation to the documentation issued by the Marine and Ports Division of the Ministry of Transport in relation to the MV Princess Ashika casts serious doubts over the circumstances surrounding their issuance and the authenticity of those documents.

\textbf{Registration of the MV Princess Ashika}

7.257 Mrs. Tupou in oral evidence stated that on 9\textsuperscript{th} June 2009, the Acting Director of Marine and Ports, Mr. Viliami Tu’ipulotu instructed her to prepare in relation to the MV Princess Ashika a Provisional Certificate of Registration, a Provisional Minimum Safe Manning Certificate, Provisional Certificate of Survey, Provisional Ship Station License and an Exemption Letter dated 9\textsuperscript{th} June 2009 to allow the MV Princess Ashika to travel from Fiji to Tonga. Additionally, Mr Tu’ipulotu did not have the relevant information to enable Mrs. Tupou to complete the documents that she was asked to prepare and were all dated 9\textsuperscript{th} June 2009. She accepted that the Certificates provided for Capt. Johnson’s signature. Mr. Tu’ipulotu had instructed her to use prior formats for these document from the Marine and Ports Division computers. She indicated that the information that was contained in the Certificates she prepared was provided to her by Captain Johnson. (T 4383 R- 4386 S)

7.258 Mrs. Tupou accepted that by 9\textsuperscript{th} June 2009, she was aware that Captain Johnson was no longer the Director of Marine and Ports and an employee of the Ministry of Transport. \textit{(Exhibit 217)} \textit{(Appendix 70)} She indicated that Mr. Tu’ipulotu had constantly contacted Captain Johnson to come into the office to assist Mr Tu’ipulotu
and to clarify certain issues in relation to the registration of vessels. Mrs. Tupou indicated that for two weeks after 8th of June 2009, the date Captain Johnson ceased employment with the Ministry of Transport, Captain Johnson would spent hours in the office and would always talk with Mr. Tu’ipulotu. Additionally, on 9th and 10th of June 2009 Captain Johnson had spent the whole day at the Marine and Ports Division Office. (T 4386 T- 4388 P)

7.259 Mrs. Tupou was asked why Captain Johnson’s name was put in the Certificates dated 9th June 2009, knowing full well that Capt. Johnson had retired and ceased employment with the Ministry of Transport on 8th June 2009. She indicated that she had raised the exact issue with Mr. Tu’ipulotu because she was of the opinion that Mr. Tu’ipulotu should sign the Certificates but Mr. Tu’ipulotu directed her to leave Captain Johnson’s name on the Certificates. Captain Johnson signed the Provisional Certificate of Registration dated 9th of June 2009 despite his retirement coming into effective on 8th June 2009. (Appendix 70) Mrs Tupou found the situation very odd because she knew that Captain Johnson no longer had the authority to sign the Certificate. (T 4400 P - 4402 I)

7.260 Mrs. Tupou admitted that the Certificates that she prepared on 9th June 2009, all provided for Captain Johnson’s signature. However the unsigned letter she prepared, which was produced under summons, in relation to Exemption for Princess Ashika provided for Mr. Tu’ipulotu’s signature. ( Exhibit 183) Mrs. Tupou was questioned as to why all the Certificates provided for Captain Johnson’s signature and the unsigned Exemption Letter provided for Mr. Tu’ipulotu’s signature. She proffered the explanation that she had only done what she was instructed to do by Mr. Tu’ipulotu. Mrs. Tupou stated that Mr Tu’ipulotu had told her that he did not have the authority to sign for the Certificates on 9th June 2009 which was obviously not the case, in fact, it was Captain Johnson who did not have the authority to sign the Certificates. (T 4402 J - 4404 O)

7.261 In late June, early July 2009, Mr. Jonesse saw Mrs. Kalesita Taumoepeau, Personal Assistant to Mr. Karalus, with a document which was signed by Captain Johnson. He requested that she placed the Ministry of Transport official stamp on it. Mrs. Kalesita Taumoepeau noticed that it was a single page document on the letter head of the Ministry of Transport which was dated 8th June 2009. As she was aware that Captain Johnson retired as of 8th June 2009, Mrs. Taumoepeau refused to stamp the document requested by Mr. Jonesse. The letter related to the purported exemption to allow the MV Princess Ashika to carry out a delivery voyage from Fiji to Tonga. (Appendix 68) (Exhibit 349 paragraphs 84 and 85; T 4574 – 4579; Exhibit 354) Mrs. Kalesita Taumoepeau also indicated that Ms. Finau also informed her that she had also been approached by Mr. Jonesse in the same manner and she also refused to
stamp the document. We have serious reservations in relation to the authenticity of the exemption letter purported to be signed by Captain Johnson on 8th June 2009.

7.262 Mrs. Tupou indicated that it was proper and normal procedure that before a vessel is registered in the Register of Ships and a Certificate of Registration issued, an application for registration will have to be lodged at the Marine and Ports Division of the Ministry of Transport and accompanied by the relevant fees. Mrs. Tupou in oral evidence was shown a copy of an Application for Registration of a Tongan Vessel in relation to the MV Princess Ashika dated 8th June 2009. (Appendix 56) She accepted that in the space provided for the applicant to sign the words “Ministry of Transport” was printed. She accepted that in relation to the Application for the Registration of the MV Princess Ashika dated 8th June 2009, the relevant fees had not been paid to warrant the consideration of the application and the issuance of a Provisional Certificate of Registration. (Exhibit 80) (T 4410 J -4413 G)

7.263 Mrs. Tupou indicated that on 9th June 2009, when Mr. Jonesse attended the Marine and Ports Division office to take the Provisional Certificate of Registration for the MV Princess Ashika, she informed him that he must pay the relevant fees before taking the Certificate. She stated that Mr. Jonesse informed her that this was an urgent matter because the MV Princess Ashika was supposed to leave Fiji on that day and that he had already talked to the Minister of Transport, Mr. Karalus, and that the Minister was aware of it. (T 4414 H – 4416 M)

7.264 Mrs. Tupou stated that she was aware that Captain Johnson on 9th June 2009 completed the entries for the registration of the MV Princess Ashika in the Register of Ships but did not sign it. As it transpired, Mr. Tu’ipulotu, on his own admission, signed the Register of Ships in July 2009 effectively endorsing and completing the registration of the MV Princess Ashika. Mrs. Tupou when shown a copy of the Register of Ship (Exhibit 110) identified in relation to the registration of the MV Princess Ashika, the handwriting of Captain Johnson in relation to the entries regarding the details of the vessel and the signature of Mr Tu’ipulotu endorsing the entries made by Captain Johnson on 9th June 2009. Mrs. Tupou could not understand why Captain Johnson completed the Register but did not sign, because it was normal that the person, which should be the Registrar of Ships, should complete and sign the Register of Ships. (T 4404 M – 4406 N) As previously stated in relation to the Provisional Certificate of Registration for the MV Princess Ashika dated 9th June 2009, Captain Johnson did not have any authority on 9th June 2009 to complete the registration entries for the MV Princess Ashika on the Register of Ships.

Provisional Certificate of Survey for the MV Princess Ashika

7.265 Mrs. Tupou stated that on 3rd July 2009 the Acting Director of Marine and Ports, Mr. Tu’ipulotu, instructed her to prepare a Provisional Certificate of Survey for the MV
Princess Ashika and directed her to backdate the certificate to 2nd July 2009 (Appendix 20). She accepted that it was an unusual practice to prepare a Provisional Certificate of Survey and backdate it. Within a space of 3 hours she was again instructed by Mr. Tu’ipulotu to prepare another Provisional Certificate of Survey and date it 3rd July 2009 (Appendix 19). She indicated that the information to complete both the Provisional Certificates of Survey was provided by Mr. Tu’ipulotu. (T4407 D – 4409 M)

7.266 We accept that there is inconsistency in the evidence provided by Mrs. Tupou and the Acting Director of Marine and Ports, Mr. Tu’ipulotu. Mrs. Tupou maintained in her evidence that on 3rd July 2009 the Provisional Certificate of Survey, dated 2nd July 2009 was issued first, and the Certificate dated 3rd July 2009 was issued a few hours later. (T2409 R-T) Mr. Tu’ipulotu however stated in his evidence that on 3rd July 2009 the Provisional Certificate of Survey, dated 3rd July 2009 was issued first and the Certificate dated 2nd July 2009 was issued afterwards. (T 1584- 1586 O-P) Mr. Tu’ipulotu has also indicated in his evidence that he found the original Provisional Certificate of Survey dated 2nd July 2009 (Exhibit 3), which he had signed himself, sitting on a tray in his office well after the vessel sank. (T 19 D-20 J) (T 1581 O-1582 F) Significantly, the Provisional Certificate of Survey dated 2nd July 2009, Mr. Tu’ipulotu discovered in his office was an original, a copy of which was never produced to the Commission by any official from Shipping Corporation of Polynesia Limited who should have at least had a copy of that Certificate. Additionally, the Provisional Certificate of Survey dated 3rd July 2009, produced to the Commission by Shipping Corporation of Polynesia Limited, was never produced by any official of the Ministry of Transport officials who as the issuing authority should have in their files a copy of the Certificate. The numerous inconsistencies, the circumstances surrounding the discovery of the original Provisional Certificate of Survey dated 2nd July 2009 and the production of a different Certificate of Survey by the Ministry of Transport from that by Shipping Corporation of Polynesia Limited, casts serious doubts over the authenticity of both Provisional Certificates of Survey. It might be open to suggest that the Provisional Certificates of Survey for the MV Princess Ashika might not have been issued on the dates to which they purport to have been issued.

7.267 Mrs. Tupou indicated that the Marine and Ports Division of the Ministry of Transport had 3 operational computers at the beginning of 2009 but one had broken down during the year and was not repaired or replaced. She indicated in her oral evidence that the Marine and Ports Division currently had 2 operating computers shared between 9 staff members. She accepted that the Marine and Ports Division were in need of more computers and that it would take 3 or 4 computers to effectively run and operate the Marine and Ports Division of the Ministry of Transport. She indicated that she had raised the issue of the lack of computers with the Acting Director of Marine and Ports, Mr Tu’ipulotu and he indicated that it had already
been conveyed to the persons within the Ministry of Transport in charge of that area. (T 4388 Q - 4391 A)

7.268 Mrs. Tupou indicated that Mr. Tu’ipulotu does not personally prepare Certificates in relation to Registration or Survey of Vessels. Mr. Tu’ipulotu had the habit of instructing Mrs. Tupou to prepare certificates for vessels but would not direct her specifically as to the types of Certificates to be prepared, but would only direct her to use precedence from current files on other vessels held by the Marine and Ports Division. Effectively Mr. Tu’ipulotu was relying on Mrs. Tupou to prepare important certificates in relation to vessels. Mrs. Tupou admitted that she had no training in the maritime industry and had no training as to what certificate may or may not be required as a matter of law. Additionally, she would only rely on what people instructed her to prepare. (T 4391 B-T) We accept that Mr. Tu’ipulotu should have personally prepared Certificates of Registration or Survey himself and should have not relied on precedence contained in Marine and Ports files or Mrs. Tupou, a person with no maritime experience to prepare such important documents.

7.269 On 1st July 2009, Mrs. Tupou was told by Mr. Lou Pale and Mr. ‘Onesi Tu’ifua, marine surveyors of the Ministry, that they had seen the MV Princess Ashika upon arrival and that the vessel was not seaworthy. She indicated that continuously between the arrival of the MV Princess Ashika and when it sank the surveyors, namely, Mr. Tu’ifua and Mr. Pale maintained that the vessel was not seaworthy and it was clear from their conversations that they were not happy about the vessel. On one occasion she was told by Mr. Pale that “they should berth the Ashika and make it as a restaurant ... that the ship is not safe to travel in Tonga”. Mrs. Tupou indicated that during these various conversations where the surveyors expressed their views and dissatisfaction with the MV Princess Ashika openly, Mr Tu’ipulotu was present and he would only react with a smile. (T 4417 l – 4420 R)

PART F – MS. ‘OFA FINAU

Overview of Evidence

7.270 Ms. Finau currently holds the position of the Assistant Secretary, Legal in the Ministry of Transport. She obtained a Bachelor of Arts Degree from the University of the South Pacific, Fiji in 2004. In February 2005, Ms. Finau became the Assistant Secretary in the Ministry of Marine and Ports and continued to hold that position in 2006 and 2007 when the Ministry of Marine and Ports merged with the Ministry of Civil Aviation. In 2008, she obtained a Masters of Science Degree in Maritime Affairs, specialising in Maritime Policy from the World Maritime University in Sweden. She resumed work in October 2008, after obtaining her Masters Degree, and formally became the Assistant Secretary, Legal in May 2009.
7.271 Ms. Finau was involved together with the Acting Director of Marine and Ports, Mr. Tu’ipulotu, in an evaluation Committee constituted to evaluate bid documents in relation to awarding a Government subsidy for operating the shipping route to the Niua. Shipping Corporation of Polynesia, which proposed to operate the MV Princess Ashika, was one of the two bidders for the Government subsidy. On 6th July 2009, Mr. Tu’ipulotu provided the Committee with a Certificate of Survey for the MV Princess Ashika and advised the Committee that the vessel was seaworthy. This is despite the fact that Mr. Tu’ipulotu saw the MV Princess Ashika on 1st July 2009 and formed the view that the vessel was totally unsuitable for Tongan waters. Additionally, Mr. Tu’ipulotu on 3rd July 2009 was provided with a three page deficiencies list of the MV Princess Ashika on which he identified major deficiencies which indicated that the MV Princess Ashika was clearly unseaworthy.

Substantive Evidence of Ms. ‘Ofa Finau

Roles and Responsibilities

7.272 Ms. Finau accepted that part of her duties in terms of her position as Assistant Secretary, Legal was to ensure that the Ministry of Transport remain compliant with its national and international legal obligations which includes compliance with the Shipping Act, Shipping Regulations, SOLAS and other International Conventions. Effectively, Ms. Finau was tasked with advising the Ministry of Transport in relation to international and national aspects of law.

Niua Shipping Subsidy Contract

7.273 Ms. Finau was a member of the Evaluating Committee for Bid documents in relation to the Niua Shipping Subsidy Contract together with Finau Moa, Mandie Finau and Viliami Tu’ipulotu, all of whom are Ministry of Transport employees. The subsidy contract was to be awarded to the successful bidder to operate the Niua shipping route. The bid documents were opened on 30th June 2009. The only 2 bidders were Shipping Corporation of Polynesia Limited who was to operate the MV Princess Ashika and Walter Trading Company Limited who operated the MV Pulupaki and the MV Tautahi. The Evaluating Committee met on 1st July 2009 to evaluate the bids, however Mr. Tu’ipulotu informed the Committee that the MV Princess Ashika was to be surveyed on 2nd July 2009 so the bid evaluation was adjourned to the 3rd July 2009. Mr. Tu’ipulotu was not available on the 3rd July 2009, so the committee did not meet until 6th July 2009. (Exhibit 343, Paragraph 13-15, 17-18)

7.274 Ms. Finau stated that on evaluating the bid from Walter Trading Company Limited and on advice from the Acting Director of Marine and Ports, Mr. Tu’ipulotu, it was determined that the Provisional Certificate of Survey for MV Pulupaki expired on 27th July 2007 and there was a technical problem in respect of MV Tautahi. Ms. Finau had
checked in 2009 the Marine and Ports files on the MV Pulupaki and found Mr. Tu’ipulotu’s advice to be correct according to the information containing in the files. However in early 2010, Ms. Finau discovered that there were 3 different files held by the Marine and Ports Division in relation to the MV Pulupaki despite being assured by Mr. Tu’ipulotu on 1st July 2009 that there were 2 files on the MV Pulupaki. She conceded that Mr. Tu’ipulotu’s advice on 1st July 2009, in relation to the MV Pulupaki was incorrect and that the MV Pulupaki was in fact in survey on 1st July 2009. Ms. Finau accepted that there is a complete disorganisation in terms of filing documents at the Ministry of Transport. Additionally, the Marine and Ports Division do not have logs, indexes or books kept showing clearly when Certificates of Survey are issued in respect of different vessels. (T 4445 B- 4456 Q)We accept that it is very critical for the Marine and Ports Division of Ministry of Transport to keep accurate records in relation to survey of vessels, so that vessels are surveyed in a timely fashion and vessels are not allowed to operate out of survey.

7.275 Ms. Finau agreed that in the case of MV Pulupaki when they were considering the bid the evaluating committee proceeded on the premise that the MV Pulupaki Certificate of Survey expired in 2007 and that was one of the fundamental premises in rejecting the bids in relation to the MV Pulupaki. Additionally, Ms. Finau accepted that in relation to the bid on behalf of the owners of MV Pulupaki a disservice and injustice was placed on their bid to the extent that a fundamental assumption was made which was wrong. (T 4456 Q - 4457 G)

7.276 Ms. Finau indicated in oral evidence that on 6th July 2009, in evaluating the bid Mr. Tu’ipulotu showed the evaluating committee a Provisional Certificate of Survey for the MV Princess Ashika. Ms. Finau stated that she asked Mr. Tu’ipulotu why a Provisional Certificate of Survey was issued instead of a Certificate of Survey, and Mr. Tu’ipulotu replied that Shipping Corporation of Polynesia Limited have been advised to rectify certain deficiencies on the vessel. (T 4458 C-S) Ms. Finau also indicated that Mr. Tu’ipulotu had informed them on 6th July 2009, that the MV Princess Ashika was seaworthy. (T 4461 O- 4462 B) The assurances made by Mr. Tu’ipulotu to the evaluating committee on 6th July 2009 was false and contrary to overwhelming evidence put before Mr. Tu’ipulotu before 6th July 2009 in relation to the unseaworthiness of the MV Princess Ashika.

7.277 The Niua Shipping Subsidy Contract was subsequently awarded to Shipping Corporation of Polynesia Limited who were to operate the MV Princess Ashika on the Niua shipping route. As a consequence, the MV Princess Ashika a vessel which had been stated by the Acting Director of Marine and Ports, Mr. Tu’ipulotu and his surveyors in oral evidence to be totally unsuitable to operate in Tongan waters, was to travel over the longest distance a domestic shipping vessel could possibly travel in open waters in Tonga.
Draft Charter Agreement

7.278 Ms. Finau was told by the Minister of Transport, Mr. Paul Karalus, approximately a week before the arrival of the MV Princess Ashika in Tonga that Mr. John Jonesse, the General Manager of the Shipping Corporation of Polynesia Limited will give her a draft Charter Agreement and she was to check the wording to see if it was applicable to the Laws of Tonga and she was to work together with Mr. Jonesse on the Draft Charter Agreement. When Mr. Jonesse gave the Draft Charter Agreement to Ms. Finau, that was the first time she became aware of the replacement vessel for the MV Olovaha namely, the MV Princess Ashika. (Exhibit 343 Paragraph 10-11)

7.279 Ms. Finau stated that on 26th June 2009, Mr. Jonesse had come to the office of the Ministry of Transport, which was the original date set to open the bid documents for the Niua Shipping Service, with two copies of certificates saying that they were the Survey Certificates for the MV Princess Ashika. The two certificates provided by Mr. Jonesse were in fact a Safe Manning Certificate (Appendix 71) and a Radio Survey Certificate (Appendix 72) issued in Fiji. Ms. Finau informed Mr. Jonesse that the Certificate he had provided were not Certificates of Survey. (Exhibit 343 paragraph 24, Annexure H)(T 4462 P- 4463 T)

7.280 On 29th June 2009, Ms. Finau gave Mr. Karalus a copy of the amended Draft Charter Agreement for his information. However Mr. Karalus told Ms. Finau that the Board of Directors of Shipping Corporation did not like the Draft Charter Agreement as amended by Ms. Finau and after contacting Lord Dalgety QC the Minister told her that the Shipping Corporation is referring the matter to maritime lawyers in New Zealand. (Exhibit 343 paragraph 21) Ms. Finau indicated that Mr. Karalus called Lord Dalgety QC on the phone while she was still in his office, and Mr. Karalus told her that Lord Dalgety QC told him that the Board of Directors have referred the matter to maritime lawyers in New Zealand. (T 4472 H- 4474 I)

7.281 Ms. Finau in paragraphs 22 and 23 of her affidavit deposed to the effect that negotiations between the Ministry of Transport and Shipping Corporation of Polynesia Limited in relation to the charter agreement for the MV Princess Ashika had reached a stalemate. The Minister of Transport proposed to Ms. Finau that a general meeting will be called which will be attended by Mr. Jonesse to discuss the charter agreement. She stated that by “the time Princess Ashika sank the meeting which the Minister was going to arrange had not been held”. (Exhibit 343) No written charter agreement was entered into by the Ministry of Transport and the Shipping Corporation of Polynesia Limited by the time the MV Princess Ashika sank.

7.282 On 2nd July 2009, Mr. Karalus emailed Mr. Jonesse and Ms. Finau the following:

“Dear John
As per our on-going discussions please be advised that the Ministry of Transport agrees to the operation of the MV Princess Ashika for the month of July for the fee of $5,000. During this period the full terms and conditions of a lease agreement are to be conducted and concluded. During this month the SCP is to ensure full compliance with the laws of the sea and port management in the operation of the vessel as per the survey documentation. This interim will also allow us to negotiate a charter rate.

Happy sailing!!

Paul” (Appendix 73) (Exhibit 29 page 68)

PART G - LORD NUKU

Overview of Evidence

7.283 Lord Nuku was appointed the Minister of Works in 2006 and was appointed by Cabinet in August 2009 as the Acting Minister for Transport after the resignation of the former Minister for Transport, Mr. Paul David Karalus.

7.284 During late December 2009 and early January 2010, documents had been brought to Lord Nuku’s attention, as Acting Minister of Transport, that clearly indicated that the MV Pulupaki was unseaworthy and unsafe. The first document was a survey report prepared by the surveyors of the Marine and Ports Division dated 23\textsuperscript{rd} December 2009 accompanied by supporting photographs. The second was a report prepared by Mr. William Maddick, a marine surveyor from New Zealand, dated 14\textsuperscript{th} January 2010. Mr. Maddick’s report recommended that the MV Pulupaki be detained because it was unseaworthy and unsafe. On 19\textsuperscript{th} January 2010 the MV Pulupaki’s Certificate of Survey was “suspended” by the Ministry of Transport by way of letter from the Acting Director of Marine and Ports, Mr. Tu’ipulotu, to the owner of the vessel. Remarkably, this vessel on 23\textsuperscript{rd} January 2010 was allowed to sail to a position over 260 miles from Nuku’alofa allegedly to tow the MT Punalei, an oil tanker back to Tonga from deep within Fijian waters. We accept that despite Lord Nuku’s denial, the evidence establishes that he was aware and authorised the MV Pulupaki to sail on 23\textsuperscript{rd} January 2010 before it departed.

Substantive Evidence of Lord Nuku

Cabinet Decision of 22\textsuperscript{nd} December 2009

7.285 Lord Nuku indicated in sworn evidence that shortly before Christmas in 2009, he was aware that a radio announcement broadcasted that the Ports Authority would not allow the MV Pulupaki to return to port in Nuku’alofa. On Tuesday 22\textsuperscript{nd} December 2009, the Ports Authority radio announcement was raised in a Cabinet meeting.
Cabinet unanimously resolved that the public announcements cease immediately and that the MV Pulupaki be allowed to berth at the Queen Salote Wharf.

7.286 Cabinet Decision No. 1187 of 22nd December 2009 (Appendix 74) provided that:

“That the Chief Secretary & Secretary to Cabinet to write, as a matter of urgency to Ports Authority and direct them:-

1. That the public announcement with respect to the movement and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2. That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature;

3. That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its current trip for usual loading and unloading purposes.” (Underlining added) (Exhibit 331)

7.287 Lord Nuku accepted that the Cabinet Decision No. 1187 of 22nd December 2009, effectively allowed the MV Pulupaki to sail into Nuku’alofa. Additionally, the decision of 22nd December 2009 was made irrespective of whether the vessel was seaworthy or unseaworthy. (T 4302 S – 4307 I)

7.288 Lord Nuku indicated that Cabinet was unaware that the reason why the public announcement was put on the radio is because the MV Pulupaki had left Nuku’alofa without a departure clearance which was a breach of Ports Authority Code Standing Orders issued under the Ports Authority Act. The evidence establishes that when the vessel left Nuku’alofa it was carrying more passengers than that permitted by the Certificate of Survey. Lord Nuku admitted, that it did not cross his mind that Ports Authority might have a good reason to stop the vessel coming back into the Queen Salote Wharf. Cabinet, when resolving to allow the MV Pulupaki to berth at Queen Salote Wharf on 22nd December, 2009 acted in ignorance of the fact that the vessel had left port without a departure clearance and was in breach of Ports Authority Standing Orders. (Exhibit 327) (T 4149 F - 4152 P)

Detention of the MV Pulupaki

7.289 Lord Nuku, during his sworn evidence admitted that he had been shown in late December 2009 various photographs of the MV Pulupaki taken by the Marine and Ports Division surveyors. He was also shown further coloured photographs produced to the Commission by the Acting Director of Marine and Ports, Mr. Tu’ipulotu. Lord Nuku accepted that the photographs portray a vessel in very poor condition and it was clearly evident that the MV Pulupaki was unseaworthy. (Exhibit 319; T 4136 M – 4139 B)
7.290 On 17th January 2010, Lord Nuku received from the Secretary for Transport, Ms. ‘Eleni Mone, a survey report dated 14th January 2010, conducted by a surveyor from New Zealand, Mr. William Maddick in relation to the MV Pulupaki. After Lord Nuku received the report, a meeting was called which was attended by himself, Mr. Tu’ipulotu, Ms. ‘Eleni Mone and Mr. William Maddick to discuss the survey report prepared by Mr. Maddick. Lord Nuku accepted that Mr. Maddick raised serious concerns about the safety and condition of the MV Pulupaki and that it did not comply with the Shipping Act and was therefore unseaworthy. (T 4139 R – 4143 F)

7.291 Lord Nuku agreed with the opinion expressed by Mr. William Maddick in his report of 14th January 2010 stating:

“I believe that this vessel is unseaworthy and should be detained. Immediate Action must be taken to stop this vessel from further operation until the issues identified in the reports by the Ministry of Transport, Marine surveyor are rectified. The reports stated that there are numerous safety issues on the condition of the vessel, super structure, its fixtures and fittings together with the condition of the machinery, life saving and fire fighting. There is a lack of official certification and documentation, health and safety requirements, crew training and management operational procedures. Anyone of these safety issues relate to a very serious breach of the Tonga Shipping and Seamen Act. I strongly believe that the Ministry of Transport should take immediate action to detain the vessel. As there is no back up ship for the service the ship was providing, emergency assistance is required.” (Exhibit 323) (T 4143 G – U)

7.292 Lord Nuku indicated that upon reading Mr. Maddick’s report, he was alarmed and concerned. He accepted that the report was reliable and accurate and he had no reason to disbelieve the contents, accuracy and recommendations of Mr. Maddick’s report. It was clear from the report that the MV Pulupaki was unseaworthy and unsafe and should be detained in order to rectify the identified deficiencies. Lord Nuku indicated that the report clearly suggests, and on advice from the surveyors of the Marine and Ports Division, that it would take several months to rectify the deficiencies. (T 4144 A – 4147 L)

7.293 Lord Nuku accepted that it was his duty and responsibility to detain vessels which are unseaworthy. We accept that the Minister of Transport is the only person empowered under the Shipping Act to detain unseaworthy vessels. As a consequence of Mr. Maddick’s report, stating that the MV Pulupaki was unseaworthy and unsafe, the vessel’s Certificate of Survey was suspended on 19th January 2010.

7.294 Ms. Mone the Secretary for Transport in sworn evidence said that she orally advised the Acting Minister for Transport, Lord Nuku, at a meeting in January 2010 that the
MV Pulupaki should be detained because it was unseaworthy and unsafe. (T 3597 H – U) Lord Nuku responded by indicating that “we should carry out what the law tells us”. Ms. Mone accepted in oral evidence that if she received information to suggest that the MV Pulupaki was unseaworthy and unsafe, she had a duty and obligation to advise the Minister. When Ms. Mone gave evidence on 25th January 2010, she accepted that it was recently determined by the Ministry of Transport that the MV Pulupaki was unseaworthy and should be detained.

On 19th January 2010, Mr. Tu’ipulotu wrote a letter to Mr. ‘Uliti Uata of Uata Shipping Line, the owner of the MV Pulupaki stating that:

“I have just been instructed now at 1515 hrs by the Secretary of Transport, Ms. ‘Eleni Mone to advise you the ship owner, NOT TO ALLOW THE “MV. PULUPAKI” to leave on her normal trips but to continue current maintenance works in order to fulfil MOT Shipping Requirements.

As such, I therefore suspend her current “Certificate of Survey” now until further notice.

Your utmost compliance is very much needed in this respect.” (Underlining added) (Exhibit 302) (Appendix 59)

On 23rd January 2010, despite its detention, the MV Pulupaki was permitted to leave Nuku’alofa. Lord Nuku states that on 23rd January 2010, Mr. ‘Uliti Uata informed him on the phone stating that there was a problem with one of his vessels, the oil tanker MT Punalei, which was drifting somewhere between Tonga and Fiji. Lord Nuku stated that Mr. Uata did not ask him whether the MV Pulupaki should sail but only inquired about some urgent emergency assistance. He indicated that a ship was required for the emergency but the MV Pulupaki was not specifically mentioned. Lord Nuku indicated that he advised Mr. Uata to liaise with the Acting Director of Marine and Ports, Mr. Tu’ipulotu in relation to his concerns. (T 4158 M – 4161 D)

Lord Nuku stated that he only became aware that the MV Pulupaki had left to tow the MT Punalei on 25th January 2010. He accepted that the MV Pulupaki had sailed on 23rd January 2010 in an unseaworthy condition. He stated that he had been advised that the detention only applied to carriage of passengers and cargo. He later conceded that the lives of crew members on the MV Pulupaki were equally as important as that of passengers and it was still unlawful to send an unseaworthy ship to sea whether it was carrying passengers or not carrying passengers. He was well aware that it was an offence to allow a ship to sail whilst under detention or unseaworthy. He proffered his opinion that in cases of emergency, something had to be done. He admitted in oral evidence that the Crown Law office was not consulted to offer legal advice on whether the vessel MV Pulupaki should sail whilst under
detention. We accept that the most appropriate cause of action that should have been undertaken was to urgently consult the Crown Law Department or the Solicitor General, given the circumstances, to advice on the issue, especially in circumstances where the Shipping Act could be breached and that lives might be unnecessarily put at risk. (T 4161 O – 4163 I)

7.298 Ms. Mone in oral evidence said that she made inquiries at the Ministry of Transport after giving evidence before the Commission on 25th January 2010 and became aware that the MV Pulupaki left port on 23rd January 2010. She was informed by Mr. Tu’ipulotu that the MV Pulupaki was permitted to sail in accordance with an emergency trip to the seas between Tonga and Fiji, in order to tow the MT Punalei which was said to be undergoing some problems due to its rudder not working. (T 3730 S – U) Mr. Tu’ipulotu said that he had spoken to Lord Nuku. Accordingly, Ms. Mone organised a meeting to talk to Mr. Tu’ipulotu and Lord Nuku. Ms. Mone raised the fact that she had not been informed of the decision to let the MV Pulupaki sail. Ms. Mone said that she needed to know what happened. Mr. Tu’ipulotu explained that:

“She had received the request from the ship owner and this request - and he had spoken to the Minister and the Minister had directed Viliami Tu’ipulotu to work with it and that they had agreed and approved that in the nature of the request and due to the emergency of the request that the MV Pulupaki should sail with only the crew, only in terms of distress to help tow in the Punalei, which was drifting between Fiji and Tonga. That is my recollection of the conversation that was held.” (Underlining added) (T 3734 B – E)

7.299 Ms. Mone gave sworn evidence that during this meeting “Lord Nuku confirmed that he had approved the action to be taken” which was “to allow the vessel to sail”. (T 3734 E-H) In a diary entry taken by Ms. Mone on 25th January 2010, records in relation to the MV Pulupaki, “Min. authorise decision by A/D M&P”, “Min” being a Reference to the Minister and “A/D M&P” a reference to the Acting Director of Marine and Ports, Mr. Tu’ipulotu. This was denied in oral evidence by Lord Nuku. (T 4166 R – 4167 P) We accept the evidence of Ms. ‘Eleni Mone that Lord Nuku was aware and authorised the MV Pulupaki to leave whilst her Certificate of Survey was suspended and with knowledge that it was unseaworthy.

7.300 Lord Nuku indicated that during the meeting, Mr. Tu’ipulotu had informed him that in cases of an emergency, it would be lawful under the Shipping Act to allow a detained vessel to sail. As it transpired from the evidence of Mr. Tu’ipulotu, the MV Pulupaki travelled some 260 miles away from Nuku’alofa to tow the MT Punalei which was allegedly drifting towards reefs in the Lau Group in Fiji. The evidence also established that the position of the MT Punalei was 100 miles closer to Suva than Nuku’alofa. The MV Pulupaki was not designed to tow vessels. It is not possible to
adduce from these circumstances how one could consider it reasonable to send an unseaworthy vessel, to the extent that it was her Certificate of Survey was suspended only days earlier, to travel over 260 miles from Nuku’alofa to tow an oil tanker.
CHAPTER 8 - SHIPPING CORPORATION OF POLYNESIA

8.1 The Shipping Corporation of Polynesia (hereinafter referred to as SCP) is a limited liability company registered in the Kingdom of Tonga under the Companies Act. The company has been conducting shipping operations in Tonga for many years. The company records reveal that all the shares are and were owned by the Government of Tonga. (Exhibit 41) Shipping Corporation of Polynesia is a “public enterprise” under the Public Enterprises Act.

8.2 A company profile (Exhibit 23) discloses the following persons as Directors:

Mrs. ‘Alisi Taumoepeau (Chairperson), Reverend Tevita Haukinima, Mr. John Jonesse, Managing Director (and Lord Ramsay Dalgety QC as the Company Secretary).

8.3 SCP were the operators of the MV Princess Ashika up to the time of the sinking. They have contested the fact that they were the owners. This was principally one of the “defences” of Lord Dalgety QC, who in attempting to absolve himself from any responsibility for this tragedy, claimed that any responsibility lay solely with the owners, namely the Government. But for a person who said he knew his way round admiralty legislation, he had a poor knowledge of the Shipping Act. He did not appreciate that SCP was an “owner” within the meaning of that term in section 2 of the Shipping Act until his attention was drawn to this by Counsel Assisting during the course of his evidence. Section 2 of the Act defines an “owner” as follows:

““Owner” means in respect of a ship the person whose name appears as owner, or as co-owner jointly and severally with others, of the ship or of a ship or of a share in it in the register that records the ship’s particulars in compliance with the law of the State whose flag the ship is flying and includes:

(a) a charter by demise

(b) the operator of the ship; and

(c) any other person exercising control over the navigation of that ship, its equipment or its crew;”

The acquisition of the MV Princess Ashika:

8.4 SCP had operated the MV Olovaha for a number of years as its main inter-island ferry (cargo and passengers), principally between Tongatapu, Ha’apai, Vava’u and the Niuas. This is an essential service between the islands for the people and for the economy. Consequently, there was much concern for the deteriorating state of the MV Olovaha, not least due to its age but also exacerbated by the lack of
maintenance. In particular, the MV Olovaha suffered from serious mechanical and electrical problems.

8.5 Shipping Corporation of Polynesia had proposed that the MV Olovaha be replaced by a new vessel under Japan’s grant aid programme and originally this vessel (which would also be called MV Olovaha) was proposed to be delivered by 2009. As the evidence of Mr. Karalus, (the former Minister of Transport), discloses, Shipping Corporation of Polynesia was charged with the setting up of a team to commence the pre-design scoping for the new vessel as early as 2006. There were then delays in the design process and building of the new ship and it was not expected that it would be ready for service until late 2010. It was resolved that it was not financially viable or technically feasible to keep the MV Olovaha in operation until that time. It was estimated that the cost to do so was over TOP$800,000.

8.6 SCP was strongly encouraged to search for a short term vessel to fill the gap until the arrival of the new Japanese vessel.

8.7 The Board of SCP and the Company Secretary had a formal meeting of the Board on 17th March 2009. In a report prepared by Mr. Jonesse for this Board meeting, it was noted that the MV Olovaha was over 29 years old; had been due for replacement 6 years ago and had no significant maintenance since 1993. There is evidence before the Commission that supports the conclusion that the MV Olovaha was in fact unseaworthy and unsafe by late 2008.

8.8 At a Board meeting of SCP on 17th March 2009, the report concerning the MV Olovaha was reviewed by the Directors and “it was clear to them that realistically there were only two options”, which were:-

(a) Maintain the Olovaha in service; or

(b) Replace the Olovaha without delay.

8.9 It was noted that after discussions, the Directors unanimously resolved to recommend option B to His Majesty’s Government.

8.10 In a Memorandum to Cabinet on 20th April 2009, Mr. Karalus advised (amongst other things) that:

“It is clear that the financial outlay for a replacement ship to fill the gap until the arrival of the new ferry is the preferred option as there is also the residual value of the replacement ship once the new ferry arrives” (Exhibit 64)
8.11 That Memorandum recommended that the Princess Ashika be purchased by the Government subject to due diligence on the technical suitability and seaworthiness of the vessel and leased to the SCP without delay.

8.12 On 21st April 2009 Board of Directors of SCP and the Company Secretary considered a report of the Managing Director, Mr. John Owen Jonesse relating to the replacement of the Olovaha. The report stated that the MV Princess Ashika had been identified and independently surveyed. It was not correct that it had been independently surveyed and no documents were provided to the Board to support this. Mr. Jonesse is said to have reported that the vessel was suitable for SCP purposes.

8.13 The Directors resolved unanimously to:

“(1) to recommend to His Majesty’s Government that they purchase the MV Princess Ashika

(2) to remit to the Managing Director to negotiate with His Majesty’s Government (for submission to the Board for approval) terms for a time charter by service of the new vessel to Shipping Corporation of Polynesia, preferably in NYPE (New York Produce Exchange) format.

(3) to authorize the Managing Director to travel to Fiji as required to assist with survey, inspection and acquisition of the new vessel.”

(Exhibit 507)

8.14 What is alarming is that the Board of SCP would recommend the purchase of MV Princess Ashika to the Government without any proper due diligence, surveys, inspections, valuations, documentation or proper inquiry having been completed. That is, of a vessel that they were to operate. In other words there was a recommendation to purchase followed by a direction to the Managing Director to assist with surveys, inspection and acquisition. Independent due diligence should have been conducted on behalf of SCP before making a recommendation and before SCP commenced operating the MV Princess Ashika.

8.15 On 23rd April 2009, Cabinet considered the Memorandum of 20th April 2009 which was signed by Mr. Karalus and the Minister for Finance recommending the purchase of the MV Princess Ashika. Cabinet resolved on the 23rd April 2009 (Cabinet Decision No. 300), by resolution number 2:

“(2) That the Hon. Minister for Transport assisted by the Hon. Attorney General and Minister for Justice to proceed with the arrangements to do with MV Princess Ashika and because of the urgency of this matter, that necessary deposit and other financial arrangements be finalized
with the Hon. Minister for Finance, Natural Planning and Information who is hereby authorized to endorse or otherwise the proposed transaction and a report be lately tabled in Cabinet.”

8.16 The Company Secretary of SCP, Lord Dalgety QC, produced unsigned minutes of meetings and Board papers. These minutes and papers have relevantly been set out in detail when reporting upon his evidence as set out in this Report. It is not proposed, in the circumstances, to repeat these matters in any detail when reporting upon the evidence of the Directors of SCP.

PART A - LORD DALGETY QC

Overview of Evidence

8.17 Lord Dalgety QC has been the Company Secretary of Shipping Corporation of Polynesia Limited (SCP) since about 2003. The sole shareholder of the SCP is the Kingdom of Tonga (“the Government”). He was told at the time of his appointment as Company Secretary, by the then Chairman and Deputy Chairman of SCP, that he was appointed as Company Secretary because of his knowledge of shipping law.

8.18 Lord Dalgety QC considered that he was very experienced in admiralty law and company law matters. As Company Secretary, he understood that when performing his duties, he was to exercise reasonable care, diligence and skill. He also appreciated that he had a statutory duty to advise the Board of Directors of SCP on the proper management of the company. He said that as Company Secretary he could advise the Board on any matter which appeared on the Board agenda. Lord Dalgety QC also said that apart from attendance at Board meetings and providing advice to the Board, he was to ensure that documentation was prepared, available for lodging and lodged.

8.19 On 17th March 2009, Lord Dalgety QC was present at a Board meeting of SCP at which it was unanimously resolved to recommend to His Majesty’s Government that the MV Olovaha be replaced without delay. He accepted that to enable the Board to make an informed decision they required sufficiently detailed and adequate papers and that such information should be in writing.

8.20 On 21st April 2009, the Board of SCP held another formal Board meeting at which Lord Dalgety QC was present. At that Board meeting, it was resolved to recommend to HM Government that it purchase the MV Princess Ashika. Lord Dalgety QC considered that the recommendation was appropriate. The Board and Company Secretary had before it a one and a half page paper provided by Mr. Jonesse, the CEO of SCP, together with some photographs of the MV Princess Ashika. The material relied upon for the purposes of making the recommendation for the
Government to purchase the MV Princess Ashika was very scant and insufficient to support the recommendation.

8.21 Lord Dalgety QC rightly accepted:

- Before a prospective owner of a vessel, such as MV Princess Ashika, was going to purchase the vessel, proper due diligence needed to be conducted.
- He knew that the Government of Tonga was the proposed purchaser.
- The single shareholder of the SCP was the Government of Tonga.
- Proper due diligence would include an independent survey conducted by a person of appropriate qualifications and experience; an independent valuation and checking and verifying documents in relation to the vessel.
- The Ministry of Transport would not be independent for the purposes of conducting any survey.
- The failure to carry out independent due diligence prior to the purchase was a major contributing factor to the disaster.
- The MV Princess Ashika was clearly unseaworthy and unsafe prior to its purchase and continuously until in sank on 5th August 2009.
- The purchase price of FJD$600,000 (plus 15% tax) was a significant investment on behalf of the Government.
- There were serious question marks raised at SCP Board meetings about the reliability and seaworthiness of the MV Olovaha, which needed to be replaced as it was “finished”.
- The main source of income of SCP was dependent upon the successful operation of a single ferry, which was temporarily intended to be the MV Princess Ashika.
- SCP was always intended to be the operator of the replacement vessel.
- He was aware that there were numerous offences if owners or operators failed to protect the safety of life at sea.
- He “overlooked” that the definition of “owner” under the Shipping Act effectively covered an “operator” such as SCP.
- SCP had an obligation to ensure that it did not send a ship to sea which was unseaworthy and, in his words, it would be “a stupid thing to do”.

8.22 As Company Secretary, Lord Dalgety QC in the proper discharge of his duties as a Company Secretary, should have advised the Board of SCP of the need for SCP to have conducted its own independent due diligence prior to the recommendation to Government to purchase the vessel and also prior to the operation of it by SCP. He did not so advise because, in part, he erroneously considered that, SCP was the operator only and not the owner of the vessel. Sadly, Lord Dlagety QC had not read the Shipping Act for a few years prior to the sinking of the vessel. He only became aware, that for the purposes of the Shipping Act, the “owner” of a vessel included
the “operator” when it was drawn to his attention during questioning by Counsel Assisting. There were thus considerable statutory obligations relating to safety imposed on SCP which Lord Dalgety QC was not aware of.

8.23 It was apparent during the course of the evidence by Lord Dalgety QC that he had no serious regard to ensure SCP complied with the law. For example, SCP failed to lodge tax returns as required; failed to provide reports to the Minister of Public Enterprises as required by the Public Enterprises Act; failed to lodge return to the Companies office under the Companies Act; lost important company records; failed to keep proper financial records; failed to ensure that the MV Princess Ashika was registered under the Shipping Act (even by the time that the vessel sank); failed to ensure that the MV Princess Ashika had a licence to enable it to operate under the Shipping Act (even by the time that the vessel sank).

8.24 Lord Dalgety QC seriously breached the Corporate Code of Ethics that applied to him in the performance of his duties as Company Secretary. He also demonstrated no proper regard for adherence to basic principles of good corporate governance. The evidence before the Commission, including the evidence given by Lord Dalgety QC himself unquestionably demonstrated that, contrary to the Corporate Code of Ethics he:

- Was dishonest.
- Failed to behave with integrity.
- Failed to be accountable for his actions.
- Failed to ensure that his actions complied with the requirement for transparency.
- Was not diligent and did not give his utmost in the performance of his public duties.
- Failed to carry out his duties in a fair and impartial manner.

8.25 The Corporate Code of Ethics applicable to Lord Dalgety QC in his position as Company Secretary of SCP is and was identical to that applicable to him in his position as Chairman of the Electricity Commission.

8.26 Lord Dalgety QC was highly evasive during the course of his evidence and a most unimpressive and unreliable witness. He often said he could not recall matters during the course of his evidence, when clearly this was not the case. He lacked credibility and was prepared to give answers to many questions irrespective of the truth. His answers to questions, in many cases, were rambling. This factor, together with his evasiveness and unwillingness to tell the truth, necessitated him giving evidence for much longer than would have been required had he been responsive to the questions. It has also had the consequences of prolonging the amount of time taken in analysing his evidence for the purposes of this Report.
8.27 If Lord Dalgety QC had properly carried out his duties as Company Secretary the MV Princess Ashika should never have been recommended for purchase by SCP to the Government and should never have been allowed to operate in Tonga.

Substantive Evidence of Lord Dalgety QC

Educational Background, Qualifications and Experience

8.28 Since about 2003, Lord Dalgety QC has been the Company Secretary of Shipping Corporation of Polynesia Limited (SCP). (Exhibit 21 paragraph 1; T 3174) SCP is a company incorporated under the laws of Tonga. The sole shareholder of SCP is the Kingdom of Tonga (“the Government”).

8.29 Lord Dalgety was an Advocate, later Queen’s Counsel, in practice, in the United Kingdom from 1972 until 1991. One of his main areas of specialisation was admiralty law. He also had experience in the area of commercial law. (Exhibit 21 paragraph 4; T 3173) He held a part-time Judicial Warrant in Scotland from 1986 until 1991 and also held office as Deputy Transport Commissioner for Scotland. (Exhibit 21)

8.30 In 1991, Lord Dalgety QC arrived in Tonga. In that year, he was appointed a Justice of the Supreme Court of Tonga. He held that position until 1994. In about 2004, he was appointed as an Acting Justice of the Supreme Court to hear one case. (T 3475) In the 1990s, he also had experience as a Receiver of Companies. (T 3183) He was a member of the Tonga Chamber of Commerce and Industry for at least 10 years, although he said he had very little to do with it in the last few years. In the 1990s he said that he was engaging in various commercial activities as a consultant. This entailed giving “business advice.” (T 3182)

8.31 Lord Dalgety QC was a Director of the Tonga Electric Power Board in 2002 and elected the Chairman in 2003. (T 2181) In July 2008, he was appointed Chairman of the Electricity Commission. (T 3152)

8.32 From about 2003 to 2006, he was Company Secretary of Ocean Pacific Limited. (Exhibit 466) SCP has a 40% shareholding in Ocean Pacific Limited. Lord Dalgety QC was also a Director of another company a few years ago, but said he could not recall the name of it. He went to one meeting of the company, although he was a director for about one year. (T 3175 P – 3177 C)

8.33 In October 2003, he was also appointed as Company Secretary of Ocean Pacific Limited. (Exhibit 466) SCP has a 40% shareholding in Ocean Pacific Limited. Lord Dalgety QC was also a Director of another company a few years ago, but said he could not recall the name of it. He went to one meeting of the company, although he was a director for about one year. (T 3175 P – 3177 C)

8.34 Lord Dalgety QC said he was very experienced in admiralty law and company law matters. (T 252; T 3519) He considered that he knew his way around the shipping legislation and company law legislation in Tonga “reasonably well”. (T 253 L) Lord
Dalgety QC was told by the then Chairman and Deputy Chairman of SCP that he was appointed as Company Secretary because of his knowledge of shipping law. (T 253; T 266 D; T 3174 T – 3175 B)

8.35 Lord Dalgety QC held the position as Company Secretary in MBF Bank in 2010, holding that position for several years prior to that time. (T 3175)

8.36 In 2008, Lord Dalgety QC was appointed a Royal Commissioner in Tonga under the Royal Commissions Act to inquire into and report the burning of the Royal Palace Uoleva in Tatakamotonga. The Commission was established in about March 2008. He commenced work as a Royal Commissioner in July 2008 and produced a Report at the end of 2009. (T 3162) When asked if the Report was published he said, incredibly, “I wouldn’t know the answer”. (T 3163 D) At a later point in evidence, he said:

“it was certainly circulated to various parties. Whether it has been formally published as a government paper and circulated widely, I don’t think it has, which is a shame.” (T 3163 H)

8.37 In July of 2008, he was appointed Chairman of the Electricity Commission. (T 3152)

8.38 On 24th July 2008, Lord Dalgety QC was appointed as a Law Lord and made a member, with three other Law Lords of a Judicial Committee of Privy Council. (Exhibit 271; T 3155)

Role and Duties as Company Secretary of Shipping Corporation of Polynesia Limited

8.39 As stated above, Lord Dalgety QC well knew he was appointed because of his knowledge of shipping law. (T 253; T 266 D; T 3174 T – 3175 B)

8.40 In his affidavit, Lord Dalgety QC stated:

“My primary role as Company Secretary for SCP has been concerned with governance and maintaining the records of meetings of directors.” (Exhibit 21 paragraph 6)

8.41 Lord Dalgety QC agreed that only fit and proper persons should be Company Secretaries and Directors of companies. This included people having appropriate expertise, having integrity and complying with appropriate codes of conduct in terms of honesty. (T 6138) He was not prepared to accept that he was not a fit and proper person to be a Company Secretary of any company in Tonga, including SCP. (T 6139) The overwhelming evidence is that Lord Dalgety QC is clearly not a fit and proper person to be the Company Secretary of any company in Tonga. This will become apparent in this section of this Report concerning Lord Dalgety QC. He clearly lacks integrity and honesty, even when giving evidence before a Royal Commission.
Section 136 of the *Companies Act* has at all relevant times provided:

“A director or company secretary of a company, when exercising powers or performing duties as a director or company secretary, shall exercise reasonable care, diligence and skill taking into account, but without limitation—

(a) the nature of the company;

(b) the nature of the decision; and

(c) the position of the director or company secretary and the nature of the responsibilities undertaken by him.” (Underlining added)

Lord Dalgety QC appreciated that he and the directors of SCP had the obligations in 2009, when exercising their powers or performing their duties, of exercising reasonable care, diligence and skill. He considered that this was as a “very repeat of common law”. (T 3206; T 6139) He said that in the areas where he was involved he had “duties to perform, I performed them, and that includes often giving advice and doing things”. (T 3159 E) These duties were considerable and important. (T 3159)

At all relevant times, section 161 of the *Companies Act* (which is entitled “Duties of Company Secretaries”) has provided:

“(1) It is the primary duty of a company secretary to advise the board of directors on the proper management of the company.

(2) A company secretary has other duties prescribed by this Act and the constitution of the company.” (Underlining added)

Lord Dalgety QC was aware of the duty imposed by section 161 of the *Companies Act*. As he said, “that’s always been there”. (T 3196 S – 3197 A) Lord Dalgety QC was asked a number of times whether he advised the Board on the proper management of SCP. His answers demonstrated that he did not properly do so. (T 3197) This failure is also clear from other evidence given by him, as well as the evidence of the Chairperson (Mrs. ‘Alisi Taumoepeau), and two of the other directors of SCP (Rev. Haukinima and Mr. John Jonesse).

Section 127 of the *Companies Act* has, at all material times, provided:

“Management of company

(1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the board of the company.
The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.

Subsections (1) and (2) are subject to any modifications, exceptions or limitations contained in this Act or in the company’s constitution.”

Underlining added

8.47 Lord Dalgety QC was asked whether he knew what the duties the Directors of SCP owed or had under the Companies Act. He said:

“the duties, whether they come at common law or whether they come under the Companies Act are to take proper care for the business of the company and that is done on the basis of reasonable information received so that you can make a reasonable decision.” (T 3205 Q)

8.48 There are other statutory duties placed on directors and company secretaries. It is not proposed to set those out in this section of the Report. There are also obligations placed on directors and company secretaries pursuant to the Constitution of Shipping Corporation of Polynesia, including, when exercising powers or performing duties as a director or company secretary, to exercise the care, diligence and skill that a reasonable director or company secretary would exercise in the same circumstances.

8.49 When Lord Dalgety QC was asked what he considered his obligations were as Company Secretary he said:

“to make sure that the Companies Act requirements were fulfilled and that the directors, when they were making decisions, were making reasonable decisions which were not contrary to law.”(T 266 J)

8.50 This obligation “was always there in the forefront of my mind”. (T 266 L)

8.51 Lord Dalgety QC was asked, at a subsequent time, what his duties, obligations and responsibilities are as Company Secretary of SCP. His answer was:

“well, apart from attendance of board meetings, its advice when asked or when it seems appropriate and to ensure that documentation is prepared and is available for lodging and is lodged.” (T 295 C)

8.52 When Lord Dalgety QC was asked what he relied on, if anything, to state that they were his duties, obligations and responsibilities he said “experience”. (T 295 J) It became evident during the course of his evidence that he, in the course of acting as Company Secretary placed reliance on his outdated “experience”, irrespective of the current state of the law in Tonga. This resulted in him failing to appreciate the advice
he should have properly given to the Board of SCP in the proper discharge of his duties.

8.53 In 2009, Lord Dalgety QC was thinking about resigning as Company Secretary because he “was too busy”. However he said he was waiting for the Government to reconstitute the Board and that would have been an appropriate time to do so. As the Board had not been reconstituted, he had not resigned. (T 3175 Q; T 3293 – 3294) He had been thinking of resigning as Company Secretary because he was “trying to take all these extraneous activities and concentrate on my principal ones”. (T 3175 K) He said that these principle functions would be the Law Commission, the Judicial Committee and the Electricity Commission. (T 3175 O)

8.54 Lord Dalgety QC accepted, irrespective of him being “too busy doing other things”, he was not suggesting that it absolved him of his duties and responsibilities as Company Secretary. He said that “if you find yourself working to capacity and beyond, you eventually – you look, in due course, to disengage from matters which are peripheral”. (T 3294 L) He said that he was paid for being the Company Secretary “a modest $300 a month”, as well a fee of $80 for attendance at each Board meeting. (T 295; T 3413) This is a considerable amount of money for many Tongans and is certainly not “a modest” amount for them.

8.55 The Company Secretary was asked to explain, when he said his primary role has been concerned with governance and maintaining the records of meetings of directors, what he understood by “governance”. His response was:

“Just make sure that the – well, two things. Make sure the company complies with its regulatory and legal obligations and that decisions they take are sane and sensible.” (T 3189 O)

8.56 It was rightly acknowledged by Lord Dalgety QC that as Company Secretary he had a duty and responsibility to ensure that the laws of Tonga are complied with on behalf of SCP. (T 3505 T – 3506 C) Given that Lord Dalgety QC conceded that he had not “checked” the Shipping Act for years, one questions how he expected he could properly advise the Board and ensure that SCP complied with all the laws of Tonga. (T 3542 - 3543) The evidence establishes that SCP failed to comply with many statutory provisions. Basic failures included the failure to lodge company returns at the Registrar of Companies office; failure to lodge taxation returns; failure to provide reports to the Minister of Public Enterprises under the provisions of the Public Enterprises Act; entering into contracts with the CEO of SCP which were void by reason of contraventions of the Public Enterprises Act; sending a ship to sea which was unseaworthy. There were many other serious failures.
When asked to state what Lord Dalgety QC considered his primary role is or was as Company Secretary his answer was:

“I suppose the primary role was attend at meetings and making sure that if there were papers, they were circulated- and we didn’t always get papers to circulate; that the minutes were prepared and, at meetings, that if I thought I could make a contribution, I stated my views.” (T 3185 H – J)

Lord Dalgety QC suggested that decisions that were sane and sensible presupposed that they were reasonable. (T 3189 R) He appreciated that as Company Secretary he needed to ensure that the Directors of SCP exercised due care and diligence and that his role included ensuring that the Directors carried out their duties and obligations in accordance with law. He also understood that he needed to make sure that they did not make decisions that demonstrated a degree of negligence. (T 3191) Lord Dalgety QC said that he would give advice when he thought appropriate, to make sure that legal obligations were carried out and that rational decisions were made. (T 3191 – 3192) He properly acknowledged that he was there to advise the Board and to ensure that there was compliance with the law. As Lord Dalgety QC put it, he was there “to make sure that they were doing things properly”. (T 3192)

It was properly stated by Lord Dalgety QC “that the Board of SCP should not make decisions without having information to justify it”. In other words, he agreed that a responsible Board should not make decisions without appropriate information before it. (T 3193) He said that he “would intervene if I thought it was inappropriate to make a decision”. (T 3194 A) and one of his principle roles was to support the work of the Board. (T 3195 – 3196 A)

As Company Secretary, Lord Dalgety QC properly accepted that one of his responsibilities was ultimately to ensure that company returns required to be lodged by law with the company’s office were lodged within the time prescribed by law and that they were accurate. (T 3189 H – M)

Lord Dalgety QC, as one of his primary roles, was required to maintain the records of meetings of directors. (Exhibit 21 paragraph 6; T 254 B) He was responsible for preparing the agendas and minutes of meetings of the Board of SCP. (T 259) He said that “the original- the minutes at the time were prepared within- usually within 24 hours and signed off then”. (T 258 G)

When Lord Dalgety QC was asked whether he was responsible for governance of SPC, his response was “issues of governance”. When asked what that entailed he said “looking at the finances, making sure she was solvent, that she was liquid, matters like that”. (T 264 H – J) He said “governance is one of these buzz words that people use nowadays for ensuring that, at a meeting, you give independent advice
when you think its appropriate…and also ensuring that if they (the Directors) have certain legal duties, that they comply- that they’re told to comply”. (T 3185 O – S)

8.63 It was accepted by Lord Dalgety QC that the concept of corporate governance means an internal system encompassing policies, processes and people which serves the needs of shareholders and other stakeholders by directing and controlling management activities with good business savvy, objectivity, accountability and integrity. (T 3206 M – R) Sound corporate governance, as Lord Dalgety QC was aware, is reliant on legislation together with a healthy Board culture which safeguards policies and processes. (T 3206 R – T)

8.64 Lord Dalgety QC accepted that some of the essential corporate governance principles that a company such as SCP should follow include:

- Laying solid foundations for management and oversight (which includes recognising and publishing the respective roles and responsibilities of Boards and management)
- Ensure that the Board is structured to add value (i.e. have a Board of effective composition, size and commitment to adequately discharge its responsibilities and duties)
- Promoting ethical and responsible decision making
- Safeguarding the integrity in financial reporting (i.e. have a structure to independently verify and safeguard the integrity of the company’s financial reporting)
- Making timely and balanced disclosure of all material matters concerning the company
- Respecting the rights of shareholders
- Recognising and managing risks (including establishing a sound system of risk oversight, management and internal controls)
- Recognising the legitimate interests of stakeholders (T 3207 – 3212)

8.65 Shipping Corporation of Polynesia had a Corporate Code of Ethics binding on the Officers and employees of SCP, including the Company Secretary. In the Corporate Code of Ethics the Company Secretary and Directors were required, in the performance of their duties to:

- Be honest
- Behave with integrity
- Be accountable for their actions
- Ensure that all their actions comply with the requirement for transparency
- Be diligent and give off their utmost in the performance of their public duties
- Carry out their duties in a fair and impartial manner
• Act within the law and in accordance with policies adopted by the companies (T 3213 – 3214 C)

8.66 Lord Dalgety QC said he took an active role at meetings and was an active member of SCP at Board meetings. He also said he raised concerns at meetings. He did not simply sit and take minutes. He said that he gave advice as required and when he thought it was appropriate. (T 265) Lord Dalgety QC said his “bit” at Board meetings. Sometimes he indicated that he would be remarkably quiet, other times he was quite active. He was never stopped from participating in Board meetings, nor was he stopped from providing any advice to them. The Company Secretary never felt under any pressure not to give advice. (T 266 – 267) We accept Lord Dalgety QC’s evidence that he “didn’t keep quiet if (he) had something to say.” (T 3336 G) As he put it, he “stated (his) views, sometimes quite firmly” and he also actively participated in the meetings of SCP. He understood that as company Secretary he was required to ensure that the Board made reasonable and rational decisions. (T 3170) Lord Dalgety QC would give advice to the directors as he saw fit, and considered this as part of his responsibility as Company Secretary.

8.67 Lord Dalgety QC was of the opinion, on the basis of advice tendered by management, that the Board of Directors of SCP and he as Company Secretary had the authority on behalf of SCP to recommend to the Government the purchase of MV Princess Ashika. (T 3551 I – K) However, he said that he had no legal authority to bind SCP in making a recommendation to the Government to purchase MV Princess Ashika. He said that the Board would have authority to do that. (T 4551 M – Q) He considered his “role was to attend meetings and to tender advice and answer questions”. (T 3551 R)

8.68 As Company Secretary, Lord Dalgety QC accepted that he could advise the Board on any matter which appeared in the Board agenda and that included whether SCP should recommend to the Government the purchase of MV Princess Ashika. (T 3551 T – 3552 C) Similarly, in the event that he became aware that the vessel was operating or going to operate unlawfully he said he “would have immediately contacted the Board.” (T 3552 E) Importantly, Lord Dalgety QC properly acknowledged that it was his duty and responsibility to advise the Board of Directors of SCP if, in his opinion, the recommendation for the purchase of MV Princess Ashika was unreasonable. (T 3552 F – G) If he had “come into information” that the vessel was operating contrary to the provisions of the Shipping Act or the Regulations, he said he would “of course... advise the Board forthwith”. (T 3552 L) The MV Princess Ashika was operating in contravention of this legislation, for many different reasons, which will become apparent subsequently in the section of this Report relating to Lord Dalgety QC.
In terms of the governance responsibility on Lord Dalgety QC, he correctly understood that he had a duty to advise the Board of SCP in terms of ensuring that there were appropriate risk management procedures put in place. However, he was of the view that this would not include advising the Board of matters that would minimise the risk of a vessel proposed to be purchased by the Government actually being unseaworthy. He said that “I think that is going too far”. (T 3552) In the case of MV Princess Ashika, it will be appreciated that Lord Dalgety QC was aware that it was proposed that SCP was going to operate the vessel and there was a legal obligation on SCP not to send an unseaworthy ship to sea. (T 3398; T 3553)

Lord Dalgety QC knew that if SCP sent or attempted to send an unseaworthy ship to sea, they would be negligent. He tried to suggest that at common law, they would only be negligent if they “knowingly” sent or attempted to send an unseaworthy ship to sea. (T 3553 G – I) This is incorrect. It is not a prerequisite, for purposes of negligence, if SCP or its officers had “knowledge”. The tort of negligence is concerned with careless behaviour. The duty of care imposed by law is in accordance with the test of what “a reasonable man in the position” of the respondent would do. The standard of care to be exercised in accordance with the duty of care is measured by what is reasonable in the circumstances. (See Polynesia Airlines (Investments) Ltd v Kingdom of Tonga [2000] Tonga Law Reports 168) Lord Dalgety QC accepted that it was negligent of the Government not to conduct due diligence prior to the purchase of the vessel, but considered it was not SCP’s responsibility to conduct any due diligence. (T 3528)

It is not only contrary to law to send an unseaworthy vessel to sea in Tonga, but, in the words of Lord Dalgety QC “its wrong in just about every capacity you can think of.” (T 3432) We agree with this remark. That is one of the reasons why he should have advised the Board of SCP that independent due diligence was required to be conducted by SCP and ensured that it was in fact done. He failed to do so. He was of the opinion, for good reason, that in terms of the Government not having conducted due diligence prior to purchase, “negligence exists”. (T 3443) He was in fact aware, as he should have been, that there was a statutory obligation on SCP to ensure that the MV Princess Ashika was not sent to sea if it was unseaworthy. (T 3383 K – M) In this context, Lord Dalgety QC correctly understood that one of his obligations was to ensure SCP complied with its legal obligations. (T 3189) It did not because, inter alia, it sent an unseaworthy ship to sea.

Lord Dalgety QC accepted that the MV Princess Ashika was unseaworthy and should never have sailed. (T 3432; T 3553) Lord Dalgety QC said:

“Ex post facto evidence made available at this inquiry leads to the inevitable conclusion that the vessel should never have been certified as seaworthy.” (T 3399 P; T 3432)
8.73 The Company Secretary also accepted that every time the MV Princess Ashika sailed in Tonga, it was sailing in an unseaworthy condition. (T 3400)

8.74 In properly exercising his duties, Lord Dalgety QC in his position as Company Secretary, had a duty to advice on matters that would minimise the risk of the vessel proposed to be purchased by the Government (and operated by SCP), being unseaworthy. He not only accepted, correctly, that SCP had obligations to ensure that a vessel that was sent to sea was seaworthy, but also an obligation to keep it seaworthy during the entire voyage. (T 3550 M – P) He was of the view that one should only make decisions that were “sensible”; soundly based on advice and that any decision should be well argued. (T 3211)

8.75 It was correctly accepted by Lord Dalgety QC that he would be answerable for his actions as Company Secretary of SCP and he could be held accountable for omissions which he should have carried out as Company Secretary but did not do. (T 3242) He understood that one is “always accountable for your actions” and “responsible for your actions or your inactions”. (T 3432 R – 3433 B)

8.76 Lord Dalgety QC was fully aware that the Board of SCP should only make resolutions on the basis of having sufficient and reliable information before them. He accepted that, as the Company Secretary, he had a duty and obligation of ensuring that the Board of SCP did not make resolutions unless they had sufficient information before them to make an informed decision. He rejected the suggestion that if he had exercised reasonable care, diligence and skill, SCP should never have recommended to the Government that they purchase the MV Princess Ashika. (T 6210 – 6211) We do not accept this rejection for reasons which become apparent in this Report. He said that if he was given information or if anybody is given information which is questionable, then one asks questions. (T 3470 I)

8.77 It was most disturbing that Lord Dalgety QC did not have a current and up to date copy of the Shipping Act. (T 3542 E – H) What is even more disturbing, is that Lord Dalgety QC, who was to advise the Board of a shipping company, had not “checked” the Shipping Act for years. (T 3542 - 3543) When Lord Dalgety QC was asked whether he ever read the Shipping Act in 2008 or 2009, his response was:

“I didn’t go back to look at it at the time of the purchase of the Ashika because in terms of the demise charter I knew exactly what the position was.”

(T 3569 F – J)

8.78 We consider that it is highly doubtful that he has looked, at least carefully, at the Shipping Act or Regulations for several years.

8.79 Lord Dalgety QC did not consider that he was negligent in carrying out his duty as Company Secretary in not having read an up-to-date copy of the Shipping Act and
Regulations and advising the Board accordingly as to relevant provisions. (T 3379 F; T 3573 D – H)

8.80 Lord Dalgety QC’s attention was drawn to the fact that a Provisional Certificate of Registration for the MV Princess Ashika was issued by the Ministry of Transport. The Provisional Certificate expressly stated that it was granted pursuant to section 28 of the Shipping Act. That section had effectively been repealed in about 2001 and replaced by a section dealing with other matters completely disassociated with Provisional Registration. Lord Dalgety QC was asked questions about this. The relevant exchange was as follows:

“MR VARITIMOS: Lord Dalgety, that section was in fact repealed in about 2001, are you aware of that?

LORD DALGETY: No, but anybody looking at the law for the time being, you get the up-to-date version and you see what’s - and you see all the amendments made.

MR VARITIMOS: What I am suggesting to you is that when these certificates, provisional certificates of registration, were purportedly issued there was no jurisdiction or authority to issue them. What do you say about that?

LORD DALGETY: Well, if the section permitting it has been repealed, then the legal warrant for doing it no longer exists.

MR VARITIMOS: So what I am suggesting is that when the vessel sailed in July and August, it in fact did not have a valid certificate of registration. What do you say about that?

LORD DALGETY: Well, I haven’t studied the sections, but if the sections have been repealed and this is a document for which there is no legal warrant, then it is a purported certificate only, it is not a certificate issued under the Act.

MR VARITIMOS: And it has no force and effect, do you agree with that?

LORD DALGETY: It states an opinion by whoever signed it, but it’s not a legal document under the Act.

MR VARITIMOS: It has no legal force or effect, do you agree with that?

LORD DALGETY: It has no statutory warrant for it.

MR VARITIMOS: And therefore it has no legal force or effect.

LORD DALGETY: Obviously.” (T 3379 E – R)
8.81 The responses by Lord Dalgety QC as to when he had last looked at the *Shipping Act*, and his justification for failing to do so, were nothing short of completely embarrassing. (T 3542 – 3543; T 3548; T 3569 – 3573) He well knew not only that he should have looked at the *Shipping Act*, but also that he needed to “*get the up-to-date version*”. (T 3379) However, Lord Dalgety QC seemed totally unphased by his failure.

8.82 It became evident during the course of the evidence of Lord Dalgety QC that he had no appreciation of critical provisions in the *Shipping Act, Public Enterprises Act* and *Companies Act*. As the Company Secretary, the failure of Lord Dalgety QC to be familiar with these Acts, had the inevitable consequence that he was not in the position to, and did not, properly and adequately advise the Board, including in relation to ensuring that SCP complied with the laws of Tonga.

8.83 From time to time in the past, Lord Dalgety QC said that he had been asked to do other things in addition to his primary roles. For example, he said that he had “*to help sell a ship several years ago*”. There may also have been “*the occasional document*” he said he was asked to prepare. (T 3186) Lord Dalgety QC was and has been for years a signatory to the bank accounts of SCP. It was quite common for him to sign cheques on behalf of SCP, as he put it, “*sometimes virtually daily*”. (T 3313 P) Notwithstanding this evidence, one questions why Lord Dalgety QC said that he only went to the SCP offices “*for odd occasions during the month*”. (T 3319 J) He played a more active role in the affairs of SCP than he was prepared to admit in relation to the MV Princess Ashika.

8.84 Lord Dalgety QC considered that he took his position as Company Secretary of SCP seriously and that he carried out his duties in a reasonable fashion. (T 3319) This was not so. Lord Dalgety QC carried out his duties and obligations as Company Secretary of SCP appallingly.

**Audit Committee of SCP**

8.85 Lord Dalgety QC was asked whether he had been on the Audit Committee of SCP for a number of years. His response was:

> “*The audit committee is an ad hoc body. It looks at the accounts when they’re ready, yes. But it hasn’t been. It’s not an audit committee as one would expect in - with a public corporation. It’s there when there are management accounts to be looked at. We have not had, until recent time, management accounts. We were awaiting them to be produced and then the audit committee was going to meet and go through them with a tooth comb before our board meeting.*” (T 303 F – H)

8.86 On 12th December 2009, the Board of SCP unanimously resolved:
“[2] to reconstitute the Audit Committee of the Board to compromise Rev. T. Haukinima (Chairman), the Managing Director and the Company Secretary;

[3] to Recommend to the Shareholder at the next A.G.M. of the Company that Messrs KPMG, Chartered Accountants, Lautoka, Fiji be reappointed as the company’s auditors for calendar 2009.” (Exhibit 282; T 3406 – 3407)

8.87 Lord Dalgety QC well knew that SCP needed to be audited. He said that it was not required to be audited by the Auditor General, but could be audited by an Auditor approved by the Auditor General. When he was asked whether the Auditor General had ever done so, he said “Yes. I received a letter 2 or 3 weeks ago from him in respect of the previous audit which had been completed a year before”. When then asked whether he had the ability to obtain those documents he said “I’ll look for them”. When Counsel Assisting submitted that Lord Dalgety QC to be directed to produce financial reports and audit documentation in relation to SCP his response was, “Sorry, just one moment. The letter from the Auditor General, I’m just remembering, that related to a different company, not Shipping Corporation, sorry.” Lord Dalgety said that he had never seen any letter from the Auditor General in relation to SCP. (T 296 – 298)

8.88 A draft document entitled “Shipping Corporation Polynesia Limited Audit of the year ended 2008 Report to the Board” was prepared by KPMG. (Exhibit 275) The draft report indicated a number of serious problems associated with SCP. These included the fact that the finance department of SCP did not maintain journal vouchers for entry to the journal ledger; the fixed asset register did not maintain a detailed listing of all assets owned by the company; the company had not been lodging its company tax returns and consequently income tax penalty amounting to $214,141 had been incurred; problems with the bank reconciliations and in particular no evidence to suggest that there were reviews by an independent senior official; failure to properly maintain proper employee records and a failure to provide detailed stock take instructions. (T 3322 – 3331)

8.89 When questioned about the draft report from KPMG, despite the fact that Lord Dalgety QC was the Company Secretary and a member of the Audit Committee, he said “I don’t think I have seen this document”. We do not accept Lord Dalgety QC’s evidence in this regard. (T 3321 – 3331) He said that he was not aware of most of the things mentioned. (T 3331) In 2008, Lord Dalgety QC said that Mr. Jonesse indicated he had been in touch with Inland Revenue and an extension had been granted to
lodge the tax return. (T 3229 C) He never asked Mr. Jonesse whether he had written confirmation of this extension. (T 3330 C; T 3504 – 3505)

8.90 The thrust of Lord Dalgety QC’s evidence was that he was not aware that tax returns were lodged late because he understood that extensions had been granted. (T 3507) We do not accept that he was so informed. He however never asked for, nor saw any documents supporting the granting of any extensions. (T 3505) When it was suggested to Lord Dalgety QC that it was his duty and obligation, as Company Secretary, to ensure that tax returns were lodged within time by SCP, his response was:

“These are management duties, but part of the role of the board is to ensure that there is compliance with the law and you do that by asking the management, “Have you done this, have you done that; if you haven’t, ask for an extension”.” (T 3508 G – H)

8.91 Lord Dalgety QC regularly sought to deflect serious failings by suggesting they were “management duties”, rather than accept, as he should, some responsibility himself. Ultimately, he refused to accept any responsibility whatsoever for the disaster.

8.92 Lord Dalgety QC said that the extent of the duty he would accept was “the duty to tell management they have to do it. It’s not my duty to do something that’s not under my control.” (T 3508 O) In this context, he was asked whether he checked to see whether tax returns were lodged and his response was we can ask to see tax returns. When it as then suggested that he had not done so, his response was:

“Oh, I can’t remember from the past” (T 3508)

8.93 Given that Lord Dalgety QC properly conceded that the lodgement of tax returns within the time prescribed by law by SCP was an important matter and that he knew that if it was not done, it raised the prospect of severe penalties, one can only be critical of the Company Secretary not following up to ensure that the returns were lodged. (T 3508 – 3509) Lord Dalgety QC was fully aware that as Company Secretary he was there to ensure that the company complied with the law. (T 3518 F – H)

8.94 A subsequent KPMG report was prepared in relation to SCP. (Exhibit 328) Many of the matters raised in the draft report by KPMG continued to exist.

8.95 We do not accept any suggestion made that the failure to prepare financial reports could be justified on the basis that it would have required a full time chartered accountant, nor the implication by Lord Dalgety QC that the company did not have the amount of money required to have financial reports, and in particular annual reports prepared. (T 300 – 301) Given the amount of money spent by Lord Dalgety QC on behalf of SCP when he went to Singapore on four occasions and Dubai on one
occasion, all by first class travel, and was paid a daily per diem allowance at US$674, any suggestion that the failure to prepare reports or keep proper records because of financial constraints smacks with hypocrisy.

8.96 The Company Secretary was asked if there were any minutes or records kept of the Audit Committee. His answer was:

“If there’s a- if there was a committee meeting, then it- that would be- it would be reported in exactly the same way as a Board meeting” (T 303 I)

8.97 As it transpired, no minutes were produced of any Audit Committee meetings.

8.98 Lord Dalgety QC said that there had been an external audit of SCP every year he had been involved with the company. He appreciated that it was essential to good corporate governance to safeguard the integrity in financial reporting. This included having a structure to independently verify and safeguard the integrity of the company’s financial reporting. He also understood that proper books should be kept on the company and they should be audited on a regular basis. This was, in his words “common sense”. (T 3208) We agree that this is common sense. The books and records of SCP have not been properly kept by SCP for many years. In fact, important records have gone missing.

8.99 As Company Secretary and a member of the Audit Committee of SCP, he said that although he was appointed to the Committee, he could not remember it ever meeting. (T 3214 G) At another point in his evidence he said:

“But what I do know is that we did not - I think there may have been one meeting but the meetings were not called because papers were (not) ready, and when they were ready there was a board meeting coming up so they went directly to the board. There was a problem with the production of financial information and we were not able to go through with the ideal procedure of having an audit committee first to look at it and then produce it on to the board.” (T 3214 M – O)

8.100 Lord Dalgety QC said that the purpose of an Audit Committee was:

“You’re supposed to go through the accounts on a regular basis, the management accounts, and then you’re supposed to go through the drafts of the financial statements so that you can give advice to the board on that and then make sure that everything is ready for external audit.” (T 3215 A – B)

8.101 On another occasion during the course of the evidence by Lord Dalgety QC, he was provided with an opportunity to state what the purpose of having an Audit Committee was. His response was:
“The purpose of having the audit committee was so the nitty-gritty and the
details could be gone in instead of having to go all that and spend a long time
at board meetings dealing with particular aspects which are really a matter of
detail.” (T 3217)

8.102 Lord Dalgety QC said that “papers were not produced in sufficient time to enable the
Audit Committee to do its job and instead therefore these papers went directly to the
Board.” (T 3217 N) It is totally unsatisfactory that papers were not prepared for
consideration by the Audit Committee, to enable it to properly “do its job”. As it
transpires, the financial affairs and records of SCP were, and have been, for many
years in a complete state of disarray. Given the failure of the Audit Committee to
have regular meetings, this is not surprising.

8.103 It was correctly acknowledged by Lord Dalgety QC that the key functions of an Audit
Committee included to ensure integrity of financial statements and financial
reporting systems; to ensure the appointment of external auditors; to ensure that
external auditor performance, qualification and independence is adhered to and to
ensure that its internal audit functions are being properly complied with. (T 3215)

8.104 Lord Dalgety QC said:

“we kept asking can we have the management accounts in time to do this.
They were never made available in time to do it and that was a criticism
which was taken up from time to time with the board. When they were -
came - they went to the board without having gone to the audit committee
because the papers - there was not the time for us to look at it. By the time
they were ready the next board meeting was coming up.” (T 3215 S – 3216 A)

8.105 It would have been “sensible”, if the Audit Committee was properly
and professionally functioning, to ensure compliance with financial reporting and related
regulatory requirements. He said however that this was never done, because there
were no such meetings. (T 3217)

8.106 Lord Dalgety QC’s failure to appreciate his duties and responsibilities as Company
Secretary and a member of the Audit Committee is evident from his failure to
acknowledge that the Audit Committee was conducted in a totally unsatisfactory
way. (T 3217 H – J)

Records Required to be Lodged by SCP under the Companies Act

8.107 Documents were required to be lodged by SCP pursuant to the Companies Act. It
transpires that many of the documents required to be lodged were lodged very late,
and in some instances not at all, contrary to the provisions of the Companies Act.
(Exhibit 23; T 284 - 295) As Company Secretary, Lord Dalgety QC accepted that it was
his responsibility ultimately to ensure that company returns required to be lodged by law with the companies’ office are lodged within the time prescribed by law and are accurate. (T 3189 H – M) Lord Dalgety QC accepted that many documents, and in particular annual returns, were lodged very late (in some cases by a number of years). Although there was a fire which destroyed records held by the Registrar of Companies in 2006, SCP were not able to produce copies of any documents lodged prior to the fire. (T 284 – 294) Lord Dalgety QC accepted that as Company Secretary he was responsible for ensuring that accurate annual returns were lodged within the prescribed period. When asked whether he accepted in the case of SCP that that had not been done he said:

“So it would appear. The ones that I prepared were not lodged when they were supposed to be and somebody had put in incorrect documentation and hasn’t requested my permission and I wasn’t shown a copy. I was, however, informed that they have been lodged.” (T 294)

8.108 Given that Lord Dalgety QC accepted that his duties, obligations and responsibilities as Company Secretary of SCP included, “to ensure that documentation is prepared and is available for lodging and is lodged” he failed in his duties. (T 295 C) He said that he recalls being told that they had been lodged but couldn’t remember when he was told this. He doubted very much that he was told at a Board meeting. (T 294) It should be noted that fees are payable when annual returns are lodged at the Registrar of Companies Office. It was common for Lord Dalgety QC to sign cheques on behalf of SCP, “sometimes virtually daily”. He was thus in a position to check if annual returns had been lodged from the cheques that he signed or the cheque butts.

8.109 Lord Dalgety QC said that “it has not been traditional” for it to be reported to the Board that annual returns have or have not been lodged. It would have been a simple matter, yet an important matter, for Lord Dalgety QC (or at least Mr. Jonesse) to report to the Board that annual returns required to be lodged by law under the Companies Act had in fact been lodged.

8.110 The documents obtained by the Commission from the Registrar of Companies (Exhibit 23) indicated that various annual returns had been “lodged by Ramsay R. Dalgety QC”. However, against “the signature of Company Secretary”, Mr. Jonesse often signed the documents. In some of these instances he wrote “for the Secretary” next to his signature and it was, in the words of Lord Dalgety QC, “quite improper for him to have done so”. (T 3315) Lord Dalgety QC said that he did not authorise Mr. Jonesse to sign these documents. Some of the documents lodged were signed by Lord Dalgety QC as Company Secretary.
8.111 The Company Secretary was critical of the certain documents lodged saying they contained mistakes and were incorrect. For example, as to the inclusion as Directors in the 2007 annual return of Commander Lupeti Vi and Mr. James Cocker (the former Deputy Prime Minister) he said that they should not have been included as they were not Directors of SCP. (T 290 – 291) As to the inclusion of their names in the annual returns he said “someone has put that in who doesn’t know what they’re talking about”. (T 219 I) As it transpired, Lord Dalgety QC was wrong and Commander Lupeti Vi and Mr. James Cocker were Directors. (Exhibit 177) He conceded that he was wrong. (T 3316 – 3318) When asked how did he forget that Commander Lupeti Vi was a Director he said:

“Fairly easily. It’s a long time ago. Directors have changed and I’d other things to do which were my main focus. I don’t remember everything. That’s why I go back and try and check from original records and when I do, I get the facts right.” (T 3317 M)

8.112 The reason for not recalling Commander Lupeti Vi as being a Director was most unsatisfactory. Additionally, how he forgot that the former Deputy Prime Minister, Mr. Cocker was a Director of SCP casts doubt on Lord Dalgety QC’s reliability as a witness and the lack of seriousness he takes towards his position as Company Secretary. The failure to lodge annual returns within the time prescribed by law demonstrates a lack of good governance by SCP. As Lord Dalgety QC said that one of his primary roles was “concerned with governance”, he should take responsibility for the failure to lodge the returns and have ensured, in the first place, it did not occur. Of course, as stated previously, SCP had a history of also failing to lodge income tax returns as required. (Exhibit 275; Exhibit 328; T 3326 – 3229)

**Records required to be Provided by SCP under the Public Enterprises Act**

8.113 Shipping Corporation of Polynesia Limited is and has for a number of years been a “public enterprise” listed in the First Schedule of the Public Enterprises Act.

8.114 It is accordingly bound by the provisions of the Public Enterprises Act. (T 296) The Public Enterprises Act contains many provisions in relation to “accountability” of public enterprises.

8.115 The Public Enterprises Act requires, by section 19 of the Public Enterprises Act, the delivery to the Ministry of Public Enterprises of a report of the operations of the public enterprise within 2 months after the end of the first half of each financial year. Section 20 of the same Act provides:

“(1) The Chairman of the Board shall deliver to the Minister---
(a) a report of the operations of the public enterprise and the consolidated financial statements for that financial year consisting of statements of financial position, financial performance, changes in financial position, and any other necessary statements within 3 months of the end of each financial year; and

(b) an audit report on the financial statements within 6 months of the end of the financial year.

(2) The reports under subsection 1(a) shall—

(a) contain such information as is necessary to enable an informed assessment of the operations of the public enterprise including a comparison of the performance of the public enterprise with the relevant statement for corporate intent; and

(b) state the dividend payable to the Government by the public enterprise for the financial year to which the report relates.”

8.116 Section 22 of the Act is entitled “Information to be presented to the Legislative Assembly”. It provides:

“(1) The Minister shall table in Privy Council and the Legislative Assembly, within 28 days of receiving them and if the Legislative Assembly is not in session forthwith at the next ensuing session, the following documents in respect of each public enterprise:

(a) the annual report; and

(b) the half yearly report

(2) The Minister shall within 1 week of tabling them before the Legislative Assembly publish a notice in the Gazette where the documents can be inspected and the prescribed fee.”

8.117 Sections 19, 20 and 22 of the Public Enterprises Act are just three sections dealing with accountability issues associated with public enterprises, such as Shipping Corporation.

8.118 Notwithstanding the clear statutory obligations imposed on SCP, to the best of recollection of the Minister for Public Enterprises (Hon. ‘Otenifi Afualo Matoto), he never received any half yearly reports from SCP from the time that he was appointed the Minister for Public Enterprises in 2006. (T 5122 – 5123) In terms of annual
reports, sometimes the reports were received but they were usually late. Not all the reports were provided to the Minister.

8.119 Not surprisingly, the Minister for Public Enterprises formed the view early in his appointment that SCP was not operating properly, and in fact operating poorly. He has continued to hold such view from that time to the present. (T 5124 – 5125) He was aware that there were problems with governance. There were differences between the officers of Shipping Corporation, including the Company Secretary. Because the relationship was not harmonious, it created massive instability. He was not satisfied with the Board and the Company Secretary working in the best interests of the company and held that concern during his whole term as Minister of Public Enterprises. Letters sent to SCP from the Ministry were, in many instances, ignored. (T 5130)

8.120 SCP was not, and is not, held accountable for their actions, including for their financial performance. (T 5128 – 5130) They have largely been allowed to do as they wish in defiance of the law.

The MV Olovaha

8.121 From early 2009, Lord Dalgety QC was aware that attempts were being made to try and locate another vessel to replace the inter-island ferry MV Olovaha, which was being operated by SCP. (T 3169) He well knew that the ferry service was an essential service and appreciated that the public required and were entitled to require a vessel fit for the purpose. (T 3458 R – 3459 B) When asked whether these attempts to locate a replacement vessel were being made because of concerns about the seaworthiness of MV Olovaha, his response was, “it was finished…it was too expensive to maintain to keep it seaworthy”. (T 3168 S – 3769 C) Lord Dalgety QC said that SCP could not afford to fund the repairs and the Government did not have the money. (T 3169)

8.122 In fact, on 21st November 2008, the MV Olovaha and its condition was raised at a Board meeting of SCP. (Exhibit 280) The issue of the seaworthiness of the vessel was alive in everybody’s mind by 21st November 2008. There had been public comments that the vessel was unseaworthy and Lord Dalgety QC appreciated that it was critical that any vessel that would be purchased to replace the MV Olovaha was seaworthy and safe. (T 3170; T 3395 S – 3396; T 3405) At the Board meeting on 21st March 2009, Mr. Jonesse reported that the vessel was seaworthy. (Exhibit 280)

8.123 At a Board meeting on 25th November 2008, the Chairman advised at the conclusion of the meeting she and Managing Director were meeting with Members of Parliament to discuss their “complaint” based on erroneous information, on the alleged unseaworthiness of the MV Olovaha and her alleged inability to service the
Kingdom’s needs, especially during the Christmas and New Year’s vacation period. Mr. Fakatou, a surveyor and the only member of the Board who had maritime experience, took issue with the papers about the safety of the MV Olovaha. In his opinion these reports were misleading, directors were being misled, and an independent survey was necessary. (Exhibit 281) It is noteworthy that the advice was given that an independent survey should be conducted in relation to the MV Olovaha. No such advice was given in relation to the MV Princess Ashika.

8.124 Lord Dalgety QC acknowledged that the issue of the seaworthiness of the MV Olovaha in November 2008 “was certainly alive” and “was certainly a matter for discussion”. (T 3405) The issue of the replacement vessel for MV Olovaha was raised on quite a number of occasions at SCP Board meetings at which Lord Dalgety QC was present. (T 6203) It was a very important and serious matter for SCP.

8.125 Lord Dalgety QC said that when the question marks about the seaworthiness of the MV Olovaha had “become real the vessel was taken out of service and disposed off”. (T 3488 Q – T) This is not correct, as he well knew. The vessel operated right up until late June 2009. Lord Dalgety QC well knew that the MV Olovaha “kept breaking down” and it was costing a fortune to try and repair. (T 3489 A – C)

8.126 It was accepted by Lord Dalgety QC that the board of Directors of SCP recommended that the Government replace MV Olovaha because it was “unreliable”. When it was suggested to Lord Dalgety QC that it was also because it was unsafe and unseaworthy he said “it was essentially mechanical but, yes, there were concerns”. He said “it kept breaking down and that was unsatisfactory and therefore it had to be replaced”. He tried to suggest that it was “technically seaworthy”. When asked about the report concerning the vessel breaking down mid-ocean he said that he could remember reports to the Board about its break downs but “can’t remember the details off-hand”. (T 6218 – 6219) Lord Dalgety QC was clearly aware that MV Olovaha was unseaworthy and that it should never have been allowed to continue to operate by SCP. He also appreciated that it was contrary to the Shipping Act to send a ship to sea that was unseaworthy.

The Importance of Conducting Due Diligence and SCP Decisions in April and May 2009 in relation to the MV Princess Ashika

8.127 Although there was a clear direction by the Chairperson of SCP in 2008 to the effect that papers had to be provided to the Board in support of any agenda items of significance, Lord Dalgety QC said that this was “repeated, repeated, repeated. Infrequently carried out”. (T 264 R – 265 B) The failure to produce these papers was a reflection of the poor governance at SCP. As Lord Dalgety QC stated in his affidavit, one of his primary roles as Company Secretary “has been concerned with governance”. When it was suggested that the failure to produce papers was “poor
governance”, Lord Dalgety QC’s response was “it’s not my job to produce the papers. I circulate the papers that I’m given”. The direction according to the Company Secretary “was followed up to some extent usually with very brief papers which were almost an insult”. (T 3332 R) It was Mr. Jonesse who infrequently provided the papers “and latterly when he did produce them they were terse”.

8.128 On many occasions, according to Lord Dalgety QC, the papers did not adequately address the issues. Having seen various papers presented to the Board, including that in relation to the meeting on 21st April 2009 where the Board recommended the Government purchase MV Princess Ashika, we agree. Lord Dalgety QC said that “taken on their own, you could not have made a decision on many of these papers, you had to pursue it with a verbal interrogation”, (T 3333 – 3334) There is no “verbal interrogation”, or anything of the sort, evident from the minutes of the meeting prepared by Lord Dalgety QC. The minutes were “terse”. It was impossible in many instances, as Lord Dalgety QC said, to make an informed decision on the papers alone. He accepted that to enable the Board to make an informed decision they required sufficiently detailed and adequate papers and that was a matter of common sense and that such information should be in writing. (T 3334 – 3335) Lord Dalgety said that there had been a failure by Mr. Jonesse to sometimes produce documentation and accounts on time. (T 3198) It is difficult to accept the explanation by Lord Dalgety QC that, in June 2009, he and the Board could be satisfied that Mr. Jonesse’s “value to the Company was exceptional”. (Exhibit 273; T 3335)

8.129 On 17th March 2009, the Board of Shipping Corporation and Lord Dalgety QC considered, at a formal Board meeting, an option paper with costings. The meeting was Chaired by Hon. ‘Alisi Taumoepeau. Mr. Jonesse as Managing Director was present, as was Rev. Tevita Haukinima (as a Director) and Lord Dalgety QC as Company Secretary. It was clear to all at the meeting that realistically there were only two options in relation to the MV Olovaha. That is, either maintaining the MV Olovaha in service or replacing the vessel without delay.

The Directors unanimously resolved to:

1. “Recommend to His Majesty’s Government that the MV Olovaha be replaced without delay;

2. Authorise the Managing Director to explore funding opportunities and report back thereon to the Board; and

3. Authorise the Managing Director to sign (and deliver to the Minister of Finance) a letter finalised at the meeting.” (Appendix 75) (Exhibit 307) (Underlining added)
8.130  The letter referred to in the resolution provided that the continuing service of the MV Olovaha “has been beset by increasing issues of maintenance and reliability”. (Exhibit 307)

8.131  It should be noted that the minutes of Directors’ meeting prepared and produced by Lord Dalgety QC and annexed to his affidavit of the meeting on Tuesday 17th March 2009, incorrectly stated that the meeting was on Thursday 19th March 2009. Mr. Jonesse was in New Zealand on 19th March 2009. (T 3307) These incorrectly dated minutes of the meeting, were “certified a correct record” by the signature of Lord Dalgety QC under the company seal and under the date 20th March 2009. (Exhibit 21 annexure “A”) The minutes prepared by Lord Dalgety QC were invariably very short. In many instances, they barely recorded much more than the actual decision. Although an explanation was given as to why Cabinet only records actual decisions, the same explanation was not relevant to that of SCP. The minutes prepared by Lord Dalgety QC therefore did not reveal very much of what was said by those present at the meetings. (T 3335 – 3336)

8.132  Lord Dalgety QC said that he stated on many occasions in meetings that “safety is paramount”, (T 3335 – 3336) This is not recorded in any of the minutes during the years 2007, 2008 and 2009. We agree that safety should have been of paramount concern to the Company Secretary and the Directors of SCP. However, in all the circumstances, the recommendation by the Board to the Government to purchase the vessel and the operation of the vessel by SCP is inconsistent with placing safety as a paramount concern. In reality, safety considerations were effectively ignored. The conduct of Lord Dalgety QC as Company Secretary, does not support that he placed safety as a paramount concern. It is one thing to make statements. It is quite another thing to take steps consistent with such statements.

8.133  Lord Dalgety QC said that the minutes were usually prepared “within 24 hours and signed off then”. (T 258 G) He said his habit was to prepare the minutes promptly and expeditiously after the meetings when the matters were fresh in his mind. He said that “when it’s typed up and signed, the notes are disposed off, because they are my scribbles”. (T 268 N) At another point in his evidence, Lord Dalgety QC said that it wasn’t the practice to sign the minutes at the time. He said that he signed the minutes of the meeting held on 17th March 2009, which were certified as a correct record under the date 20th March 2009, when the documents were being put together for lodging with the Royal Commission. (T 3303 – 3304) However, at another point in his evidence, Lord Dalgety QC further contradicted himself when he said that it was his practice “to sign them once a year when the auditors asked for them”. (T 3301 F) When asked on the 20th January 2010 when he actually signed all the minutes of meetings as being certified as a correct record he answered:
“That was done once a year for the auditors when they asked for it.” (T 3300 D–F)

8.134 Similarly, Lord Dalgety QC said that the practice that he followed was that the minutes are “signed when required to be signed once a year for the auditor”. (T 3300 O)

8.135 If this were in fact correct, which we do not accept, signed minutes for 2007 should have been able to be produced by SCP. They were not.

8.136 He also said that when the auditors asked for a copy of the minutes and they wanted a signature on them he “would do that for the auditors”. (T 3302 B)

8.137 Most disturbingly, apart from the minute for the meeting of the Board of SCP held on Tuesday 17th March 2009, incorrectly recorded by the Company Secretary as being held on Thursday the 19th March 2009, there was not one single certified or signed minute of meeting which SCP was able to produce. His response to this problem was that “it wasn’t the practice to sign them at the time”, the suggestion being that they were signed when the auditors asked for the minutes. (T 3302–3303) The difficulty with this suggestion by Lord Dalgety QC is that the purported minutes produced by Lord Dalgety QC, under direction by the Commission, covered the period 2007, 2008 and 2009. The fact that none of these were certified or signed, apart from the 17th March 2009 meeting, raises serious concerns about the lack of corporate governance in SCP and the accuracy of the minutes. If the minutes were prepared, as Lord Dalgety QC suggested, by him “within 24 hours” it is not logical that they would have not been signed at the time of the next meeting of the Board. Certainly, SCP should have been able to produce more than one signed minute of meeting covering the period 2007, 2008 and 2009.

8.138 The Company Secretary said that the date which appears at the front of the minutes is the date he prepared the minute and that has always been his practice. (T 3306) All the minutes of meetings prepared by Lord Dalgety were, as previously indicated, very brief. The minutes did not record when the meetings opened or closed. It would have been prudent to have done so, as it was not apparent from the minutes taken by Lord Dalgety QC as to how long and as to potentially how rigorous the discussions at the meetings were. (T 267)

8.139 Lord Dalgety QC and the Board members well knew that it was of critical importance that any vessel which was to replace the MV Olovaha needed to be safe, reliable and seaworthy. (T 3170)

8.140 On 21st April 2009, the Board of SCP held another formal Board meeting. Those present were Hon. ‘Alisi Taumoepeau (Chairperson), Rev. Haukinima (Director), Mr. John Jonesse (Managing Director) and Lord Dalgety QC (Company Secretary). The
unsigned minutes record relevantly under the heading “Replacement of the MV Olovaha”:

“3. The Directors considered page 1 of the Managing Directors’ written report which related to a replacement for the m.v. “Olovaha”. A Fiji registered vessel in good seagoing condition, the m.v. “Princess Ashika”, had been identified. The price was 600,000 FJD which Mr. Jonesse considered very reasonable and significantly less than its open market value. Tonga had an Option to acquire this vessel, which expired on 20th May 2009. A further factor which made this acquisition attractive was that the new vessel’s fuel consumption was some 24% less than the Olovaha. In all respects Mr. Jonesse reported that this vessel was suitable for SCP purposes.” (Appendix 76) (Exhibit 272) (Underlining added)

8.141 Obviously Mr. Jonesse correctly considered, which was the reason for his report, that it was obviously important to the Board of SCP that the vessel was “suitable for SCP purposes”, not just for the purposes of the Government. This point seems to have been lost on Lord Dalgety QC, given his firm attitude that SCP had no obligation to conduct due diligence in respect of the MV Princess Ashika.

8.142 The minutes of the meeting for 21st April 2009 indicate that “After detailed discussion the Directors unanimously resolved” as follows:

“[1] to recommend to H.M. Government that they purchase the m.v. Princess Ashika:

[2] to remit to the Managing Director to negotiate with H.M. Government (for submission to the Board for approval) terms for a Time Charter by Demise of the new vessel to SCP, preferably in NYPE (New York Produce Exchange) format:

[3] to authorise the Managing Director to travel to Fiji as required to assist with survey, inspection, and acquisition of the new vessel.” (Appendix 76) (Exhibit 272)

8.143 At the Board meeting on 21st April 2009, some coloured photographs of the MV Princess Ashika were shown to Lord Dalgety QC and the Directors. He said that the photographs “were circulated round the table”. It was apparent from one of the photographs, which Lord Dalgety QC accepted, that there was a large gap on the side of the bow ramp shown in the photograph. As it transpired, water coming in through the bow ramp, which was not properly sealed, was one of the major causes of the disaster. Lord Dalgety QC correctly accepted that if a vessel sailed with the ramp as shown in the photograph, obviously a lot of water would come through the gap. He
tried to suggest that he thought that the photograph was a picture of the ramp being raised or in the process of being closed. Even a quick look at the photograph would not support this view. It should certainly alert one to potential problems. What is troubling is that Lord Dalgety QC knew that there was a problem about the bow ramp and “believed that the question of the bow ramp was one of the matters that had to be attended to” before the first voyage on 3rd July 2009. (T 6221 – 6222) Lord Dalgety QC was aware of another RoRo, the Herald of Free Enterprise, sinking because of water coming onto the deck, causing a major maritime disaster. He well knew how important it was for bow ramps to be made watertight. (T 3373; T 3574 – 3575)

8.144 The Company Secretary was of the view that due diligence, which should be conducted prior to the purchase, was the responsibility of the Government as purchaser, not SCP. He therefore refused to accept that he failed to give appropriate and timely advice to the Board and CEO of SCP, including what due diligence should be conducted in relation to the vessel prior to purchase. (T 6140; T 6200) Lord Dalgety QC well knew that Shipping Corporation had a responsibility under both the Shipping Act and common law to operate a safe and reliable ferry service. If it failed to do so, he appreciated that SCP could be held liable. He was also “absolutely” aware of the fact that SCP had a duty to ensure that the MV Princess Ashika did not operate if it was unseaworthy, (T 6201) It was also rightly accepted by Lord Dalgety QC that the vessel should never have been allowed to depart from Fiji or operate in Tonga. (T 6202) Of course, the vessel was at all times being operated in Tonga by SCP. We have no hesitation in concluding that both SCP and the Government needed to each have conducted independent due diligence.

8.145 Lord Dalgety QC said:

“If we had known, if we had known the information which we do now, and that had been put before the board, I think the simplest way around it would have been, we’d have looked at it and simply said, if you want - we withdraw our previous recommendation to look at the vessel, even if you proceed to buy it, we ain’t going to operate it. It’s not safe.” (T 3203)

8.146 The statement above made by Lord Dalgety QC supports the conclusion that some significance, even in the mind of Lord Dalgety QC, should be attached to any recommendation made by SCP in relation to MV Princess Ashika.

8.147 Lord Dalgety QC and the Board were never provided with any written documents to support the conclusion that any due diligence had been conducted in relation to the MV Princess Ashika. Lord Dalgety QC said that Mr. Jonesse “was taken on trust”. (T 6203) This is not consistent with good governance, particularly when such an important decision is being made. Lord Dalgety QC accepted that if the information
supplied by Mr. Jonesse to him and the Board of SCP in relation to MV Princess Ashika had been supplied to them as the purchaser of the vessel, acting properly, SCP could not have purchased the vessel. (T 6204 – 6205)

8.148 Lord Dalgety QC said that even though he and the Board of SCP effectively resolved to recommend to the Government that it purchase the MV Princess Ashika, “it (did) not absolve the owners from their responsibilities of carrying out proper due diligence as owners”. (T 3551) We agree with this. However, it does not mean that SCP was itself absolved as the operators of the vessel, whose sole shareholder was the Government, from its responsibilities of carrying out proper due diligence. This failure to accept responsibility by Lord Dalgety QC resulted in him not giving professional and prudent advice to the Board. If he had done so, the vessel should never have been purchased and never have been allowed to operate in Tonga.

8.149 It was suggested that the Directors and Company Secretary were effectively making decisions that would impact on the Government of Tonga. Lord Dalgety QC denied this and said they were making “commercial decisions”. (T 3209) His attitude as to the consequences of decisions made by SCP on the Government, which was the sole shareholder of SCP, should be most troubling to the Government. (T 3209 – 3211) Lord Dalgety QC accepted that when the Board of SCP was considering whether to recommend the purchase of MV Princess Ashika to the Government, it had to have in mind at the time that its 100% shareholder was the Government of Tonga. He also correctly accepted that an essential corporate governance principle for good corporate governance was to recognise the legitimate interests of stakeholders which, in the case of SCP, would include the Government. (T 3212; T 3401 – 3402) It was suggested to Lord Dalgety QC that when SCP was considering the prospective purchase, and recommending the purchase of the MV Princess Ashika, it needed to keep in mind that the single shareholder in SCP was the Government. He said “I would have known that and that would have been a factor, yes”. (T 3402) However, other parts of his evidence, including as to what was relevant in his mind as to what needed to be before the Board to make an informed decision to recommend to the Government that it purchase the MV Princess Ashika, do not reflect that it was a factor he adequately took into account.

8.150 The unsigned minutes for the meeting of 21st April 2009 produced by the Company Secretary, have under “certified a correct record” the date 20th March 2009. (Exhibit 272) He said that he had not “picked that up” (T 3299) and that it was an obvious typographical error.

8.151 At the meeting on the 21st April 2009, there was a one and a half page Managing Director’s report presented. It stated that “a replacement vessel had been identified and independently surveyed”. (Appendix 76) It also stated:
“The MoP.E (Ministry of Public Enterprises) and MoT (Ministry of Transport) agree with the replacement planning and provided accounting resources to make the financial proposal. This has been accepted and will be presented for cabinet approval this week. (Discuss).

The independent survey and the evaluation of the circumstances has fallen very well in our favour after some time of extreme pressure. The proximity to Fiji, the relationship with the current owners and their engineers has also made the decision easier. On the basis of currency whispers, I pushed hard for Fiji’s not US and as a result the big aid has been timing with Fiji’s devaluation, a straight saving of 120K. The final requirements of a sale are to be met under normal Marine Terms of an MOU and standard S&P Agreement acceptable to GoT.

In principle the Princess Ashika, as circulated, is a similar size vessel to the Olovaha with a shallower draft allowing access to some other potential uses. With a roll through hull, she has a greater cargo capacity (2x Olovaha) and as a flatter design structurally she is very maneuverable and very stable. Pax facilities are of a high standard. Some modifications will be required but will not stop immediate operations.” (Exhibit 272) (Underlining added)

8.152 Lord Dalgety QC was asked whether he supported the resolution made on 21st April 2009 to recommend to the Government that it purchase the MV Princess Ashika. His reply was:

“I didn’t oppose it on the basis that I understood that when that went to government they would then be going through all the normal processes which a competent purchaser went through in acquiring a vessel.” (T 3397 H)

8.153 Consistent with the evidence given by the Company Secretary, if he did not agree with the proposed resolution, he had a duty to accordingly advise and would speak up.

8.154 Lord Dalgety QC properly accepted that anyone who purchased a vessel without carrying out due diligence was acting imprudently and negligently. (T 3454 L – O) Understandably, he considered that the Government was negligent in not conducting proper due diligence prior to the purchase of the vessel. (T 3528) However, he did not accept that anyone that recommended the purchase of a vessel without carrying out appropriate due diligence was acting imprudently and negligently. (T 3454 O – S) The Company Secretary did not consider that SCP had any responsibility to carry out due diligence. (T 3528)

8.155 The above answers by Lord Dalgety QC reflected his failure to have any proper appreciation of the duties and responsibilities of SCP, and him as Company
Secretary. The single shareholder in SCP was the Government. The proposed replacement vessel, which was ultimately the MV Princess Ashika, was to be operated at all times by SCP. The design of the vessel needed to be appropriate for use in Tongan waters as an inter-island ferry. If documentation was not checked prior to purchase, at least by the Government, Lord Dalgety QC considered that it would certainly be “utterly stupid”. (T 3455 Q - 3456 D) When it was suggested that SCP had a duty and obligation, in the interest of its shareholder, amongst others, to ensure that the vessel was safe and seaworthy, Lord Dalgety QC’s response was “that is the sort of statement that makes a lot of sense on the face of it but the reality was, the company was not buying the ship...”. (T 3398 H – L)

8.156 It was properly accepted by Lord Dalgety QC that decisions made by or on behalf of SCP needed to be made having regard to the interests of the shareholder and accordingly the Government, which was the 100% shareholder in SCP. Accordingly, he rightly accepted that if the Government was negligent in the purchase of MV Princess Ashika it would follow that the only shareholder of SCP was obviously negligent. It was also obvious that if the Government was negligent in purchasing the vessel and allowing it to sail that would potentially have ramifications on SCP. (T 3431) When asked if, in effect, the Government did not attend to due diligence matters they would be clearly negligent his answer was:

“In the context of the Ashika, there’s no other answer except yes.” (T 3462)

8.157 Given that SCP had an obligation to act in the interests of its shareholder, the Government, and that SCP was always going to operate the proposed replacement vessel, it should have been abundantly clear to Lord Dalgety QC and the Directors that SCP had a duty and obligation to ensure that the vessel was safe and seaworthy.

8.158 It was suggested to Lord Dalgety QC that SCP had obligations, as it was going to operate the vessel, to carry out due diligence even though the Government was purchasing it. He disagreed and said:

“The due diligence and the purchase was not a matter for Shipping Corporation. The purchasers were another entity. The fact that they were also the shareholder is clear but the owner was government, not the company. If the company (SCP) had been buying it they would have instructed the surveyors, or government could have remitted to the company to undertake the purchase on their behalf, in which case a broker would have been appointed, surveyors would have been appointed, the vessel would - and as we now know - the vessel would have remained in Fiji, but we were not instructed to do that, the government dealt with that matter themselves.” (T 3402 I – L)
8.159 Lord Dalgety QC never advised anyone associated with SCP that they should conduct an independent survey or an independent valuation. Additionally, he never advised anyone on behalf of the Government that they should conduct an independent survey or obtain an independent valuation. (T 6205) Having said this, he said that he would have asked for a copy of surveys which had been received at the time when the Charter Party was going to be entered into between SCP and the Government. (T 6204 – 6205) It would have been a simple and appropriate matter to ask for copies of the surveys prior to the recommendation made by SCP to the Government to purchase the vessel and prior to the operation of it by SCP. Lord Dalgety QC should have ensured that this was done. If he had, the obvious advice should have been that the vessel should not be recommended by SCP to purchase and not be operated.

8.160 The Company Secretary accepted that if there had not been a failure to carry out due diligence, including conducting an independent survey prior to purchase, the vessel would still be in Fiji; it would never have been purchased and it would never have sailed in Tonga. (T 3401) We agree with this. He went onto state:

“And even if, for whatever reason, it had come here, if at the same time we had seen the defects list we would have refused to operate the vessel - no matter how embarrassing that might have been for the owners. So there were two ways of stopping a disaster: one was, do your homework and don’t purchase if it’s unsafe, the second is that the board should have had a proper report as to the condition of the vessel so that - in other words, the defect list should have been tendered to us. It was not tendered to us. Now that is - that’s unacceptable. Because that again would have been a second way of preventing the casualty” (T 3401 H – K)

8.161 Lord Dalgety QC should have ensured that SCP did its own “homework” and obtained a proper report as to the condition of the vessel before it recommended the purchase of it and prior to operating the vessel in Tonga.

8.162 When giving evidence on the 21st January 2010, Lord Dalgety QC accepted that the MV Princess Ashika, which he previously described as “a rust bucket”, should have remained in Fiji and never have been purchased. He was of the opinion and remained of the opinion on the 21st January 2010 that the tragedy could have been averted if proper due diligence had been conducted in relation to the purchase of the MV Princess Ashika. (T 3424) Lord Dalgety QC correctly accepted that if proper due diligence had been conducted the disaster would “absolutely” have been avoided and that that was the inescapable conclusion. We also agree with this.

8.163 It was properly acknowledged by Lord Dalgety QC that SCP had a clear interest to ensure that any vessel purchased, to be operated by SCP, was safe and seaworthy.
He also “absolutely” accepted that SCP did not want the Government of Tonga purchasing a vessel that was likely to sink. (T 3369) In his words, “it was not fit to take a vessel like this to sea” and it was a “useless purchase”. (T 3371) One may question how SCP, in these circumstances, not only recommended the purchase of the vessel by the Government, but operated the vessel in Tonga. The answer is, in part, that the Company Secretary and Board of SCP did not properly and adequately exercise reasonable care, diligence and skill when exercising their powers and performing their duties.

8.164 Lord Dalgety QC however regularly suggested that it was not the responsibility of SCP to conduct due diligence, as it was not purchasing the vessel. He accepted however that SCP made the recommendation to the Government to purchase MV Princess Ashika. The following exchange is of noteworthy.

“MR VARITIMOS: And could I take it that Shipping Corporation did not wish to operate a vessel that was going to sink.

LORD DALGETY: Of course not.

MR VARITIMOS: And Shipping Corporation did not wish to operate a vessel which was unseaworthy, is that correct?

LORD DALGETY: Absolutely.

MR VARITIMOS: And Shipping Corporation did not wish to operate a vessel which was unsafe.

LORD DALGETY: Correct.

MR VARITIMOS: And could I suggest that, again, the 100 per cent and single shareholder in Shipping Corporation was the Government of Tonga.

LORD DALGETY: Yes.

MR VARITIMOS: Could I suggest that Shipping Corporation had a duty on it to ensure that any vessel that they recommended for the purchase to the government was seaworthy and safe.

LORD DALGETY: No, that would be the obligation of the purchaser to go through proper due diligence.

... 

MR VARITIMOS: You say and accept that Shipping Corporation as the operators, or prospective operators of this vessel, were concerned that the vessel operating would be safe and seaworthy.
LORD DALGETY: When they operated the vessel that it was safe to operate, yes.” (T 3480 – 3481)

8.165 The failure of Lord Dalgety QC to give any advice to the Board, let alone appropriate advice, is apparent from the following evidence:

“MR VARITIMOS: Lord Dalgety, so is it correct to say that you did not proffer any advice to the board of Shipping Corporation that an independent survey should be conducted of the vessel prior to recommending its purchase, is that correct?

LORD DALGETY: There was no discussion of that. It was never suggested and I never suggested it.

MR VARITIMOS: And is it correct to say that you never recommended or advised the board of Shipping Corporation, including the chairperson, that prior to the purchase of Ashika that an independent survey should be conducted, is that correct?

LORD DALGETY: Not by Shipping Corporation, no.

MR VARITIMOS: So you never advised that.

LORD DALGETY: Not by Shipping Corporation, no”. (T 3484)

8.166 Lord Dalgety QC was asked if he ever advised anyone, formally or informally, or suggested even in passing to anyone, or mentioned anything to anyone, that any of the due diligence matters that he referred to needed to be attended to prior to the purchase. His response was:

“I mentioned to the managing director of Shipping Corporation, who was the officer who the government had asked to assist them, I told him that the proper document to be used was the Norwegian Sale Form, and he should advise the purchasers of that. And I remember him saying on one occasion when he’d returned to Fiji - from Fiji, that the government had conducted two - two surveys had been conducted, but the government wasn’t entirely satisfied with that, so there’d been a third survey. So therefore there’d been three surveys, he said, that the government had conducted and to me that might have been overkill, but it seemed like a step in the right direction, a very positive step in the right direction. When, however, these so-called survey reports were seen by me, which was after the sinking of the vessel, they were matters for government, they weren’t a matter for the company, I have to say, I did not regard them as survey reports, they were materially inadequate.” (T 3427 K – O)
8.167 Lord Dalgety QC went on to say:

“I was never instructed or even informally requested by anyone in
government to give them advice. If they had asked they would have had it
willingly and quickly. My responsibility was to advise the board on various
matters and I gave suitable advice as to what was required to be done to the
managing director, who said he had passed that on to the Ministry of
Transport.” (T 3428 B – D)

8.168 The Company Secretary said that he did not think the issue of due diligence by
Government, which was the only shareholder in SCP, was ever a subject of
discussion at the Board of SCP and he said “we do not offer gratuitous advice.” He
did not think that the matters of due diligence were ever a matter on the Board
agenda for SCP as “once the matter had been passed to government, it was left to
them to carry matters out and...I think, anticipated that they would do it properly”.
Lord Dalgety QC did not think he ever told the Board of SCP what he expected the
Government should do in terms of due diligence. (T 3430) We find that Lord Dalgety
QC never told the Board of SCP what due diligence he considered should be
conducted prior to the purchase or operation of that vessel.

8.169 It is astonishing that the Company Secretary of Shipping Corporation of Polynesia
Limited, Lord Dalgety QC, having acknowledged that one of his duties was to
properly advice the Board, completely failed to do so in terms of recommending due
diligence be conducted. It shows a complete disregard by the Company Secretary to
properly carry out his duties and obligations. He said that “you use an appropriate
form so you can recover all the relevant documentation and you conduct appropriate
surveys which includes a hull survey” to avoid what he described as, in the case of
the MV Princess Ashika, a “useless purchase”. (T 3371) Lord Dalgety QC agreed that
the vessel had a “nil value” or “was in such condition, it had no practical value” and
the Government should have obtained a valuation prior to purchase. (T 3459 – 3460;
T 3372) He was of the view that Mr. Karalus was clearly acting negligently if he did
not have evidence before him to justify that the purchase price was fair and
reasonable before signing the contract for the purchase of MV Princess Ashika.

8.170 Lord Dalgety QC appreciated that it was fairly fundamental as part of due diligence
that someone with maritime experience look at and examine the vessel prior to
purchase. He was also aware that Mr. Jonesse had neither the qualifications nor the
experience to proffer any worthwhile opinion in terms of any survey of the vessel.
Although Lord Dalgety QC tried to suggest the Mr. Jonesse was sent to Fiji to “assist
government”, he well knew that he could not survey the vessel. (T 3393 – 3394 F; T
3436) He maintains that Mr. Jonesse told him that the Government wanted him to
go to Fiji to have a look at the ship. Lord Dalgety QC said that he responded to Mr.
Jonesse by saying “well, why send you? Why not send our marine superintendent. I
would have thought he’d be more appropriate”. (T 3391) However, Lord Dalgety QC knew that Captain Vi was not available to go to Fiji and he was not aware of whether someone else went with Mr. Jonesse to Fiji to inspect the vessel. (T 3392) The Company Secretary should have insisted that someone with maritime experience inspect the vessel and report back to him and the Board members of SCP so they could make informed decisions in relation to the MV Princess Ashika. Lord Dalgety QC was of the view that if Mr. Jonesse had properly informed him of certain information, then the tragedy could have been averted. (T 3200 H – J) This goes to highlight why the Company Secretary and Board should have taken more care to ensure that Mr. Jonesse provided them with more detailed information and why independent due diligence should have been insisted upon. Discussions at relevant Board meetings should have been more robust and inquisitive.

8.171 Lord Dalgety QC well appreciated that it was important that an independent survey be conducted in relation to the vessel. He says that Mr. Jonesse told him that the Government wasn’t happy with two surveys and in fact went ahead and obtained a third survey. Lord Dalgety QC thought that this sounded like a very sensible owner, “taking three surveys.” (T 3200 – 3203) Notwithstanding the fact that the Company Secretary fully appreciated the importance of an independent survey being conducted, he never asked Mr. Jonesse to be shown copies of the surveys. He clearly should have asked to see copies of the survey. It would have been a very simple, yet very important matter to insist upon.

8.172 Lord Dalgety QC did not see the so-called “surveys” until after the vessel sank. As to these documents, he said:

“I have to say I was not happy. In my mind they were not the sort of surveys that one should have had if you were buying a ship. They were wholly and utterly inappropriate” (T 3201)

8.173 The Company Secretary said that “the absence of...material information was crucial”. (T 3201) If he had seen certain information in relation to the vessel, including a defects list he said:

“I would have told the board, “You must not allow that vessel to sail until this has been attended to, until we have our own survey, and we consider the result.” If you do - competence - your competence - you could be regarded as incompetent, you could be regarded as negligent. You know the state of the vessel is not satisfactory, according to these defect lists. If you allow her to go to sea now, you are exposing yourselves to trouble. Don’t. That would have been my advice.” (T 3202 B – D)
8.174 The above passage highlights why Lord Dalgety QC should have insisted on being provided with all relevant information, so that he could give appropriate advice and enable an informed decision to be made, on whether the vessel should be purchased and operated in Tonga. It should be appreciated that the Company Secretary “fully expected” that the Board would have listened to the above advice and not allowed the MV Princess Ashika to go to sea as they could be regarded as “incompetent” and “negligent”. (T 3202) The incompetence lay in the failure of Lord Dalgety QC in ensuring that all relevant information was provided to him and the Board so that an informed decision could be made in relation to the MV Princess Ashika.

8.175 There were in fact no independent surveys conducted in relation to the MV Princess Ashika. The Ministry of Transport officials surveyed the vessel in early July 2009. However the deficiencies list prepared on 2nd and 3rd July 2009, as part of the survey process, demonstrated that the vessel was unseaworthy and should never have been allowed to sail. Lord Dalgety QC accepted that this was so. The “Provisional Certificate of Survey of vessels” relating to the MV Princess Ashika dated 2nd July 2009 and 3rd July 2009 is dealt with in another section of the Report, dealing with the Ministry of Transport officials. In that section we have raised reservations about the genuiness of the Certificates, including that the “Provisional Certificate of Survey of vessel” said to be dated 2nd July 2009. It was probably created at a much later time. In any event, there is no authority under the Shipping Act to issue a “Provisional Certificate of Survey of Vessels” seeking to certify, for example, that the MV Princess Ashika “is considered to be seaworthy”. The certificates sought to rely on section 126 of the Shipping Act. However, that section did not authorise the issuance of any such “Provisional Certificate of Survey of Vessels”.

8.176 Lord Dalgety QC said that he “wasn’t expecting a provisional certificate, I was expecting a certificate of survey, not a provisional one.” (T 3556) He accepted, that by reason of the fact that the vessel did not have a certificate of survey, as opposed to a “Provisional” certificate, SCP had been totally exposed to liability. (T 3556)

8.177 Mr. Jonesse was, during all his four visits to Fiji in 2009, the CEO and Managing Director of SCP. He was being paid in that capacity by SCP. He was not being employed by the Government. Lord Dalgety QC cannot seek to extricate responsibility for failing to ensure that proper due diligence was not conducted by SCP, by asserting that Mr. Jonesse was not going to Fiji on behalf of SCP. Lord Dalgety QC had no information to support any worthwhile conclusion that independent due diligence had been conducted on behalf of the Government, let alone SCP, even up to the time that the MV Princess Ashika sank on 5th August 2009.

8.178 It is ridiculous for Lord Dalgety QC to suggest that Mr. Jonesse “was not acting for us (SCP)”, and that he was “an independent contractor or agent of government” such that “Shipping Corporation is not involved in this.” (T3436 – 3437) The evidence
indicates that SCP was paying for return airfares and certain associated costs for Mr. Jonesse to travel from Tonga to Fiji in relation to MV Princess Ashika. The Company Secretary was trying to, as many persons were seeking to do, “pass the buck”. This is also evident from the answer to the question whether he agreed if Mr. Jonesse had properly carried out his duty as CEO of SCP, the tragedy would never have happened. His answer was:

“There’s two aspects to it. He did not go to Fiji on behalf of the company. He went there because he was requested by government to go to assist them. The question then emerges, whether the information that he gleaned was information for government, or whether it was information he should have shared with us. My view would be that he could have asked government if he could – or take a copy of and give it to us. But it was, as far as I’m concerned, it’s crucial information we should have had to allow us to make, or to allow the company to make a sensible decision about that vessel. The trouble was, that he was not going there on our behalf. If he had, he would have come back, I would have - we’d have seen a lot of this documentation. All that documentation was asked for, paid for by government. Therefore it belonged to government.” (T 3203 T – 3204 D)

8.179 Lord Dalgety QC clearly should have asked to see the documents and information obtained by Mr. Jonesse. It would be absurd to suggest that it “belongs to the Government” and therefore should not be asked for and considered by SCP.

8.180 A number of useful brief propositions or suggestions were put to Lord Dalgety QC towards the conclusion of his evidence on 26th February 2010. (T 6222 – 6227) Lord Dalgety QC rightly accepted:

- Before a prospective owner of a vessel, such as MV Princess Ashika, was going to purchase the vessel, proper due diligence needed to be conducted
- He knew that the Government of Tonga was the proposed purchaser
- The single shareholder of the SCP was the Government of Tonga
- Proper due diligence would include an independent survey conducted by a person of appropriate qualifications and experience; an independent valuation and checking and verifying documents in relation to the vessel
- The Ministry of Transport would not be independent for the purposes of conducting any survey
- The failure to carry out independent due diligence prior to the purchase was a major contributing factor to the disaster
- The MV Princess Ashika was clearly unseaworthy and unsafe prior to its purchase and continuously until in sank on 5th August 2009
• The purchase price of FJD$600,000 (plus 15% tax) was a significant investment on behalf of the Government
• There were serious question marks raised at SCP Board meetings about the reliability and seaworthiness of the MV Olovaha, which needed to be replaced
• The main source of income of SCP was dependent upon the successful operation of a single ferry, which was temporarily intended to be the MV Princess Ashika
• SCP was always intended to be the operator of the replacement vessel
• He was aware that there were numerous offences if owners or operators failed to protect the safety of life at sea
• He “overlooked” that the definition of “owner” under the Shipping Act effectively covered an “operator” such as SCP
• SCP had an obligation to ensure that it did not send a ship to sea which was unseaworthy and, in his words, it would be “a stupid thing to do” (T 6222 – 6227)

8.181 It was also accepted by Lord Dalgety QC that there would be additional financial ramifications, if proper due diligence was not conducted, in that repairs to the vessel would need to be done at the expense of SCP. (T 3527 – 3528) Thus, if the Government adopted the recommendation of SCP to purchase the MV Princess Ashika, it was imposing a significant liability on SCP. This is another reason why independent due diligence needed to be conducted before the recommendation was made. As it transpired, he accepted that the vessel was in such terrible condition that it would not be commercially feasible to repair it.

8.182 The Company Secretary and Board of SCP have, since the disaster, considered winding up the company. (T 3253 – 3254)

8.183 The paper presented to the Board on the 21st April 2009, indicated that in relation to the MV Princess Ashika “some modifications will be required but will not stop immediate operations”. (Exhibit 272) There was no discussion at the meeting about the “modifications”, let alone the cost. This is a matter which should have been raised as it was likely to have potential detrimental financial ramifications on SCP.

8.184 Lord Dalgety QC said that he had no involvement in the purchase of MV Princess Ashika. (T 3164 N – Q) However as to the meeting where the Board of SPC recommended that the Government purchase MV Princess Ashika on 21st April 2009 he said:

“I remember that meeting. It was done on the basis of a report from a manager who’d been sent to Fiji at the request of government, not at the request of the company, to look at a vessel there.” (T 3164)
8.185 As to the question of whether Lord Dalgety QC actively participated in meetings of SCP, his response was:

“On that particular meeting, there was a report. When that report was - they said, well, that’s fine; if that is the case, pass it on to government so they can then proceed with due diligence. They’re purchasing the vessel, not us.” (T 3165 A – D)

8.186 The Company Secretary went onto affirm:

“The role of the - no, you’ve got to get this clear: the role of the shipping company in respect of that ferry was only to be as the operator of the vessel, and it’s been made perfectly clear by the Chairman of the Board that where there are divisions of responsibility between the company and government, government does things, the company doesn’t - they do not get involved. In the past, there have been too much crossover and involvement and that caused difficulties. Under the new Chairman these - there was to be no such crossover and frequently management were told that if it’s a government matter, do not get involved, and in this case they purchased the vessel, which was quite clear. This was a matter for government. If you think this is a good ship, pass it on with a recommendation. That is what they wanted. They must then go ahead and make a decision, having gone through all the normal processes you go through when you’re purchasing a ship. There was still another matter which would have to be considered later, whether for our purposes it was the right vessel for operations, operationally. We had not got to that stage.” (T 3165 E – J)

8.187 Lord Dalgety QC sought to down play the responsibilities on SCP in relation to the purchase of MV Princess Ashika by stating that “we were set up simply to manage and the whole idea was that, in due course, there would be a charter party from government to the company to manage the ship”. (T 302)

8.188 Lord Dalgety QC said that he knew what he would have done if SCP had been purchasing the vessel. The first thing he would have done was to appoint a lawyer to advise on legal issues related to the purchase. The Company Secretary went onto explain:

“The second thing I’d have done was to look, with lawyer’s advice, for a good S&P broker - a sale and purchase broker, and unless they came up with a good reason for it, otherwise I’d have suggested that they use the Norwegian Sale Form. And that proper surveys are carried out. And, of course, under the Norwegian Sale Form there is all the arrangements for inspecting documents beforehand and then seeing the originals before you actually complete the
deal. That’s what I’d been used to in the past, and I would have expected that - I would have expected that to be followed by anybody purchasing a vessel. And in addition I would have wanted to know further - and indeed I said this, I said as much to John Jonesse and to anyone else who was interested, that there were four things I was interested in. Is she seaworthy?” (T 3166)

8.189 Lord Dalgety QC considered that there were four fundamental things he would have been interested in if SCP were purchasing the vessel. These were all matters which we consider should have been taken to account by SCP irrespective of whether they were going to purchase the vessel, before SCP recommended the purchase of the vessel and also before SCP commenced operating it in Tonga. They were:

- Is the vessel seaworthy?
- If the vessel suitable for use in Tonga waters?
- Is the vessel insurable?
- Can the vessel be used for 2 years without the necessity of having to slip it? (as it was needed for 2 years) (T 3166)

8.190 He said that he mentioned these matters to Mr. Jonesse either before or after the Board meeting, but said these were matters for Government. We have no hesitation in concluding that they were also matters which SCP, as operator of the vessel, should have satisfied itself of. Lord Dalgety QC should have advised the Board of SCP accordingly. Lord Dalgety QC said that he was just giving the benefit of his experience and thoughts. (T 3166) Although the four matters were critical matters that he knew should be attended before purchase, Lord Dalgety QC took the view that as SCP was not purchasing the vessel, SCP had no responsibility in ensuring that the matters were attended to. None of the four critical matters, including the requirement to conduct a survey prior to purchase, were recorded in any minutes of SCP. Lord Dalgety QC said that this was “because we weren’t purchasing the ship”. He went onto state:

“If it had been something we were doing then there would have been a paper produced and there would have been a lot more. We weren’t doing it. It was John was going, John Jonesse was going there, not at our behest, at the request of government and I was simply saying, remember there are certain things that you would find it beneficial to do. This is what you need to do, and make sure it’s done.” (T 3167 L – N)

8.191 If SCP was purchasing the vessel, Lord Dalgety QC said in the context of SCP Board meetings, that “there would have been a lot more said, and a lot more done.” (T 3168 E)
8.192 He acknowledged however that SCP was always going to operate the MV Princess Ashika and that it was of critical importance for SCP to ensure that the vessel was seaworthy. He accepted that SCP did not wish to operate a vessel which was unseaworthy and that SCP’s “job before we operated it, (was) to ensure that she was properly certified and was safe to operate”. (T 3170)

8.193 The Company Secretary “absolutely” agreed that if proper due diligence had been conducted, the disaster would have been avoided. (T 3840) We have no hesitation in concurring with this view.

8.194 Lord Dalgety QC was asked some questions about who was responsible for conducting due diligence and SCP’s position. The following appears at transcript page 3481:

MR VARITIMOS: Could I suggest that Shipping Corporation had a duty on it to ensure that any vessel that they recommended for the purchase to the government was seaworthy and safe.

LORD DALGETY: No, that would be the obligation of the purchaser to go through proper due diligence.” (T 3481)

8.195 At a later point in evidence, the following exchange appears:

“MR VARITIMOS: So do you accept then, from that answer, that Shipping Corporation of Polynesia had a duty, responsibility, or obligation to ensure that any vessel recommended by Shipping Corporation to the government for purchase was safe and seaworthy?

LORD DALGETY: There was nothing in the papers to suggest it was not. The inference was that it was.

MR VARITIMOS: Well, do you accept that there was a duty?

LORD DALGETY: In the broadest terms, yes.” (T 3483)

8.196 Notwithstanding the acceptance of a duty “in the broadest terms”, the Company Secretary gave no advice to the Board of SCP to ensure that steps were taken, such as the conduct of due diligence, to ensure SCP only recommended a vessel for purchase which was safe and seaworthy. He clearly should have done so and failed in his duty as Company Secretary to properly advise the Board of SCP.

8.197 Lord Dalgety QC was asked whether he agreed that any responsible Board or Company Secretary would be concerned to ensure that any vessel they were to operate, prior to acquisition, was safe and seaworthy. His answer was as follows:
“Yes, I agree with that, and then the following conditions: there was a report which said this vessel could be satisfactorily recommended to government. We recommended it to government. Then to make sure that in fact the layman’s report, which was what Mr Jonesse’s report was, was fact, if all the proper procedures had been carried out by the prospective owners of the vessel, and if it had been properly certified, or not, seaworthy, then the company would have had a ship. If it has been purchased as seaworthy and was seaworthy, it would still be operating. If it wasn’t seaworthy, that would have been seen at the time of the report. That was the role – I’m sorry, that is the role of the owners and the charterers are entitled to rely on the prospective owners to carry out their duties, and indeed, they knew what their duties were. They were carried out.” (T 3495 B – F)

8.198 It was conceded by Lord Dalgety QC that the inevitable consequence of not properly conducting due diligence in relation to the MV Princess Ashika was that the vessel sank. He also properly accepted that the inevitable consequence flowing therefrom is that Shipping Corporation lost its major income stream and had to retrench staff, including longstanding, hard working Tongan people. Lord Dalgety rightly acknowledged that if the vessel replacing the MV Olovaha was unsafe or unseaworthy then, effectively, SCP would close down because it would lose its major income stream. (T 3489) Notwithstanding this, he was insistent that he did not have any responsibility as Company Secretary to advise that proper due diligence should be conducted on behalf of SCP. (T 3487 – 3495 R) Lord Dalgety QC was wrong. As matters transpire, the Board of SCP have, subsequent to the sinking of MV Princess Ashika, considered that they will probably need to wind up the company. It now has few staff working for it.

8.199 Lord Dalgety QC considered that as part of proper due diligence the MV Princess Ashika should not have been purchased unless independent survey was conducted of it by the time of the purchase. We agree with this obvious proposition. In the words of the Company Secretary, it is “sheer madness to buy the ship if you don’t survey it” and that this surveyor needed to be independent. Officials from the Ministry of Transport would not be independent. (T 3425; T 3470 – 3474; T 3486 – 3487)

8.200 When it was suggested to Lord Dalgety QC that SCP had a responsibility and duty to ensure that proper due diligence was conducted prior to the purchase of the MV Princess Ashika his answer was:

“No. I would have thought that our proper due diligence would be in the context of the negotiations on charter party before we signed the charter party to satisfy ourselves that what we were getting was something that we
could operate. In other words, that it had a Safe Ship Certificate and that it had been properly insured for a period of at least 12 months.” (T 3487 M – O)

8.201 Clearly, SCP had a duty, responsibility and obligation to ensure that any vessel recommended by it for the Government for purchase was safe and seaworthy. It did not do so, because as Lord Dalgety QC pointed out on dozens of occasions during his evidence, SCP was not purchasing the vessel. This was a major failure by Lord Dalgety QC and the Board of SCP to properly carry put their duties.

Government Procurement Committee

8.202 Lord Dalgety QC was asked whether he understood that there was a Procurement Committee in Tonga. He said that although he had not heard of it, he accepted that there needed to be some sort of system for looking at major purchases and that was a matter of common sense. He said that anybody purchasing must have some system for looking into a perspective purchase to make sure that it is and would be a valuable addition to their business (or to the State in the case of a Government purchase). This included making sure that it was fit for the purpose for which it was sought to be acquired for, and that the price being paid for the good or proposed to be paid was a fair and reasonable price. This was again, “absolutely” a matter of common sense according to Lord Dalgety QC. (T 3157 M – 3158 B; T 3456) Lord Dalgety QC succinctly put it that “you only procure things that can do what you want them to do”. (T 3466) It follows from this that SCP should not have recommended the purchase of the MV Princess Ashika unless the vessel could safely operate as an inter island ferry in Tonga and that it was seaworthy.

8.203 It was accepted by Lord Dalgety QC that it made good sense to have a Government Procurement Committee and thought that it was “inevitable that governments have to have this”. (3447 S – 3448 E) Having regard to the material, Lord Dalgety QC rightly concluded that the Government did not appear, at least on the face of it, to have followed their own procedures. (T 3449; T 3453) He recognised that it was highly improper for Mr. Karalus to have signed the contract for the purchase of the vessel on 8th May 2009, if done deliberately, before the matter had been referred to the Government Procurement Committee. (T 3453)

8.204 We have no hesitation in concluding that it was a matter of common sense for the Board and Company Secretary of SCP to have been satisfied that the MV Princess Ashika would be fit for the purpose for which it was sought to be acquired, prior to SCP recommending to the Government that they purchase the vessel by the decision of 21st April 2009.
The Contract for the purchase of the MV Princess Ashika

8.205 The contract for the purchase of the MV Princess Ashika was a cash unconditional contract. (Exhibit 417) It was signed by Mr. Karalus on 8th May 2009. As Lord Dalgety QC put it, once the contract was signed it was a binding agreement and there was no let out. (T 3450) He also, in respect to the contract, aptly put it that there was “no manoeuvring room whatsoever”. (T 3461)

8.206 Lord Dalgety QC described the contract as “so highly unusual to be worthy of questioning”. (T 3364 T) He said he would never have signed it and would “strongly advise others not to sign it”. He described the contract as “rubbish” and “wholly inappropriate”. (T 3352; T 3365) He thought that he also “used some impolite terms about it as well”. (T 3352 – 3353)

8.207 Lord Dalgety QC said:

“The next thing that I was concerned about and asked about, are they using the Norwegian Sale Form? And I was told, no they’re not. The way he put it was, the lawyer in the Ministry of Transport does not think that’s necessary because the sellers have come up with a document which they have seen and they are quite happy to use. And they were proceeding on that basis. And as it was put to me that she was a lawyer, one assumed that she knew what she was doing. After the tragedy, when all the papers were being put together, I was shown a copy of the sale and purchase agreement. And I’m afraid my language was less than polite. I said, “What the hell is this?” And then when I had another look at it very quickly, I threw it down at Jonesse and said, “This is a load of crap.”

... No self-respecting lawyer would ever have assented to a document like that. Then I said, “Who is this lawyer that you are talking about?” To which he said, “Well, actually, she’s not a lawyer, she’s just doing the work there, she is one of the clerks, or one of the civil servants there.” Now, if I had known earlier that they didn’t have a lawyer, then obviously one would have - one would have asked why - one might have asked why are you not using a Norwegian Sale Form which would have protected you? These are the sort of things” (T 3200 – 3201 A)

8.208 On another occasion during evidence, Lord Dalgety QC said that he did not see a copy of the contract for the purchase of MV Princess Ashika until “after the vessel went down”. (T 3202 H)
8.209 On yet another occasion, Lord Dalgety QC said that he did not see a copy on the contract until probably sometime in August or early September 2009. He formed the view that no self respecting lawyer could have been involved in the preparation of the contract. (T 3203)

8.210 The following exchange in relation to any advice sought or given by Lord Dalgety QC is noteworthy:

“MR VARITIMOS: Were you asked to give any advice in relation to the terms and conditions of any contract -- -

LORD DALGETY: Regretfully, I wasn’t.

MR VARITIMOS: - - - for the purchase of Ashika?

LORD DALGETY: No. Regretfully, I wasn’t.

MR VARITIMOS: Were you asked to give any advice in relation to any memorandum of agreement associated with Ashika?

LORD DALGETY: No.

MR VARITIMOS: No one ever asked you.

LORD DALGETY: Nobody asked me.” (T 3353 B – I)

8.211 Although when giving evidence on the 19th January 2010, Lord Dalgety QC said that he was shown a copy of the Sale and Purchase Agreement after the tragedy, when giving evidence on the 20th January 2010, he said that he thought he was shown the copy produced by Patterson Brothers before the purchase and told Mr. Jonesse that it was “wholly inappropriate and that the Norwegian sale form should be used”. (T 3352; T 3360 – 3363; T 6237) Lord Dalgety QC said that Mr. Jonesse showed him the draft contract and he told him that that was not the appropriate document and to use the Norwegian sale form. This conversation occurred before, as Lord Dalgety QC described it, the “rubbish” contract was signed for the purchase of the vessel. (T 3361 – 3363) It left the State completely exposed because, for example, it made no provision for the requirement to provide critical documents after the contract was signed. (T 3363)

8.212 In documents provided to the Solicitor General by Mr. Karalus on the 6th May 2009, a copy of the draft contract for the purchase of the MV Princess Ashika and a draft Memorandum of Understanding (“MOA”) was enclosed. In a document entitled “contents” it made a reference to MOA Standard Agreement revised with Lord Dalgety. (Exhibit 129) Lord Dalgety QC said that the reference to him having revised the Memorandum of Agreement was “totally and utterly incorrect”. (T 3367 R) He said:
“I did not revise, and I would not have revised that piece of rubbish. I’d have put a line through it and simply said, “Reject, unsatisfactory.” (T 3368 A)

8.213 Lord Dalgety QC said he had not seen the Memorandum of Agreement before or any similar Memorandum of Agreement. When asked where Mr. Karalus got the information from to advise the Solicitor General that the “MOA Standard Agreement revised with Lord Dalgety”, his answer was:

“I have no idea, but what I do know, and I’ll repeat it, and I’ll keep repeating it: I did not draft, revise, of any part in any of these agreements. I saw one agreement - the Patterson Brothers one - which they’d suggested, and I said it was inappropriate. “Go back and tell the Ministry they have to use the Norwegian sale form; that’s the only appropriate one”, and that was the extent of my involvement in giving advice. The Government have their own lawyers. They will take advice as they think fit. I was not asked. The only person that showed me anything was Jonesse. I told him that was inappropriate. That should not be used, but there again that was it. I do not know where or why this statement is made, but it is factually inaccurate and it is wrong, and I’m not going to be the fall guy for signing this contract or agreeing to it. I had nothing to do with it. It’s rubbish, totally and utterly. Anybody agreeing to this needs their head examined.” (T 3368 P – U)

8.214 We find that Lord Dalgety QC certainly was shown by Mr. Jonesse a draft contract for the purchase of the MV Princess Ashika in materially the same terms as the actual contract signed on 8th May 2009 before it was signed. The only changes were grammatical or typographical. In particular, he was shown a copy of the draft contract which was sent by Mr. Karalus to the Solicitor General under cover of Savingram dated 6th May 2009. (Exhibit 129 attachment “C”) Given that he was of the view that the contract was “rubbish” and that it did not, in his opinion, offer proper protection, he should have taken a more proactive role in ensuring that not only that another contract was used, but also that appropriate due diligence was conducted before the contract was signed. It was clear that Mr. Jonesse was playing an active part in relation to the purchase of the vessel, yet it was known to Lord Dalgety QC that Mr. Jonesse had no legal experience or qualifications.

8.215 It should be noted that in relation to the likely cause of the disaster, Lord Dalgety QC said:

“I realised that this should never have happened if proper steps had been taken during the purchase, that is, using the Norwegian Sale Form, using - using proper qualified sale and purchase brokers and getting proper survey reports, and the benefit of using the Norwegian Sale Form is that all the documentation relating to the ship, all the survey documentation from the
past, all the state documentation for certification, that would all be there. You would see – you could ask for copies in advance but at the final handover you would go through and the brokers would go through and they would check every single one of these documents and if one of them wasn’t right the deal would not proceed at that stage. That is how it happens. That’s the normal way of doing it and if it had happened in this case the Ashika would not have left Fiji and Tonga would have been saved a terrible disaster” (T 3243 N – S)

8.216 The tragedy is that Lord Dalgety QC had used the Norwegian Ship Brokers Association Memorandum in relation to the Sale and Purchase of another vessel; it would have been a very simple matter for the Standard Memorandum to have been used; he knew it should have been used, and if used the disaster may have been averted. (T 3349; T 3352; T 3360 – 3362; T 3424)

8.217 As to the Memorandum of Agreement, it is likely that Lord Dalgety QC had some discussions with Mr. Jonesse about it, but did not formally approve the use of it.

8.218 On any rational construction of the contract for the purchase of MV Princess Ashika, it provided that the Government was legally bound to pay the entire purchase price of FJD$600,000 irrespective of the condition of the vessel or the value of it. (T 3461) It was thus critical, before the contract was signed, that all proper due diligence had been conducted and that all relevant documentation had been sighted, including a current survey certificate. (T 3461) When the contract was signed on 8th May on behalf of the Government and Patterson Brothers Shipping Company Limited (as the vendor), the Government was obliged to pay the FJD$90,000 and the balance of FJD$510,000 on 8th May 2009. This would obviously not have allowed any inspection of the vessel between the date of signing the contract and the date required for the payment of the purchase price. As it transpired, the vendors agreed to accept the balance purchase price in early June 2009. (Exhibit 477)

Charter Party between SCP and the Government

8.219 Lord Dalgety QC was aware that it was fairly fundamental that a Charter Party should be entered into between SCP and the Government. (T 3490) He well knew that the purpose of the Charter Party was “to set out the respective obligations of owners and charterers”. That is, set out the terms and conditions, obligations and duties of both SCP and the Government. (T 3491) However, no Charter Party was entered into, even by 5th August 2009. (T 3490 – 3491) He suggested that in the absence of a Charter Party, SCP were acting “as agent for the owners”. (T 3525) Lord Dalgety QC said that it would have been desirable if the process of having the Charter Party Agreement “speeded up”, but he was “not involved in the negotiations. I would have seen the documents when it came back.” (T 3491) When Counsel Assisting asked him whether he considered “picking up the phone and ringing Mr. Karalus and
suggesting that there needs to be a Charter Party entered into prior to the vessel sailing”, his answer was:

“the point of contact with the Ministry was through the Managing Director and the officials of the Ministry.” (T 3492 I – K)

8.220 When Lord Dalgety QC was asked if it was correct that he took no steps to ring Mr. Karalus or contact Mr. Karalus to ask him what was happening with the Charter Party he said that he did not as “it was a management issue to fulfill”. (T 3493) It should be noted that Lord Dalgety QC had known Mr. Karalus for 20 years and he was on a first name basis with him. (T 3260; T 3366; T 3485) He accepted that he would have had no trouble contacting Mr. Karalus or speaking to him. When asked if he had discussed the MV Princess Ashika with him on occasion he said “I may have. I can’t recall”. (T 3485) It was not uncommon for Lord Dalgety QC to say he could not recall matters which clearly he should have been able to recall. This was a reflection of his unreliability as a credible witness.

8.221 The above evidence should be contrasted by the evidence of Ms. 'Ofa Finau (Assistant Secretary, Legal in the Ministry of Transport). Ms. Finau says that on the 29th June 2009, she gave Mr. Karalus a copy of the amended Draft Charter Agreement for his information. However, Mr. Karalus told Ms. Finau that the Board of Directors of Shipping Corporation did not like the Draft Charter Agreement as amended by Ms. Finau. After contacting Lord Dalgety QC, the Minister told her that Shipping Corporation was referring the matter to maritime lawyers in New Zealand. (Exhibit 343 paragraph 21) Ms. Finau indicated that Mr. Karalus called Lord Dalgety QC on the phone while she was still in his office. Mr. Karalus told her that Lord Dalgety QC said that the Board of Directors have referred the matter to maritime lawyers in New Zealand. (T 4472 H – 4474 I) We accept the evidence of Ms. Finau in relation to her conversation with Mr. Karalus.

8.222 Although Lord Dalgety QC would not accept the failure of SCP to enter into a Charter Party in relation to MV Princess Ashika was, in the circumstances, an illustration of the amateurish manner in which SCP was conducted, it is difficult to come to any other reasonable conclusion. (T 3493)

8.223 On 2nd July 2009, Mr. Karalus emailed Mr. Jonesse and Ms. Finau the following:

“Dear John

As per our on-going discussions please be advised that the Ministry of Transport agrees to the operation of the MV Princess Ashika for the month of July for the fee of $5,000. During this period the full terms and conditions of a lease agreement are to be conducted and concluded. During this month the SCP is to ensure full compliance
with the laws of the sea and port management and the operation of the vessel as per the survey documentation. This interim will also allow us to negotiate a charter rate

Happy sailing!!

Paul” (Exhibit 29 page 68)

8.224 As previously stated, there was no Charter Party entered into between SCP and the Government, even by the time the vessel sank on 5th August 2009.

Shipping Corporation of Polynesia Board Meeting on 3rd July 2009

8.225 On 3rd July 2009, there was a Board meeting of SCP in the afternoon. Those present were Hon. ‘Alisi Taumoepeau, (Chairperson), Mr. Jonesse (Managing Director), Rev. Tevita Haukinima (Director) and Lord Dalgety QC (Company Secretary).

8.226 The Board resolved, in relation to MV Princess Ashika as follows:

"3: The Managing Director reported to the Board that all paper work necessary to

(a) transfer title to the vessel to the Kingdom of Tonga and (b) permit the vessel to operate commercially in Tongan Waters would be completed this day before the vessel set sail. This report was NOTED.

4: The Board considered a style Barecon 2001 Charterparty and APPROVED the use of that charter format as the basis for the contract between the Kingdom of Tonga (as Owners) and SCP (as Charterers).

5: Contractual terms were presently being negotiated with the Ministry of Transport and a final draft was unlikely to be available to the Board for consideration until the end of July. In the meantime a holding contract letter would be issued by the Ministry of Transport: the charterhire for July 2009 had been agreed at 5,000 Pa'anga/month. It was also likely that Government would exempt certain marine costs from liability to Consumption Tax. The foregoing report by the Managing Director was NOTED.” (Exhibit 29, annexure “A”)

8.227 It is therefore clear from the Board minutes that at the time of the meeting the vessel did not have all the necessary “paper work” to permit the vessel to operate commercially in Tongan waters. The Company Secretary and Board members well knew that the vessel was intending to depart at about 6pm on the evening of the 3rd July 2009. (T 3201; T 3554) The vessel nevertheless departed Nuku’alofa on 3rd July 2009. As it transpired, as is apparent from this section of the Report dealing with Lord Dalgety QC in relation to the registering and licencing of the vessel, the MV
Princess Ashika was not properly registered or licenced even at the time of the sinking on 5th August 2009.

8.228 As to the meeting on 3rd July 2009, Lord Dalgety QC said:

“when the vessel was to put to sea, there was a board meeting and the certificate had not yet been forthcoming. There was discussion round the table and it was made perfectly clear, and I made it perfectly clear as well, this vessel must not proceed to sea unless it is issued with a seaworthiness certificate. If you do there are substantial penalties which would be incurred.” (T 3554 B – D)

8.229 The Board minutes do not record that Lord Dalgety QC made it clear that the vessel should not proceed to sea unless it was provided with “a seaworthiness certificate”. Lord Dalgety QC said that this is because the minutes would record decisions “not the inter play round the table”. (T 3555) If, in fact Lord Dalgety QC had made it perfectly clear that the vessel should not sail without the issuance of “a seaworthiness certificate”, it should have been recorded in the minutes. We do not accept that Lord Dalgety QC made the statement that he maintains. (T 3554 – 3556) In any event, even if he had raised the matter, he should have insisted on seeing the certificate at a time well before the vessel sank on the 5th August 2009. At the very least, one would have expected the matter to have been raised at the subsequent SCP Board meeting held on 15th July 2009. Additionally, although Lord Dalgety QC says that he raised the requirement to obtain “a seaworthiness certificate” there is no certificate expressed in those terms in the Shipping Act or the Regulations. Furthermore, Lord Dalgety QC made no reference to any requirement to obtain any licence to operate the vessel (which was required under section 203 of the Shipping Act) or any registration certificate (which was required under section 8 of the Shipping Act).

8.230 It is clear from the evidence of Lord Dalgety QC that he was only making reference to the requirement to have one certificate, namely, the so-called “seaworthiness certificate”. (T 3374) He said that in the afternoon that the vessel was going to sail he remembers “making a comment”, “whatever you do, you must not put to sea until you have the certificate from government”. (T 3374 F)

8.231 The Company Secretary was questioned whether he asked to look for the certificate. His answer was:

“That would have been sometime in the evening. No, after- it was coming later that day after the meeting was over. “Do not put to sea till you have the certificate”.” (T 3374)
8.232 When it became apparent during examination of Lord Dalgety QC that there was a requirement for a valid survey certificate as well as a valid registration certificate, he said that he told Mr. Jonesse that the vessel could not go to sea without both these documents. (T 3380 S – 3381 E) We do not accept that Lord Dalgety QC provided any proper direction or advice to Mr. Jonesse or the Board of SCP as to what documents were required to enable the MV Princess Ashika to be lawfully operated by SCP and sail in Tongan waters. This failure was inexcusable and continued even to the time that the vessel sank on 5th August 2009.

8.233 Although when giving evidence on 22nd January 2010, the Company Secretary referred to the requirement to obtain “a seaworthiness certificate”, this should be contrasted with his evidence given on 19th January 2010. Lord Dalgety QC was asked whether he could remember certain things about the meeting in July 2009. He said that he did remember very explicitly at the end of the meal, “well, just make sure that you don’t sail till you’ve got the certificate”. (T 3171 R) He said that he told this to Mr. Jonesse. When asked what certificate he was referring to he said “the safe ship certificate”. Lord Dalgety QC was given the opportunity to indicate where the “safe ship certificate” was to be found in the legislation of Tonga. Instead of referring to any section or part of the Shipping Act his response was:

“That’s the one, it’s called a safe ship certificate, that’s the one the Ministry issued, the seaworthy certificate, which includes the wording that she is safe to go to sea”. (T 3172 A – D)

8.234 The Shipping Act and Regulations make no reference to any certificate called “the safe ship certificate”, although it may be a term found in legislation in other jurisdictions.

Shipping Corporation of Polynesia Board Meeting on 15th July 2009

8.235 On 15th July 2009, there was a Board meeting of SCP in the afternoon. Those present were Hon. ‘Alisi Taumoepeau, (Chairperson), Rev. Tevita Haukinima (Director) and Lord Dalgety QC (Company Secretary). Mr. David Wright was also in attendance, but not in the capacity as a Director or any voting capacity.

8.236 The Board resolved in relation to MV Princess Ashika:

“m.v. PRINCESS ASHIKA

4: The Board NOTED the circulated Temporary contractual arrangements with the Minister of Transport for the charter of vessels during July 2009.

Given that it was unlikely that a Charterparty would be agreed upon by the Board and consented to by the Minister of Transport before the end of July the Directors present:-
RESOLVED to defer the matter to the Managing Director to arrange for a continuation of the Temporary contractual arrangements until the end of August 2009.

5: It was reported to the Board that (a) a Charterparty in *Barecon 2001* format was acceptable in principle to the Ministry of Transport: (b) SCP’s admiralty lawyers, Messrs Wilson Harle of Auckland were now preparing a final draft of the necessary charterparty which would first of all be circulated to Directors for approval and, thereafter, delivered to the Ministry for their consent: and (c) the Ministry, at least verbally, had offered to pay SCP’s legal fees in connection with the preparation of the charterparty.” (Exhibit 21)

Failure to Properly Register the MV Princess Ashika

8.237 The MV Princess Ashika was required to be registered pursuant to the *Shipping Act* to allow it to lawfully operate in Tonga. Lord Dalgety QC well knew this. (T 3532 – 35335) However, it was not properly or lawfully registered. He accepted that if it was not properly registered, it could not lawfully operate. (T 3523) Lord Dalgety QC should not have allowed this failure to occur.

8.238 A purported “Provisional Certificate of Registration” was produced to the Commission in relation to MV Princess Ashika said to be granted “pursuant to section 28 of the *Shipping Act*”. (Exhibit 81) It was allegedly registering the vessel for the period 9th June 2009 to 8th September 2009. On the face of it, it was signed by Captain William Leslie Johnson as “Registrar” of Shipping in Tonga. However, Captain Johnson ceased employment at the Ministry of Transport on 8th June 2009 and thus had no authority whatsoever to sign the certificate at any time thereafter. Additionally, section 28 of the *Shipping Act*, which previously dealt with provisional registration, was repealed in about 2001.

8.239 A further purported “Provisional Certificate of Registration” was produced to the Commission in relation to MV Princess Ashika said to be granted “pursuant to section 28 of the *Shipping Act*”. (Exhibit 114) It was signed by Mr. Viliami Tu’ipulotu as Registrar of Shipping in Tonga. Again, the problem with this “Provisional Certificate of Registration” was that it purported to have been granted by the Registrar pursuant to section 28 of the *Shipping Act*, which did not in 2009 authorise the issuance of any such Certificate of Registration.

8.240 There was no jurisdiction or authority for any Provisional Certificate to be issued by authorities in the Kingdom of Tonga in relation to the MV Princess Ashika.

8.241 The Company Secretary well knew, as he should have, that the MV Princess Ashika needed to be registered to allow it to lawfully sail. (T 3381; T 3522 – 3535) He
accepted that if it did not have a valid Certificate of Registration, it would be operating contrary to law and illegally. (T 3381 – 3383)

8.242 Although the requirement to ensure that the MV Princess Ashika was properly and validly registered prior to operation, Lord Dalgety QC said that the issue was not discussed at the Board. He said that the “matter was never raised with me or with the board”. (T 3537) Consistent with good governance, the issue should have been discussed at a Board meeting of SCP. Lord Dalgety QC should have raised the issue. It is simply not good enough for Lord Dalgety QC to suggest that:

“There was an assumption that the formalities which the owners needed to undertake had been complied with and that management had carried out its functions to ensure that the vessel could properly put to sea with the right certificates.” (T 3537)

8.243 Unfortunately, Lord Dalgety QC did not appreciate that under the Shipping Act, SCP was considered to be an “owner” of the MV Princess Ashika. (T 3539 – 3545) He was proceeding on an erroneous understanding of the law. Even though Lord Dalgety QC was not aware of the correct state of the law, as the operator of the vessel, he should have ensured that the MV Princess Ashika was validly and properly registered.

8.244 Lord Dalgety QC rightly conceded that one of his key duties was to make sure that the company complied with its regulatory and legal obligations and with the laws of Tonga. (T 3189; T 3542 – 3543) The failure to ensure that the MV Princess Ashika was validly registered was a very basic, yet critical, failure to comply with the laws of Tonga. Even if Lord Dalgety QC had seen the “Provisional Certificate of Registration”, given his admission as to his failure to look at the Shipping Act for over a year prior to the purchase of MV Princess Ashika, he was not likely to have been able to properly advise on issues of registration of the vessel.

Failure to obtain a Licence to operate the MV Princess Ashika

8.245 SCP never obtained a licence, in relation to the MV Princess Ashika, to enable the vessel to engage in coastal trade or in any commercial activities in the territorial waters of Tonga. SCP was therefore operating an unlicensed vessel in contravention of the provisions of section 203 of the Shipping Act. Lord Dalgety QC well knew that the Princess Ashika, on every occasion that it sailed in Tonga, did not have a licence issued under section 203 of the Shipping Act. (T 3515)

8.246 At all material times, section 203 of the Shipping Act provided:
“203 Ships engaged in coasting trade and commerce

(1) No ship or boat shall be engaged in coastal trade or in any commercial activity in the territorial waters of Tonga except under a licence granted by the Minister upon the payment of a fee prescribed by the Minister from time to time.

(2) A licence granted under this section may be—

(a) a general licence;

(b) a licence for the whole or any part of the coasting trade or commerce; or

(c) a licence for a specified period or voyage

(3) The Minister may at any time revoke or modify a licence if the circumstances of the case so require.

(4) Any person who contravenes the provision of this section shall for each offence be liable on conviction to a fine not exceeding $5,000.”

8.247 The Company Secretary was asked whether he ever saw an application for a licence. His response was “again, these were matters left to management”. He said that he told Mr. Jonesse that “in discussion that you’ve got to go to the Ministry and get all the licences you require to operate in Tonga.” (T 3518) This advice was close to useless, if one can categorise it as advice from a Queen’s Counsel and Company Secretary. Lord Dalgety QC said that he knew his way around the admiralty legislation and he was very experienced in admiralty and company law matters. (T 252–253; T 351) He should have given much better advice than this in all the circumstances to Mr. Jonesse, who he knew was not a lawyer and had no maritime experience other than the limited amount which he had acquired at SCP.

8.248 Lord Dalgety QC was asked why a licence was not obtained under section 203 of the Shipping Act. He said that it was the Ministry of Transport’s opinion that SCP had been prepared to accept, for well over 10 years, that the interpretation of the section did not require a licence. (T 3523) However, neither he nor any other officers of SCP were able to produce any letter to support this. We do not accept Lord Dalgety QC’s evidence that this was a view advanced by the Ministry of Transport to SCP. There is no credible evidence to support Lord Dalgety QC’s assertion. In any event, it would have been a simple matter to make an application to the court seeking a declaration as to the proper construction of the section, so as to determine whether a licence was or was not required. This would have avoided any suggestion
that SCP were operating an unlicensed vessel. Lord Dalgety QC never considered that any such application should be made.

8.249 Lord Dalgety QC accepted that the MV Princess Ashika was being engaged in a “commercial activity”. It was charging passengers to travel on the vessel. It was also charging to carry cargo. His attempt to justify, on the proper construction of the section, that a licence was not required under section 203 of the Shipping Act was absurd and embarrassing. (T 3518 – 3524)

Obligations under the Shipping Act

8.250 There are a number of heavy duties, responsibilities and obligations on the “owners” of a ship, under the Shipping Act. For example, section 118 of the Act provides that the owner and the master of a ship that carries one or more passengers shall each be responsible for maintaining onboard certain minimum standards in accordance with the regulations, such as proper protection for the passengers from the sea and weather.

8.251 Section 144 of the Shipping Act has at all material times provided:

“144 Sending unseaworthy ship to sea

(1) No person shall take or send or attempt to take or send an unseaworthy ship to sea.

(2) Subject to subsection (3), a person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding $250,000 or to a term of imprisonment not exceeding 15 years, or both, and the ship is subject to forfeiture to the Crown.

(3) No person shall be convicted under subsection (2) if he can show that the contravention of subsection (1) occurred without his actual fault or privity, or that it was reasonable in the circumstances to take or send the ship to sea while unseaworthy.”

8.252 For the purposes of the Shipping Act, by force of section 2 of the Act, “person” includes a corporation. Thus, Shipping Corporation were legally obliged not “take or send or attempt to take or send an unseaworthy ship to sea”. Lord Dalgety QC effectively accepted that Shipping Corporation was in fact sending the MV Princess Ashika to sea which was unseaworthy (although he says he only became aware of this after it sank). (T 3582 – 3585) He well knew that given the serious consequences of sending, or attempting to send an unseaworthy ship to sea, that SCP had a very heavy obligation to ensure that proper steps were taken to make sure that an unseaworthy ship was not sent to sea. (T 3579 D – H)
8.253 Lord Dalgety QC asserted that Shipping Corporation had not contravened section 144 of the Shipping Act because it was “reliant upon a document which had been issued, or purported to be issued by the regulatory authority in the Kingdom which said it was seaworthy”. (T 3578 – 3579) The mere fact that a certificate may be issued certifying that a vessel is seaworthy does not inevitably lead to the conclusion that a person taking or sending or attempting to take or send an unseaworthy ship to sea, does not contravene section 144 of the Act. A vessel may in fact be seaworthy on a particular date, but may become unseaworthy at a later date. The evidence indicates that every time the MV Princess Ashika sailed in Tonga, large holes were created on the sides of the vessel caused by waves breaking through the fragile and heavily corroded sides of the vessel. He also accepted that the MV Princess Ashika was not seaworthy and that the certificate certifying that the vessel was seaworthy should never have been issued.

8.254 Section 155 of the Shipping Act requires, inter alia, the “owner” within 48 hours after the happening of an accident occasioning loss of life, to provide a report of the accident and of the probable cause thereof.

8.255 Section 209 of the Shipping Act provides:

“209 Owner’s obligation to keep ship seaworthy

Notwithstanding any agreement to the contrary, in:

(a) every contract of service, express or implied, between the owner or master of ship and any member of the crew of that ship; and

(b) every contract of carriage, express or implied, between the owner or master of a ship and any passenger on that ship

there is an implied term binding and obliging the owner that the owner of the ship and the master, and every agent or other person charged with preparing the ship for sea, or sending it to sea, will use all reasonable means to ensure the seaworthiness of the ship at the commencement of the voyage, and to keep it seaworthy during the voyage.”

8.256 For the purposes of this section of the Report, it is not necessary to refer to the other sections dealing with statutory obligations imposed on owners. The point that is sought to be made is that Lord Dalgety QC proceeded on the basis that the provisions of the Shipping Act dealing with “owners” under the Act had no application to SCP, because SCP was only the operator and not the owner. The first time that he became aware that SCP was effectively treated as an “owner” under the Shipping Act was when Counsel Assisting drew his attention to the provisions in the
Shipping Act during the course of his evidence (T 3381 – 3382; T 3556) He therefore proceeded to provide, or fail to provide, advice on this erroneous understanding of the law. (T 3556 – 3573) Lord Dalgety QC said:

“We’ve never regarded ourselves as owners of the vessel” (T 3556)

8.257 It is almost incomprehensible how a Company Secretary and Queen’s Counsel responsible for ensuring that SCP complied with its legal obligations, and required to give advice to the Board, had no idea that SCP was bound by the provisions dealing with “owners” under the Shipping Act. It may in part be explained by his failure to have “checked” the Shipping Act for years. (T 3542 – 3543)

8.258 Lord Dalgety QC however knew that owners of vessels under the Shipping Act have onerous duties and responsibilities on them. (T 3512 – 3513; T 3557) He also fully appreciated that SCP was at all times required to operate the MV Princess Ashika legally, which would mean that there needed to be compliance with the Shipping Act and the Regulations.

8.259 Section 2 of the Shipping Act is the interpretation section. For many years it has provided that:

‘ “Owner” means in respect of a ship the person whose name appears as owner, or as co-owner jointly and severally with others, of the ship or of a share in it in the register that records the ship’s particulars in compliance with the law of the State whose flag the ship is flying, and includes—

(a) a character by demise;
(b) the operator of the ship; and
(c) Any other person exercising control over the navigation of that ship, its equipment, or its crew;’ (Underlining added)

8.260 The register that records the ship’s particulars in compliance with the laws of Tonga, as referred to in the definition of “owner” in section 2 of the Shipping Act, records that the owner of the MV Princess Ashika is the Government of Tonga and Shipping Corporation. (Exhibit 110) For that reason alone, for the purposes of the Shipping Act and the statutory obligations imposed there under, Shipping Corporation was the “owner” of MV Princess Ashika, as was the Government. It should also be noted that the definition has the effect that the owner includes “the operator of the ship” and also “any person exercising control over the navigation of that ship, its equipment, or its crew”. It is not an exclusive definition. For completeness, “person”, by reason of section 2 of the Shipping Act includes a corporation. The submission on behalf of Shipping Corporation to the effect that SCP was not the “owner” under the Shipping Act is without any legal foundation.
8.261 Not only did Lord Dalgety QC not understand the legal obligations imposed on Shipping Corporation of Polynesia under the Shipping Act, he had not even heard of the law concerning the tort of misfeasance in public office which was applicable to the officers of Shipping Corporation. As it was, in his words, “a term of English law which I’m not familiar with”, he also obviously failed to advise the Board on this area of the law and the duty of the relevant Directors. (T 6207) We note that Lord Dalgety QC was a lawyer practicing in the United Kingdom. He should clearly have known about this area of law if he expected to properly advise the Directors of Shipping Corporation.

**Observations by Lord Dalgety QC in relation to the Condition of the MV Princess Ashika**

8.262 Lord Dalgety QC said that “in lay terms”, the MV Princess Ashika was a “rust bucket”, although he suggested he only became aware of this after the tragedy. (T 3387)

8.263 The Company Secretary accepted that the vessel was unquestionably unseaworthy and should never have left Fiji, let alone sailed in Tonga. (T 3383) Lord Dalgety QC saw photographs of the vessel during the course of this Inquiry after the vessel sank, taken of the vessel when it was in Tonga in July and early August 2009. Some showed large holes on the sides of the vessel caused by corrosion. (T 301)

8.264 On 21st April 2009, Lord Dalgety QC and the members of the Board were shown some photographs of the MV Princess Ashika. Two photographs in particular should have alerted those that saw them, including Lord Dalgety QC, that there were at least potential problems with the condition of the vessel. This should have triggered in the mind of Lord Dalgety QC, the importance of SCP obtaining independent due diligence before the recommendation was made to purchase the vessel and, also after it arrived from Fiji, before SCP commenced operating it in Tonga.

8.265 Lord Dalgety QC was aware that there was “passage damage” that needed repairs by SCP before it sailed, which damage was caused when the vessel sailed from Fiji to Tonga. (T 3374) This should have again emphasised the need for Lord Dalgety QC to ensure that SCP had independent due diligence conducted.

8.266 Lord Dalgety QC was asked if he ever had gone on the MV Princess Ashika, his response was:

“Yes, on one occasion before some ministers of religion were taken back home after their conference. There was a prayer service at the wharf. I happened to be in the office, I was asked to go along, and I think we went on board up the gangplank, saw the passenger accommodation, saw the bridge, and left. I was on board for about 10, 15 minutes. Once, and once only.” (T 301 O – P)
Although he could not remember the date he went on the MV Princess Ashika, Lord Dalgety QC remembered it was in July 2009. (T 301 R – 302 B)

In subsequent evidence Lord Dalgety QC said that sometime in July 2009 he went on the vessel “once for about half an hour”. (T 3383) He was asked whether he walked over the MV Princess Ashika, to which he answered:

“I didn’t walk over her, there was a party of Faifekau leaving for the northern islands, they were having a prayer service and I was invited to go along and participate in that. And then there was an opportunity, “Why don’t you come onboard and have a look at the bridge.” We walked up to the bridge, we were there for about 10 minutes and then - 10, 15 minutes, wandered through the passenger accommodation, which was certainly - it was old, but light years ahead of the Olovaha and then left so that all the passengers could get on board, because they were agitating to get on board to leave.” (T 3384 B – E)

He certainly looked at the vessel sufficiently to make the comparison between the MV Princess Ashika and the MV Olovaha to have formed the view that the former vessel was “light years ahead of the Olovaha”. (T 3384) Photographs were taken of Lord Dalgety QC standing near and on the MV Princess Ashika. (Exhibits 278 and 279; T 3385 – 3390) He said he “wasn’t looking for rust” (T 3386 B; T 3387 R) and “I didn’t look for rust”. (T 3387 H) When asked about his impression of the vessel when he walked on it he said “she was old” and “it was certainly old”. In fact, the MV Princess Ashika was older than the MV Olovaha which the MV Princess Ashika was replacing. He said that he didn’t have the time and wasn’t looking for rust and he had no recollection of rust being obvious to him. (T 3387)

On another occasion, when giving evidence on 20th January 2010, he accepted that he was interested in looking at the condition of the vessel when he entered it in July 2009.

Having regard to all the evidence, we do not accept that Lord Dalgety QC did not observe, what he described as an “old” vessel and a “rust bucket”, was in very poor condition. Any responsible Company Secretary, in all the circumstances should have been sufficiently interested in the condition of the vessel to have observed the heavy corrosion.

Lord Dalgety QC was asked by Counsel Assisting if could be taken that he was concerned about the condition of the vessel. One would have thought that the answer was obviously in the affirmative. However, his answer was:

“No, that’s not the point. I’m not trying to impose myself as a technical expert over those in the Ministry who, on the face of it, know about these things and issue it. If they say the vessel is seaworthy, that’s fine. One accepts that unless
one has credible evidence to the contrary. And credible evidence to the contrary would have been a sight of the defects list, or it would have been an adverse report from the Master or senior officers of the ship that they had reservations about the vessel and they would give their reasons for it.” (T 3386 N – Q)

8.273 A defects list was in fact prepared in relation to the MV Princess Ashika on 2nd and 3rd July 2009. (Exhibits 17 and 19) The vessel sailed on five occasions after this date, operated by SCP. Lord Dalgety QC considered the defects list supported the view that “it should not have been take to sea. It was not fit to take a vessel like this to sea.” (T 3371) He said that if he had seen the defects list before the vessel was sent to sea, he would have given advice that “the vessel cannot and will not be operated by us”. (T 3370 I)

Appointment of Mr. Jonesse by SCP and Drafting of Contracts of Employment of Mr. Jonesse by Lord Dalgety QC

8.274 Lord Dalgety QC was asked whether he had ever been involved in drafting or preparing a contract on behalf of Shipping Corporation. His answers are illustrative of his unreliability as a credible witness. The questions and answers are instructive. They were:

“MR VARITIMOS: Lord Dalgety, have you ever been involved in drafting contract or preparing contract on behalf of Shipping Corporation?

LORD DALGETY: Yes, I have from time to time in the past. Not so - not in recent times but under the old management, yes, that happened quite a bit and under the old board, that happened quite a bit.

MR VARITIMOS: Well, in the last - well, since beginning of 2007, have you been involved in drafting or preparing contracts on behalf of, or relating to Shipping Corporation?

LORD DALGETY: There may have been the occasional document I was asked to prepared but it hasn’t been a major part of my - it hasn’t been a significant part of my duties.

MR VARITIMOS: Well, what sort of - -

LORD DALGETY: I can’t remember offhand. If you tell me did you do this or did you not, I’d be able to tell you. I can’t remember what happened years ago.

MR VARITIMOS: In the last 12 months, Lord Dalgety, have you had any involvement in preparing or assisting in the preparation of any contracts that would relate to or be associated with Shipping Corporation?
LORD DALGETY: There might have been a renewal of the contract for John Jonesse.

MR VARITIMOS: Beg your pardon?

LORD DALGETY: I may have had a hand in the renewal of the contract for John Jonesse.

MR VARITIMOS: Well, you did have a hand in the renewal of the contract for Mr Jonesse.

LORD DALGETY: It was basic - yes, it was a repeat of the previous one. That’s the only one that immediately springs to mind.

MR VARITIMOS: Lord Dalgety, you were involved in the preparation of a fresh contract for Mr Jonesse last year, is that correct?

LORD DALGETY: Yes, that’s probably correct.

MR VARITIMOS: In fact - - -

LORD DALGETY: But based on the original one which was drafted several years before.

MR VARITIMOS: Lord Dalgety, why did you not say that before?

LORD DALGETY: I was trying - you can’t - there’s lots of things one does. If you say “were you involved in this?” As I said, that’s the only thing I could think of in the last year or so that I might have been involved in.

MR VARITIMOS: Well, you were involved - - -

LORD DALGETY: And exactly what my role in that was, I can’t remember now. But it’s more than likely that I took the old one and prepared a new draft on the basis of the old one, that’s quite likely.

MR VARITIMOS: Well, Lord Dalgety, would it be correct to say that in about May or June last year you prepared a contract, an employment contract, for Mr Jonesse to sign?

LORD DALGETY: I prepared a draft based on his existing one, yes, and circulated that to the directors.” (T 3186 – 3187)

8.275 At one point in evidence, when it was suggested to Lord Dalgety QC that he was in fact instrumental in preparing Mr. Jonesse’s original contract of employment, his response was that “that’s probably right, yes”. (T 3188 A – B)
8.276  Lord Dalgety QC prepared the original contract of employment between SCP and Mr. Jonesse dated 7th March 2007. (Exhibit 368) He eventually accepted that he drafted the contract of employment dated 7th March 2009 “with the assistance of the financial controller”. (T 3276 M)

8.277  On about 19th March 2007, the Minister received a Memorandum from the Company Secretary, Ramsay R. Dalgety QC, in relation to the engagement of a new CEO. (Exhibit 270; T 3281) The Memorandum stated that Mr. Jonesse was selected for the post after extensive advertisement within Tonga and overseas. It stated that the Board’s Appointment Committee (which Ramsay Dalgety was a member of) prepared for the Board a report unanimously recommending the appointment of Mr. Jonesse. It went onto state that on 2nd February 2007, the SCP Board of Directors unanimously resolved, amongst other things, that Mr. Jonesse be appointed, subject to satisfactory completion of contractual arrangements. The Memorandum sought the “blessing” to the arrangements from the Minister for Public Enterprises.

8.278  Lord Dalgety QC denied that he was instrumental in the appointment of Mr. Jonesse as CEO in 2007. However, the minutes of Directors’ meeting held on 2nd February 2007, at which Lord Dalgety QC was present, record that it was resolved that Mr. Jonesse be appointed as CEO, subject to satisfactory completion of contractual arrangements. (Exhibit 267) The resolution also records that it was to be remitted to Lord Dalgety and the financial controller to negotiate a draft contract of employment by Mr. Jonesse for approval by the Board and the Minister for Public Enterprises. (Exhibit 367) Mr. Jonesse sent an e-mail to Lord Dalgety QC on 28th November 2006 in relation to the position of CEO. (Exhibit 36; T 3255 – 3256) When asked whether he played any part in the appointment of Mr. Jonesse he said that he “was one of several members of the Appointments’ Committee”. (T 3222) When asked who the other members of the Appointments Committee were he said, “I don’t remember. Look it up.” When asked what the duties and obligations sought to be fulfilled by the CEO were he said “it would be in the advert.” The Company Secretary was then asked “Can you remember?” The response was “No, of course not. It was several years ago”. (T 3245)

8.279  When Lord Dalgety QC was asked where the position was advertised and how widely it was advertised, his response was “I can’t remember. Check the records…but I can’t remember, 3 years ago, all these trivial details”. (T 3247) He did state however that the appointment of a CEO is the most important matter for any company. In response to the suggestion that the question of the appointment of CEO needs to be conducted in a rigorous manner to ensure the appropriate appointment is made his response was:

“You advertise. You get the documents back and then the likely candidates are interviewed. That’s fairly normal procedure.” (T 3248 J)
It should have been evident to Lord Dalgety QC that Mr. Jonesse should not have been appointed as CEO of SCP and he should never have been recommended by the Appointments Committee of which he was a member of. He did not have the appropriate qualifications and experience to warrant his appointment and did not meet critical and sensible criteria contained in the job advertisement that the candidate was required to demonstrate. (Exhibit 301) It is noteworthy that another candidate for the job, Captain Tevita Mafi, at least on the basis of his curriculum vitae, was a superior applicant to Mr. Jonesse. (Exhibit 266) Lord Dalgety QC prepared a document dated 27th November 2006 recommending that Captain Mafi and Mr. Jonesse be interviewed. (Exhibit 301) He considered that Captain Mafi was not a suitable candidate. In any event, even if Captain Mafi was not suitable, it did not justify an unsuitable candidate being appointed and a further effort should have been made to find the appropriate person.

Although Lord Dalgety QC spoke briefly to Mr. Karalus about Mr. Jonesse, he did not speak to any of the former employers of Mr. Jonesse. (T 3259 – 3265) Additionally, according to Mr. Jonesse, there were no references provided by him to SCP, nor were any asked for. We accept Mr. Jonesse’s evidence on this point. Lord Dalgety QC could not remember whether or not any references were provided and none were in the documents supplied by SCP. (T 3260) Lord Dalgety QC accepted that he did not contact any of Mr. Jonesse’s previous employers, but relied on the Acting Managing Director. As to the Managing Director, Lord Dalgety QC said “if he’d had anything adverse to say, it was reported at the meeting”. Given that Lord Dalgety QC could not even remember who the other members of the Audit Committee were and the documentation provided by SCP in relation to the perspective and actual appointment of a CEO, we do not accept that any inquiries were made of former employers of Mr. Jonesse. Mr. Jonesse did not know of any. It was completely irresponsible for no references to be sought. There were not even any referees provided by Mr. Jonesse for SCP to contact, apart from mentioning Mr. Karalus.

Although there was a clear direction by the Chairperson of SCP in 2008 to the effect that papers had to be provided to the Board in support of any agenda items of significance, Lord Dalgety QC said that this was “repeated, repeated, repeated. Infrequently carried out”. (T 264 R – 265 B) Additionally, key documents relating to SCP could not be located despite requests from Lord Dalgety QC to Mr. Jonesse to locate them. In any event, it should have become clearly apparent to Lord Dalgety QC fairly shortly after Mr. Jonesse was appointed that he should not have been appointed.

Lord Dalgety QC was aware that Mr. Jonesse had no experience in shipping when he was engaged or recommended for engagement by SCP, but said that that was not the point as “we were looking for somebody who was a competent manager, who
would be supported by a qualified finance officer and a marine superintendent who
would be the specialist in that area”. (T 3246 A – C) He also said that “the key factor
was management, ability and experience and that seagoing experience (was) perfect
for marine superintendent, not necessarily so for Chief executive”. (T 3273) Lord
Dalgety QC said that “the feeling at the time from the Acting Managing Director was
that what the company required was a Manager, not a seaman”. (T 3271 N) Having
said that, he could not remember what the indicia or criteria were in relation to the
qualities, experience or qualifications sought by SCP for a perspective candidate of
CEO. (T 3287 Q) However the job advertisement for the position of CEO,
understandably, made it very clear that the candidate for CEO was required to have
experience with commercial shipping. The job advertisement provided that:

“The candidate should be able to demonstrate:

- Broad ranging management experience with commercial shipping
- Clear strategic thinking and planning capacity
- Focus on service development to maximise economic benefits derived
  from inter-island shipping within minimum requirement for
  governmental financial support.
- Ability to work within very tight cash constraints and budget limitation
- Ability to work at all levels to develop and mentor local staff to
  maximise their capacity and effectiveness
- Strong drive and commitment to change
- Experience of shipping within a developing economy, ideally within the
  South Pacific would be a major advantage
- Good understanding of Maritime Legal and Regulatory environment.
- Excellent verbal and written communication skills in English essential,
  Tongan language skills an advantage.” (Exhibit 301) (Underlining
  added)

8.284 It should have been apparent from the curriculum vitae provided by Mr. Jonesse to
Lord Dalgety QC, by e-mail dated 28th November 2006, that he was not suitable for
the position. (Exhibit 36) Lord Dalgety QC said that “no shipping company should
exist without a marine superintendent”. (T 3239) This would have been ever more
important because Mr. Jonesse had no maritime experience. Lord Dalgety QC said
that he only found out in August 2009, after the vessel sank, that SCP did not have
any marine superintendent. (T 3239) He said that it was “almost an obscene failure”
for SCP not to have a marine superintendent and accepted that one way of looking
at it was that it constituted gross negligence. (T 3546) The Company Secretary
accepted that if a competent marine superintendent had been employed by SCP in
July and August 2009, he would have expected that the person would have advised
immediately that the vessel should not sail. We agree with this. Lord Dalgety QC was
of the view that the failure to employ a marine superintendent when the vessel was in Tonga represented gross negligence on behalf of SCP. (T 3547)

8.285 Lord Dalgety QC said he “would have been pleased that we’d actually found a candidate to do the job rather than have a prolonged vacancy.” (T 3249) This statement may go some way to explaining why Lord Dalgety QC was prepared to recommend the appointment of Mr. Jonesse, even though he did not meet critical criteria which the candidate was required to demonstrate in accordance with the job advertisement.

8.286 The Minister relied on Lord Dalgety to submit what he and the Board considered to be an appropriate person as CEO. (Exhibit 270; T 5118 – 5119)

8.287 On 24th April 2007, the Minister for Public Enterprises indicated he was happy to confirm the appointment of Mr. Jonesse as the CEO for Shipping Corporation. However, the Minister pointed out that SCP should ensure that annual targets are set, referring to section 26 of the Public Enterprises Act. (Exhibit 394) To the knowledge of the Minister, there was never any review of the performance targets. (T 5102 S)

8.288 The contract of employment with Mr. Jonesse was required, by reason of section 26 of the Public Enterprises Act, to be a written performance based contract of employment which contained certain minimum provisions, including the objectives expected to be achieved by the Public Enterprise, the performance expected of the public enterprise and a review of the performance of the Chief Executive Officer. These provisions were not contained in the employment contracts prepared by Lord Dalgety QC.

8.289 Section 30 of the Public Enterprises Act provides as follows:

“Appointments in contravention of this Act

(1) The appointment of a person as director of Chief Executive Officer in contravention of the provisions of this Act shall be void.

(2) A director appointed in good faith in contravention of this Act shall be deemed to have resigned his office from the date that he is advised of the fact by the Minister

(3) A Chief Executive Officer appointed in good faith in contravention of this Act shall be deemed to have resigned his office from the date that he is advised of that fact by the Chairman of the board.” (Underlining added)
Lord Dalgety QC also prepared the contract of employment dated 1st June 2009, in addition to the contract dated 7th March 2007, between SCP and Mr. Jonesse. He said that it was “a standard contract which is used for all employees”. (T 3312 B) He was a witness to that contract. (Exhibit 274) The Company Secretary was at the Board meeting on 1st June 2009 where the Board met to review the possible terms of re-engagement for Mr. Jonesse and according to the unsigned minutes prepared by Lord Dalgety QC considered that “his value to the company was exceptional”. Lord Dalgety QC sought to explain this by saying that the reference “related to the turnaround in the accounts”. (Exhibit 273; T 3308 – 3313; T 3335; T 3337) These minutes, prepared by Lord Dalgety QC, recorded that “a renewal contract of employment was duly executed by the Chairman and the Secretary for the Employers (SCP)”. (Exhibit 273) They did not qualify or explain that the reference to “exceptional” was as suggested by Lord Dalgety QC. The Chairperson of SCP Mr. ‘Alisi Taumopeau said that she never agreed that Mr. Jonesse’s value to the company was exceptional. According to her, it was probably Lord Dalgety QC’s view, but “definitely not mine”. (T 3895)

The two contracts, prepared by Lord Dalgety QC, in 2007 and 2009, were therefore in contravention of the provisions of the Public Enterprises Act and were accordingly clearly void as a matter of law by reason of section 30 of the Public Enterprises Act. (Exhibits 268 and 274)

When it was suggested to Lord Dalgety QC that the contracts of employment that he had drafted and signed were void as a matter of law by force of statute, he said that he would need to “take advice on that”. (T 6189 – 6191) This again demonstrated his failure to take responsibility for what can only be described as incompetence and a failure to properly carry out his duties.

Lord Dalgety QC supported the reappointment of Mr. Jonesse in 2009. (T 3188) The support was not reasonably justified.

Lord Dalgety QC’s opinion on the Cause or Causes of the Disaster

Lord Dalgety QC was given a number of opportunities of stating what he considered was the cause or causes of the disaster. On 19th January 2010, when asked what his assessment or opinion was as to the cause or causes of the disaster, his evidence is noteworthy. The following appears in the evidence:

“... it was only when I had seen everything that I realised that this should never have happened if proper steps had been taken during the purchase, that is, using the Norwegian Sale Form, using - using proper qualified sale and purchase brokers and getting proper survey reports, and the benefit of using the Norwegian Sale Form is that all the documentation relating to the ship, all
the survey documentation from the past, all the state documentation for certification, that would all be there. You would see – you could ask for copies in advance but at the final handover you would go through and the brokers would go through and they would check every single one of these documents and if one of them wasn’t right the deal would not proceed at that stage. That is how it happens. That’s the normal way of doing it and if it had happened in this case the Ashika would not have left Fiji and Tonga would have been saved a terrible disaster.” (T 3254 I – L)

8.295 It is also noteworthy that Lord Dalgety QC stated on 19th January 2010:

“But I’ve already told you there was information which we should have had we didn’t get - information if, which we would have had, would have caused us to do something and---” (T 3254 L – N)

8.296 Lord Dalgety QC accepted that a decision should only be made on behalf of SCP if there was sufficient information to make an informed decision. He also correctly accepted that the Board of SCP had a duty not to make a recommendation unless they had a basis on which to do so. (T 3484) Clearly the Board of SCP, supported by the Company Secretary, should never have recommended the purchase of the MV Princess Ashika to the Government and should never have allowed the vessel to operate as there was insufficient information to allow them to make an informed decision that the vessel was safe and seaworthy and would meet the requirements for operation in Tonga by SCP.

8.297 On 20th January 2010, the following evidence by the Company Secretary in relation to the cause of the disaster is also noteworthy. It was in these terms:

“I think I said yesterday that if certain information which had been known to Mr Jonesse had been made available to us, i.e., the discussions with the Ministry about the state of the vessel and the work that had to be done, and the defects list, that I think all of us acting independently would have said this ship is not sailing until - certainly I would have advised that - until such time as this is rectified. Because the state of the vessel as shown in the defects list is not how it was put to us at the beginning when he said there was a vessel that might be suitable for use in Tonga.” (T 3297 P – S)

8.298 Lord Dalgety QC correctly accepted that if proper due diligence had been conducted the vessel should never have come to Tonga and never have sailed. Thus, he was of the view that the failure to conduct due diligence caused the disaster. (T 3550)
Lord Dalgety QC’s opinion on how to Prevent a Similar Disaster

8.299 Lord Dalgety QC was asked on 26th February 2010, how a similar disaster like the MV Princess Ashika was going to be prevented in the future. His evidence was:

“Well, it - more care should be taken by purchasers when they’re purchasing a vessel to comply with all the normal rules; do proper due diligence; get the right surveys; use the right form. And so far as operators are concerned, if they’re given a vessel to operate, they ought - obviously they have a safe ship certificate. If there is documentation which is known to management, that must be disclosed to the board which it appeared - which, in this case, it wasn’t. And so far as - so far as shipping is concerned, there must be a marine superintendent and, as I think I’ve already said, I think I was under the assumption - and I’m sure the directors were as well - that there still was a marine superintendent. The fact that he was no longer there was not disclosed to us either.” (T 6206)

8.300 On another occasion during his evidence on 19th January 2010, Lord Dalgety QC was asked whether he had turned his mind on anytime to the question of preventing a similar disaster or occurrence in the future. His answer was:

“Recently I’ve been thinking about that and the only way to ensure it doesn’t happen is that proper procedures for the purchase of vessels like this must be adhered to. Professional advice must be sought. Funding must be made available to pay for the brokers and to pay for surveyors. And you must have qualified staff - properly qualified staff in the regulatory department which is responsible for maritime affairs. That’s the sort of thinking I’ve had in recent times about that.” (T 3244 E)

8.301 Lord Dalgety QC said that he had not expressed this opinion to any other people. It is troubling that these opinions were not expressed to the Board of SCP, particularly given that there were at least some 74 people that died from the tragedy. Additionally, what is disturbing is that no report of the accident and of the probable cause thereof was provided by SCP after the vessel sank, contrary to the provisions of section 155 of the Shipping Act. No such Incident Report was ever presented to the Board. He disagreed that this was a considerable failure of the Board and SCP to properly administrate and carry out their duties and obligations, suggesting “that these are matters of management.” (T 3239) The response by Lord Dalgety QC shows disregard not only for the requirements of the Shipping Act and good governance, but also the lives lost in the tragedy.
8.302 It is important to note that at a Board meeting on the 21st November 2008, at which Lord Dalgety QC was present, the Board minutes prepared by Lord Dalgety QC referred to an Incident Report. The minutes record as follows:

“The Managing Director spoke to an incident concerning the berthing of the vessel at Ha’afeva on 31st October 2008 during hours of darkness and produced an Incident Report which by law he was required without delay to submit to the Ministry of Transport (Marine Division). This is very much in the nature of a Preliminary Notification: a fully detailed report is the Master’s Report which was prepared and duly circulated at a later stage together with a photographic record. Since then a Government Marine Surveyor had examined the vessel and found her to be seaworthy. It is understood that the Minister of Transport would be providing a copy of the Master’s Report and Government Survey to his Cabinet colleagues.

Mr. Fakatou expressed the opinion that the Incident Report was “misleading and unacceptable”. He was alone in that opinion.

After further discussion the Directors, Mr. Fakatou dissenting:-

RESOLVED to Note the Incident Report, the papers circulated to Directors in respect of said incident, and the Managing Director’s oral report to the Board.” (Exhibit 280) (T 3395; T 3402)

8.303 The minutes of the meeting of 21st November 2008, where an Incident Report was not only tabled but discussed, undermines the evidence of Lord Dalgety QC to the effect that there was no requirement to produce an Incident Report in relation to the MV Princess Ashika as “these were matters of management”. The incident in relation to the MV Princess Ashika involved the death of many people, yet an Incident Report involving no deaths was tabled and discussed at a meeting on 21st November 2008 in relation to MV Olovaha. His evidence in relation to the failure to present and discuss an Incident Report at the Board in relation to the sinking of the MV Princess Ashika is just one of many instances, in the evidence of Lord Dalgety QC, where he was prepared to say anything that suited him.

8.304 The Company Secretary refused to accept any responsibility whatsoever for the disaster. He was of the view that he was not to blame for anything in relation to the MV Princess Ashika disaster. (T 6205 – 6206; T 6228) He did not consider he had any reason to resign or step aside as Company Secretary after the vessel sank. (T 3293) We conclude that if Lord Dalgety QC had properly carried out his duties as Company Secretary the vessel should never have been purchased or operated in Tonga.
The Suspension of Mr. Jonesse as CEO of SCP

8.305 Mr. Jonesse was suspended as CEO by the Board of SCP during the course of giving evidence at the Commission. When it was suggested to Lord Dalgety QC that he supported the decision to suspend Mr. Jonesse, he said:

“I did not support the decision. They made that decision, I did not oppose it.”
(T 3198 J)

8.306 When it was suggested to Lord Dalgety QC that he had an involvement in advising the Board on whether Mr. Jonesse could be suspended or not his answer was:

“No, I advised them that he could not be dismissed. I said that it would be improper.” (T 3199 A)

8.307 Lord Dalgety QC said he told the Board that the very most they could do was to suspend Mr. Jonesse and “if that’s what you wanted to do, go ahead and do it.” (T 3199 C)

8.308 Lord Dalgety QC said that he told the Board:

“you cannot sack him on the spot. You cannot dismiss him on the spot. The very most you could do would be, if you wished to take something and have him out, would be to suspend, and it would have to be on full pay because otherwise you’re prejudging the issue” (T 3503 D – F)

8.309 The Company Secretary said that the suspension, was not done on his advice, it was the Board’s decision but he was not prepared to criticise it. The decision was made and he said that he did not disapprove of it in the circumstances. (T 3199) He said that he had no reason to disagree with the suspension, but as he was not voting “it didn’t really matter what (he) thought.” (T 3291 M) He also said that in the circumstances the decision to suspend “seemed to be not inappropriate”. (T 3291 N) It should be noted that Lord Dalgety QC correctly accepted that he had a duty, as Company Secretary, to advice. His evidence in relation to the suspension of Mr. Jonesse and in particular his involvement in the decision demonstrates his evasiveness to face up to reality and accept responsibility for decisions. (T 3198 – 3200; T 3289 – 3291)

Ocean Pacific Limited

8.310 On about 3rd October 2003, Ocean Pacific Limited was incorporated in Tonga under the Companies Act 1995 as company No. 0646. The details in relation to the company, held at the office of Intellectual Property and Company Registration, were destroyed by fire on 16th November 2006. (Exhibit 467)
8.311 Lord Dalgety QC was the Company Secretary of Ocean Pacific Limited on incorporation of the company. He signed and prepared a number of documents in 2003 in relation to or associated with the company including the following:

- Application for Reservation of Company name
- Register of Directors
- Register of Secretaries
- Register of Interests
- Declarations
- Correspondence (Exhibit 466) (T 6145 – 6157)

8.312 Most of these documents were signed by him as “Company Secretary”.

8.313 On 19th January 2010, Lord Dalgety QC was asked about his experience. The questions and answers following is noteworthy:

“MR VARITIMOS: Have you been, or are you a company secretary of any other companies, apart from Shipping Corporation?

LORD DALGETY: Yes, one of the banks.

MR VARITIMOS: Which bank?

LORD DALGETY: MBF. (sic)” (T 3175)

8.314 Lord Dalgety QC did not say he had been a Company Secretary of Ocean Pacific Limited.

8.315 Lord Dalgety QC was asked whether he used funds for Shipping Corporation to attend the Athens Olympics. He said that $3000 was paid out of Ocean Pacific some months before “to send two of our archers to training event for competition purposes”. (T 3178) He was President of the Tonga Archery Federation at the time, and has been since. In relation to whether he used the funds to attend the Athens Olympics, he said:

“No, I - I got some money from the National Olympic Committee because I was going there as manager of the archery team and I paid the balance myself but there was an occasion, I think, about a year before that - that would have been about 2003 - when our archers were going to a - an event and the sponsorship money they were expecting to come through had not arrived, they were leaving that night. If they didn’t have some money, they couldn’t go and I asked Ocean Pacific – not Shipping Corporation - I asked Ocean Pacific if they could make an advance and, if they wished, they could treat that as sponsorship but they would have - they would have to look into that. They - that money was forthcoming. As I recall, if was about 3,000
pa’anga. There were two archers going; they got 1500 each and since then there has been no request for repayment and I know that the Germans who were involved with Ocean Pacific had said to me at one meeting in Singapore that they wished to do something for Tonga and that there’d be a certain degree of sponsorship so, therefore, they were asked would they be prepared to treat that as sponsorship.” (T 3177)

8.316 The Company Secretary admitted that he went to the Athens Olympics and said that:

“it’s perfectly normal to ask for sponsorship and it’s perfectly normal to ask those that you think might be able to help... And on this - on this occasion, it was done on the basis, “If you want the money back, we’ll organise it back if it is a short-term loan, but if you don’t” ask them if they’re prepared to treat it as sponsorship. But that wasn’t a Shipping; that was a question of going to the Germans and asking them.” (T 3179)

8.317 Lord Dalgety QC accepted that Shipping Corporation have a significant interest, at the very least, in Ocean Pacific Limited. (T 3178) In fact SCP have and have had a 40% interest in Ocean Pacific Limited for years.

8.318 Lord Dalgety QC said that the money had never been repaid because “it’s never been requested, therefore, it’s been treated as sponsorship”. (T 3179 T; T 3321) He said “if there’d been a request later for repayment, that would have been honoured.”

8.319 The Company Secretary was asked, in effect, whether he saw a conflict of interest in the moneys being provided. (T 3180 L) His answer was:

“No, I don’t actually because it was a very last-minute - it happened - it - there was about two or three hours to organise some funds. If it didn’t happen, they wouldn’t be able to go; they wouldn’t get their qualification points, therefore, one of our athletes may not qualify. It was an emergency. These things happen. Who can one ask?” (T 3180 E – G)

8.320 When asked on the 20th January whether he saw any conflict of interest in terms of being the Company Secretary of SCP and also President of the Tonga Archery Association to seek money from SCP or an associate of SCP he answered:

“I think this was midday, early afternoon. They had to leave that evening. The arrangements which we thought were in place for sponsorship had fallen through. Without that money, they could not have gone. If they had not gone, the likelihood is that one of them would not have got to the Olympics. That would not have been good for the Kingdom. As president of Archery, I thought, “Who can I” - “Who can I approach to see if they can assist?” But I
don’t think there was anything improper about that. I asked. It was agreed and it was recorded. There was a receipt signed and if Ocean were not prepared to treat it as sponsorship, they were told it would be a short-term loan; they could ask for the money back, and the Archery Federation would organise that.” (T 3320 R – 3321 A)

8.321 Lord Dalgety QC was also, at the time, the Company Secretary of Ocean Pacific Limited.

8.322 On 4th December 2007, one of the Directors of SCP, Mr. Mosese Fakatou wrote a letter to the Chairperson. In the letter he stated:

“In 2004, the Company Secretary made a loan from SCP of USD $3,000.00 to go to the Athen’s Olympic Games, and when I left the company in 2005, this loan had not been repaid despite repeated attempts to recover this debt.

What is more worrying, is I now hear this loan has been transferred by the former Financial Controller and the Company Secretary, from SCP accounts to Ocean Pacific Ltd. account (a Subsidiary of SCP which SCP has never reported on to the Board) and the loan has been written off as a donation from Ocean Pacific Ltd. to the Tonga National Archery Team to the Athen’s Olympics in 2004.

Admittedly, I was also at fault for authorizing this loan without the Board’s approval, but in retrospect, I think the Company Secretary was very skillful in planning the loan. I was approached in the very last minute when it was impossible to call a Board meeting for the approval of the loan, and after initial consideration of this person to be of an impeccable character and record i.e. being an ex-judge and a QC, and also considering the loan was promised to be settled the following week, I put my neck on the line and approved it.

Much to my dismay, I found I made my biggest plunder of the year, which was also one of the personal reasons I left the company in 2005.

However, having gotten this far, one wonders how many more of these shaky loans or deals has this person gotten away with, and how many more similar deals will he commit in future.” (Exhibit 300) (Underlining added)

8.323 It should have been clear to Lord Dalgety QC that there was a conflict of interest, even if the money was not used by Lord Dalgety QC to attend the Athens Olympic but used to send two archers to a training event. A conflict of interest could not be overcome by some “emergency” to provide funds. If there was truly an “emergency” the money should have been obtained from another source. The conflict was
ignored by Lord Dalgety QC because it personally suited him. His explanation about the circumstances surrounding obtaining access to the $3000 and whether it was a loan or sponsorship was not credible. The whole circumstances surrounding the loan of $3000 and who obtained the benefit of it is highly questionable and, on any view of the matter, casts serious doubts on the integrity of Lord Dalgety QC.

8.324 Lord Dalgety QC was asked whether he knew what the shareholding in Ocean Pacific Limited is. His answer was:

“I - I can’t remember that. It was - it was organised out - I wasn’t involved in the organisation of that company.” (T 3178 L)

8.325 Lord Dalgety QC was asked on 26th February 2010 about the above answer. He suggested that Counsel Assisting was ‘misunderstanding the use of the word “organised”’. (T 6145)

8.326 He said that he could not recall the question of Ocean Pacific being raised very much at all, if at all, in the meetings of the Board of SCP. He said that he thought once or twice that it may have come up, but that was a separate organisation. (T6158) The evidence of the Chairperson of SCP, as well as the Director (Rev. Haukinima) supports this. Rev. Haukinima was never aware that Lord Dalgety QC was the Company Secretary of SCP or that he was a signatory to any bank account of Ocean Pacific Limited. What is disturbing is that in a document provide to SCP by KPMG entitled “Audit for the year ended 31 December 2008 Report to the Board”, under the heading, “Significant financial reporting/audit issues”, it was recorded that for the year ended 31 December 2006 to 2008, the company had been recording expenses and liabilities on behalf of its associate, Ocean Pacific Limited. It was suggested on the basis of legal advice stating that SCP was not liable by the debts incurred by Ocean Pacific Limited, the financial statements for the years ended 31 December 2006 to 2008 had been adjusted, subject to approval from the Board. (Exhibit 328 page 11) The effect of the adjustments, if approved, would be effectively to improve the financial statements of SCP in an amount in excess of over $3 million dollars for the period 31 December 2006 to the period 31 December 2008.

8.327 In the circumstances, in terms of good governance, one cannot justify how the question of Ocean Pacific Ltd. only came up, as Lord Dalgety QC said “once or twice”. (T 6158)

8.328 SCP is and was a public enterprise and therefore answerable to the Minister for Public Enterprises (Hon. ‘Otenifi ‘A. Matoto). The Minister said that he knew “very little” about Ocean Pacific Limited and he had no idea who the Company Secretary was. (T 5300 − 5302)
Similarly, Mr. Karalus said he did not know anything “intimate” about it. He did not know whether it had any bank accounts in Tonga.

In his evidence, he said he had resigned as Company Secretary of Ocean Pacific Limited. (T 6158) There were no documents to support this. He said that he prepared a document resigning as Company Secretary of Ocean Pacific Limited and left it to be lodged. He however did not personally lodge it and had no evidence to support the fact that it had. (T 6158 – 6159) He was asked:

“So are you saying that you have not had anything to do with Ocean Pacific for several years?” (T 6143)

The answer by Lord Dalgety QC was an unqualified:

“That’s right.” (T 6143)

When it was suggested to Lord Dalgety QC that such answer was false he said “No, it’s not”. (T 6144) He considered that it was right to say that for the last few years, at least, he had nothing to do with Ocean Pacific Limited. (T 6144) This answer is contrary to the evidence.

Lord Dalgety QC said that he believed he was a signatory to the bank account of Ocean Pacific Limited when it was established in 2003 with MBF. (T 6157) He of course, has held the position of Company Secretary of MBF for several years. (T 3175) Lord Dalgety QC was asked about bank accounts of Ocean Pacific Limited. The following questions and answers are informative.

“MR VARITIMOS: Are you still a signatory to the bank account of - any bank accounts of Ocean Pacific Limited?

LORD DALGETY: I may well be, I can’t remember.

MR VARITIMOS: You can’t remember whether you’re still a signatory to any bank accounts of Ocean Pacific Limited, is that correct?

MR VARITIMOS: I mean there is a - there is bundles - there’s bundles of cheques brought to me from Shipping Corporation, have been in the past, and as long as the right vouchers are attached to it, and it seems in order, I sign them.

MR VARITIMOS: Well, Lord Dalgety, can you remember whether in 2009 you were a signatory to any bank accounts held by Ocean Pacific Limited?

LORD DALGETY: 2009?

MR VARITIMOS: Yes.
LORD DALGETY: Not offhand, no.

MR VARITIMOS: You can’t remember, or you weren’t?

LORD DALGETY: I can’t remember.

MR VARITIMOS: Well, do you know in 2010 whether you were a signatory to any bank accounts held by Ocean Pacific Limited?

LORD DALGETY: No, because any cheques coming would come in one bundle and there’s several cheque accounts and some related to the Capitaine Tasman, I know, but I’m not sure which account it was on, I can’t remember that.

MR VARITIMOS: Well, Lord Dalgety, do you know whether Ocean Pacific Limited had any bank accounts in Tonga in 2009 or 2010?

LORD DALGETY: I presume they had the same accounts as the ones that were opened in 2003.

MR VARITIMOS: Well, do you know as a matter of fact whether in 2009 and 2010 - sorry, I’ll rephrase that. Do you know whether in 2009 Ocean Pacific Limited had any bank accounts in Tonga?

LORD DALGETY: It would be a presumption, not as a matter of fact, no.

MR VARITIMOS: So you’d be guessing, in other words, is that right?

LORD DALGETY: It would be a presumption, yes.

MR VARITIMOS: Well, in 2010 do you know whether Ocean Pacific Limited had any bank accounts in Tonga?

LORD DALGETY: Again, I would presume they still had the same bank accounts.

MR VARITIMOS: But you’re guessing, are you?

LORD DALGETY: It would be a presumption.

MR VARITIMOS: So as a matter of fact you don’t know, is that what you’re saying?

LORD DALGETY: As a matter of fact I don’t know.” (T 6157 – 6158)

8.334 Lord Dalgety QC said that he could not remember whether Ocean Pacific Limited had a US dollar account with the MBF in Tonga. In relation to the signing of cheques he said that he had no independent knowledge of whether they had any bank accounts
in Tonga over the last three years. He said that he did not know what the financial position was in the last three years of Ocean Pacific Limited. (T 6162 – 6174) It transpired during evidence that Ocean Pacific Limited had two bank accounts in 2008 and 2009. Both accounts were held with MBF bank, the same bank that Lord Dalgety QC is the Company Secretary of. For the period 4\textsuperscript{th} January 2006 to 31\textsuperscript{st} December 2009, the total debit through the US dollar account 5/001/011981/8 was US$474,112. The total credit for the same period was US$482,211. (T 6164) (Exhibit 469)

8.335 Ocean Pacific Limited also had a TOP account numbered C/001/001/36/3 with MBF. The statements for the period 5\textsuperscript{th} January 2006 to 14\textsuperscript{th} January 2010 indicated that the total debit items on the account were $1,850,586.99. The total credit items to the account for the same period represented $1,964,408.00. (Exhibit 470)

8.336 It was clear from the evidence that Lord Dalgety QC was signing cheques on behalf of Ocean Pacific Limited as recently as January 2010. When asked whether when he signed the cheques, whether he appreciated that he was signing cheques on behalf of Ocean Pacific Limited his answer was:

“Probably not because they were all in the Shipping Corporation bundle.” (T 6170)

8.337 However Lord Dalgety QC had previously said that he would check the vouchers before signing cheques. (T 6169) We do not accept that Lord Dalgety QC had no recollection of signing cheques in relation to Ocean Pacific Limited in 2009 and 2010, when he gave evidence on 26\textsuperscript{th} February 2010. (T 6170) The cheques that he signed had clearly printed on them in capitals near his signature:

“OCEAN (PACIFIC) LTD” (T 6170)

8.338 In many instances, the cheques signed by Lord Dalgety QC were not crossed and were made payable to MBF. He therefore accepted that the cheques could be negotiated and that someone could take the cheques to the bank and take cash out. He could not explain why most of the cheques were made payable to MBF, even though he said that he looked at the vouchers which supported the cheques and signed them. He said that he didn’t sign cheques unless “they’ve got supporting vouchers”. (T 6168) He said he did not know who the other signatory to the other Ocean Pacific bank accounts were. (T 6173 – 6174) However, it appears that Mr. Jonesse did sign some cheques for Ocean Pacific Limited. (T 6328)

8.339 Lord Dalgety QC was asked whether it was correct that he never disclosed to the Chairperson of SCP or the Director, Rev. Haukinima, that he was signing cheques on behalf of Ocean Pacific Limited. His answer was:
“I never- I don’t know if I- I don’t know the- it was never an issue. That’s-
that’s been a longstanding arrangement.” (T 6171)

8.340 If it was in fact a longstanding arrangement that he would sign Ocean Pacific Limited
cheques, which is clearly the case on the evidence, it contradicts Lord Dalgety QC’s
earlier evidence to the effect that he did not know that Ocean Pacific Limited had
bank accounts. It also raises serious questions about the integrity and honesty of
Lord Dalgety QC and his failure to inform fellow Board members about important
matters.

8.341 Lord Dalgety QC could not recollect whether Ocean Pacific Limited had ever lodged
any taxation returns. His appalling excuse, which we do not accept, was that this was
because that “these matters were in the hands of management”. (T 6173)

8.342 The evidence also establishes that no returns were lodged in accordance with the
Companies Act at the Companies office in Tonga, since at least the fire on 16th
November 2006. (Exhibit 467) We are doubtful that all annual returns required to be
lodged, prior to this date, were in fact lodged. Lord Dalgety QC was not in a position
to contradict this, even though he was given an opportunity. (T6171)

8.343 Because Ocean Pacific Limited was not a “public enterprise” under the Public
Enterprises Act, it was not required to produce financial and other reports to the
Minister of Public Enterprises. It thus was not subject to the accountability provisions
under the Public Enterprises Act. We have very serious concerns about Lord Dalgety
QC’s involvement in Ocean Pacific Limited.

MV Golden Trader

8.344 Lord Dalgety QC signed a Memorandum Agreement for the sale of the MV Golden
Trader on about 18th November 2005. The vessel was formerly known as “Fua
Kavenga”. The purchase price was stated in the contract as “US$3,570,000 cash”.
(Exhibit 276) The seller was described as “Kingdom of Tonga and Shipping
Corporation of Polynesia Limited.” The sales form 1993 Norwegian Shipbrokers’
Association’s Memorandum of Agreement for sale and purchase of ships was used.
The contract was finally completed on 31st May 2006, according to a Board of
Director’s briefing report. (Exhibit 276) There were a number of addendums to the
contract. Lord Dalgety QC was the only person who signed the contract and the
addendums on behalf of the seller.

8.345 Addendum number 4 to the contract effectively provided that from the sale
proceeds, the sum of US$107,100.00 would be remitted to the seller’s attorney (or
otherwise directed by him). The seller’s attorney was Lord Dalgety QC.
Lord Dalgety QC was not acting as the lawyer for the seller, as he accepted he does not have any practicing certificate to do so. (T 3341) He attended Singapore for 4 visits and Dubai for 1 visit in relation to the sale of the MV Golden Trader. The first class airfares of all his trips were paid for. Lord Dalgety said that he had been travelling first class since the age of about 27 or 28. (T 3345) He was born in 1945.

Additionally, he was paid a per diem allowance of US$674 per day for 66 days. That is, a total of US$44,506. (Exhibit 276) (T 3357) This was in addition to disbursements made to the financial controller (of US$13,872), disbursements paid to the Acting General Manager (of US$25,380) and legal fees of NZ$16,963. (Exhibit 276) The financial report provided to the Board under cover of a Board of Director’s briefing on the sale of the MV Golden Trader, represented the disbursements paid to Lord Dalgety QC were paid by SCP. Lord Dalgety QC said some were paid by the purchaser.

Lord Dalgety QC was asked what his involvement was in relation to the sale of the vessel. He said:

“To make sure that the sale and purchase brokers went through the proper processes and that legal advice was provided by lawyers, where required - external lawyers, where required - and that the deal was completed at the price stated, which it was.” (T 3338 A – B)

On another occasion he said that he was instructed by the Board that nothing untoward happened. (T 3339) He accepted that there had been engaged a competent sale and purchase brokers who had exceptional experience in the sale and purchase of ships. (T 3341) The buyer for the vessel had already been found before Lord Dalgety QC was required to go overseas for 66 days. Thus, his role was fairly limited.

When he was originally asked how many times he went overseas Lord Dalgety QC said “three times”. (T 3340) Initially he said, when asked how many days he was away, “Many days”. When pressed, he said that he may have been overseas in relation to the sale for “maybe 45 days, 50 days, something like that”. (T 3338 L) He was overseas for 66 days. (Exhibit 476) When it was suggested that he was away 66 days his response was “I knew it was a long time”. (T 3342 I) He stayed in 5 star accommodation in Singapore. He could not recall the figure that he was paid per day until he was shown a report submitted to the Board. (T 3344)

When Lord Dalgety QC was asked whether he considered using a fax or phone to avoid the expenditure associated with the 66 days allowance, he said that he was instructed by the Directors to go and he carried out these instructions. (T 3357)
8.352 It was suggested to Lord Dalgety QC that the duration of 66 days was excessive for what he was required to do. He disagreed. (T 3346 S) It was clearly excessive. It is yet another indication of his lack of fitness to hold the office of a Company Secretary.

8.353 When it was suggested to Lord Dalgety QC that the expenditure for 66 days was a wasteful expenditure of public moneys he answered “rubbish”. (T 3346 T) It was rightly suggested that he knew that someone else could have done the job, that he said he was engaged to do at a fraction of the cost. His ridiculous response was:

“I was asked to do it; I did it” (T 3347 B)

8.354 The expenditure of US$674 per day for 66 days, together with the payment of 5 first class airfares, in relation to Lord Dalgety QC’s role in relation to the sale of MV Golden Trader was a scandalous and shameful waste of public funds. When that was suggested to him, his response was:

“I was expressly instructed to do it. I did it. The deal went through. It was a good deal.” (T 3422 T)

8.355 Lord Dalgety QC never prepared a report on the work that he did on the 66 days. He said that he did not prepare a report because:

“I wasn’t asked to do anymore than that. I had fulfilled my part which was to make sure the deal went through and I produced the documents to prove that.” (T 3423 T)

8.356 We have no hesitation in concluding that the expenditure was a wasteful expenditure of public moneys. Lord Dalgety QC’s evidence in relation to the MV Golden Trader portrays a Company Secretary who has no regard for any concept of the proper expenditure of public moneys. (T 3337 – 3359)

8.357 A copy of an unsigned minute of “Director’s meeting” for SCP held at Nuku’alofa on 5th December 2006 recorded that Hon. ‘Alisi Taumoepeau (Chairperson), Rev. Tevita Haukinima (Director), Mr. Mosese Fakatou (Director), and Mr. Robert Hight (Financial Controller) were present. The Company Secretary was recorded as being away on overseas travel. This meeting was a long time after the sale was completed in May 2006. The minutes record relevantly that the contents of a Board briefing note was reviewed in relation to Fua Kavenga. The following resolutions were recorded:

“6: Report on Fua Kavenga.

The contents of the Board Briefing note were reviewed.

RESOLVED [1] That the Financial Controller take steps to contact an international firm of accountants such as PWC or
KPMG to arrange for the audit of the report on a timely basis if practicable to do so that the Financial Report on the Sale of The MV Golden Trader can be issued to government with the minimum further delay.

[2] That the Board note that The Company Secretary had not yet submitted to signed travel claim to support the payments to him by Tonga Electric Power Board and Tonga Corporation that were subsequently reimbursed at his instruction from Sale Proceeds

[3] That the Company adopt the same Per Diem rate as Government without adjustment.” (Exhibit 476 paragraph 6)

8.358 Lord Dalgety QC accepted that the Tonga Electric Power Board paid for some of his travel expenses in relation to his involvement with the sale of the MV Golden Trader. (T 6271; T 6274) Lord Dalgety QC was a Director of the Tonga Electric Power Board in 2002 and elected the Chairman in 2003. (T 2181)

8.359 Funds from Tonga Corporation were also used by Lord Dalgety QC in relation to his role associated with the sale of the MV Golden Trader. Lord Dalgety QC said that his recollection was that the Tonga Corporation’s contribution was only for the final visit. He thought that Tonga Corporation was dissolved at the end of 2006. Lord Dalgety QC was the Company Secretary of Tonga Corporation from, to his recollection, 2003 to 2006. It was a Government entity incorporated in Hawaii. The nature of its activity, according to Lord Dalgety QC, was farming. (T 6272 – 6273)

8.360 Remarkably, Lord Dalgety QC sought to explain the payment by Tonga Corporation by saying that they “helped out because they had some spare, they had some cash lying there at the time, and it wasn’t long before they got that money back.” (T 6272) His explanation is nothing short of deplorable. He has no concept of conflict of interest or improperly taking funds from one company to be used by another company. He has no idea of any notion of breach of fiduciary duties.

8.361 Tonga Electric Power Board and Tonga Corporation had nothing to do with the business of SCP. These entities had nothing to do with SCP and should have not been involved in any payments to Lord Dalgety QC in any travel by him in associated with the MV Golden Trader.

Electricity Commission

8.362 The Electricity Commission is established pursuant to the Electricity Act. Lord Dalgety QC is one of three Commissioners. He was appointed Chairman of the Commission in
July 2009. (T 3181) The functions of the Commission are set out in section 4 of the Act. In effect, it is an economic regulator of the electricity market in Tonga. (T 3181 H) It is not responsible for the supply of power in Tonga. Section 5 of the Act deals with the powers of the Commission. Lord Dalgety QC said he “superintends the whole work of the Commission”. (T 3499)

8.363 The Electricity Commission is funded from the tariff rates charged to consumers. On 25th February, it was 1 cent of every unit that was charged to Tonga households. Additional revenue is raised from registration of electricians and for building permits in terms of installing power points. The Electricity Commission therefore uses its public funds to operate, which should not be wasted, just as funds for SCP should not be wasted. (T 5994 S – 5995 F)

8.364 It is not proposed to deal in this Report in great detail with Lord Dalgety QC’s involvement in the Electricity Commission. Some brief matters are included in this Report in relation to the Electricity Commission which clearly highlights the inappropriateness of Lord Dalgety QC to hold the position of Company Secretary of Shipping Corporation of Polynesia. He has no respect for concepts of good governance or corporate ethics and is totally unfit to hold such an important position as a Company Secretary. One should not underestimate the importance, if disasters like the MV Princess Ashika are to be prevented in the future, of the critical need to have suitably qualified and appropriate officers of companies such as Shipping Corporation appointed.

8.365 Lord Dalgety QC signed a contract of employment as “employee”, with the Tonga Electric Power Board as the employer. The contract provides that it came into effect on 1st July 2008 notwithstanding the date of its execution. Ms. Mele Folau, who Lord Dalgety QC described as his Deputy, signed the contract for the “employers”. The contract provided that the contract of employment shall deemed to have been assigned to the Electricity Commission as employers upon the coming into effect of the Electricity Commission in 2007. Significantly, clause 6 of the contract of employment provided:

“That Salary shall be paid monthly in accordance with the Employers’ employment code at a rate to be advised in writing from time to time. Salary is payable in addition to any Directors Fees earned.” (Exhibit 457)

8.366 The employment code, by clause 18 provided:

“Remuneration

18(1) The Employee shall be entitled to the salary from time to time fixed by the Employers as appropriate for the post held by the Employee:
18(2) *Salary shall be payable each calendar month under deduction of Income Tax, into a Bank Account in the Kingdom of Tonga nominated by the Employee.*

18(3) *Salary will be reviewed periodically*

18(4) *No overtime is payable.*

18(5) *Salary is deemed to include an allowance for the Employee acting from time to time in a higher position.*

18(6) *No bonus is payable.*" (Exhibit 457)

8.367 The contract, unlike the contracts of employment which Lord Dalgety QC had drafted for Mr. Jonesse did not stipulate what Lord Dalgety QC’s salary was. It could be fixed by his employers and reviewed periodically. Given that Ms. Folau signed the contract on behalf of the “employers”, Lord Dalgety QC would probably take the view that Ms. Folau could fix his salary and review it periodically. Notwithstanding Lord Dalgety QC’s attempt to suggest that this is in order not to stipulate the salary payable to him in the contract, as it was set in accordance with advice from external consultants, this is unacceptable. There is clearly no transparency in relation to his contract. It is disgraceful that Lord Dalgety QC sought to justify the appropriateness of the contract.

8.368 It should also be noted that Lord Dalgety QC drafted a contract of employment in favour of Ms. Folau which, like his contract, did not stipulate what salary she was to be paid. This contract was signed by Lord Dalgety QC for the “employers” and by Ms. Folau as the “employee”. This is again a disgrace and his conduct in preparing such a contract, let alone signing it, is scandalous. There was clearly a conflict of interest in Lord Dalgety QC preparing a contract on behalf of both the employer and himself and signing it.

8.369 Lord Dalgety QC’s response as to whether he agreed that it would be a sensible thing when someone signs an employment contract to stipulate what they are supposed to be paid, said:

“Well, people want to know but most members of staff of the power board had been with - had been there for long before and it was - the contracts were being updated, that’s the most recent addition, and they already knew what their – they already knew what their salary arrangements were and were going to be for the next three years.” (T 6181)

8.370 This answer is, again, a ridiculous one.
Ironically, the contract of employment prepared by Lord Dalgety QC in relation to his employment provided a corporate code of ethics. It provided that he must apply ethical values in the performance of his public duty including being honest; behaving with integrity; being accountable for his actions; ensuring that all of his actions comply with the requirement for transparency; being diligent and giving off his utmost in the performance of his public duties; carrying out his duties in a fair and impartial manner; and acting within the law and in accordance with policies adopted by the employers. (Exhibit 457) These were the same ethical values which were adopted by SCP, which were applicable to Lord Dalgety QC as Company Secretary. (T 3213 – 3214 C)

The evidence reveals that Lord Dalgety QC travelled regularly overseas on behalf of the Electricity Commission. When first class was offered he always travelled first class. If it was not available he would certainly travel business class. (T 3345; T 3498) When asked whether he did much travelling around the world his answer was “from time to time”. He was also asked whether he had anyone travelling with him. His response was, “No, not normally”. (T 3252) Ms. Mele Folau was described by him as his Deputy who performed secretarial duties for him as well. When asked whether Ms. Folau travelled with him overseas his answer was “only once a year when we go to an annual regulators’ conference”. (T 3253 A – B) The evidence in relation to travel by Lord Dalgety QC was false in many respects. He often travelled with his “Deputy” Ms. Folau on overseas trips. (Exhibits 462 and 463) It should also be noted that Lord Dalgety QC, although not travelling on the same flight as his Deputy, attended overseas meetings at which she also attended. Exorbitant amounts of money were spent by Lord Dalgety QC on travel. There was no justification for such huge expenditure. (Exhibit 473) Lord Dalgety QC’s attempts to justify the expenditure only reflected poorly on his unfitness and unsuitability to be a Company Secretary of any public enterprise or statutory body.

On 9th November 2009, both Lord Dalgety QC and Ms. Folau departed Tonga to Auckland on flight NZ273. Lord Dalgety QC said that he travelled for the purposes of going to a regulator’s conference in Vietnam. Lord Dalgety QC and Ms. Folau signed a document to facilitate the Electricity Commission obtaining an overdraft with a limit of TOP$100,000, to be repaid by 30th June 2010. (Exhibit 454) (T 6188) This coincided with them travelling to Singapore and Vietnam for the conference and was used towards the cost of their trip. The Electricity Commission bank account C/001/0011032/2 was held at the MBF Bank. It went into rapid overdraft on 5th November 2009 reaching $93,974 by 11th November 2009. Although the balance fluctuated, as at the 12th January 2010 it was $94,063. (Exhibit 472) (T 6188) They both returned to Tonga on the same flight NZ6801 on 25th November 2009. (Exhibits 462 and 463) Given that Lord Dalgety QC said that his role as Chairman of the Electricity Commission was to “superintend” the whole work of the Commission,
being out of Tonga from the 9th November 2009 to 25th November 2009 with his “Deputy”, raises question marks about the extent of the work actually required to be undertaken by him as the Chairman. They travelled to Singapore and stayed in Singapore for about 6 days. When asked why he stayed 6 days in Singapore Lord Dalgety QC said:

“We had to get visas for Vietnam, and there’s a-either- you either go to- down to Wellington, or you stop off in Singapore and get the visa, it’s as simple as that.” (T 6185)

8.374 Lord Dalgety QC said that he and Ms. Folau arrived there in the evening and the next morning the Consul took them to the Vietnamese Embassy. He said they filled in forms, lodged them and paid the fee. He said they just waited as they had no choice. He said he could not remember how much the per diem amount was that he and Ms. Folau received. He refused to accept that it was a waste of public expenditure, staying in Singapore for 6 days. (T 6186 – 6187) It clearly was. The visas could have been organised well in advance and did not require Lord Dalgety QC and Ms. Folau to stay in accommodation for 6 days in Singapore.

8.375 It should be noted that Mr. K Barron Afeaki SC was one of the three Commissioners on the Electricity Commission. He appeared before the Commission of Inquiry representing Mr. Karalus and was also attending the conference in Vietnam with Lord Dalgety QC and Ms. Folau. On 17th November 2009, well after Lord Dalgety QC and Ms. Folau left to allegedly go to New Zealand and then Singapore to obtain the visa for each of them, Mr. Afeaki SC advised the Commission that he had to travel the next day to Vietnam to attend as a Commissioner of the Electricity Commission for Tonga. (T 1481 A) Obviously, it was not necessary for Mr. Afeaki SC to spend 6 days in Singapore to try and arrange a visa. Of course, one questions why someone in the position of Lord Dalgety QC and Ms. Folau would take the risk of organising a visa prior to departure, in case difficulties arose and they were not able to obtain the visa to attend the conference.

8.376 We do not accept that Lord Dalgety QC and Ms. Folau had to incur significant public funds to stay in accommodation in Singapore and receive a significant per diem allowance, waiting for a visa. Lord Dalgety QC knew that he was going to the conference in Vietnam by early 2009. (T 6185)

8.377 In relation to travel, it should be noted that Lord Dalgety QC had travelled to Hamburg at the expense of Shipping Corporation, as well as Singapore and Dubai. (Exhibit 276) (T 6175)

8.378 Lord Dalgety QC said that for the times that he is in New Zealand he is paid NZ$400 per diem. His accommodation is normally prepaid by the Electricity Commission and
does not come out of the daily per diem payment. (T 6184) Lord Dalgety QC is paid $9000 a month as salary as Chairman of the Electricity Commission. He also is paid a monthly attendance allowance and meeting fees. (T 6183 – 6184) None of these entitlements, including the monthly salary, is evident from the contract of employment which Lord Dalgety QC prepared on behalf of the Tonga Electric Power Board and himself. (Exhibit 457)

8.379 It is troubling that Lord Dalgety QC completed a cheque on an Electricity Commission account made payable to Forum Travel in the amount of $5606.60 in August 2009. The cheque was signed by Ms. Folau. However, it should have been refused on presentation as it also required his signature. It is bizarre why Lord Dalgety QC would complete the cheque in his own handwriting, but would not sign it. (Exhibit 450) His attempts to explain this were not credible. The fact is that Lord Dalgety QC well knew that part of the $5606.60 was to be used by Ms. Folau for personal travel to Los Angeles. The payment voucher that he signed on behalf of the Electricity Commission made reference to part of the cost “to be treated as Staff Advance to Secretary to be repaid by arrangement.” (Exhibit 461) (T 6194) It did not make reference to the position of Ms. Folau as being “Deputy”. There was no time stipulated for the repayment. It was only repaid after Counsel Assisting raised the issue with Lord Dalgety QC on Friday 22nd January 2010 about Electricity Commission funds being used for personal travel for Ms. Folau. He said that he would raise the issue at a Commission meeting that Friday evening.

8.380 As it transpired, Lord Dalgety QC said he became ill and was not able to return to give evidence on Monday 25th January 2010 to explain the matter. He did not resume giving evidence until Friday 26th February 2010. A report dated Friday 22nd January 2010 was prepared in relation to the payment for the personal travel paid for by the Electricity Commission by Ms. Folau, after the issue was raised at the Commission of Inquiry in January 2010. It does not justify why Lord Dalgety QC completed but did not sign a cheque to facilitate the payment for this personal travel to Los Angeles by Ms. Folau to see family. It did not address satisfactorily why the “Staff Advance” was not repaid until after the matter was raised in January at the Inquiry. (Exhibit 461) The Advance was only repaid on the 25th January 2010 by Ms. Folau. (Exhibit 461) If the Staff Advance process had been effectively operating, as Lord Dalgety QC suggested, it should have been repaid from salary deductions well prior to this time. In actual fact, no deductions were ever made. His suggestion that there’s nothing unusual about Staff Advances is disconcerting because he said that “if people want advances, they get advances, but there was never a lot of money and they’ve always repaid”. (T 6194) An amount of over TOP$1000 may not be a lot of money for Lord Dalgety QC to spend, but this was expenditure of public moneys. Additionally, as stated elsewhere, although paid on 21st August 2009, it was not repaid until after the matter was raised in the Commission in January 2010.
8.381 Evidence was given by three medical practitioners in relation to Lord Dalgety QC’s medical condition, namely, Dr. Zingel and Dr. Neer (General Practitioners) and Dr. Matoto (Physician). Medical records relating to Lord Dalgety QC were also produced. We are not satisfied that Lord Dalgety was so medically unfit as to be unable to give evidence during at least parts of the period 22\textsuperscript{nd} January 2010 and 26\textsuperscript{th} February 2010. He obviously had much that he did not wish to have revealed before the Royal Commission of Inquiry and we do not accept he was totally frank in what he told the medical practitioners as to his condition.

8.382 The bank statements for the Electricity Commission account number C/001/001032/2 held at the MBF Bank indicate that the total debit items for the period 2\textsuperscript{nd} January 2009 to 12\textsuperscript{th} January 2010 totalled $1,226,591.43. The total credit items for the same period totalled $1,090,250.78. The expenditure included considerable amount for overseas travel. (Exhibit 473) However, Lord Dalgety QC sought to justify the expenditure by saying “money has been spent on travel and subsistence overseas when it was considered necessary”. (T 6182) Clearly, what Lord Dalgety QC considers as “necessary” and what is reasonable expenditure of public moneys are not the same. He was not prepared to consider that the expenditure by the Electricity Commission in a year was exorbitant. (T 6181 – 6182) In the context of Tonga, which has a population of about 102,000 people, the expenditure represented, (over a one year period), approximately $12 for each man, woman and child, in Tonga.

8.383 Although Lord Dalgety QC accepted, as he should, that as Commissioner of the Electricity Commission, he had a responsibility and duty to ensure that public money is not wasted and that public money is wisely spent (as would similarly apply to SCP), in reality he completely disregarded these responsibilities and duties. It is very sad that the hard working public of Tonga is subjected to such scandalous conduct.

8.384 Mr. Tapu Panuve, another Electricity Commissioner, (T 5964 – 6006) was called to give evidence on 25\textsuperscript{th} February 2010. His attention was drawn to expenditure of the Electricity Commission. He accepted that he could not justify the Electricity Commission spending such huge amounts of money. He was in fact concerned about the legality of the Electricity Commission obtaining an overdraft. The legal advice he obtained was that it was not lawful for the Electricity Commission to obtain an overdraft. He said he was intending to raise the matter with Lord Dalgety QC (T 5997 – 5999) He acknowledged that it was totally unacceptable for the Electricity Commission to go into overdraft to fund overseas travel to Vietnam for Lord Dalgety QC, Ms. Folau and Mr. K. Barron Afeaki. (T 5994 K – M)

8.385 As to the use of funds of Electricity Commission funds for Ms. Folau to travel to Los Angeles for personal reasons, even if it was to be an advance which is to be repaid,
he considered that “it’s not a good look for the Commission and probably not appropriate”. (T 5995 H)

8.386 Mr. Tapu Panuve had the integrity to indicate that he was embarrassed by the expenditure of the Electricity Commission and other matters and that he had considered resigning as a Commissioner when he read the article in the Matangi-Tonga website about Electricity Commission matters raised at the Inquiry. (T 5995)

8.387 Ms. Folau gave evidence on 25th February 2010. Ms. Folau said that she was Secretary to the Electricity Commission and General Administrator. Previously, she was Secretary at the Tonga Electric Power Board. She said that she was also clerk for the Tonga Law Commission. (T 6091 – 6092)

8.388 Lord Dalgety QC prepared her contract of employment which did not stipulate the amount of her salary. However, she said she was paid $4500 per annum. Given the amount paid for Ms. Folau, we question the necessity of her requiring a staff advance to enable her to travel overseas for personal reasons. Her evidence as to Lord Dalgety QC authorising payment for her personal travel to Los Angeles did not particularly show Lord Dalgety QC in good light. Ms. Folau well knew that Lord Dalgety QC wrote the cheque, but did not sign it. She recognised that he should have signed it but said “he overlooked to sign the cheque”. (T 6107 – 6108) The cheque was signed by Ms. Folau. It was accepted that cheques would normally be signed by her and Lord Dalgety QC. (T 6107)

8.389 Ms. Folau said that she spoke to Lord Dalgety QC who approved an advance from Electricity Commission funds to enable her to travel to visit her parents in Los Angeles. (T 6100) Lord Dalgety QC signed that approval for her to travel and completed the cheque dated 21st August 2009 paid to Forum Travel. It was only repaid when Mr. K. Barron Afeaki directed her to repay it in January 2010. It was repaid by her on 25th January 2010. She said that the money was supposed to come out of her wages but it was not taken out because she said she trusted the Finance Officer would do it.

8.390 Ms. Folau also gave evidence about Lord Dalgety QC and her signing a document to facilitate an overdraft for the Electricity Commission of up to $100,000. When asked whether she knew why it was necessary to go into overdraft she replied “we need for the electricity”. (T 6110 J)

8.391 Shortly after the overdraft was organised Ms. Folau accepted that she, Lord Dalgety QC and Mr. K. Barron Afeaki went to Singapore and Vietnam. (T 6110) The overdraft facility was used to help fund the overseas travel and trip to Singapore and Vietnam.
8.392 Contrary to the evidence of Lord Dalgety QC, she recognised that she travelled on
the same plane with him on many occasions but said did not know whether he
travelled first class. (T 6113)

8.393 When travelling for the Electricity Commission she receives a per diem allowance as
well as a payment of her accommodation and her salary. She said that her per diem
allowance, when she travels to New Zealand is NZ$ 400 a day. (T 6116)

Failure to Produce Documents by Lord Dalgety QC, Company Secretary of SCP

8.394 Lord Dalgety QC admitted he personally held his own copy of each file in relation to
SCP. They included agendas, the minutes and papers which were circulated to
Directors in relation to the minutes. (T 268 R – 269) He however failed to produce
these documents despite being served with a summons. (T 255 – 256; T 269) His
attitude to the attempted service of the summons was unusual. (T 3227 – 3231) Lord
Dalgety QC also took an arrogant approach to the significance of the summons.
When asked whether he had read the summons before giving evidence on the 19th
January 2010, the answer was “well, I hadn’t noticed the bit about e-mails.” Lord
Dalgety QC was then asked whether he had read the part of the summons which had
just been read to him before. His response was:

“I’d looked over it and simply said- basically, I just said, ‘Oh yes, all the
documents I have on Ashika’.” (T 3225)

8.395 On the issue of disclosure, it should also be noted that Lord Dalgety QC did not
produce any e-mails pursuant to the summons until a direction was made by the
Commission that he was required to produce e-mails. Lord Dalgety QC was asked
whether he had read any of the transcripts of the proceedings of the Commission.
He indicated that he wasn’t aware that they had been published and had not read
them. When asked whether he was aware that the Commission had a website he
said as follows:

“I don’t use computers. I never have, I don’t know how to.” (T 3218 A)

8.396 Lord Dalgety QC also said “I do not access the internet because I don’t use
computers”. (T 3318 A)

8.397 When he was asked about whether he ever received any e-mails about MV Princess
Ashika he said “there may have been”. (T 3218) He went on to say that “it wouldn’t
surprise me if some of the emails which were received were related to Ashika.” (T
3219) When asked whether he was aware that Mr. Jonesse regularly sent him e-
mails in relation to SCP matters, he said “yes there was a lot of rubbish”. (T 3251)
According to Lord Dalgety QC “John is one of these people that spends a lot of time e-
mailing everybody including himself”. As Lord Dalgety QC said, he was “not an e-mail
sort of person. If it’s relevant it goes in the right file, if it’s not it gets torn up and thrown in the bucket’. (T 3251) However he said that “some of them were matters of substance which were to be discussed either at the Board or he’s seeking some assistance on a point.” (T 3252 D)

8.398 Lord Dalgety QC was asked when he was travelling around the world whether he accessed his e-mails. He said “how could I do that? I don’t know how the damn thing works.” (T 3252)

8.399 There were a number of directions made requiring Lord Dalgety QC to produce documents. (T 270 N) He produced certain e-mails after directions were made, but they related mainly to communications with his lawyer. He said that between March 2008 and when he gave evidence on 22nd January 2010, “the person that does these things said there are no e-mails to me or from me to shipping or about shipping. The only one is a huge bundle in relation to counsel and the Ashika”. (T 3464) Lord Dalgety QC suggested that the computer was corrupted and that “a new box” was put in thus resulting in e-mails prior to March 2009 not being available. (T 3464) We are not satisfied that Lord Dalgety QC made proper disclosure of e-mails to the Commission.

8.400 When Lord Dalgety QC prepared his affidavit, he produced excerpts only from the minutes of Directors’ meetings held from the period 17th March 2009 to 15th July 2009, except for the meeting held on 17th March 2009 (incorrectly certified as being held on 19th March 2009) (Exhibit 21 attachment A). There were no minutes produced for any other periods, including after the vessel sank. There were no agendas whatsoever originally produced by Lord Dalgety QC pursuant to the summons, even though they have prepared by him and he had copies. He said that he was not aware they were required. When asked whether he accepted that agendas were important his response was “they are a guide as to what will happen at the meeting. The important thing is what happens at the meeting.” (T 261 L)

8.401 Lord Dalgety QC was given an opportunity to indicate who came up with the idea of producing excerpts of meetings. The response was as follows:

“LORD DALGETY: I think it must have been myself

MR VARITIMOS: It was yourself?

LORD DALGETY: Undoubtedly yes, it would have been.” (T 262)

8.402 It was patently clear that minutes outside the period 17th March to 15th July 2009 were relevant to the terms of reference, the subject of the Royal Commission and should have been produced by Lord Dalgety QC. He became aware of the terms of reference in August 2009, well before he was required to produce documents to the
Commission under summons, and about two months before he affirmed his affidavit on about 20th October 2009. (T 3161 S – 3162 B) In that affidavit, Lord Dalgety QC affirmed in paragraph 7:

“The Royal Commission require that I appear before the Commission and provide all the relevant documentation I hold, relating to the terms of reference of the Royal Commission.” (Exhibit 21)

8.403 In paragraph 9 of his affidavit, after attaching extracts of meeting papers, Lord Dalgety QC affirmed:

“As Company Secretary, these are all the documents held by me. I confirm that any other relevant documentation held by SCP are kept by company management and staff, and not by myself.” (Exhibit 21)

8.404 Paragraphs 7 and 9 should be contrasted with the admission by Lord Dalgety QC that he personally held documents in relation to SCP in his “own copy of each file”. (T 268 T – 269 C) Lord Dalgety QC affirmed that at the time he made his affidavit he considered that the matters contained in it were true and correct. (T 3159 S – 3161 B)

8.405 It is worth noting that the affidavit affirmed by Lord Dalgety on 20th October 2009 consisted of only 10 paragraphs containing a total of 11 sentences. He nevertheless expected “that everybody would be asked what their involvement was”. (T 3164) He was aware that Counsel for SCP had suggested that an affidavit would be required by Mr. Jonesse. Lord Dalgety QC “thought that was a good idea”. (T 283) Although he said he had no input whatsoever into Mr. Jonesse’s affidavit and had nothing to do with the preparation of the affidavit, this was contradicted by Mr. Jonesse. (T 13 – 14; T 260; T 279 – 283)

8.406 It was clear from the evidence of Lord Dalgety QC that he sought to disassociate himself from anything to do with the MV Princess Ashika, including any recommendation by SCP to purchase the vessel. This was unjustifiable. The complete lack of detail contained in the affidavit prepared by Lord Dalgety QC was an embarrassment and consistent with his attempt to seek to disassociate himself from anything to do with the MV Princess Ashika. He refused to accept that in terms of assisting the Commission he could have made a better effort then producing a two-page affidavit. He said that he “was not told that the affidavit...wanted was about one total involvement with the ship”. (T 3172 G) As a Queen’s Counsel, former Supreme Court Judge, former Royal Commissioner and Company Secretary of SCP, we reject any notion that Lord Dalgety QC could seriously and honestly believe that the Commission would not want his affidavit to address his “total involvement with the ship”.


8.407 Lord Dalgety QC admitted that SCP discussed matters in relation to the MV Princess Ashika after the vessel sank at Board meetings. He considered that they were not produced because it had been assumed that only documents up to the date of the sinking were required and that “there was no attempt to hide. It was question of interpretation”. (T 3236 P – S)

8.408 It was suggested, correctly, that it was patently obvious that a Royal Commission considering the sinking of the MV Princess Ashika would be interested to look at the minutes of the Board of SCP after the vessel sank. His response was “in retrospect, yes, but it wasn’t seen that way at the time by any of us”. Lord Dalgety QC said that he only attached documents to his affidavit which he considered was necessary. (T 3234) If he was seriously concerned about commercially sensitive matters being disclosed he was aware of the practice of many countries with parts blanked out. (T 264)

8.409 It was put to Lord Dalgety QC that it would take some 10 seconds by a competent lawyer to determine that a Royal Commission investigation the sinking of the MV Princess Ashika would be interested in the minutes of the Board after the vessel sank. Lord Dalgety QC agreed “in retrospect”. (T 3233 B – E)

8.410 Lord Dalgety QC gave evidence that the filing cabinet, which important SCP documents were kept in, had gone missing. He said he had raised this with Mr. Jonesse in the past who said he could not find the documents. He said that he understood “that a lot of the rearrangement and files were taken and put in a container outside in which there is no light.” (T 275 – 277) When Lord Dalgety QC was asked whether the files kept at SCP were in disarray, which they obviously were, he said “I’m telling you they are not in the form that I would have kept them”. (T 278) He said that it was “not easy to find the papers one wants” and he accepted that it was a matter of “considerable concern”. (T 279) At another part of his evidence when Lord Dalgety QC was asked where the filing cabinet was, he said “somewhere else in the office. I didn’t ask. It had been removed from the Board room.” (T 338) As it transpired, Lord Dalgety QC accepted that the filing cabinet containing his records as Company Secretary at SCP had been missing, at the time of his giving evidence in October 2009, for over a year. (T 338) This is and was totally unacceptable. Lord Dalgety QC said that the system of filing at SCP was certainly not a sort of system that he would approve of if he was running SCP and that it had been totally unsatisfactory for many years. (T 3265 – 3266) There were box loads of documents in relation to SCP which had gone missing in the past and some of the records could still not be found when he gave evidence on 19th January 2010. These included important company records. (T 3266 – 3269)
PART B – MRS. MALIA VIVIENA ‘ALISI NUMIA AFEAKI TAUMOEPEAU

Overview of Evidence

8.411 Mrs. ‘Alisi Taumoepeau was appointed Chairperson of the Shipping Corporation of Polynesia in September 2006.

8.412 She was educated in Tonga and New Zealand. Mrs. ‘Alisi Taumoepeau holds an LLB degree (1982) from Victoria University, Wellington and an LLM Honours degree from the same University. She was admitted as a Barrister and Solicitor in 1984 and she had a distinguished career becoming Solicitor General in 2002 and was appointed Attorney General and Minister of Justice in May 2006 until retiring on 31st May, 2009.

8.413 SCP were the operators of the MV Princess Ashika and always intended to be so.

8.414 Mrs. Taumoepeau described the Board and the Company Secretary (Lord Dalgety QC) as being dysfunctional and described Lord Dalgety QC as having a high level of participation at Board Meetings. It is a common theme throughout the evidence that he acted effectively as a Director.

8.415 The Chairperson played a leading role in the decisions leading up to the replacement of the MV Olovaha and the recommendation to acquire the MV Princess Ashika as a temporary replacement until the new vessel being built in Japan would become available. At Board Meeting on the 17th March 2009, the Board members and the Company Secretary of SCP considered an option paper/report concerning the Olovaha and the Directors unanimously resolved “to replace the Olovaha without delay”.

8.416 A crucial meeting of SCP was held on 21st April 2009. The Board and Company Secretary considered a report of Mr. Jonesse relating to the replacement of the MV Olovaha by the MV Princess Ashika. The Directors resolved unanimously “to recommend to His Majesty’s Government that they purchase the MV Princess Ashika” and Mr. Jonesse was authorised “to travel to Fiji as required to assist with survey, inspection, and acquisition of the new vessel”. (Exhibit 272)

8.417 It is inexplicable as to how there could be a recommendation by the Board and Company Secretary to purchase Princess Ashika and in the same breath resolved to send Mr. Jonesse to Fiji “to assist with survey, inspection and acquisition” of a vessel which SCP was to operate.

8.418 Mr. Jonesse had misled the Board as no due diligence, proper inspections, independent surveys, proper documentation or proper inquiry had been made as he had intimated to the Board. But the Board did not sight any documents itself. It made no inquiries as to valuation. In fact Mr. Jonesse, despite everything else he had
done, including placing a signature on an “audit” document without authorisation, had never said that there was a valuation prepared by him or anyone else.

8.419 The Chairperson and other Directors had by the time of this meeting on 21st April 2009 become disenchanted with Mr. Jonesse as a person who was unreliable, disorganised and not believable. But the Chairperson and the rest of the Board simply followed Mr. Jonesse’s proposals without seeking to see any documentation, valuation or survey documents or independent surveys.

8.420 That raises the issue of whether the Chairperson and other Directors exercised reasonable care, diligence and skill when they resolved to recommend the purchase of the MV Princess Ashika.

8.421 When the vessel arrived in Tonga on 1st July 2009 and to when it sailed on the 3rd July 2009 (there was a Board meeting on the 3rd July 2009) the Board did not make any independent inquiry as to the state of the vessel, seaworthiness or suitability for Tonga. There were no such inquiries between these times to the time it sank on the 5th August 2009. Independent due diligence should have been insisted upon by the Board and Company Secretary of SCP.

8.422 This was, after all, the purchase of a major asset on behalf of SCP by the Government which was the sole shareholder of SCP. In fact, it was the only vessel which the SCP would operate and it concerned the shipping of persons around the islands, which is a potentially hazardous business.

Substantive Evidence of Mrs. Malia Viviena Numia Afeaki Taumoepeau

Chairperson of Shipping Corporation of Polynesia.

8.423 Mrs. Taumoepeau was appointed Chairperson of SCP in September 2006. She is the former Attorney General and Minister of Justice.

8.424 The Chairperson was educated in Tonga and New Zealand. She holds an LLB law degree from Victoria University of Wellington in 1982 and an LLM Honours from the same university in 1998. Mrs. Taumoepeau was admitted as a Barrister and Solicitor of the High Court of New Zealand in 1984. She worked in various areas of the law including the Crown Law Department as part of the Solicitor General’s team. She became Solicitor General of the Kingdom of Tonga in 2002 and was appointed Attorney General and Minister of Justice in May 2006 until retiring from that position on 31st May, 2009.

8.425 Mrs. Taumoepeau stated that as Chairperson her main role within the company concerned matters of corporate governance. (T 3659) She had no maritime or shipping experience and in fact, neither did anyone else on the Board. This was a
shipping corporation without any technical maritime experience (at least at Board level).

8.426 The Chairperson was asked about the production of Board minutes to the Commission and she confirmed that it was Lord Dalgety’s idea to prepare excerpts of meetings only. (T 3659) She advised that he had a lot of say on the decisions that were made and the Board relied on him on a lot of things. (T 3660) He had a pivotal role in terms of corporate governance and played a critical role in the company. (T 3665)

8.427 She was asked:

“MR VARITIMOS: Did he speak openly and frankly about issues?

MRS TAUMOEPEAU: Yes, I think so.

MR VARITIMOS: Was he restricted in any way by you or others from talking, or offering any opinion?

MRS TAUMOEPEAU: More the opposite, I think” (T 3666 P - R)

8.428 It is a common theme throughout the Chairperson’s evidence that Lord Dalgety QC took a leading “hands-on” role in the meetings of the Board and in the decisions that were made.

8.429 The Chairperson was very frank and honest in her evidence, for example, in her statement that “the tragedy resulted from a failure of the whole Tongan system which struggles with governance and due process of law at all levels” and that in this case the government failed to carry out due diligence and “procurement policies were not fully complied with when buying the ship” (Exhibit 288 paragraph 7)

8.430 In her view the systemic failure was:

- The failure in the Ministry of Transport who, as responsible for safety issues, failed in issuing a seaworthy certificate for a ship that was unsafe and failed to carry out proper checking of the vessel;
- The captain and crew failed to stand up and effectively say that the ship should not sail because it was unsafe;
- There was a failure to give passengers adequate warning;
- So that the vessel sank because of failure of governance at all levels and sound corporate governance includes commitments and reliance on legislation.
8.431 Mrs. Taumoepeau described the Board and the Company Secretary (Lord Dalgety QC) as being dysfunctional. She described the Company Secretary as having a very high level of participation at Board Meetings. (T 3666)

8.432 SCP operated one vessel only. There are heavy duties and obligations on operators and owners under the Shipping Act. (T 3668) She accepted that SCP, by definition, was an owner of the MV Princess Ashika as well as an operator. (T 3671)

8.433 Mrs. Taumoepeau agreed that it was of critical importance to SCP in recommending the purchase that MV Princess Ashika was a reliable vessel; that it was seaworthy; that when it arrived in Tonga that it be immediately available for service; and that it would not break down. (T 3676) This was largely due to the experiences with Olovaha and the serious problems it had. (T 3676)

8.434 The Chairperson was asked:

“MR VARITIMOS: Well, just to clarify the position, do you accept that in 2009 Olovaha was being sent to sea by Shipping Corporation when the vessel was unsafe and unseaworthy?

MRS TAUMOEPEAU: Yes, I think so.” (T 3681 F - H)

8.435 Mrs. Taumoepeau had written to the Minister of Public Enterprises on 24th November 2008 raising concerns on the safety and seaworthiness of MV Olovaha. (T 3681) She agreed that by the end of 2008 the MV Olovaha was unseaworthy and in fact had been unseaworthy for the whole period when she was the Chairperson. (T 3683) All of that meant that she was aware of the importance of making a careful decision in recommending the new vessel but said, “We have a managing director who was involved, who gave us information, who withheld information, gave us wrong information, gave everybody wrong information, and a decision was made”. (T 3684 S - T)

8.436 In this context Mrs. Taumoepeau stated in paragraph 8 of her affidavit that:

“"We as the Board of SCP failed in that we did not realise at the time that the Managing Director was withholding vital information from us and giving the wrong information to the Board. Instead, it appears the Managing Director was taking instructions from Government". (Exhibit 288 paragraph 8) (T 3689)

8.437 The Chairperson further stated that:

“In hindsight with all this information and all the time in the world to work out what to do. I think we could have done – asked –, asked more questions, not as trusting of our CEO, assuming that he was telling the truth, assuming that government had done due diligence, assuming that Ministry of Transport...”
had done what they were supposed to do, we could have distrusted all of
them and try to do more. But this is what we did at the time, with the best of
intentions. Assuming that everybody had done their job, we wouldn’t have
had a result like this and if you call that a failure, yes”. (T 3691 C-F)

8.438 Mrs. Taumoepeau agreed there had been a systemic failure and failures of a number
of individuals and entities such as failure to have the vessel surveyed and the failure
to follow the procurement process and entering into a contract to purchase MV
Princess Ashika before referring the matter to the procurement committee as they
found out later. (T 3691 G – 3692 P) She had no idea why this happened.

8.439 The Chairperson had spoken to the Solicitor General that all processes of the law
were to be put in place. Mr. Karalus had advised the Solicitor General that all
compliances had been done. (T 3693)

8.440 Mrs. Taumoepeau indicated that she only became aware after the sinking, that Mr.
Jonesse had gone to Fiji on four separate occasions to look at the MV Princess Ashika
and that it was without Board approval. However she said he was authorised once,
after the decision to purchase the vessel. (T 3697)

8.441 The Chairperson says that she was becoming disillusioned with Mr. Jonesse. One
example was that he had assured her that he had put Directors and Officers
Insurance into place and even though there was a reference to this in the Board
Meeting minutes, Mr. Jonesse denied it and in fact no such insurance was ever put
in place. (T 3698)

The Chairperson was asked the following critical questions and we quote:

“MR VARITIMOS: Do you consider that the board and company secretary
failed in conducting their duties particularly in relation to Ashika?

MRS TAUMOEPEAU: Yes, like I’ve said.

MR VARITIMOS: Well, in what respects have they failed or did they fail?

MRS TAUMOEPEAU: Well, not having the information that should have come.

MR VARITIMOS: Could I suggest that it was fundamental that the board
before making a recommendation to purchase the vessel was satisfied that
the vessel was going to be suitable?

MRS TAUMOEPEAU: Yes, we trusted what the managing director had told us
and the recommendation was subsequent to Government’s decision to buy
the ship anyway.
MR VARITIMOS: The Government was making a - sorry, Shipping Corporation was making a recommendation, the effect of which would have serious implications on its 100 per cent shareholder - namely, the Government - is that correct?

MRS TAUMOEPEAU: Yes.

MR VARITIMOS: So I suggest to you that the board and company secretary of Shipping Corporation needed to act responsibly in making any recommendation.

MRS TAUMOEPEAU: Yes.

MR VARITIMOS: Could I suggest, therefore, that the board of Shipping Corporation and company secretary before making any recommendation for the purchase needed to have all credible documents and information before them to make an informed decision?

MRS TAUMOEPEAU: Yes, they should have.

MR VARITIMOS: And could - - -

MRS TAUMOEPEAU: They - we trusted that, like I said before, everybody at each stop would do their job, and in hindsight we should have demanded, but at the time that’s what happened. “(T 3700 M – 3701 G)

8.442 The Chairperson then agreed that a major cause of the accident was the failure to conduct due diligence and no proper due diligence was conducted. (T 3701) Furthermore, she agreed:

- Due diligence needed to be independent.
- Due diligence needed to be conducted by persons not associated with either the purchasers or the vendor.
- That surveys needed to be conducted prior to purchase
- That the survey needed to be considered and evaluated by the prospective purchasers.
- That copies of all relevant documents be obtained, eg. Survey certificates; load line certificates and other important certificates be evaluated.
- And copies be obtained for record purposes.
- That an independent valuation conducted by a person of appropriate qualifications and experience.
- That a written valuation be in fact, evaluated and considered. (T 3702 – 3703)

8.443 We note that no valuation of any kind was ever obtained or sought.
8.444 The Chairperson agreed that the MV Princess Ashika was a major acquisition or proposed acquisition on behalf of the Government and that if these due diligence matters had been properly carried out, the disaster would not have happened.

8.445 Mrs. Taumoepeau agreed that at all times when the MV Princess Ashika was in Tonga, it was in an unseaworthy condition and should never have been allowed to sail. She agreed that the Ministry of Transport had a duty and obligation to inspect the vessel prior to purchase (T 3703 - 3704)

8.446 The Chairperson’s decision and indeed the decision of the Board (with the effective agreement of the Company Secretary of SCP) to recommend to the Government that they purchase the MV Princess Ashika and the circumstances surrounding that decision raise various issues under the Companies Act. Section 136 of the Companies Act provides:

“136. Directors and company secretary’s duty of care

A director or company secretary of a company, when exercising powers or performing duties as a director or company secretary shall exercise reasonable care, diligence and skill taking into account but without limitation:

(a) the nature of the company
(b) the nature of the decision and;
(c) the position of the director or company secretary and the nature of the responsibilities undertaken by him.”

8.447 The Directors and the Company Secretary of the SCP have obligations under the Companies Act, Shipping Act, Constitution of the company and at common law. We shall return to those considerations when dealing with all Board members and the Company Secretary.

8.448 The Chairperson reported that she had become disillusioned with Mr. Jonesse and thought that he was not up to the job. This was about late 2008, early 2009. She said he would not produce proper reports and would produce reports without documentation. (T 3764) She says he continued with providing inadequate papers to the Board in support of items in the agenda and looking back on it she did not know if he was just incapable of doing so or whether he just ignored things. (T 3765) She said he had no administrative skills. (T 3770)

8.449 Mrs. Taumoepeau in evidence was asked:

“MR VARITIMOS: So in the case of Mr Jonesse he never properly informed the board to enable them to make appropriate decisions, is that right?
The Chairperson said that the one person on the Board with maritime (legal) and regulatory environment experience was Lord Dalgety QC. By the time the Board was considering whether to recommend the purchase of MV Princess Ashika he was the only person with experience in that area. (T 3771) He did not give any advice at any Board meeting in relation to MV Princess Ashika and the prerequisites that should be attended to prior to the purchase of MV Princess Ashika. We accept that this is so. He also never advised of the need for any independent survey. (T 3772) She agreed that his attitude was that “we’re not purchasing the vessel Shipping Corporation is not purchasing the vessel so let the government sort everything out.” (T 3772 K)

The Chairperson accepted, when made aware in evidence, that for the purposes of the Shipping Act, SCP is an owner of the vessel. If Lord Dalgety QC had told her that, then it would have changed her approach completely. (T 3772 K - T) Mrs. Taumoepeau relied on Lord Dalgety QC, as Company Secretary to give the Board advice.

The agenda for company meetings would normally be fixed by Lord Dalgety, the Company Secretary and he formulated the terms of the resolutions contained in the minutes. Mrs. Taumoepeau stated that Lord Dalgety prepared all the minutes and that she only recently became aware that he never certified as a correct copy, the minutes until well after they had been prepared, sometimes many months later. (T 3818 - 3822)

With the exception of one meeting, SCP has not been able to produce one certified copy of any Board meeting of SCP for 2007, 2008 and 2009.

The Chairperson confirmed that Lord Dalgety QC participated in the meetings of the company as if he were both the Company Secretary and a Director and that he was a very active participant. She, as Chairperson relied on him. (T 3831) But the minutes he prepared do not resemble the type of minute that one would expect of a competent Company Secretary. (T 3833)

In relation to the Board meeting of the 21st April 2009 which recommended the purchase of the MV Princess Ashika by the Government, the Chairperson had only a limited memory. She says she recalled that there was some report and recalled that Mr. Jonasse was very enthusiastic about the vessel. She acknowledged that the minutes recorded these matters and that therefore they would be correct. (T 3845)

Mrs. Taumoepeau could not recall if anyone asked Mr. Jonasse about the MV Princess Ashika (T3845 - 3846). She thought the resolution was unanimous by general consensus. (T 3846) She agreed that it had been resolved in terms of resolution 3, that Mr. Jonasse was authorised to travel to Fiji to assist with survey,
inspection and acquisition of the MV Princess Ashika. (T 3847) She agreed that she was aware in April 2009 and May 2009 that Mr. Jonesse had no expertise in surveying vessels. (T 3848) She accepted again that as part of due diligence there needed to be an independent survey; a valuation and copies of relevant documentation in relation to the vessel to be sighted, copied and reviewed including survey certificates. (T 3848)

8.457 In relation to the Board meeting of 21st April 2009, where the Board unanimously resolved to recommend to the Government that they purchase the MV Princess Ashika, Mrs. Taumoepeau agreed that the Board had before it the managing directors written report relating to the replacement of Olovaha by a “Fiji registered vessel in good seagoing condition”, the MV Princess Ashika which had been identified. The price was FJD$600,000 which Mr. Jonesse considered very reasonable and significantly less than its open market value. (T 3863)

8.458 Further, it had been put to the Board that the Government had an option to purchase the vessel by 20th May 2009. (T 3803) No document was ever produced establishing that there was, in fact, an option (T 3876). There was no such document. The Chairperson agreed that the Managing Director’s report said that the MV Princess Ashika had been independently surveyed. (T 3866)

8.459 The meeting consisted of herself, the Reverend Haukinima, Mr. Jonesse and Lord Dalgety. She agreed that Lord Dalgety QC as Company Secretary would actively participate in the meeting and in fact was an outspoken person at their meetings. (T 3864)

8.460 The Chairperson accepted that no independent survey was asked for at the meeting and none produced. In fact none was ever produced. She agreed that in hindsight it should have been asked for and agrees that in fact there never was an independent survey. (T 6865)

8.461 Mrs. Taumoepeau agreed that an operator such as SCP had a responsibility to ensure that due diligence was actually conducted. (T 3866)

8.462 It was also agreed by Mrs. Taumoepeau that the Board had failed in assuming that these things had been done. She agreed that the Board should have been more proactive in ensuring that proper due diligence was in fact carried out prior to the purchase and that included the Company Secretary as “we’re the board”. (T 3872)

8.463 Mrs. Taumoepeau agreed that the Board of SCP and Lord Dalgety QC should have asked Mr. Jonesse to provide the so-called independent survey and if he could not have done so then this would have immediately put them on high alert. In such case the Board would certainly not have made the recommendation to purchase the vessel. (T 3877 - 3878)
8.464 The Chairperson agreed that there was a systemic failure surrounding the acquisition of the MV Princess Ashika by the Transport Department, the Government, in terms of procurement and due diligence and a systemic failure arising from the Master and the crew not carrying out their duties. (T 3878) She was asked:

“MR VARITIMOS: Yes, and you indicated in paragraph 8 of your affidavit, “We as the board of SCP failed in that we did not realise at the time that the managing director was withholding vital information from us and giving wrong information to the board” - that’s what you said?

MRS TAUMOEPEAU: Yes.

MR VARITIMOS: Now, you said that frankly. Could I suggest that the position is, in fact, that the board of SCP and the company secretary failed in their duties in not ensuring that sufficient information was before them to enable them to make informed decisions in relation to Ashika?

MRS TAUMOEPEAU: Yes.

MR VARITIMOS: And that includes the failure to have sufficient information before the board and company secretary to, in fact, make the recommendation on 21st April to His Majesty’s Government that they purchase Ashika.

MRS TAUMOEPEAU: Yes.” (T 3879 C – J)

8.465 There was no documentation before the Board and Lord Dalgety QC in relation to the value of the vessel. She agreed that a valuation should have been obtained and that the failure of the Government to do so prior to entering into the contract was coupled with the flagrant disregard for proper procedure by the failure of the Government to ensure that the Procurements Committee advice was sought prior to purchase. (T 3879 J – 3880 U)

8.466 The Chairperson agreed that in reaching the Resolution on 21st April 2009 to recommend the purchase of MV Princess Ashika, the Board and Lord Dalgety QC had relied solely on what Mr. Jonesse had asserted and that by this time there had been serious question marks about the competency of Mr. Jonesse. (T 3882)

8.467 The Board of SCP (except for Mr. Jonesse) had little to do with the day to day running of the corporation. Whatever Mr. Jonesse presented to the Board was approved without “meaningful challenge” (in the words of TAIC).

8.468 Mrs. Taumoepeau was asked if she was aware of a letter of the 17th April 2009 from Mr. Jonesse to Mr. Karalus in relation to the replacement of the Olovaha. She said she did not but stated that:
“I think by then everybody had accepted that John (Jonesse) was corresponding and in contact with the Minister of Transport most of the time.” (T 3883 L)

8.469 The Chairperson was asked in oral evidence:

“MR VARITIMOS: Do you accept that the board and company secretary should have asked Mr Jonesse prior to the recommendation to the Government to purchase the vessel to provide documentation in relation to the vessel from Fiji, such as survey certificates?

MRS TAUMOEPEAU: Yes.

MR VARITIMOS: Do you accept that the - that was a failure of the board and company secretary?

MRS TAUMOEPEAU: Yes. I mean, that’s what I have said in my affidavit, now, in hindsight, we know what exactly had happened with it - those documents.” (T 3886 H – L)

8.470 Mrs. Taumoepeau accepted that the Board and Company Secretary are collectively accountable when things go wrong and that things had gone terribly wrong in relation to MV Princess Ashika. She was asked again by Counsel Assisting:

“MR VARITIMOS: And, ultimately, I suggest, that the board of Shipping Corporation and the company secretary are accountable in relation to the sinking of Ashika?

MRS TAUMOEPEAU: Yes.” (T3891 R – S)

8.471 The Chairperson was questioned about a statement in the unsigned Board minutes for the meeting on 1st June 2009 prepared by Lord Dalgety QC that minuted that Mr. Jonesse’s value to the company was exceptional. She said that she had never agreed with this and that Lord Dalgety QC had put that in the minutes and it was probably his view. (Exhibit 273) (T 3895)

8.472 Mrs. Taumoepeau accepted that she would have expected Lord Dalgety QC to have given specific instructions to Mr. Jonesse on matters of registration and other compliance issues as “Dalgety always instructed John what he was supposed to do, most of the time”. She was asked the following:

“MR VARITIMOS: Did Lord Dalgety take a very active role in the operations of the company?

MRS TAUMOEPEAU: Yes. And we all deferred to him because he was the expert on admiralty things” (T 3897 N – Q)
8.473 The Chairperson agreed that it was unacceptable that the vessel was sailing when there was no charter party. (T 3899)

8.474 It was noted that SCP had failed to lodge tax returns for the years 02/03, 03/04 and 04/05, which resulted in penalties. During that time Lord Dalgety QC was the Company Secretary of SCP. (T 3904)

8.475 An audit report of SCP financial year for the year ending 31st December 2008 indicated that there was a failure to lodge tax returns with the last return being lodged in 24th August 2007 for the year ended 31st December 2006. (Exhibit 328)

8.476 The Chairperson was asked:

“MR VARITIMOS: Could I suggest to you that the failure of Reverend Haukinima and the company secretary, Lord Dalgety, to inform you about the failure to lodge tax returns was a flagrant breach of their duties.

MRS TAUMOEPEAU: Yes.

MR VARITIMOS: I suggest that it is almost incomprehensible that a company secretary with Lord Dalgety’s qualifications and experience could fail to inform you as the chairperson that company tax returns had not been lodged. Do you agree with that?

MRS TAUMOEPEAU: Yes.

MR VARITIMOS: And I suggest that single factor alone supports the conclusion that Lord Dalgety is not a fit and proper person to be a company secretary. What do you say about that?

MRS TAUMOEPEAU: I think I agree and that’s what I’ve said - that there was failure in the board to carry out all the duties that we should have carried out.”(T 3929 J – N)

8. 477 Mrs. Taumoepeau stated in paragraph 83 – 84 of the affidavit:

“83. I believe there is a culture of fear in Tonga to stand up for what is right in the public sector because one may be forced to retire early, go on leave or be sidelined. Some may say that this is an aspect of our respect for authority. But in my view, respect and fear are not the same and blurring them fosters bad decisions at all levels of government. This threatens the rule of law.

84. Tonga needs sons and daughters who can give professional, frank and fearless advice to those in authority – without fear of sanction. We need to ensure that a tragedy such as the MV Princess Ashika, where
so many people failed to stand up, does not happen again. We owe this to our country.”

8.478 The Chairperson raised the issue of a “culture of fear” operating in Tonga insofar as this was relevant to persons not standing up to what was right and as relevant to a systemic failure of the system which otherwise might have prevented this vessel ever having been purchased and allowed to operate in Tonga. That issue was raised in the context of the term of reference to present proposals for any measures that would help to prevent the future occurrence of a similar disaster. That issue will be considered in another section of this Report.

8.479 The Chairperson was asked about her knowledge of Ocean Pacific Limited of which SCP had a 40% interest. She, along with most others, had very little knowledge of this company. She agreed that Lord Dalgety QC was the Company Secretary but said that he had informed the Board that he had resigned. She thought that he had established or assisted in establishing the company before 2006. She thought Lord Dalgety QC was still the Company Secretary last year. She did say that he had been the Company Secretary for many years. Lord Dalgety QC never reported anything to do with the profit of Ocean Pacific Limited to the Board of SCP. (T 3709 - 3712)

8.480 Mrs. Taumoepeau agreed that there has never been any financial report in relation to Ocean Pacific Limited submitted to the Board of SCP despite the fact that it was 40% owned by SCP and that Lord Dalgety QC whilst Company Secretary of SCP had been intimately involved in establishing Ocean Pacific Limited. He was the only one who knew anything about Ocean Pacific Limited. The Board of SCP was never informed of the affairs or of the financial or any other aspects of Ocean Pacific Limited. (T 3780 B - 3781 F)

PART C – REVEREND TEVITA HAUKINIMA

Overview of Evidence

8.481 Rev. Haukinima was appointed a Director of SCP in September 2006. His full time position is Financial Secretary to the Free Wesleyan Church of Tonga. He was educated in Tonga and in Papua New Guinea at the P.N.G. Unitech and holds a Bachelor of Commerce degree conferred in 1984. He obtained a Master’s of Commerce Degree from the Queensland University of Technology. He has been ordained a Minister of the Free Wesleyan Church of Tonga. His role at SCP was primarily the provision of governance services including accountancy provisions.

8.482 The Rev. Haukinima knew, along with other Board members, that the Olovaha was unseaworthy, unreliable and too rusty to maintain and the Board decided that it needed to be replaced.
Rev. Haukinima had little knowledge of the relevant legislation including the Companies Act and was probably a bit out of his depth as a Board member of SCP. We consider that is evidenced, for example, from the audit report of SCP prepared by KPMG for the year ending 31st December 2008 which raised serious and fundamental flaws in relation to the accounts and conduct of the business of SCP, particularly from a financial perspective. That included the absence of a fixed asset register, dummy bank accounts in the general ledger to account for island based agents cash collections and failure to lodge tax returns and incurring tax penalties of $214,141. These matters would surely have been within Rev. Haukinima’s sphere, along with Lord Dalgety QC, the Company Secretary.

In relation to the crucial Board meeting of 21st April 2009, when the Board unanimously resolved to recommend to the Government that they purchase the MV Princess Ashika, the Reverend Haukinima agreed that the Board was informed by Mr. Jonesses “that a Fiji registered vessel in good sea-going condition, the MV Princess Ashika had been identified and the price was $600,000”. Mr. Jonesse also told the Board that the Government had an option to acquire the vessel which expired on 20th May 2009. This was obviously false.

The Board accepted what Mr. Jonesse told them.

The Board then, having recommended the purchase, resolved that Mr. Jonesse travel to Fiji to assist with “survey, inspection and acquisition”. It is unacceptable that the acquisition could be recommended and then in the same breath, after the recommendation, the Managing Director could be directed to conduct surveys and inspections.

Rev. Haukinima had agreed that at this time there were doubts about Mr. Jonesses’s abilities, yet they (the Board) accepted what Mr. Jonesse had said about the MV Princess Ashika without any real inquiry of their own. They did not make any of their own inquiries as to the value of the ship. The Board cannot blame that on Mr. Jonesse for this was one thing he did not make up. There never had been a valuation by anyone and Mr. Jonesse had not pretended that there had been. The Board did not have evidence of an independent survey and did not have any worthwhile evidence of due diligence having been done. Rev. Haukinima was aware that Mr. Jonesse often presented papers to the Board that lacked detail.

This, to us, suggests that the Board could have been more proactive in its decision to recommend the purchase of the MV Princess Ashika without questioning the issues of due diligence, valuation, survey documents or independent surveys and sighting documentation. This was, after all, to be a major acquisition of a vessel of which SCP would be the operator.
8.489 That raises an issue of whether the Rev. Haukinima and all the Board members and Lord Dalgety QC exercised reasonable care, diligence and skill when they resolved to recommend the purchase the MV Princess Ashika.

8.490 When the vessel arrived in Tonga on 1st July 2009 and to the time it sailed on the 3rd July 2009, on its first voyage in Tonga, and in fact until the time that it sank on 5th August 2009, the Board should have ensured that independent inquiry as to its seaworthiness and reliability for operations in Tonga had been conducted.

**Substantive Evidence of Reverend Tevita Haukinima**

8.491 Rev. Haukinima was appointed a Director of SCP in September 2006. He is employed as the Financial Secretary of the Free Wesleyan Church of Tonga. He was educated in Tonga and in Papua New Guinea at the P.N.G Unitech and holds a Bachelor of Commerce Degree conferred in 1984. He obtained a Master of Commerce Degree from the Queensland University of Technology. (T 4211) He has been ordained a Minister of the Free Wesleyan Church of Tonga. His role as a Board member of S.C.P included the provision of governance services to the company. He accepted that it included the corporate governance principle “to promote ethical and responsible decision making”. (T 4213)

8.492 The Reverend accepted that he as a Director, when exercising powers or performing duties as a Director, was required to exercise reasonable care, diligence and skill. (T 4214)

8.493 Rev. Haukinima accepted that by mid 2008 it was very clear to him and other Board members, that the MV Olovaha was unseaworthy, unreliable and too rusty to maintain. (T 4215) The Board decided that there needed to be a replacement vessel sought. (T 4216)

8.494 Rev. Haukinima conceded that he had not read the Companies Act since the late 90’s; he had never looked at the Public Enterprises Act even though SCP was governed by the Act, and he had never read the Shipping Act and the Shipping Regulations. He had no experience in the maritime industry or shipping. He did not seem to appreciate that the Public Enterprises Act imposed certain obligations and duties on Public Enterprises including returns and annual reports. (T 4218 - 4222)

8.495 The Reverend accepted that as a Director of SCP he had a duty to the company including its shareholders, employees and creditors to:

- *Act honestly and carefully*
- *To know what the company was doing*
- *To take care when handling other people’s money*
- *To ensure that the company could pay its debts*
- To ensure that the proper financial records were kept
- To act in the company’s best interests
- To use only information gained which was reliable information (T 4223-4222)

8.496 The Reverend appreciated the fact that he needed to ensure that any information given had to be reliable before acting upon it. (T 4223) He accepted that Company Secretaries and Directors need a good understanding of the legislation (including the Companies Act, The Shipping Act and Regulations and the Public Enterprises Act) before making decisions, but acknowledged that he had no knowledge of the Shipping Act and little knowledge of the Public Enterprises Act. (T 4224 - 4225)

8.497 Rev. Haukinima acknowledged that he had been appointed Chairperson of the Audit Committee of SCP which included Lord Dalgety QC and Mr. Jonesse as its members. (T 4227) The key functions of the Audit Committee included the integrity of financial statements and financial reporting systems. (T 4227 - 4229)

8.498 The Reverend said that the audit committee was inactive and could not agree with Mr. Jonesse’s contention that it met about every two months. (T 4229)

8.499 SCP received a Report to the Board entitled “Audit for the year ended 31 December 2008” prepared by KPMG, which was reported to the Board on about October 2009. (Exhibit 328)

8.500 The report raised serious and fundamental flaws in relation to the accounts and conduct of the business of SCP particularly from a financial perspective. (T 4232) Some of those concerns which had been going on for years included:

- The “fixed asset register does not maintain a detailed listing of all assets owned by the company”(Exhibit 328) (T 4232)
  (This is a fundamental flaw. No detailed fixed asset register can lead to dishonesty.)

- Dummy bank accounts were included in the general ledger to account for island based agent cash collections

- The last income tax returns were lodged on 24th August 2007 for the year ended 3rd December 2006. It was noted that because the company had not been lodging its company tax returns that income tax penalties of $214,141 had been incurred. (T 4234)

8.501 There was a lack of an audit trail and no supporting documents were available to verify transactions or entries to the repairs and maintenance general ledger. Other problems were listed which Rev. Haukinima accepts, as he does to the above stated deficiencies. (T 4235)
8.502 Rev. Haukinima accepted that any prudent and responsible purchaser such as the Government would not only obtain an independent survey but would analyse the results of that survey and would have conducted a valuation and would look at all the appropriate documents including surveys. He correctly agreed that a survey by the Department of Marine and Ports would not have been truly independent. (T 4236 - 4237)

8.503 The Reverend agreed that, if any of the following matters had been attended to, it would have resulted in the vessel not being purchased:

1. If an independent survey had been conducted;
2. If a valuation had been conducted;
3. such as survey documents. (T 4236)

8.504 There was never any valuation of MV Princess Ashika. The government did not seek to obtain relevant documents in relation to MV Princess Ashika. (T 4237 - 4238)

8.505 The Reverend accepted that the photographs of MV Princess Ashika showed that it was in a very poor condition and that if he had seen the photographs, he would have been aware that the vessel had serious corrosion problems. (T 4238)

8.506 Rev. Haukinima made a series of admissions, certainly as relevant to issues of negligence when he responded to the following series of questions:

“MR VARITIMOS: Now, the chairperson indicated that the board of Shipping Corporation failed because they did not realise at the time that the managing director was withholding vital information and giving wrong information. Do you accept that?

REV HAUKINIMA: Yes.

MR VARITIMOS: Could I suggest that the board of Shipping Corporation and company secretary also failed because they did not properly challenge - - -

REV HAUKINIMA: Yes.

MR VARITIMOS: - - - some of the remarks and opinions expressed by Mr Jonesse?

REV HAUKINIMA: Yes.

MR VARITIMOS: Could I suggest that the board and company secretary of Shipping Corporation should have been more proactive - - -

REV HAUKINIMA: Yes.
MR VARITIMOS: - - - in asking Mr Jomesse questions about Ashika - - -

REV HAUKNIMA: Yes.

MR VARITIMOS: - - - before making decisions?

REV HAUKNIMA: Yes.

MR VARITIMOS: And could I suggest that the board of Shipping Corporation and the company secretary should have asked Mr Jomesse for more information to enable the board and company secretary to make informed decisions about Ashika?

REV HAUKNIMA: Yes.

MR VARITIMOS: Do you accept the evidence of the chairperson of Shipping Corporation to the effect that Mr Jomesse often provided papers to the board very late?

REV HAUKNIMA: Of course.

MR VARITIMOS: And do you accept her evidence to the effect that many of the papers presented to the board were - had an insufficient amount of detail in them?

REV HAUKNIMA: I accept it.

MR VARITIMOS: Do you agree with that?

REV HAUKNIMA: Yes.

MR VARITIMOS: And because of the insufficient detail, the board could not properly make an informed decision - - -

REV HAUKNIMA: Yes.

MR VARITIMOS: - - - and that applied to decisions in relation to Ashika.

REV HAUKNIMA: That’s right.

MR VARITIMOS: Could I suggest that the board, with all due respect, if faced with a position where it had not had sufficient information presented to it, it should have not made the decision?

REV HAUKNIMA: Could you repeat it, sir?
MR VARITIMOS: Could I suggest to you that if the board was aware that insufficient information was in front of it, it should have deferred making the decision - put off making the decision? Do you agree with that?

REV HAUKNIMA: Partly, sir. In relation to Princess Ashika, we knew the information is not enough but, as I said earlier, we trusted the Government is purchasing the boat so - at one time, he shows to us some nice photos, so, even me, I was so happy to get a new boat to replace the Olovaha but I - maybe I talk too long - but the thing is, we trust the Government to do her duty and comply to the regulations and procedures and so forth.

MR VARITIMOS: Well, do you accept that Shipping Corporation should have conducted its own independent due diligence?

REV HAUKNIMA: Yes.

MR VARITIMOS: And I’m suggesting as operator of the vessel, both the Tongan Government and, in fact, Shipping Corporation as separate entities, should have conducted separate due diligence.

REV HAUKNIMA: yes.

MR VARITIMOS: And, of course, you know that neither the Government nor Shipping Corporation conducted due diligence.

REV HAUKNIMA: Yes.” (T 4242 H – 4244 C)

8.507 When asked about Lord Dalgety QC, Reverend Haukinima agreed that he was an active participant at meetings. He agreed that he talked a lot at meetings and never sat there silently. He said that the Board relied on him to give legal advice and to make decisions.

8.508 In relation to the Board meeting of 21st April 2009 he agreed that the Board was told that a Fiji registered vessel in good sea-going condition, the MV Princess Ashika had been identified and that the price was FJD$600,000. Mr. Jonesse also told them that the Government had an option to acquire the vessel which expired on 20th May 2009. This was when the Board unanimously resolved to recommend to the Government that they purchase Ashika and resolved that the Managing Director was to travel to Fiji as required to assist with survey, inspection and acquisition of the new vessel. Photographs were before the Board as well as a document entitled “Survey, December 2008 valid to December 2010, Fiji Maritime Board”. In evidence, Reverend Haukinima stated he was not provided with a copy of any survey. (Exhibit 272) (T 4270)
8.509 The Reverend was asked: (T 4279)

“MR VARITIMOS: I’m suggesting to you that the board has to take some responsibility for this disaster. Do you agree with that?

REV HAUKNIMA: I accept it.

MR VARITIMOS: And I suggest to you that the responsibility of the board of Shipping Corporation and the company secretary was to ensure that proper due diligence was conducted prior to the recommendation for the purchase of the vessel - - -

REV HAUKNIMA: Yes.

MR VARITIMOS: - - - and prior to the purchase of the vessel. And I suggest to you that if the board and company secretary had ensured that proper due diligence was conducted prior to the purchase of the vessel, then the vessel would never have been acquired or purchased. Do you agree with that?

REV HAUKNIMA: Yes.

MR VARITIMOS: So what I’m suggesting to you is that there were a number of bodies in the chain that, if they had done their job effectively and properly, would have stopped this disaster.

REV HAUKNIMA: Yes.” (T 4279 C – K)

8.510 SCP did not consider the purchase of any other vessel apart from the MV Princess Ashika. He agreed that SCP at all times intended to send MV Princess Ashika to sea; to use the MV Princess Ashika as an inter-island ferry; to take passengers and to charge for cargo. (T 4288) He was aware that it was unlawful to send a ship to sea which was unseaworthy.

8.511 The Reverend was referred to the Board meeting of 3rd July 2009. That is of course the date of the MV Princess Ashika’s first commercial voyage in Tonga. He agreed that the Managing Director Mr. Jonesse reported to the Board that all paperwork necessary to transfer title of the vessel to the Kingdom of Tonga and to permit the vessel to operate commercially in Tongan waters would be completed before the vessel set sail (Exhibit 310) (T 4298). It was clear, at the time of the meeting, that there were still some considerable matters to be done before it sailed. As it transpires, for reasons which are addressed in the section of this Report dealing with Lord Dalgety QC, the MV Princess Ashika was not validly registered or licensed to operate at any time when it sailed in Tonga.

8.512 The Reverend was asked about Ocean Royal Shipping Company Limited and confessed that he knew very little about it. It was recorded that in the year ending
31st December 2006 to 2008 the company had been recording expenses and liabilities on behalf of its associate Ocean Pacific Limited. An audit report stated that over TOP$1.9 million was payable to Ocean Royal Shipping Company Limited. He said that despite the fact that SCP had a 40% interest in Ocean Pacific Limited he knew very little about it. (T 4247) He had never been provided with financial statements in relation to that company. It was accepted that this was a serious shortcoming in the operation of SCP. He said he did ask Lord Dalgety QC about it but he was told that SCP had a minority holding (40%) and so SCP had no say in it. He was never aware that Lord Dalgety QC was the Company Secretary and never aware that he was a signatory to the bank account of Ocean Pacific. Lord Dalgety QC never told him that the company had paid for certain travel costs associated with himself. (T 4247)

PART D - JOHN OWEN JONESSE

Overview of Evidence

8.513 Mr. Jonesse was first employed as CEO of SCP in April 2007 and was appointed Managing Director in February 2008. Originally the position of CEO was not a Board member, but the position was co-opted into the Board and the title was changed to Managing Director.

8.514 Mr. Jonesse was in Tonga in late December 2006 and early January 2007 when he apparently became aware of the position of CEO and the advertised job vacancy position. The advertisement disclosed that a candidate amongst other things, needed to be able to demonstrate: “Broad ranging management experience with commercial shipping”, “Experience of shipping within a developing economy, ideally within the South Pacific would be a major advantage” and “good understanding of Maritime Legal and Regulatory environment”.

8.515 Mr. Jonesse had none of these attributes and in fact had no maritime, shipping or for that matter any engineering background as he readily admitted. He had a background as a teacher initially and then in a wide range of businesses. There seems to have been a string of failures mainly in marketing and entrepreneurial style businesses. He could produce no references and appears not to have been actively employed in the preceding three years. There were seven candidates and Mr. Jonesse was one of only two interviewed.

8.516 Mr. Jonesse, as the Managing Director of SCP, was clearly aware of the shortcomings of the MV Olovaha and of the need to replace it with a temporary vessel, until the new vessel being built in Japan would be ready by late 2010. In late 2008 he commenced making enquiries internationally. We think he had a vested interest in SCP acquiring another vessel. In seeking a new vessel he was in discussions with Mr. Karalus, the then Minister of Transport. He was led to Patterson Brothers in Fiji who
had another vessel for sale which he decided was the wrong one for Tonga. He was then informed that they had another vessel for sale namely the MV Princess Ashika which “was to be taken out of service.”

8.517 Mr. Jonesse made four trips altogether to Fiji commencing on 25th March 2009. It was left to him to undertake all the prerequisites to acquiring a ship.

8.518 The actions of Mr. Jonesse in purchasing the vessel or recommending its purchase were not subjected to any effective checks and his opinions and decisions were not questioned. (Exhibit 423 paragraph 3.5.7)

8.519 Mr. Jonesse has agreed that he was the pivotal figure in ensuring that the MV Princess Ashika was acquired by the Government. We would however include the role of Mr Karalus, the then Minister of Transport, who was in constant liason with Mr. Jonesse. Mr. Jonesse’s assessment and recommendations as to the condition of the vessel ensured that the Government purchased the vessel.

8.520 Prior to the acquisition of the MV Princess Ashika, Mr. Jonesse represented and advised the Board of SCP that it was in good condition and that it had been well maintained. He insisted on that from March 2009 until the 4th August 2009 (the day before it sank that it was in good condition). This was obviously false.

8.521 We are of the opinion that Mr. Jonesse:

- failed to have any independent survey conducted;
- caused no surveys at all to be conducted;
- did not even obtain or seek to obtain a valuation;
- placed the signature of Mr. David Shaw without his authorisation on an “audit” document, who had given him a short oral account of the state of the mechanics of the vessel;
- carried out no proper due diligence;
- prepared a misleading document referring to “Survey December 2008 valid to December 2010- Fiji Marine Board- Rusite Waqa” This was untrue.
- produced a survey certificate from Fiji which had been altered. That is the survey certificate which had been issued in early 2009 allowing the vessel to sail in calm waters for a distance of approximately 8 nautical miles. The endorsement “vessel to operate between Natovi and Buresala with reduced cargo and reduced speed” was erased. Passenger numbers were restricted to 145 with a crew of 15.

8.522 The original survey certificate located at FIMSA with the endorsement, would easily have been discoverable had Mr. Jonesse chosen to undertake basic due diligence.
If Mr. Jonesse had conducted the most cursory due diligence he would have been aware that the MV Princess Ashika was unseaworthy. We are satisfied that he was well aware that the vessel was unseaworthy. He went to extreme measures to misrepresent the truth, particularly as to the condition of the vessel.

Mr. Jonesse had been told that he must obtain a current survey certificate. He had been told that the vessel was old and he must obtain a proper independent survey report. He had been told on the best authority that the vessel was unsuitable for operation in Tongan waters and that it could not withstand the seas in Tonga. He ignored all of this advice in his irrational desire to see that the vessel was purchased. He nevertheless well knew it was unseaworthy.

When the vessel was operating in Tonga Mr. Jonesse allowed it to continue sailing despite a long list of defects prepared by Marine and Ports Division surveyors. We are satisfied that he intended to sail the vessel regardless of the survey and that in fact is what happened.

Mr. Jonesse cannot claim that he was acting in ignorance of the consequences of sailing an unseaworthy vessel. He had noted in an email to Mr. Karalus on 11th November 2008 in relation to the MV Olovaha that:

“While deterioration is a factor in any vessel of this age with the Olovaha, it is compounded by historic failure to maintain any rational programme of R&M to the extent of gross negligence and any failure resulting in injury would have been deemed to be criminal negligence”. (Exhibit 419)

Substantive Evidence of Mr. John Jonesse

Mr. Jonesse was first employed as Chief Executive Officer of SCP in April 2007 and was appointed Managing Director in February 2008. Originally the position of CEO was not a Board Member, but the position was co-opted into the Board and the title was changed to Managing Director. He appears to have been in Tonga in late December 2006 and early January 2007 and he knew the then Minister of Transport, Mr. Karalus. He became aware of the position of Chief Executive Officer and of the advertised job vacancy position. The advertisement disclosed that candidates for the position should (inter alia) be able to demonstrate:

“Board managing management experience with commercial shipping; Experience of Shipping within a developing economy, ideally within the South Pacific would be a major advantage” and “Good understanding of Maritime Legal and Regulatory environment”.(Exhibit 301)

Mr. Jonesse had no maritime, shipping or for that matter, any engineering background as he readily admitted. He was interviewed for the position by Ramsay
Dalgety QC (as he then was) the Company Secretary and at least one other person who were part of the “Appointments Committee”. The Appointments Committee recommended Mr. Jonesse and he was appointed. The fact that Lord Dalgety QC conducted the interview, employed him and drew up his contract (later shown to be void) is of significance as it is one of many examples of Lord Dalgety’s hands on management role at SCP, contrary to the suggestions he played little role in the company’s activities.

8.529 There had been a total of seven applicants. (Exhibit 301) Mr. Jonesse produced no references and it is apparent that he had none. He had a background in teaching initially and then in a wide range of areas. In the more recent times, prior to his appointment, he seems to have been occupied in marketing and in entrepreneurial style businesses some of which were described as “new age”. There appears to have been a string of failures. He does not seem to have been actively employed in the three years prior to accepting the position with SCP. It is again doubtful as to why he would have obtained the position.

8.530 Mr. Jonesse set about the acquisition of the temporary replacement vessel or interim vessel. In late 2008 he commenced making general enquiries internationally. In February 2009 he was in contact with Auckland Ship Brokers which had previous relationships with SCP over the design concept for the vessel being built in Japan. He says that he was shown images of a new vessel the “Island Navigator” owned by Patterson Brothers in Fiji that had been advertised on the broker’s website. He says that he travelled to Fiji on 25th March 2009 and met Mr. George Patterson and viewed the Island Navigator with Pattersons Brothers operating manager. He came to the conclusion that this was the wrong vessel for Tonga. He says that he was then told of another vessel namely the MV Princess Ashika which “was to be taken out for service as Patterson Brothers had purchased another vessel earlier and they were looking to sell this vessel”. The vessel was then operating from Natovi landing and Buresal in Sheltered Coastal waters, a distance of about 8 nautical miles or about a 45 minute voyage. It was operating in restricted conditions with reduced cargo, reduced speed and confined to smooth waters. Mr. Jonesse reported that he was very impressed with the mechanical and electrical state of equipment as he considered these had been the main problematic issues with the MV Olovaha.

8.531 Mr. Jonesse was then back in Tonga and he had a meeting with Mr. ‘Inoke Vala the Chief Executive Officer of the Ministry of Public Enterprises on 31st March 2009 and on 1st April 2009. Also present at those meeting were Lorraine Paasi, Sulia Makasini and Bruce MacQueen, all employees of the Ministry of Public Enterprise. (T 5691)

8.532 Mr. Vala took notes of the meeting and his evidence is as follows:
“I have then written the name Princess Ashika as “Princess Yshika” The words “open book” refer to information about the vessel which was available to Mr. Jonesse to analyse. Mr. Jonesse told me that a survey of the vessel had been undertaken by the “Australians” and that a full survey was being done the following week in Fiji at a cost of $60,000 to $80,000. He also told me that the vessel had been well maintained (“good maintenance”). He mentioned that he had obtained a provisional price for the vessel of FJ$600,000. (T 5692 - 5693)

8.533 Mr. Vala explained that the words “open book” as he understood it referred to information about the vessel which was available to Mr. Jonesse to analyse. Mr Vala had made a note “next week, full survey in Fiji” to be done in Fiji $60,000 to $80,000 and he clearly understood that Mr. Jonesse told him on the 31st March 2009 that a survey would be done the following week in Fiji in relation to Ashika at a cost of $60,000 to $80,000. Mr Jonesse returned to Suva again on 6th April 2009 having requested the opportunity to further evaluate the vessel. In all, he made four such trips. (T 5694)

8.534 On the 16th April 2009, Mr. Vala had a further meeting with Mr. Jonesse and Mr. MacQueen. This was also in relation to the proposed purchase of MV Princess Ashika. Mr. Jonesse advised that the vessel was in good mechanical condition and that a survey had just been done. His notes made at the time read:

“Good mechanical position; just done survey; Shaw good report; Marine survey on hand; Independent Australia Survey”. (T 5695- T 5696)

8.535 Mr. Vala then recalls that there was a meeting with Mr. Karalus which discussed the same things but he had to leave the meeting and cannot recall what was said. (T 5697) There is no reason to doubt the evidence of Mr. Vala.

8.536 Mr. Jonesse was clearly being untruthful. There was no independent Australian survey. There was no “full” survey done costing $60,000 to $80,000. The vessel had not been well maintained. This is an indication of Mr. Jonesse’s deceit and cover up as to the true condition of the MV Princess Ashika.

8.537 He has agreed that he was the pivotal figure in ensuring that the MV Princess Ashika was acquired by the Government and on all of the evidence that is beyond dispute. That does not mean that others, including Mr. Karalus, did not play a pivotal role. He agrees that he was the only person who went to Fiji to inspect the MV Princess Ashika. (T 387; 393) He did say that he had arranged or requested for the Ministry of Transport surveyors to survey the vessel but that they did not do so. We simply do not accept this and there is no evidence of any such arrangement ever having been made. Given Mr. Jonesse’s unreliability as a witness, to which further reference will
shortly be made, we find this to be doubtful. Neither, the Ministry of Transport, the former Minister of Transport or for that matter any of the marine surveyors of the Marine and Ports Division have any knowledge of this. Even if this was so, he should have insisted and ensured that an independent survey and other due diligence was conducted.

8.538 Mr. Jonesse represented and advised the Board of SCP, as well as Lord Dalgety QC (Company Secretary), prior to the acquisition of the vessel, that it was in good condition and also in effect that it had been well maintained. He insisted on that from March 2009 until the 4th August 2009 (the day before Ashika sailed on its final voyage) that it was in good condition (T 388-391) Given the truly appalling state of this vessel we find that to be quite unbelievable and not credible.

8.539 Mr. Jonesse set out to purchase the MV Princess Ashika at any cost. What followed was quite staggering. It was left to him alone to have inspected the vessel before the Board recommended the purchase. No due diligence was carried out. There was no independent survey conducted. There were no surveys at all conducted by the purchaser or SCP. There were documents deliberately manufactured by Mr. Jonesse. There was not even a valuation conducted. A Signature was placed without authorisation on an important document in relation to the condition of the MV Princess Ashika. It is not as if Mr. Jonesse was acting in ignorance, even if he had no maritime or shipping experience. At an earlier time (11th November 2008) he had noted in an email to the Hon. Minister of Transport in relation to the MV Olovaha that:

“While deterioration is a factor in any vessel of this age, with the Olovaha it is compounded by historic failure to maintain any rational programme of R & M to the extent of gross negligence and any failure resulting in injury would have been deemed to be criminal negligence”

8.540 As matters transpired these words show that Mr. Jonesse was well aware of the duty of care involved in the operation of shipping, including the acquisition of a vessel for whose operation SCP would be responsible.

8.541 In early April 2009 Mr. Jonesse advised the Minister of Public Enterprises and its Director that he had identified a vessel to replace the MV Olovaha which could be acquired for approximately FJD$600,000, about half of the price previously projected. He said it was the ideal replacement vessel for the Olovaha with twice its cargo carrying capacity, able to carry 395 tones and a lower draft and a fuel consumption significantly lower than the Olovaha. He then says he conducted a survey/audit report said to be “completed” between 6-8 April, 2009 in Fiji. He said he reviewed all documentation relating “to historic dry-dock etc PMP and general
maintenance and all mandatory documentation.” In evidence he swore he signed the “audit” document when he returned to Tonga on 10th April 2009.

8.542 The “audit” report stated that:

“When built in ‘72 in Japan the Princess Ashika is an example of good preventive maintenance. The vessel’s easy design has enabled excellent engine room management on a ‘day to day’ basis. While rust is expected in a vessel of any age, the rust has been minimized in all structural areas and painting is ongoing. The Hull thickness test at dry docking showed 86%, well within acceptable limits, all anodes were replaced at Dry Docking.” (Exhibit 29 A 200/4)

8.543 It was completely baseless to represent that the vessel was an example of good preventative maintenance.

8.544 The report stated that the audit was completed also by David Shaw of Shaw Diesel Services. In fact Mr. Shaw had assisted in giving a brief oral statement to Mr. Jonesse as to the state of the mechanics, after having gone aboard the vessel. Mr. Jonesse has now admitted in evidence that he placed Mr. Shaw’s signature on the document without his authorisation. Mr. Shaw had not signed any audit report. (T 633)

8.545 Mr. Jonesse further stated that the:

“documentation that was audited and found to be valid included a current Fijian Marine Survey Certificate issued in January 2009 and valid until January 2011; a Load Line Certificate and a dry docking schedule dated December 2008”

8.546 A schedule was prepared by Mr. Jonesse which stated “Survey December 2008 valid to December 2010- Fiji Marine Board- Rusiate Waqa”. The report implied that it was under the hand of Mr. Rusiate Waqa of the Fiji Marine Board. Evidence disclosed that he was a Fijian radio surveyor and not a marine surveyor and that this was a misleading document. (T 744-746) Mr. Jonesse conceded that no survey had been or was conducted by or on behalf of the Fiji Marine Board for the period December 2008 valid to December 2010. (T 748 - 750) He also conceded that he had told the Ministry of Transport and Mr. Karalus that indeed the Fiji Marine Board had conducted this survey. (T 749 - 750) This was untrue. Having said that, if one properly examine the document, it was evident that it was not prepared by the Fiji Marine Board by reason of a number of references in the body of the document.

8.547 There were survey certificates in Fiji, the last being issued on the 26th May 2009 valid to the 16th June 2009. (Exhibit 53) At that time the owner did not apply to FIMSA for
a new survey and the certificate lapsed. The ship was laid up at anchor at Natovi. That certificate had been endorsed:

“vessel to operate between Natovi and Buresala with reduced cargo and reduced speed”

8.548 Passenger numbers were restricted to 145 with a crew of 15. As stated this is a short journey in calm waters.

8.549 Prior to the certificate issued 26th May 2009, there had been a survey certificate issued on 9th April 2009 and valid until 7th May 2009. (Appendix 77) (Exhibit 52) A copy of that certificate of survey was obtained by the Commission from the FIMSA files. The certificate on the FIMSA file contained an endorsement as follows:

“VESEL TO OPERATE ONLY BETWEEN NATOVI AND BURESALA WITH REDUCED CARGO AND AT REDUCED SPEED” (Exhibit 52)

8.550 The photocopy of the survey certificate that was on the Ministry of Transport files had the endorsement covered up and therefore deleted on the copy. (Exhibit 33) (Appendix 15) In all other respects the two versions of the survey certificates were identical. It is unclear who made the deletion. It could have been a number of individuals, including Mr. Jonesse.

8.551 We agree with the views of TAIC who have reported as follows:

“The Princess Ashika was an example of what has been identified as a wider problem with substandard shipping in the South Pacific region, possibly one of the worst examples. The ship had steadily deteriorated during the years in service in the pacific as ships do over time. The rate of decline was commensurate with how well it had been maintained”. (Exhibit 423)

8.552 By the time the ship came to the end of its service in Fiji, it was effectively at the end of its life and should have been disposed of at that time. FIMSA recognised this and placed operating restrictions on it to mitigate the risk. This may have been pragmatic approach, but it did effectively promote the operation of a non-compliant vessel. The ship was unseaworthy and no level of risk management would have changed. The ship should have been withdrawn from service.

8.553 In the condition it was in, the MV Princess Ashika should never have been allowed to depart Fiji.

8.554 Not only was the vessel unfit to depart from Fiji, but it was also unfit and unseaworthy to operate between the islands of Tonga. The vessel was at the end of its economic and operational life.
8.555 If Mr. Jonesse had conducted even the most cursory due diligence he would have been aware that the MV Princess Ashika was unseaworthy. Any person going aboard could not have avoided, the advanced corrosion and decayed state of the infrastructure. No documentation was properly checked. Mr. Jonesse stated in oral evidence he saw a current survey certificate on board. We do not accept his evidence. If in fact he saw an original certificate he would have seen an endorsement on it and noticed that it was only valid for a short duration. He did not attend FIMSA. If he had done so, he would have seen the survey of the 16th December 2008 and the surveyor’s comments as follows:

“We found 56 holed areas; some had single holes whilst others had multiple holes which showed the rate of corrosion existing in the vessel was very high since its last dry-docking and annual slip survey.

...

Corrosion was widespread invading the whole vessel and had reached a conquering stage, which showed that this vessel should and must be condemned from sea transportation of any nature, since it is a danger to the public and crew who man her”. (Exhibit 44 page 1219)

The vessel is now 36 years old and the condition it is in now if allowed to trade will cause a Maritime Disaster and will be the cause of pollution. It is about time the vessel be condemned for good since its condition will continue to deteriorate further. The vessel is beyond repair and is no longer fit for sea service of any nature. We cannot ignore the fact that she is truly unseaworthy. (Exhibit 44 page 1221) (Underlining added)

8.556 Mr. Jonesse made no useful independent inquiry. He relied on Patterson Brothers, the vendors, to provide him with documentation. Some minimal inquiry would surely have revealed the vessel MV Ovalau II described as the sister ship to the Princess Ashika (also a Ro-Ro vessel) and owned by Patterson Brothers had sunk in Fiji on 23rd August 2003. A Marine Inquiry found the vessel to have been unseaworthy and that it had capsized after taking in water. The Inquiry found, inter alia, that:

“Not only that the ship owners also failed to see to the proper application and enforcement of the Act and Regulations with full knowledge that their vessel was far from seaworthy in the eyes of the law and allowed it to proceed to sea on this voyage with passengers and cargo and which eventually proved fatal” (Marine Enquiry, The Sinking of MV Ovalau II (2005) FJHC 369)

8.557 The MV Ovalau II was built in Japan in 1969. It had some similarities to the Princess Ashika. The inquiry found that the hull had been heavily corroded and it had capsized due to the free surface effect of water accumulated on the vehicle deck.
The circumstances surrounding its loss are in many respects similar to those of the Ashika. Patterson Brothers Shipping were severely criticised in the report.

8.558 The MV Princess Ashika had a long history of problems, including heavy corrosion and wastage of the hull and framing and being described as substandard. There were long standing mechanical and structural defects. In 2007 corrosion was described to be at a very high rate. In the annual survey of 2008 there were found to be 56 holed areas with many leaks in the hull. All of this information was on public record at the FIMSA office in Fiji, yet Mr. Jonesse made no attempt to carry out the most basic due diligence.

8.559 On the week ending 24th April 2009, Mr. Jonesse said he gave the Director of Marine and Ports, Captain William Johnson, information on the Ashika including a copy of his so called “2008 survey check list”. This claimed to show that all the appropriate certificates, including current survey certificates were in order.

8.560 Mr. Jonesse agreed that he had represented to the Board of SCP and to Lord Dalgety QC prior to the acquisition of the MV Princess Ashika that it was in good condition and that it had been well maintained and that he had stated that consistently between March 2009 and the 4th August 2009. (T 388) He conceded however that these statements were clearly incorrect. (T 393) He proved to be a witness who was untruthful and longwinded in his answers. He stated that his statements that the vessel was in good condition was not so much incorrect, but rather was inadequate and tried to say that he was really referring to its mechanical condition. He attempted to say that the vessel was seaworthy when it sailed on the fatal voyage of the 5th August 2009. (T 394) That cannot be taken seriously. He said he had never seen a stability book. He says he was not aware that the vessel was built for smooth waters only. These matters were obvious and could easily have been discovered.

8.561 Mr. Jonesse advised the Board of SCP on 10th September, 2009 (Exhibit 32) that he had an official Fiji Government receipt for the issue of a Safe Ship Certificate for 2008/2009. (T 441) It transpired that this was a Coastal Trading Licence. It was not a “Safe Ship Certificate”. There was no such Fiji Government Receipt for the issue of a “Safe Ship Certificate” and what he had said was incorrect. (T 457) This reinforces why independent due diligence should have been conducted on behalf of SCP and why the Board and Company Secretary should have insisted upon this. It also highlights why questions should have been asked at the Board meeting of SCP on the 21st April 2009 when the Board recommended the purchase of the vessel by His Majesty’s Government.

8.562 Mr. Jonesse acknowledged that he did not visit the Fiji Marine Department or the Fiji Islands Maritime Safety Administration (FIMSA) whilst he was in Fiji. (T 458) The copy of the Coastal Trading Licence which he produced was unsigned. He agreed that this
was not a complete and accurate copy. (T 460) He agreed that in Tonga, a licence was required to be granted pursuant to section 203 of the *Shipping Act* to enable the MV Princess Ashika to be used in the Coastal Trade or in any commercial activity in Tonga but no such license was ever issued.

8.563 Mr. Jonesse suggested that he had seen in Patterson Brothers Office and on the MV Princess Ashika in Fiji a survey certificate. He said the one he saw had been issued in 2009 for a period of 4 to 5 months expiring in June 2009. No such survey certificate was ever issued by the Fiji Marine Board. As stated earlier, the survey certificates were being issued for periods of about one month only under restricted conditions.

8.564 It was critical for the Ministry of Transport to inspect and survey the vessel prior to purchase, or at least ensure an independent survey was conducted. This was never done. Not one single surveyor from the Ministry of Transport looked at the vessel prior to its purchase.

8.565 The Managing Director Mr. Jonesse claimed that the records he received showed that “*maintenance had been maintained, especially mechanical maintenance over the last I believe approximately eight years, sir*”. He could produce no documents in support of this.

8.566 He agreed that he did not obtain any valuation. He has never said that there was a valuation nor did he seek to have one done as good governance and due diligence would demand. The Board never discussed the issue of the cost of the vessel (T 572, 573). He did not ask for a Load Line Certificate, Tonnage Certificate or a Stability Book. (T 602 - 603)

8.567 Mr. Jonesse reported that the MV Princess Ashika “*was built to a high specification in Japan and has operated under a well managed preventive maintenance program for over 16 years*”. (T 607 E – F) No documentation could be produced to support this contention and on the evidence before us it is plainly incorrect.

8.568 The reality is that the MV Princess Ashika was designed to operate in smooth or inland waters. Its original design incorporated features or defences to mitigate the risk of foundering should it unexpectedly encounter adverse weather; but it was not designed for continued operation in such weather. By the time the MV Princess Ashika began its third life in Tonga the condition of the vessel was beyond economic repair and the only value of the ship was as scrap (which on the evidence was a negative value). (Exhibit 423 page 78)

8.569 Mr. Jonesse stated in a document that the vessel was well scuppered. It was put to him that the scuppers were in an appalling condition and a number were heavily blocked. He agreed that there was no basis for saying that it was well scuppered. (T 610 - 611)
8.570 Mr. Jonesse conceded that by the time the vessel sank on the 5th August 2009, the sides had not been closed up to avoid sea/weather damage and accepted that no work had been done on the scuppers, even though they were in an appalling condition. (T 612)

8.571 Mr. Jonesse was asked:

“MR VARITIMOS: Did you see any reports prepared by anyone in relation to the condition of the vessel?

MR JONESSE: No, sir.

MR VARITIMOS: You didn’t see any at all?

MR JONESSE: Not from a survey nature perspective. No, sir.” (T 616 E – G)

8.572 He agreed that even as late as 5th August 2009 he was not in a position to say whether the design of the MV Princess Ashika was suitable for Tongan waters.

8.573 Mr. Jonesse reported to the Board of SCP and referred to a Fiji registered vessel in good seagoing condition. (T 671) This was the SCP Board meeting of 21st April, 2009. He told the Board and the Company Secretary that the price was FJ$600,000. He had no basis for saying that was its open market value. It was simply the price nominated by Patterson Brothers.

8.574 Mr. Jonesse agreed that he never had anyone independently examine the MV Princess Ashika. There was never any independent survey conducted to see if the vessel was suitable for smooth or rough seas. In any event, that was obvious from inspecting the vessel. The Commission obtained a copy of the stability book from Japan confirming that the vessel was designed and built for operation in smooth waters only and could only operate for 1.5 to 3 hours trips.

8.575 References to the reports of FIMSA which are damming of the condition of Ashika are littered throughout the evidence. In particular, they are documented in the transcript from pages 718 to 737 culminating in the view that the vessel was a “maritime disaster waiting to happen”.

8.576 Mr. Jonesse could not produce a copy of any document supporting the proposition in his “Audit” report that a marine survey showed no major defects. (T 755) Clearly there was no such marine survey. He had been told by Captain Johnson (former Director of Marine and Ports) that he must obtain a current Marine Survey Certificate. (T 755)

8.577 The Managing Director conceded that he had never sighted a load line certificate. Again he had been told by Captain Johnson that he should obtain or at least look at a
8.578 After the MV Princess Ashika arrived in Tonga on 1st July, 2009, Mr. Jonesse conceded that he saw the long defects list prepared by Marine and Ports Division surveyors. The survey was conducted on 2nd July, 2009. He conceded that a critical defect was the closure of the ramps. (T 779) He also conceded that a large numbers of defects had not been rectified when the vessel sailed on the fatal voyage of the 5th August, 2009. (T 780) He was aware of the problem of the scuppers. He was asked:

“MR VARITIMOS: And there were a very large number of significant matters that were contained in the defects list of 2 July that had not been rectified by the time the vessel sailed on 5 August, do you agree with that or not?

MR JONESSE: Yes, I agree with that.

MR VARITIMOS: Well, as CEO of Shipping Corporation, can you explain why you allowed the vessel to sail on 5 August in those circumstances?

MR JONESSE: Sir, the defects list was being actioned on an ongoing basis and would be required to be completed within the three months of the provisional certificate. There was no further follow up by any of the surveyors from Marine and Ports in relation to the urgency of any other actions or any assistance from them, if you like, in working through any of those defects.” (T 780 O – T)

8.579 Mr. Jonesse stated that the critical defects were the closure (or non closure) of the ramps, the state of the scuppers and as he stated the closure of the side screens (T 779) But on the 5th August, 2009 these matters had not been attended to. (T 818 - 820) Mr. Jonesse says that work was initiated as required and “work was being done when the vessel returned to port”. But the workshop and staff could not hope to keep up with what was required to be done on the MV Princess Ashika.

8.580 Mr. Jonesse was fully aware that the vessel was unsafe and that it was unseaworthy. He was the Managing Director of SCP who was the operator of the vessel. He probably, as much as anyone else, knew how unseaworthy the vessel was. Nevertheless, the vessel was sent to sea.

8.581 We agree with the finding in the TAIC Final Preliminary Report that:

“He (Mr. Jonesse) had a lack of regard for the survey process. He intended to load and sail the vessel regardless of the survey process. After the first voyage there were four more voyages and the managing director failed to intervene or follow up on the serious defects requiring corrective action before departure”. (Exhibit 423)
8.582 Mr. Jonesse had made no enquiries as to a load line. There was no load line certificate. He agreed that it was likely that the load line was submerged when the vessel sailed. (T 822) On the first voyage on 3rd July 2009 there were about 40 defects noted by the surveyors and he conceded that there was no possibility that they could be remedied or rectified before it sailed at about 4pm that day. It was estimated that it would take 3 months to rectify the deficiencies. He was aware of the extensive corrosion. (T 790)

8.583 Mr. Jonesse accepts that there was a lack of due diligence, that there was no valuation and that not all relevant documentation was obtained. But he does not accept that he was responsible for all of this. (T 3969)

8.584 The Managing Director admitted that the vessel was in an advanced state of deterioration and it should never have been recommended for purchase. He added that it would have been so if all the information had been collected satisfactorily by all parties. (T 3987) But this simplistic view overlooks the fact that he well knew that the vessel was derelict and that he was the one nominated to undertake survey, inspection and acquisition of the vessel. The fact that he completely ignored any criticism of the vessel and that he saw the need to cover up its true condition by manufacturing documents used to deceive cuts across his attempts to avoid responsibility.

8.585 The MV Princess Ashika arrived on 1st July 2009 already purchased and with cargo and passengers booked for its first trip. If it had been declared unfit or unseaworthy it would have been a source of some embarrassment for the Government and SCP if the vessel was unable to operate. (Exhibit 423)

8.586 Mr. Jonesse agreed that SCP was going to operate the vessel. He had a responsibility and duty with others to ensure that proper due diligence was conducted prior to any recommendation to the government to purchase the vessel.

8.587 He agreed that anyone reading the document entitled “Audit completed 6/8 April 2009” would conclude that Mr. David Shaw had signed the document.

8.588 Captain Viliami Vakautapola Vi, a Master Mariner gave evidence and said that Mr. Jonesse had contacted him on 21st April 2009 and told him that they had located a replacement vessel for the Olovaha and the name of the vessel was “Princess Ashika”. Mr. Jonesse showed him photographs of Ashika from when he had been aboard the vessel. He told him that it had been surveyed in December 2008 and produced some documents including the misleading “Fiji Marine Board survey December 2008 to December 2010 - Rusiate Waqa”. Captain Vi told Mr. Jonesse that the vessel was not suitable for operation in Tongan waters as it had too many openings which were not suitable for operation in the open waters of Tonga. He
pointed out other features that would discount against the MV Princess Ashika but he says that he realised that whatever advice he gave, it would not stop Mr. Jonesse from acquiring the MV Princess Ashika. He had pointed out to Mr. Jonesse that this vessel was operating in the sheltered waters of Fiji but that it could not withstand water on board as was inevitable in the seas of Tonga and that would destabilise the vessel. Further, he advised that it was not structurally sound enough to cope with open sea conditions. (T 3015 - 3059) The advice he gave Mr. Jonesse was sensible.

8.589 Mr. Jonesse disputes this account of what took place. But in our view, Captain Vi was a most impressive person and obviously a Master Mariner of great experience. He was an outstanding witness. We accept his evidence of his conversation with Mr. Jonesse where he alerted him to problems associated with the MV Princess Ashika. Mr. Jonesse was determined to recommend and see that the MV Princess Ashika was purchased, no matter what, irrespective of its obvious deficiencies and irrespective of whatever expert advice he was given.

8.590 Mr Jonesse was asked:

“MR VARITIMOS: Do you accept that if a proper and independent survey had been conducted of Princess Ashika prior to purchase it would have clearly identified that the vessel was in very poor condition.

MR JONESSE: It probably would have, sir.” (T 4087 D – F)

8.591 Mr. Jonesse stated that the Government had an option to acquire the vessel which expired on 20th May 2009. (T4087) This was later used as a means to put pressure on the sale being consummated. But we did not see any written option document or any evidence of the existence of such an option and find that none existed.

8.592 We accept the evidence that the vessel was old and Mr. John Mac Lennan the former General Manager of Pacific Forum Line, had stressed to Mr. Jonesse the need for a proper independent survey to be conducted. In this context it was put to Mr. Jonesse that he had prepared a report, “Managing Directors report, directors meeting Tuesday 21st April 2009”, a 2 page document which said:

“A replacement vessel had been identified and independently surveyed”

8.593 Mr. Jonesse accepted that it was incorrect, although in his usual evasive manner he attempted to say that he was really referring to a survey of the engines. No Board member of SCP (or the Company Secretary) ever discussed or raised the issue of an independent survey having been done. They should have raised this issue and asked to be provided with a copy.

8.594 In a facsimile dated 4th June 2009 from Mr. Jonesse to the Minister of Transport and copied to the Minister of Finance, Mr. Jonesse declared that the documents listed in
the facsimile had been sighted and supplied to him. Under the heading “Fiji Marine” certified documents required for the Tongan Ministry of Transport, the words “Current Marine Certificate” are ticked off by Mr. Jonesse. This was out of date. (T 4077) Mr. Jonesse did not sight all these documents and was never asked to provide them to Mr. Karalus or the Minister for Finance.

8.595 Mr. Jonesse knew that the bow ramp had a large gap at the side when he was considering the purchase of the vessel. (T 4082)

8.596 He was later aware that one of the main causes of the disaster was that water came through the sides and the bottom of the bow ramp (T 4084) and that every time the vessel sailed in Tonga, water had entered through the bow ramp. (T 4084 - 4088)

8.597 Mr Jonesse was asked:

“MR VARITIMOS: And do you accept that on 21 April 2009 you and the company secretary with the other two directors effectively resolved to recommend to His Majesty’s Government that they purchase the Ashika.

MR JONESSE: Correct.

MR VARITIMOS: Now, do you accept that the time that the recommendation was made the vessel was not in good seagoing condition?

MR JONESSE: The vessel had not been - we had not had a survey conducted, that is correct, sir.” (T 4088 R – 4089 B)

8.598 Mr. Jonesse had then gone to Fiji. He was aware that Mr. Karalus was putting forward a submission to Cabinet on 20th April, 2009, and he was told that this was to recommend the purchase of the vessel. Mr. Jonesse was aware that Mr. Karalus was relying on him to give information that he could then give to Cabinet including as to the condition of the vessel. (T 4095 - 4096)

8.599 Mr. Jonesse was concerned to get the vessel to sail on its first voyage on the 3rd July 2009. (T 407) The voyage had been advertised; tickets had been pre-sold; cargo was aboard and he was in desperate need to ensure that the vessel sailed. Mr. Karalus also wanted the vessel to sail and was very interested in the new vessel. Mr. Jonesse indicated that he was in regular contact with Mr. Karalus from 3rd July to 5th August, 2009. (T 4110 - 4114) The evidence from other witnesses establishes, in fact, that he was in regular contact with Mr. Karalus during all of 2009.

8.600 Mr. Jonesse was reported as saying in the press that the vessel was in very good condition. (T 4178) He now accepts having regard to the evidence that Ashika was unseaworthy from the time he first inspected it in Fiji. (T 4180)
8.601 Mr. Jonesse agreed that in the document he had prepared referring to “Fiji Marine Board Survey December 2008 Valid to December 2010”, he had typed in “Bow ramp ...can it be effectively sealed when closed. No need for seals as the ramp closure is well above water level unlike Olovaha”. It was put to Mr. Jonesse that it showed a complete disregard of anything to do with Ro-Ro. He accepted that one of the main causes of the disaster was the fact that the ramps were not properly sealed and agreed that if the ramp was not sealed, water could enter the vessel. (T 4187 – 4189)

8.602 Mr. Jonesse in oral evidence conceded that:

- A proper independent survey had to have been done prior to purchase.
- There was no weighing equipment at the wharf, so that the weight of cargo boarded onto MV Princess Ashika could only be estimated.
- That the passengers manifest list on 5th August, 2009 was totally inaccurate.
- That there were more than double the numbers of passengers on the vessel than on the manifest list.

8.603 Mr. Jonesse was involved with Mr. Karalus in a number of projects (T 4817) and they were deeply involved in the replacement of Olovaha and the acquisition of the MV Princess Ashika. They were involved together in shipping matters. There appears to be little involvement by Mr. Jonesse with any other person relating to the acquisition of MV Princess Ashika, other than Mr. George Patterson. (T 4817)

8.604 In a letter to the Minister of Public Enterprises, it was stated “John was impressed at how well this vessel, built in 1972, had been maintained by its Fijian owner”. (Exhibit 377)

8.605 The Managing Director, Mr. Jonesse was asked:

“MR VARITIMOS: And you were aware of the concept that gross negligence can be to such an extent, as you put it, that any failure resulting in injury would have been deemed to be criminal negligence.

MR JONESSE: Yes, sir.

MR VARITIMOS: You understand that. So it was your understanding, in effect, that an operator of a vessel that was operating an unsafe vessel could, in appropriate circumstances, be considered to be failing their duties to such an extent that it would amount to negligence.

MR JONESSE: Yes, sir.

MR VARITIMOS: And if the failure to carry out those duties was of such a nature, that it could, in fact, result in a person facing charges for criminal negligence.
MR JONESSE: That’s possible, sir, yes. Sir, I refer to the - going back to this maintenance situation that had been allowed to occur when the Olovaha had been owned by the Government of Tonga. The vessel was transferred to the Shipping Corporation of Polynesia in July of 2008 and - and certain things changed in relation to attitude to maintenance. But my primary references had been to the - the way in which the vessel had been maintained and operated for quite a large number of years, sir.” (T 4831 D – L)

The evidence of witnesses such as Ms. ‘Eleni Mone (CEO and Secretary for Transport), Mrs. Kalesita Taumoepeau (the Personal Assistant to the Minister for Transport) and the Minister for Transport himself indicates that Mr. Jonesse and Mr. Karalus had constant communications with each other, including meetings and e-mails. In fact, Mr. Karalus organised for Mr. Jonesse to witness his signature in relation to the contract for the purchase of the MV Princess Ashika by the Government of the Kingdom of Tonga on 8th May 2009. (Exhibit 417) The contract was in fact witnessed by Mr. Jonesse in Mr. Karalus’s Ministerial office.
CHAPTER 9 - THE CREW OF MV PRINCESS ASHIKA

The Crew

9.1 The Master, VILIAMI MAKAHOKOVALU TUPUTUPU, born 29th November 1966, began his basic seafarer training at the Tonga Maritime Polytechnic Institute (TMPI) in 1987. He was employed as a trainee deck officer and was sponsored by the Shipping Corporation of Polynesia (SCP). He initially spent some time as an ordinary seaman on the Shipping Corporation of Polynesia vessels Olovaha and Kao, then from 1989 worked as a seaman on overseas-owned international trading vessels, eventually being promoted to Bosun.

9.2 He again attended the TMPI for six months in 1991. In 1998, he gained his Master Class-4 Certificate. He then worked on the Olovaha as Second Mate, and as Third Mate on the Fua Kavenga, a Tongan-registered SOLAS vessel trading in the Pacific. Between 2001 and 2005, he spent part of his time as Master of the coastal vessels Olovaha and Otu Tonga, and part as Second and Third Mate on the Capitaine Tasman, another Tongan-registered SOLAS vessel, which had been launched as the Fua Kavenga II.

9.3 In 2005, he was made permanent Master of the Olovaha and worked on that exclusively. In July 2008, he returned to TMPI where he gained his Master Class-3 Certificate. After the arrival of the MV Princess Ashika in Tonga on 1st July 2009, he was appointed Master. He was due, in September 2009, to receive a scholarship to study at the New Zealand Maritime School for a Second Mate Foreign-going Certificate.

9.4 Captain Tuputupu is a man with over 20 years of seagoing experience in Tongan and overseas waters. He was given the task of taking the MV Princess Ashika to sea when it was clearly in a very dilapidated and unseaworthy condition. During his evidence he gave the impression that he was used to, and felt he could cope with, sailing on inferior vessels and in a poorly regulated shipping environment. He confirmed that he took the MV Princess Ashika to sea knowing that there were problems and defects to the vessel but he did not think it would sink. (T 1877 A-C)

9.5 There is evidence that Captain Tuputupu did not receive the Safety Certificate or the List of Deficiencies, prior to the first departure from Nuku‘alofa, but relied on a phone call from the CEO of SCP, Mr. Jonesse, to the effect that all required paperwork was in order. Despite this, the Master should not have sailed until all the required Certificates were onboard. Even if Captain Tuputupu had been provided with all the certificates required by law and he had cause to believe his vessel was unseaworthy, he was obliged to remain in port.
9.6 There was an unexplained letter signed by Mr. Jonesse, dated 3rd July 2009. (Exhibit 120) It reads:

“With regards to passengers and cargo carried on the Princess Ashika 3/7/09 Voyage to Ha’apai Vava’u

1. The scuppers as carried out on the Fiji voyage were sealed temporarily and steps are being taken for installing non-return valves.

2. The Bow and Stern Ramp were temporarily sealed...

3. The Bow ramp will be permanently sealed.

4. The passenger/crew manifest declaration has 302 in total.

5. The total tonnage on the manifest is 100 tonnes.

6. Manifests lodged with Port Authority.

The Master Maka Tuputupu attests to the above information

(Signed)
John Jonesse
3rd July 2009.”

9.7 There is no addressee on this letter (above) and Captain Tuputupu denied any knowledge of it when asked, even though Mr. Jonesse had written that Captain Tuputupu “attests to the above information”. It appears that Mr. Jonesse was trying to cover up the actual numbers of passengers (367) and amount of cargo (342 tonnes) carried on this first voyage, when the surveyor, ‘Onesi Tu’ifua, had the passengers counted on arrival Pangai. Mr. Jonesse appears to have implicated Captain Tuputupu in his subterfuge. This type of action does not suggest a good working relationship between these two men.

9.8 The Passenger Manifest for the first Tongan voyage of MV Princess Ashika gave a total of 302 passengers, 2 more than permitted. In fact, the total number of passengers was 367 and the vessel was grossly overloaded and it should not have sailed for this reason.

9.9 Notwithstanding the likelihood that he had not seen the Deficiencies List on 3rd July 2009, by the time of the second voyage the Captain should have been fully aware of the Surveyor’s Deficiencies List with the Acting Director of Marine and Ports, Mr. Viliami Tu’ipulotu’s written comments, and should not have sailed again on a vessel which he must have known was clearly unseaworthy. Captain Tuputupu obviously felt he could cope with the deficiencies of the vessel but that did not give him the right to sail.
According to the witness Mr. Penisimani Tupou, AB, the Captain was unwilling to sail again after the first voyage. He said:

“After the first voyage - after the first - even from the - after the first voyage, sir, the captain told us that he wants the vessel stopped from sailing because he wanted to see the deficiencies remedied before they sail again but it was the manager of the shipping company that wanted them to continue sailing.” (T 2085 A-B)

Captain Tuputupu in his evidence said:

“Jonesia is my boss and he is always calling me for meeting for talking about the company vessel. And he is always very close to me, telling me what the trip, what the schedule of the vessel and also about the cargo of the vessel.” (T 1650 F – G)

This suggests frequent contact between the Master and the CEO but Mr. Jonesse did not acknowledge that he had received any requests from the Master to keep the Princess Ashika in port in order to complete repairs and attend to the surveyor’s list of deficiencies. Despite this, Mr. Jonesse must have been aware that welders in his employ were making repairs to the superstructure of MV Princess Ashika after every voyage.

It was a weakness on Captain Tuputupu’s part that he felt unable to speak freely with management.

Whatever the pressures applied to Captain Tuputupu, he clearly felt uncomfortable as a mariner about taking an unseaworthy vessel to sea. He knew that he should not take it to sea in that condition.

Captain Tuputupu saw the MV Princess Ashika for the first time in June 2009 when he travelled to Fiji to deliver the vessel to Tonga. His initial opinion of the vessel was that it was rusted everywhere. He observed that the Fijian crew members of the vessel had painted over the rust without chipping it. (T 1665 K-R) He also indicated that the vessel was unseaworthy due to the excessive corrosion of the hull and inside the cargo deck. (T 1669 I-P)

By the time that Princess Ashika completed its first voyage, Mr. Jonesse, was overseas in Japan and could not be consulted concerning any problems the Master might have had. This should not have been a problem if the International Safety Management (ISM) Code had been fully implemented. There had been manuals prepared for SCP and the vessels it operated, but there has been no evidence that
the Master and crew, nor the shoreside staff of SCP were aware of its existence, nor were they trained in its operation.

9.17 The Captain understood that there was a Designated Person Ashore as a contact between the ship and management, but when giving his evidence, Sateki Tupou, the Workshop Foreman for SCP, said that he was unaware of the SCP Safety Management Procedures Manual and the fact that this manual designated him as the “Designated Person Ashore”. (T 364 K-T) We consider that Mr. Tupou was not trained or able to carry out this function.

9.18 It is clear that if the “Designated Person Ashore” was not aware of the ISM Manual or the responsibilities it assigned to him, he could be of little assistance to the Master of MV Princess Ashika, particularly in the absence of the CEO for much of the first half of July 2009.

9.19 Although the Master was only required to conduct safety drills once a month, it would have been prudent to hold them more frequently when the crew were operating a vessel with which they were unfamiliar. This was not done.

9.20 The evidence given by Captain Tuputupu did not make it clear if he left specific Night Orders for the Officer of the Watch on the night of the sinking, or if there were only a set of Standing Orders. His answer to the question as to what orders he left before retiring on the night of 5th August 2009 was:

“It’s about the condition of the weather, also the safety of the ship, like is there any condition of heavy rain and also checking the cargo, if any water - too much water anywhere on board ship, and also if any distress - in case - if there is - they heard or see anything problem on board or over the seas, then just call me.” (T 1769 O-Q).

9.21 These orders should have been sufficient for the Officer of the Watch to call the Master long before he was called. There may have been a reluctance to call a superior, in this case the Master, if a culture of “teamwork” had not been established and encouraged onboard. Indeed this teamwork should include the management of the ship operator so that there is a constant flow of information from management downwards and from all crew back upwards to management.

9.22 All personnel have to be encouraged to “challenge” when they feel something is going wrong, or when they feel there is room for improvement. It is no good to remain detached when observing something that is another’s responsibility going amiss. They must not feel that they will be chastised if they speak up. Captain Tuputupu does not seem to have developed this sort of working environment onboard.
9.23 Even if this culture of teamwork did not include management, Captain Tuputupu should have encouraged it onboard. If he had done so, he might have been called earlier on 5th August 2009 and in time to at least allow all onboard to abandon ship safely, if not to save the ship.

9.24 Traditionally it has been a hierarchical environment onboard ships, with all the crew knowing exactly where they come in the “pecking order”. This needs to change and is best changed from the top down with those in “inferior” positions encouraged to speak up without fear of reprimand.

9.25 Captain Tuputupu appears to have had only a basic understanding of ship stability and the importance of knowing the drafts of the vessel, the condition of the tanks and void spaces, and the cargo weights and distribution. Having send that, the deadweight of MV Princess Ashika, in the condition in which it arrived in Tonga would only permit the carrying of passengers and no cargo, as 300 passengers at 70 kg each would equal 21 tonnes, without their baggage. This figure is close to the recalculated deadweight figure of 28 tonnes. He should never have been required to take such a ship to sea. The Management and Board were ill equipped to be operating ships due to their lack of knowledge in maritime matters. There seems also to have been a lack of interest in employing a person with this knowledge to give them the required expert advice.

9.26 Captain Tuputupu stated that up to the final voyage of the MV Princess Ashika he never saw a Load Line on the vessel. This was probably more from the want of looking than the lack of a Load Line. The Load Line was clearly painted on the ship’s side but would have been difficult to see from the wharf when the vessel was alongside due to the cargo deck overhanging the hull of the vessel. The load line on the side of the vessel away from the wharf should have been easily seen when the vessel was berthed at the ramp in Nuku’alofa.

9.27 If Captain Tuputupu had insisted on the taking of soundings and the recording of these plus the drafts, he would have been alerted to ingress of water by an unusual draft and/or trim. After analysing the evidence about the vessel’s final voyage, it is considered highly likely that MV Princess Ashika sailed from Nuku’alofa with an unusual trim by the head. Merely reading the draft should have alerted the Master to a potential disaster. He was at fault in this respect.

9.28 Captain Tuputupu should have ensured that there was a regime of testing all Bridge, engine room and steering gear prior to sailing and for all watertight and weathertight openings securely closed prior to sailing.
9.29 Captain Tuputupu appears to have been called, at best, about 20 minutes, and possibly only 10 minutes, before the MV Princess Ashika sank. The Chief Mate, Mr. Semisi Pomale said he called the Master between 2325 hrs and 2330 hrs. (T 2255 H-J) Captain Tuputupu gave evidence that after being woken, he reached the wheelhouse about five minutes before the vessel sank. (T 1793 G-S)

9.30 Whichever version of timing is correct, this is very little time to assess the situation, make rational decisions, and give the necessary orders. The Master managed to give orders to slow the engines, send a crew member to alert the passengers, send the Chief Mate to the cargo deck to organise the crew to pump out water, check the position of “MV Princess Ashika” to check the distance to the nearest land, and to transmit a coherent MAYDAY message with an accurate position, shows that he was capable of making appropriate decisions in a crisis.

9.31 If he had been given sufficient time, he could have saved all of those onboard, if not the vessel. He remained in the wheelhouse to transmit the MAYDAY message and in doing so was nearly trapped in the wheelhouse as the ship sank. (T 1771 E-1772 L) Captain Tuputupu remained in the wheelhouse attempting to send a second MAYDAY message until he was washed out of the wheelhouse door shows a certain devotion to duty.

9.32 The Chief Mate, **SEMISI VE’ETUTU POMALE**, who was born 3rd November 1983, completed his basic training at TMPI in 2001 and worked as a trainee seaman on the vessels Alaimoana, Fangaafa and ‘Otú Tonga. In 2003, he gained a Watchkeeping Certificate in Fiji and sailed as an ordinary seaman on the Olovaha until 2005 when he joined the Fua Kavenga, also as an ordinary seaman. In 2006, he gained his Master Class-4 Certificate, and in 2007 sailed as Second Mate on the Olovaha, being promoted to First Mate in 2008. In September 2008, he gained his Master Class-3 Certificate in Fiji. He has a Diploma in Nautical Science. Mr. Pomale has had far less seagoing experience than Captain Tuputupu.

9.33 On 1st June 2009, the Chief Mate was sent to Suva to familiarise himself with the Princess Ashika and he returned to Tonga on the delivery voyage as Second Mate under a Fijian Master and Chief Mate. When the Princess Ashika commenced operations in Tonga, he was appointed as the permanent Chief Mate. He should have been able to give a great deal of support to the Master due to his experience on the delivery voyages during which he should have built up a good working knowledge of Princess Ashika.

9.34 With this knowledge, Mr Pomale was in an excellent position to become aware of all the deficiencies in the condition, design and suitability of the vessel for the service. Therefore he, as much as anyone, should have realised how unseaworthy it was and that the crew should not take it to sea. If he and the Master had acted together, they
might have kept MV Princess Ashika alongside. It is possible that he did not want to do anything that might jeopardise his chances of promotion, after all, he was expecting to step into Captain Tuputupu’s position when he went to study for his 2nd Mate’s Certificate.

9.35 As Chief Mate, he is the “working boss” onboard and as such has a responsibility for the operation of the “deck” department onboard. He should be in charge of ballasting operations and know the conditions of the tanks and spaces throughout the vessel. To this end he should ensure that all tanks (other than oil tanks), bilges and void spaces are sounded at least daily, and the details recorded. He recalled that there was a chalk board in the wheelhouse to record soundings but could not recall it being used. (T 2224 I-J)

9.36 Whilst he would not be responsible for sounding oil tanks, he should obtain this information from the engine room staff as this knowledge is needed to calculate the vessel’s draft and stability. It follows that he should also be aware of the vessel’s drafts and see that these too are recorded.

9.37 It was not the practice of the Chief Mate to see that the vessel was secure prior to departure from port. He gave evidence that he did not check, and was not aware of anyone else checking, that watertight doors, tank lids and hatches were closed prior to departure. (T 2232 E-L) This was a major omission on his part.

9.38 A Chief Mate should keep the Master informed of all the above and in turn, the Master must pass on all information required for the efficient running of the ship and crew. It is important that the Master and Chief Mate develop a good working relationship, with the Master developing the skills of his Chief Mate so that he will be able to understudy him, and eventually take command. There was no evidence before the Commission to suggest that these two men had a good working relationship.

9.39 The fact that Mr. Pomale, when he felt unwell, handed over his watch to Filipe Tau’ataina, a Steward, albeit someone with a Master Class 5 Certificate, and went to sleep on the Bridge was irresponsible. This was all without the Master’s knowledge or agreement. It does not suggest the two men got on well.

9.40 It seems obvious that Mr. Pomale was contemplating getting the Steward, Mr. Tau’ataina, to do his watch for him prior to the Master leaving the Bridge on the 5th Voyage, yet he did not clear this action with him. If nothing more, it was a lack of courtesy but it actually suggests deceit. If Mr. Pomale had advised Captain Tuputupu of feeling unwell, changes could have been made in the watch routine and the Second Mate could have taken the first watch to allow the Chief Mate to recover.
No matter how unwell Mr. Pomale was, he should have performed far better, had a much greater sense of responsibility, and realised the extent of the peril to which Princess Ashika was exposed. His late calling of the Master was a major factor in the eventual high loss of life.

Mr. Pomale gave evidence that during the evening of the 5th August 2009, he visited the cargo deck no less than three times. The first was at 2100 hrs when the Steward, Mr. ‘Etuate Fa’uhiva, reported that sea water was wetting the cargo. (T 2245 O - 2246 B).(Exhibit 165) This prompted the Chief Mate to order that the aft starboard water ballast tank be pumped out as water had accumulated on the starboard side of the cargo deck due to the starboard list. Secondly, Mr. Pomale went down to the cargo deck at 23:15 hrs when alerted to the amount of water in the cargo deck (Exhibit 166) by no less than three crew members, Penisimani Tupou, ‘Etuate Fa’uhiva, and Metui Satini (T 2253M-2254 E) It is sad to note one of the crew expressing their concern to the Chief Mate at the level of water in the cargo deck Mr.’Etuate Fa’uhiva, did not survive the sinking.

Mr. Pomale must have at last become a little concerned about the situation of the MV Princess Ashika as it was not long after this second inspection of the cargo deck that he called Captain Tuputupu who, amongst other actions, ordered Mr. Pomale back to the cargo deck to organise bailing and pumping of water in the cargo deck. The vessel sank soon after he reached the cargo deck with nothing achieved.

The intention was for Mr. Pomale sail as Master on the voyage following the voyage of the 5th August 2009, to allow Captain Tuputupu to undertake study for a 2nd Mate’s Certificate in New Zealand.

Mr. Pomale’s conduct on this final voyage does not show the required attitude. He did offer as an excuse for sleeping because he expected to be understudying Captain Tuputupu in the “pilotage” part of the voyage in the early morning in order that he would be prepared for command. It is worth considering, what would have been the outcome if the events leading up to the foundering had occurred the following voyage with Mr. Pomale in command and Mr. Tau’ataina officially sailing as Second Mate.

In circumstances where an officer is moving to a higher rank, best practice would require this officer to sail as a supernumerary in order to give his whole attention to learning the new job.

The Second Mate, UASIKE TUPOU, born 8th October 1975, completed his basic training at TMPI in 1998 and worked on domestic fishing vessels until 2003 when he gained his master class-5 certificate. In 2004, he gained his Master Class-4 Certificate and worked as Second Mate on various domestic passenger vessels, joining the
Olovaha as second mate in January 2009. When the MV Princess Ashika commenced operations in Tonga, he was appointed the permanent Second Mate.

9.48 **UOKALANI FILIPE Tau’ataina**, born 25th June 1984, was sailing on the MV Princess Ashika as a Steward. He completed his basic training at TMPI in 2004 and worked on fishing vessels. In 2005, he gained his Master Class-5 Certificate and started work on domestic passenger vessels as an able seaman. He joined the Olovaha in 2007, continuing to work as an able seaman. In 2008 he completed the course for Master Class-4 and the written examination, but he did not sit the oral examination so was not issued with the certificate.

9.49 After the arrival of the Princess Ashika in Tonga, he was not automatically transferred to it as part of the deck crew, but on its second voyage in Shipping Corporation of Polynesia service, he joined the vessel as a relieving Second Mate. On subsequent voyages, there were no vacancies for deck crew on the vessel, so he was employed as a Steward.

9.50 Mr. Tau’ataina gave the impression of a man who was keen to get on in his profession. He had already obtained certificates for Proficiency in Survival Craft Fire Prevention and First Aid in addition to his Master Class 5. He was prepared to sail as Steward when no higher position was available. He showed how keen he was by taking a Bridge watch when he was signed on as Steward.

9.51 He, like many of the crew on that final voyage, was becoming accustomed to sea water onboard and in the accommodation. This made them somewhat complacent and, apparently, completely unaware of the peril that they and the passengers were in. During the fatal final voyage, events of importance went on around him without him sensing their significance or feeling that he had to do any more than carry out orders given by a superior officer.

9.52 The Bosun, **METUI SATINI**, born 12th February 1990, completed his basic training at TMPI in 2007, and obtained a Watchkeeping Rating Deck Certificate on 31st August 2007. He worked on the Olovaha as a seaman. In 2008, he was promoted to Bosun of the Olovaha. In June 2009, he was sent to Fiji as part of the deck crew for the delivery voyage of the MV Princess Ashika.

9.53 Mr. Satini was asked about taking tank and bilge soundings. He gave evidence that he only sounded the four water ballast tanks and no other tanks or bilges. He was aware of the positions of the sounding pipes for the forward and aft ballast tanks and marked them correctly on a ships’ plan when asked. He stated that these soundings were only taken when the vessel returned to port after a voyage, and that they were recorded “on a blackboard ... at the stern.” (T 2610 J – 2611 R)
We find it hard to understand that Mr. Satini was employed as Bosun when his age and inexperience is considered. There were older, more experienced men amongst the Princess Ashika crew who the SCP might have been wiser to employ as Bosun.

This not to question Mr. Satini’s abilities, but a crew member’s experiences at sea can be very beneficial in an emergency such as occurred on MV Princess Ashika on 5th August 2009. If a “leading hand” such as a Bosun has considerable experience at sea, he can be a great asset when things go wrong.

Able Seaman, LEPHOPOAME KAINGA TA’UFO’OU, was born 16th February 1982, and had been at sea for 9 years. During this time he had been employed by SCP for 6 years. He had sailed on the Olovaha, ‘Otu Tonga, Tautahi and the Maama Kamo 2, prior to joining the MV Princess Ashika in Fiji for the delivery voyage. He acted as quartermaster, taking the wheel when the vessel was being conned in and out of port.

He was one of the Tongan crew who made the delivery voyages. From what little information about him is available, he seemed a capable hand, and may have been a good choice for the Bosun’s position. He, unfortunately, lost his two year old son in the sinking.

Able Seaman, PENISIMANI TUPOU, born 14th January 1987, was an 8 - 12 watchkeeper on the final voyage, completed his basic training at TMPI in 2005 and worked on domestic passenger vessels including MV Pulupaki as an Able Seaman. He joined the Olovaha in 2007 and stayed there until he joined the MV Princess Ashika after its arrival in Tonga.

Mr. Tupou appeared to do his job conscientiously on the final voyage although not to the extent that he would take the initiative to, for instance, call the Master as the situation on the final voyage worsened.

Ordinary Seaman, FISI’INAUA VEA, born 14th May 1989, who was an 8 - 12 watchkeeper on the final voyage, completed his basic training at TMPI in 2008, and then worked on the MV Olovaha as an Ordinary Seaman. In 2009, he returned to TMPI to obtain his Watchkeeper Certificate. He continued to work on the MV Olovaha until he joined the MV Princess Ashika after its first voyage in Tonga.

Mr. Vea gave evidence to the effect that water entered the cargo deck of Princess Ashika, with depths of up to half a metre, on all the voyages in which he sailed, and he was aware that on one voyage a crew member made a hole in the ship’s side to allow seawater to drain away. (T 2015A – T 2016)
9.62 The two seamen (above) on the 8-12 watch took alternating spells on the wheel of about half an hour, followed by safety rounds of the vessel. They were, therefore, able to give a good account of the pattern of events leading up to the sinking.

9.63 The Chief Engineer, **LINO SAKALIA**, born 5th April 1972, went to sea in 1990 as an engineer trainee, working on the MV Olovaha. He gained his marine Engineer Class-4 Certificate on 2nd February 2006. He worked on several ships, including the Norfolk Guardian, Sitka and Marieke, that traded overseas. In February 2009 he returned to the Olovaha and transferred to the MV Princess Ashika after its arrival in Tonga.

9.64 It is unfortunate that Mr. Sakalia was not available to give evidence in person to the Commission.

9.65 The engine room was the better maintained area of the ship, although showing signs of age. The Chief Engineer managed to keep the machinery operating apart from the breakdown at sea during the third or fourth voyage due to a faulty fuel pump and a leaking fuel pipe. The timings of these breakdowns is a matter of some confusion but the Commission is convinced by the evidence that there were problems with the leaking fuel pipe and faulty fuel pump.

9.66 The Chief Engineer made do with what was at hand, installing a submersible pump in the fuel tank, and running a flexible hose through the door in what had once been a watertight bulkhead between the aft void space (shaft tunnel) and the engine room, to supply fuel for the main engines.

9.67 This might have been the only option to get the vessel under way again and to complete the voyage but the vessel should never have sailed again without the replacement of the fuel pump, and the removal of the temporary hose, to enable the closing of the door in the transverse bulkhead. It appeared that there was already a hose running through this doorway in Fiji as early as April 2009, as a photo taken during Mr. Jonesse’s visit to the MV Princess Ashika clearly shows this.

9.68 If it had been possible to close the door between the engine room and the void space on the final voyage, the foundering may have been delayed if not averted.

9.69 These comments should not be seen as laying blame on the Chief Engineer. In a well managed company and vessel there would have proper communication between management and all personnel aboard MV Princess Ashika. This would have seen appropriate and immediate action taken to see that the necessary repairs were carried out and the hazardous situation of one, a flexible hose used to carry inflammable fuel and, two, the hose preventing the closing of the door in a supposedly watertight door was corrected.
The Second Engineer ‘UNALOTO UATA, born 22nd December 1984, went to sea in 2005 and worked initially on a domestic long-line fishing vessel. In 2008, he gained a marine Engineer Class-4 Certificate. He then joined Shipping Corporation of Polynesia as a Third Engineer on the Olovaha. On 1st June 2009 he was sent to Suva to familiarise himself with the Princess Ashika and to be Second Engineer on the delivery voyage. He remained Second Engineer on the ship once the Princess Ashika started operations in Tonga.

The Third Engineer, SOLOMONE HAVILI, born 4th October 1982, completed his basic training at TMPI in 2002 and was employed on the Otu Tonga and the Olovaha. In 2004, he did an engine room watchkeeper rating course obtaining a certificate as Watchkeeper Rating Engine on 28th September 2004, and was then employed on the Fua Kavenga as a motorman. In 2006, he went to the Olovaha as a motorman, and in 2008 returned to TMPI and gained a Marine Engineer Class-4 Certificate on 26th May 2009. He went to Fiji to join the MV Princess Ashika as a motorman for its delivery voyage. He was a motorman when the MV Princess Ashika started operations in Tonga, and one month before the accident he was promoted to Third Engineer.

Motorman SITIVENI ‘ALI, was born 16th August 1983 and left school in 2001. He commenced study at the TMPI in 2002 completing three months basic training after which he worked ashore for four years with South Pacific Resource, to train as an engineer. He gained his Class 4 Engineer Certificate on 19th February 2009. He obtained employment with SCP about the 16th May 2009 as a Motorman on M.V. Olovaha.

Motorman SIALE MIKAEL KAPELI was born on 11th December 1990. He has gained Watchkeeping Rating Engine room, Rating Deck, Safety, and First Aid Certificates.


The Performance of the MV Princess Ashika Crew

Traditionally there has been a hierarchical command structure on merchant ships where there are well defined lines of command and seniority which were not challenged. This concept was also prevalent on the flight decks of aircraft and was seen to compromise safety and to have been the cause of a number of accidents. The airline industry introduced Cockpit Resource Management (CRM), where a culture of “Challenge and Response” was encouraged. This entailed junior flight crew challenging the Captain in order to be sure the correct procedures were being followed.

At a later stage this concept was introduced onto the bridges of merchant ships as Bridge Resource Management (BRM). This meant that it was expected that those in
junior ranks would “challenge” the orders and intentions of their superiors in order to get the correct “response” to be sure that the planned actions were safe and correct. This system of checks and balances has been extended with the International Safety Management Code (ISM) to include management. This means that if an employee in an “inferior” position is not getting a satisfactory “response” from their immediate “superior”, the employee is encouraged to bypass the superior and go, ultimately, direct to a Designated Person Ashore to get a satisfactory “response”.

9.77 On MV Princess Ashika, in addition to the hierarchical command structure of a merchant ship, there seems to have been the Tongan cultural respect for elders and those of superior rank. This appears to prevent otherwise capable seafarers from taking the initiative and acting to prevent an incident occurring or to lessen its impact.

9.78 As apparent on the final voyage of MV Princess Ashika, there were several crew members who were concerned enough to report to the Chief Mate, Mr. Pomale, that there was a great deal of water on the cargo deck, but no-one seems to have considered calling Captain Tuputupu, when the situation worsened and no effective action was taken to deal with it.

9.79 Furthermore, there is no evidence to suggest that any of the crew, who must have had concerns for their own safety when sailing on MV Princess Ashika, ever considered going directly to management ashore, the Designated Person or CEO, when the Master did not take action to remain alongside until the defects were remedied.

9.80 There was only one crew member who took action when he became seriously concerned with the unseaworthiness of MV Princess Ashika. This was Talafi Tulikihakau, a trainee, who asked to leave the vessel after sailing on the fourth voyage. He reported that:

“When the vessel sailed for Tongatapu I asked to be relieved of my duties because what I had seen on the voyage to Niuafou’ou had truly scared me.”

(Exhibit 169)

9.81 This teamwork approach to operating the vessel has to come from the top. Management pleads ignorance of the shocking condition of ‘Princess Ashika’ as the Master and senior officers had only reported a faulty fuel pump and a leaking fuel pipe. Management must have known that SCP welders were patching holes in the vessel’s superstructure each time it was in Nuku’alofa. They should have fully inspected, with the senior officers, the condition of the one vessel that was being managed. Management should have been actively encouraging a culture change to
ensure a constant exchange of information and ideas and a culture of “challenge and response.”

9.82 The evidence suggests that the Master was reluctant to converse with the CEO, possibly due to cultural reasons or possibly for fear of losing his employment. Whatever his difficulties with management, the Master had many duties and responsibilities onboard which were left wanting.

9.83 The first of these was the requirement not to take an unseaworthy ship to sea. This duty applies with or without a “Seaworthiness Certificate”. Any serious structural or mechanical fault, insufficient stores, fuel, or crew, or impending bad weather would require the Master to keep his vessel alongside regardless of whether all the required certificates were onboard and in order. Management should give full backing to the Master in his decisions, and from the start should make the him understand that they will always do so, regardless of other commercial pressures.

9.84 Vessels taken into service with a new operator should remain out of service until all crew are given familiarisation training in all the safety aspects of the vessel they are joining. They should be involved in fire drills, mustering of passengers and crew, and in abandon ship procedures. The operation of all the ship’s equipment and machinery must be explained to the new crew and whenever a new crew member joins the process must be repeated. Their duties must be clearly explained to them. There is no evidence that this was done.

9.85 The Princess Ashika should not have sailed on her first voyage before all appropriate safety instruction notices, in Tongan and English, had been posted onboard. These should have included advice on the stowage and wearing of lifejackets, descriptions and demonstration of emergency signals, and directions to, and description of, the emergency muster position. This was a serious omission by management and the Master.

9.86 An emergency muster appears to have been held involving all the crew once the Princess Ashika departed Nuku’alofa on the first voyage according to Captain Tuputupu (T 1689 E-S). Captain Tuputupu gave evidence that a familiarisation exercise was conducted for the crew by the Chief Mate, Semisi Pomale, on 2nd July 2009 but the Master did not attend this, and was not aware of the extent or content of the exercise. The Chief Mate, Mr Pomale conducted this exercise as he had been part of the crew on the voyage from Fiji. The Master should have been involved in this exercise to ensure it was thorough. Even though he had many things to attend to before the maiden voyage, he was at fault for his non attendance.

9.87 A liferaft and emergency drill was conducted onboard in port after the first voyage in Tonga but this was not attended by all the crew. The Master said the drill included
abandon ship, fire, and mustering of passengers drills. These drills lasted about 30 minutes. (T 1720 T – 1722 F) **No crew should be excused from attendance at any safety drill.**

9.88 The Master and his officers and crew did not understand the importance of ship stability and the necessity of regularly reading and recording drafts, and of taking and recording soundings of tanks, bilges and void spaces.

9.89 This is a failure not only of the Master to ensure this was done, but of the training given to seafarers at the maritime colleges they attend, including TMPI.

9.90 The Master did not ensure a proper regime for preparing the vessel for sea. He did not insist on full testing of equipment on the Bridge and in the engine room where the engines, telegraphs, whistles, alarms, public address, steering gear and all Bridge equipment is tested prior to sailing. A check list of these tests should be completed and the Master informed of the result.

9.91 There is no evidence that there was a routine to ensure that all watertight openings were closed and secure, or that anything loose was secured prior to sailing.

9.92 The Master indicated that there were standing orders on the bridge to guide the Officers on a navigation watch. Good practice requires a Master to write specific Night Orders before turning in. This was not done by Captain Tuputupu. It is unlikely that the writing of specific Night Orders would have prevented the foundering unless the Master had made a specific order to be called if water was taken onboard in the cargo deck. The Master and crew had become so used to this occurring that the Master was hardly likely to have put that specific instruction in Night Orders.

**The Final Voyage.**

9.93 It is probable that the foundering of MV Princess Ashika was inevitable from about midway through the 8-12 watch whatever steps had been taken by the crew from that point. Having accepted that, there were many actions that should have been taken to preserve the lives of passengers and crew.

9.94 The ship should have been prepared for abandonment by about 2300 hrs. All crew and passengers should have donned lifejackets, the ship brought to a stop, some liferafts launched and moored alongside beneath the boarding ladders, and an urgency PAN message passed to Nuku’alofa Radio and any vessels in the vicinity to alert them to the possibility of an abandon ship and assistance being required.

9.95 These actions should not have stopped crew from continuing to minimise the ingress of water to the vessel and make attempts to remove whatever water was onboard.
9.96 It can be seen that someone should have called the Master by at least 22:30 hrs but preferably well before. If the vessel had been closer to Nuku'alofa there would have been the possibility of returning to port and saving the ship as well as all onboard. Although the major fault in not calling the Master must lie with the Chief Mate and, to a certain extent the Officer of the watch, Mr. Tau’atina, any one of the crew could have called him as the situation worsened.

9.97 That no member of the crew was prepared to call the Master is a sad reflection on their training, both at the TMPI, and onboard “MV Princess Ashika”.

9.98 It took until shortly before Captain Tuputupu was called to the Bridge for the Chief Mate to make an alteration of course. This was onto a more easterly heading to bring the wind and weather ahead. Unfortunately, this tended to force more seawater under and around the bow ramp as the vessel was trimmed well by the head by this time.

9.99 We consider that it would have been more prudent to alter course to bring the weather (wind and sea) abaft the beam and reduce speed. This action should have at least reduced if not stopped the ingress of water around the bow ramp and would have given time to pump out water from the vessel. It would also, if it had proved necessary, have made for an orderly abandonment of the vessel. This action would have bought time to summon assistance.

9.100 The Chief Mate’s alteration of course was immediately cancelled by the Master as soon as he reached the Bridge. The Master also reduced speed which would have reduced the amount of water entering the cargo deck forward. It was not long after this that the port main engine had to be stopped when the level of water in the engine room reached the flywheel.

9.101 The majority of the crew onboard held Safety, Fire Fighting, and First Aid Certificates and should have been well able to launch liferafts, and assist the passengers into lifejackets and then into the liferafts. In fact, once the MV Princess Ashika had foundered and the survivors were in the life rafts, the crew seemed to recall their training in that there were instances of crew instructing passengers on the contents of rafts and procedures to be adopted in liferafts. They remembered to keep the rafts together and to conserve the pyrotechnic distress signals. It was a pity the training was not put to use before the vessel sank.

9.102 It seems that no-one was prepared to take the initiative to even get passengers into lifejackets without an instruction from the Master. It is a sad reflection on the training given to the crew, both in gaining their qualifications and in their onboard training.
9.103 When maritime authorities are determining the numbers of crew required in the safe manning certificate and the numbers of passengers permitted to be carried they should consider the ratio of crew to passengers. It can be seen that on ‘MV Princess Ashika’ with a manning level of 18 crews and a full complement of 300 passengers, the ratio was almost 17 to 1. In an emergency situation, some crew would be preparing life rafts and others would be involved in other duties leaving only a few to assist passengers, changing the ratio to 30 to 1 possibly. It should be noted that MV Princess Ashika was overloaded by 67 passengers on her first Tongan voyage. These figures go to demonstrate how important it is for the crew to give passengers an emergency procedures “briefing” prior to departure from a port.

9.104 It is as well that the majority of liferafts automatically deployed and inflated as not one single liferaft was launched by the crew and there was no evidence that a crew member let go any lashings on liferafts that were without hydrostatic releases.

9.105 The crew continued to try and bail out, first their accommodation, then the cargo deck in what must obviously have been a futile exercise. There was no team effort to deal with the developing emergency. No-one took overall responsibility for organising the crew into a cohesive unit.

9.106 It is astounding that Mr. Pomale, the Chief Mate could continue to try and sleep when it must have been obvious that the vessel was in distress. By the time he finally started to show some interest in the situation, it was far too late to wake Captain Tuputupu as Mr. Pomale himself admitted. (T 2271 F-H) (T 2275 H-I)

9.107 Summary

- The Master should not have sailed a vessel known to be unseaworthy.
- The Master and his Officers had little or no knowledge of the importance of ship stability.
- There was no system of sounding tanks, bilges and void spaces, and keeping a record.
- There was no system of testing essential equipment prior to sailing and recording and reporting the results of the tests.
- The watertight and weather tight openings were not properly secured for sea prior to sailing.
- The cargo and moveable items of ship’s equipment and stores were not secured for sea.
• The International Safety Management Code had not been implemented ashore or aboard.

• There was no regime of ‘challenge and response’ which would have encouraged crew to take the initiative, particularly in emergency situations. This was partly because they hadn’t been taught to do this and partly due to local culture. Any one of the crew could have called the Master or alerted passengers to the situation and provided them with lifejackets.

• The Chief Mate showed a lack of responsibility in arranging for the Steward to take his navigation watch without the Master’s knowledge or agreement.

• The Chief Mate showed a lack of responsibility when made aware of the flooding of the cargo deck.

• The Chief Mate showed poor judgement in not calling the Master long before he did and was therefore responsible in a large measure for the loss of lives.

• There was no cohesive action onboard to deal with the developing emergency.

• From about 2200 hours on the 5th August 2009, it was almost inevitable that the Princess Ashika would sink or be disabled. Preparations for abandoning ship should have commenced at this time. An urgency PAN message should have been sent to Nuku’alofa Radio and to any vessel in the vicinity requesting assistance. Course and speed should have set to minimise or eliminate flooding of the cargo deck. Passengers should have been instructed in emergency procedures and provided with lifejackets. Life saving appliances should have been prepared.

9.108 Reasons for the high loss of lives

i. Late preparation for abandon ship.

ii. Lack of warning to passangers. No alarms sounded on ship’s whistle or alarm bells. There is conflicting evidence as to whether there were alarm bells and if there were, whether they were operational. For unknown reasons, there was no air on the ship’s whistle.

iii. The Public Adress system was all but inaudible

iv. Lack of instruction in Emergency Procedures given to passangers.

v. Passengers confined to the Passenger Lounge with narrow exits.
vi. Had the passangers been able to exist the Passanger Lounge they would have blocked the exits as they collected lifejackets from lockers at the exits. No-one was issued with a lifejacket.

vii. Vessel had developed a relatively small list initially but as the water found its way over the Erection Deck it capsised very quickly.
CHAPTER 10 – PORTS AUTHORITY

PART A – COMMANDER LUPETI VI

Overview of Evidence

10.1 Commander Lupeti Vi was the General Manager of Ports Authority at the time the MV Princess Ashika sank and had been so for over 10 years. He had previously been the Commander of the Royal Tongan Navy for over 20 years and is obviously very experienced in sailing in Tongan waters.

10.2 Commander Vi saw the MV Princess Ashika on three separate occasions in Fiji in 2006, 2007 and 2008. He formed the view during his observations of the vessel that it was in a very poor condition and clearly unseaworthy because of excessive corrosion apparent on the vessel and its unsuitable open structure design.

10.3 Commander Vi had for several years in his capacity as General Manager of the Ports Authority raised various safety issues in relation to vessels operating in Nuku’alofa, with Ministry of Transport officials which included the former Minister for Transport, Mr. Paul Karalus. He had been constantly informed by the Ministry of Transport that he did not have the jurisdiction to raise or address such safety issues. Commander Vi and the Port Master, Captain Sosaia Katieli Mafi, had for many years maintained that some vessels were allowed to operate in Tonga whilst unseaworthy and unsafe.

10.4 On 21st December 2009, Commander Vi after learning that the MV Pulupaki had departed from the Port of Nuku’alofa overloaded with passengers and without a departure clearance authorised a public announcement that the MV Pulupaki be not allowed to enter the Port of Nuku’alofa. On 22nd December 2009, Commander Vi was directed by Cabinet, through a letter from the Secretary to Cabinet, to cease the public announcements and allow the MV Pulupaki to enter the Port of Nuku’alofa. The MV Pulupaki was surveyed on 23rd December 2009 and in January 2010 and her Certificate of Survey was suspended on 19th January 2010. On 12 January 2010, Commander Vi was directed to take 3 months vacation leave.

Substantive Evidence of Commander Lupeti Vi

Experience

10.5 Commander Lupeti Vi was the General Manager of Ports Authority and had been so for over ten years. He had been responsible for the day to day operation of the Port at Nuku’alofa. Prior to being the General Manager of Ports Authority, Mr. Lupeti Vi was the Commander of the Royal Tongan Navy and Second in Command of the Tonga Defence Services. He had spent twenty years in the Royal Tongan Navy and had extensive experience in sailing in Tongan waters. Commander Vi had also, briefly been a Director of Shipping Corporation of Polynesia Limited.
Condition of MV Princess Ashika

10.6 Commander Vi had seen the MV Princess Ashika prior to its arrival in Tonga on 1st July 2009 on several occasions in Fiji. He had seen the Ashika for the first time in Fiji in 2006 while he was looking to purchase a vessel that was suitable to operate as an inter-island ferry in Tonga. He described the condition of the vessel when he saw it in 2006 to be “very rusty” and it seemed to him that there was nobody looking after the vessel and there was no maintenance done on the vessel. He had inquired with workers on a slipway in relation to the vessel and was told to keep away from the vessel. (T 2299 H – 2300 S)

10.7 Commander Vi saw the vessel for the second time in April 2007. He admitted that the condition of the vessel was worse than in 2006 and that no maintenance had been conducted on the vessel. In May 2008, Commander Vi saw the MV Princess Ashika again and was told that it was being advertised for sale for FJD$400,000. It was clear that Commander Vi was of the opinion that MV Princess Ashika was in a poor condition. He also indicated that the design of the vessel was not fit for the purpose of operating between the islands in Tonga and therefore unseaworthy. Commander Vi stated that the sides of the vessel were too low and it was also open to the weather at both the bow and the stern of the vessel and waves could easily enter the vessel. Commander Vi accepted that it would take a substantial amount of money to repair or upgrade the vessel. (T 2300 T – 2304 T)

10.8 Commander Vi stated that when he saw the vessel at the Queen Salote Wharf on 1st July 2009 it was freshly painted and it looked different from the time he had previously seen the vessel in Fiji. (T 2305 J-U) Commander Vi admitted that from viewing the vessel from a distance after it arrived in Tonga he “was impressed to see the paint” and “thought they had done all the maintenance”. (T 2311 F-G) However he accepted that a vessel can be unseaworthy because of its design alone, which was the case with the MV Princess Ashika. (T 2312 D-O)

10.9 After the vessel sank on 5th August 2009, Commander Vi obtained photographs of the MV Princess Ashika which showed large holes on the sides of the vessel which had been compiled by the Ports Authority which is consistent with the evidence of crew members. Most of the photographs had been taken by Hiroshi Umeda, a Japanese volunteer that travelled as part of the crew and tragically died on the Ashika, who was obviously concerned enough to take photographs of the deplorable condition of the vessel. Tragically Mr. Umeda did not survive the sinking. Commander Vi agreed that the photographs demonstrated a vessel which was appallingly maintained. (T 2307 L - 2308 R)
10.10 Commander Vi stated that in early June 2009 he received from Mr. John Jonesse an information file on the MV Princess Ashika which included a document entitled “Audit Completed 6-8 April 2009” and dated 9th April 2009 which purported to be signed to Mr. John Jonesse, Mr. David Shaw and Mr. Kerry Bennett. The audit report stated that “While built in ‘72 in Japan the Princess Ashika is an example of good preventative maintenance. ... The Hull thickness Test at Dry Docking showed 86% well within acceptable limits, all anodes were replaced at Dry Docking”. Commander Vi indicated that he was shocked to see in the report that hull thickness was 86%. He accepted that from his observations in 2006, 2007 and 2008 it was apparent that the vessel had a long history of a poor preventative maintenance and in fact next to no maintenance. (T2313- 2314 O-S)

Association with the Ministry of Transport

10.11 Commander Lupeti Vi stated in oral evidence that “over 10 years of general manager of the Authority I have absolutely no confidence in either the ability or integrity of employees of the Ministry of Transport, which recently absorbed the Ministry of Marine and Ports”. (T 2320 R- U) Commander Vi was shown Exhibit 17 which was a Deficiencies List prepared by the Marine and Ports surveyors. Mr. Tu’ipulotu, the Acting Director of Marine and Ports had made handwritten comments on the deficiencies list identifying major deficiencies on the MV Princess Ashika which included defective ramps, scuppers and a submerged load line which he signed and dated 3rd July 2009. He was also shown Exhibit 111, a Provisional Certificate of Survey which Mr. Tu’ipulotu had signed, certifying that the MV Princess Ashika was considered to be seaworthy. On the same day he made the comments on the deficiencies list. Commander Vi indicated that the deficiencies identified on the deficiencies list, were very alarming and he could not understand why a Provisional Certificate of Survey was issued. He agreed that the amount of deficiencies listed on the deficiencies list indicated that it would take months to rectify the deficiencies. (T2320-2323 R-J)

10.12 Commander Vi indicated that from his experience in dealings with certain vessels he was of the opinion that the Ministry of Transport had a record of allowing vessels to travel in Tonga which were unsafe. The Ports Authority had in the past determined certain vessels to be unseaworthy and unsafe and stopped them from operating in the Port of Nuku’alofa but to their dismay, Certificates allowing the vessel to operate in Tonga were issued by the Marine and Ports Division. Commander Vi stated that the Ports Authority Act does not empower him to stop a vessel from operating if the vessel has been issued the necessary Certificates by the Ministry of Transport and attempts in the past to stop vessels have resulted in costly litigation. (T 2323 K – 2325 U)
10.13 Commander Vi indicated that for a vessel to lawfully depart from the Port at Nuku’alofa a departure clearance must be obtained from the Ports Authority. He indicated that all the departure clearances issued by the Ports Authority have the endorsement “The seaworthiness and safety of the vessel is the responsibility of the Ministry of Marine and Ports” printed onto them. Commander Vi accepted that Ports Authority Standing Orders provide that “The Port Master may, by notice in writing served on any person, prohibit with immediate effect any operation which, in the opinion of the Port Master, is dangerous or likely to pose an undue risk to the safety of the port and other port users or is otherwise undesirable”. (T 2330 - 2331 G-P) When asked as to why the Ports Authority did not stop the operation of the MV Princess Ashika, Commander Vi indicated that the Standing Orders only required the provision of a crew list, passengers and cargo manifests. (T 2341 O-R)

10.14 Commander Vi indicated in evidence that for several years he had various correspondences with the former Minister of Transport, Mr. Paul Karalus on safety issues, concerning vessels operating in the Port of Nuku’alofa. It had often been raised that vessels should be stopped in relation to unsafe loading and other safety issues, which the Ports Authority deemed to be unsafe. He had been constantly told upon raising the safety concerns with Mr. Karalus and by other officials of the Ministry of Transport that Ports Authority had no jurisdiction over those matters. Commander Vi indicated that the Ports Master had contacted Mr. Karalus and suggested that certain vessels should not be allow to sail because they were unsafe. Mr. Karalus responded to the effect that notwithstanding the advice of the Ports Master the vessel should be allowed to sail, and he also indicated that if there was damage caused by the vessel, that the Ports Master suggested should not sail, then Mr. Karalus would indemnify the Ports Authority for any loss or damage. (T 2352-2356 Q-I)

MV Pulupaki

10.15 Commander Vi deposed in his affidavit that on 21st December 2009 the MV Pulupaki left the Port of Nuku’alofa without a departure clearance. The reason why a departure clearance was not issued was because the MV Pulupaki was carrying 67 passengers more than the authorised maximum of 420 passengers. The Ports Authority issued a public announcement on 21st December 2009, “informing the public of breaches made and also declaring that the Pulupaki will not be permitted into Port upon its return to Nuku’alofa”. (Exhibit 382 paragraphs 16-17)

10.16 On Tuesday 22nd December 2009. Commander Vi received a letter from the Chief Secretary and Secretary to Cabinet, Mr. Busby Kautoke stating the following:

“Dear Lupeti,
Re: Public Announcement Concerning MV. Pulupaki

Please be advised that the public announcement made this morning by the Ports Authority Tonga over the air with respect to the MV Pulupaki has come to the notice of His Majesty’s (sic) Cabinet at their meeting this morning, Tuesday 22nd December 2009. Because of the severity of this matter, His Majesty’s Cabinet has directed that the following directives be informed to your office today, Tuesday 22nd December, 2009:-

1) That the public announcement with respect to the movement and berthing at Queen Salote Wharf of MV Pulupaki to cease right away;

2) That the Ports Authority Tonga to work closely with the Ministry of Transport on matters of this nature.

3) That the MV Pulupaki be permitted to come into and tied to Queen Salote Wharf on its return from the Northern Islands on its current trip, for usual loading and unloading purposes.

I hope the above Cabinet directives are clear and that they be implemented in the usual way.” (Exhibit 384 Annexure 8) (Appendix 79)

10.17 Commander Vi in paragraphs 21-22 of his Affidavit, sworn 5th February 2010, stated that:

“21. I had little choice but to obey the directions of His Majesty’s Cabinet directed to me on 22 December, 2009 and immediately ceased the Public Announcement and lifted the ban on the Pulupaki from entering the Port of Nuku’alofa.

22. Counsel for the Authority was instructed to reply to Mr. Kautoke’s letter dated 22 December, 2009. Counsel addressed in his letter dated 12th January 2010 various aspects regarding the concerns about the vessel on the part of the Ports Authority management and in conclusion advises that the Authority is not able to legally do anything more with the vessel and in the event of a disaster the Authority “would be legally and morally without fault.”

10.18 As it transpired the surveyors of the Marine and Ports Division of the Ministry of Transport conducted a survey of the MV Pulupaki on 23rd December 2009 the day after the Cabinet Direction and identified 16 areas of deficiencies that should be rectified on the vessel. Surprisingly, the Acting Director of Marine and Ports, Mr. Viliami Tu’ipulotu having seen the survey report of 23rd December 2009 on the 6th January 2010, issued a Certificate of Survey ascertaining the vessel is considered to
be seaworthy. The MV Pulupaki’s Certificate of survey was suspended on 19th January 2010.

10.19 Commander Vi indicated that he was told on 12th January 2010 at a meeting attended by the Prime Minister, Dr. Sevele, the Chief Secretary and Secretary to Cabinet, Busby Kautoke and Hon. Tu’ivakano, that the Board of Directors of the Ports Authority had met and resolved that he was to take three months leave effective from Friday 4:30pm, 15th January 2010. (Exhibit 384 paragraph 32) We accept that Commander Vi has effectively been suspended.

Causes of the Disaster

10.20 Commander Vi on being asked about what he thinks are the causes of the Ashika disaster, effectively stated the following:

1. The incompetence of the Government in particular the handling of the procurement of the vessel.

2. The incompetence demonstrated by Shipping Corporation of Polynesia Limited

10.21 Commander Vi also proffered advice on what should be done to prevent another disaster. Firstly, employees of the Ministry of Transport must be competent; Secondly, employees should convey proper advice, in accordance with the law; Thirdly, make sure there’s no corruption; (T 5468 – 5475) Fourthly, good governance, transparency and lastly, always do what is right. (T 5039 F-K) (T5040-5045 J-Q)

PART B – CAPTAIN SOSAIA KATIELI MAFI

Overview of Evidence

10.22 Captain Sosaia Katieli Mafi has been the Port Master of the Port of Nuku’alofa since 2005. Captain Mafi has a New Zealand Certificate of Competency as Master on Foreign Going Ships. He has extensive experience in travelling on vessels domestically in Tongan waters since the 1960’s.

10.23 Captain Mafi in evidence indicated that the MV Princess Ashika left Nuku’alofa on its fourth voyage in Tonga without a departure clearance. Additionally, the departure clearance issued for the MV Princess Ashika on its final voyage only showed a total of 39 passenger, excluding the crew. Captain Mafi had for many years raised concerns about the seaworthiness of vessels operating in Tonga with Ministry of Transport Officials but did not get any satisfactory reply.
**Substative Evidence of Captain Sosaia Katieli Mafi**

**Qualifications and Experience**

10.24 Captain Mafi is employed by the Ports Authority, as the Ports Master and had occupied that position since 2005. Prior to that he had been employed by the Shipping Corporation of Polynesia Limited as fleet Superintended. Captain Mafi commenced his career at sea in the 1960’s as an apprentice with the Tonga Shipping Agency. In 1966 Captain Mafi attended the New Zealand Maritime School and obtained a New Zealand Certificate of Competency as a Second Mate on Foreign Going Ships. In 1968 Captain Mafi, obtained a New Zealand Certificate of Competency as Chief Mate on Foreign Going Ships. Captain Mafi again attended the New Zealand Maritime School and obtained a New Zealand Certificate of Competency as Master on Foreign Going Ships. Captain Mafi served on numerous vessels both domestic and Foreign Going since 1971 as Master. He had previously been an assessor in a Court of Marine Inquiry established under the Shipping Act and had also appeared in a Court of Marine Inquiry in a number of occasions as an expert witness. Captain Mafi is considered to be one of the most experienced Captains in Tonga.

**MV Princess Ashika**

10.25 Captain Mafi stated in evidence that from his experience in travelling through Tongan waters and Fijian waters he indicated that Tongan waters were rougher than the water conditions around the Suva area. (T2460-2461 C–D) Overwhelming evidence had been brought to the attention of the Commission, that the waters travelled by the Princess Ashika in Fiji, were much calmer compared to the open sea conditions travelled by the MV Princess Ashika in Tonga.

10.26 Captain Mafi indicated in oral evidence that the scuppers on the MV Princess Ashika were most probably designed for the release of rain water from the cargo deck. He stated that the design of the MV Princess Ashika was not suitable for Tongan waters, because potentially water could enter the cargo deck, over the sides of the vessel on both the bow and stern and the scuppers were not sufficient to get rid of the water. He agreed that a vessel with such a design as that of the MV Princess Ashika and operating in Tongan waters would need large freeing ports to allow sufficient water to be released. Captain Mafi stated that scuppers on vessels should have non return valves to stop water from entering through the scuppers and vessels with scuppers and non return valves were unseaworthy and dangerous. (T2431-2433 S-O)

10.27 Captain Mafi also indicated in evidence that when the load line of a vessel is submerged it indicates that the vessel is overloaded and its dangerous and should be stopped from sailing. (T2433 – 2434 O-N)
10.28 Captain Mafi stated that before a vessel leaves the Ports of Nuku’alofa, a departure clearance must be issued by the Ports Authority. The Master of a departing vessel is required to complete a Departure Clearance Form in relation to the number of passengers in the vessel and the weight of the cargo loaded on to the vessel. Captain Mafi indicated that the number of passengers indicated in the departure clearance in relation to the voyage of the MV Princess Ashika on the 5th August 2009, was a total of 39 passengers excluding the crew. As it transpired the number of passengers in the Princess Ashika was well over double that number of passengers. Additionally, Captain Mafi had developed great scepticism and concern about the accuracy of the information provided by vessel operators for the purposes of obtaining a departure clearance. (T2434 – 242436 N - M)

10.29 Captain Mafi indicated that the departure clearance the MV Princess Ashika on 5th August 2009 stated the following: “This clearance concerns only the passengers and cargo on board ... The seaworthiness and safety of the vessel is the responsibility of the Ministry of Marine and Ports”. Captain Mafi agreed that on the fourth voyage of the MV Princess Ashika on 23rd July 2009, the vessel left the Port of Nuku’alofa without a departure clearance. (T 2437 -2441 B –R)

Marine and Ports Division of the Ministry of Transport

10.30 Captain Mafi indicated that he had expressed his view to Mr. Karalus and Mr. Johnson that vessels had been operating in Tonga which were unseaworthy and unsafe. Mr. Johnson would always respond verbally to Captain Mafi to the effect that Captain Mafi and Ports Authority had nothing to do with the seaworthiness of vessels. Additionally, he would receive responses from Mr. Karalus to the same effect as that of Mr. Johnson. And on one occasion Mr. Karalus indicated that he would indemnify the Ports Authority for any damage that would be suffered in consequence of unseaworthy ships operating.(T 2445 – 2446 E – P)

10.31 Captain Mafi indicated that improvements have to be made to the Marine and Ports Division of the Ministry of Transport. He was of the view that the qualifications of the staff employed by the Marine and Ports Division should be upgraded to help improve the performance of the Division. He indicated that the Marine and Ports Division since 8th June 2009, did not employ any individual who is a Master Mariner. This is also the case with Shipping Corporation of Polynesia Limited. (T 2452 – 2454 R – E)

10.32 Captain Mafi suggested that a National Shipping Committee should be established, to be comprised of experienced and qualified seafarers to advise the Government on maritime matters especially safety issues. Captain Mafi conceded that if the Marine and Ports Division employees are properly qualified, then there is no need for a National Committee. Additionally, the Marine and Ports staff need to have the
courage and leadership to stand up to those who may wish to exert pressure which includes pressure to issue Survey Certificates for unseaworthy vessels.

10.33 Captain Mafi also saw a potential conflict with surveyors employed by the Ministry of Transport surveying a vessel which is owned by the Government, such as in the case of the MV Princess Ashika. He stated that a possible solution in such circumstances is to use independent marine surveyors. We accepted Captain Mafi’s statement that there needed to be a more stringent enforcement and policing of Shipping Laws and Regulations. (T 2454 – 2455 F – B)
CHAPTER 11 – THE LAW

Legislation

11.1 The Commissions terms of reference (c) and (d) state as follows:

“The matters to be inquired into and reported upon by the Royal Commission include but are not limited to the following:

(c) evidence leading to any criminal act contributing to the disaster

(d) evidence leading to any civil responsibility for the disaster”.

11.2 Any consideration of these two terms of reference must lead inexorably to a consideration or interpretation of relevant law in relation to the facts as we see them and we propose to refer to those laws at this stage.

Evidence Leading to any Civil Responsibility for the Disaster

11.3 It is not necessary for the Royal Commission to ultimately determine pursuant to the terms of reference, any civil liability or responsibility for the disaster. It is only required to consider the evidence leading to any civil responsibility leading to the disaster. The Courts, in the exercise of civil jurisdiction will ultimately need to determine civil liability. Having said that, given the terms of reference, it is appropriate to consider briefly the law that may be relevant to the issue of possible civil responsibility as this assists in inquiring into and reporting upon the evidence leading to any responsibility for the disaster.

Contractual Obligations

11.4 In the current case, the evidence (including from the survivors) establishes that survivors paid to travel on MV Princess Ashika. Many of the survivors purchased tickets from the office of Shipping Corporation just prior to the ship departing on 5th August 2009. The tickets issued included the name of Shipping Corporation of Polynesia Limited, a ticket number and erroneously the name MV Olovaha (Exhibit 29 page 218). The reference to MV Olovaha was obviously because the MV Princess Ashika replaced the MV Olovaha and Shipping Corporation did not organise the printing and issuance of new tickets. An additional amount was paid to Shipping Corporation to send cargo.

11.5 The Company records reveal that all the shares in Shipping Corporation of Polynesia are and were owned by the Government of Tonga. (Exhibit 41) The Government of the Kingdom of Tonga owned MV Princess Ashika, having purchased it pursuant to a written contract entered into on 8th May 2009. (Exhibit 356) The former Minister for Transport (Mr. Paul David Karalus) and the Acting Secretary for Transport (Ms. ‘Eleni Mone) signed the contract on behalf of the Government. Mr. John Owen Jonesse
(the then CEO of Shipping Corporation of Polynesia Limited) witnessed the signatures.

11.6 There was no written agreement signed by Shipping Corporation and the Government relating to the operation of MV Princess Ashika. There was however an email sent by Mr. Karalus to Mr. Jonesse dated 2nd July 2009 wherein the former Minister stated:

“Dear John

As per our on-going discussions please be advised that the Ministry of Transport agrees to the operation of the MV Princess for the month of July for the fee of $5,000. During this period the full terms and conditions of a lease agreement are to be conducted and concluded. During this month the SCP is to ensure full compliance with the laws of the sea and port management in the operation of the vessel and as per the survey documentation. This interim will also allow us to negotiate a charter rate

Happy Sailing!!

Paul.” (Exhibit 29)

11.7 On about 17th July 2009, Mr Jonesse forwarded a letter to Mr Karalus referring to the email of 2nd July 2009 and advising that:

“As we near the end of July and the Charter has not yet been completed can you advise that the statement made on your email will apply in August.”

11.8 Mr. Karalus responded to the letter dated 17th July 2009 by email.

11.9 Pursuant to section 8 of the Shipping Act, MV Princess Ashika was required to be registered. By reason of section 9 of the Shipping Act, the Registrar of Ships was required to enter particulars of the vessel in the Register of Ships. The Register of Ships shows that both Shipping Corporation of Polynesia Limited and the Government of Tonga are recorded as the owners of the MV Princess Ashika. (Exhibit 110) The recording of both Shipping Corporation of Polynesia Limited and Government of Tonga as the owners of the vessel is in conformity with the definition of “owner” in the Shipping Act.

11.10 Section 2 of the Shipping Act defines “owner” as:

“Owner” means in respect of a ship the person whose name appears as owner, or as co-owner jointly and severally with others, of the ship or of a share in it in the register that records the ship’s particulars in compliance with the law of the State whose flag the ship is flying, and includes —
(a) a charterer by demise;
(b) the operator of the ship; and
(c) any other person exercising control over the navigation of that ship, its equipment, or its crew.”

11.11 The term “person” is defined in section 2 of the Shipping Act as:

“Person” includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law;”

11.12 “Ship” means, under section 2 of the Shipping Act, “a vessel of any type whatsoever operating in the marine environment”.

11.13 Shipping Corporation of Polynesia operated the MV Princess Ashika during the time that it was in Tonga in July and August.

11.14 By reason of the above, including the definition of “owner” under the Shipping Act, both Shipping Corporation of Polynesia and the Government of the Kingdom Tonga were the owners of the MV Princess Ashika in Tonga for the purposes of the provisions of the Shipping Act. They therefore both had responsibilities under the Shipping Act which were imposed on “owners” of vessels.

11.15 Section 209 of the Shipping Act imposes, in effect, implied contractual obligations on the owner and master of a ship, and every agent or other person charged with preparing the ship for sea, or sending it to sea. Section 209 of the Shipping Act provides specifically as follows:

“209  Owner's obligation to keep ship seaworthy

Notwithstanding any agreement to the contrary, in:

(a) every contract of service, express or implied, between the owner or master of a ship and any member of the crew of that ship; and

(b) every contract of carriage, express or implied, between the owner or master of a ship and any passenger on that ship

there is an implied term binding and obliging the owner that the owner of the ship and the master, and every agent or other person charged with preparing the ship for sea, or sending it to sea, will use all reasonable means to ensure the seaworthiness of the ship at the commencement of the voyage, and to keep it seaworthy during the voyage.”
11.16 In the *Marine Enquiry, The Sinking of MV Ovalau II* [2005] FJHC 369, Hon. Mr. Justice Davendra Pathik considered the sinking of the MV Ovalau II. This vessel was owned by Patterson Brothers Shipping, who sold MV Princess Ashika to the Government of the Kingdom of Tonga. His Honour found that the owner of the vessel was negligent and in breach of contract. The decision is, with respect, instructive because it, for example, usefully cites certain authorities in relation to the law of contact in relation to the owners of vessels carrying goods and passengers.

11.17 In *Steel v The State Line Steamship Company* (1877) AC 72, the Lord Chancellor stated:

“I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement – a contract – by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By “seaworthy”, my Lords, I do not desire to point any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic. My Lords, if there were no authority upon the question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract.”

11.18 Lord O’Hagan in the *Steel* case (supra) at p.84 said:

“...a shipowner who accepts goods which he is to deliver in good order and condition, impliedly contracts to perform the voyage in a ship which is seaworthy.”

11.19 Further Lord Blackburn (ibid) at 86 said:

“...where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship’s room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a “warranty”, not merely that they should do their best to make the ship fit, but that the ship should really be fit.”
11.20 Lord Blackburn, in the words of Justice Pathik in *Marine Enquiry, The Sinking of MV Ovalau II* (200) FJHC 369, “hits the nail on the head” when at p.88 he said:

“My Lords, I think that exactly the same considerations would arise here as to the implied duty – the duty which, though not expressly mentioned, arises by implication of law – on the part of the shipowner to furnish a ship really fit for the purpose. If that duty is neglected, as in the case of Kopetoff v. Wilson (1), or as in the case here, as it is alleged – I do not say that it is so, because that is a point not yet determined – the shipowner is liable. If, as is alleged here, a port gives way and the seas come in and wet the wheat, and if it is a consequence of the ship having started unfit that that mischief is produced, it seems to me to be exactly like the case of Phillips v. Clark (2), where negligence, not provided for by the contract, occasioned the breakage or the leakage, which it was said was an exception, but which the Court determined was not an exception of which the shipowners could avail themselves, seeing that it was brought about by their negligence. So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it.”

11.21 We have set out evidence in this Final Report as to the condition and seaworthiness of the MV Princess Ashika.

11.22 As we have set out in dealing with the condition and seaworthiness of the vessel, the vessel was in an appalling condition, unseaworthy and unsafe when and during the time it sailed on 5th August 2009. It was not properly prepared for sea.

**Negligence**

11.23 An action in negligence will arise against a shipowner, operator of a vessel and crew members under the principles established by the House of Lords in *Donoghue v Stevenson* [1932] AC 562. These principles have been applied by the Courts in Tonga. See Polynesian Airlines (Investments) Ltd. v. Kingdom of Tonga (2000) Tonga Law Report at pg.168 and 169, that:

“The duty of care was imposed by law in accordance with the test of what “a reasonable man in the position” of the respondent would do. The standard of care to be exercised in accordance with the duty of care was also measured by what was reasonable in the circumstances: It was not a standard of unrealistic perfection, nor was it to be established by the deceptive illumination of hindsight”.
11.24 The shipowner or operator of a vessel will be vicariously liable, in appropriate circumstances, for the negligence of the crew of the vessel as its employees. “The shipowner will remain responsible for the crew’s defaults unless they can be said to constitute a “frolic of their own”, so taking their conduct outside the remit of their employment. This is extremely difficult to prove ...”. (S. Baughen, Shipping Law, Cavendish Publishing Limited, Fourth Edition, 2009 at page 279)

11.25 In addition to the shipowner or operator being liable for the negligence of the crew, the crew will also be held personally liable for their own negligence. Thus, in Adler v Dickson [1955] 1 QB 158, a passenger of a cruise ship was injured whilst disembarking and successfully sued the Master whose negligence had been a contributing factor to the accident. It was held that although the Master was not vicariously liable for the faults of other crew members involved in the berthing, he had personal responsibility because he failed to supervise the berthing.

11.26 The evidence establishes that the Directors of Shipping Corporation, by resolution made 21st April 2009, resolved unanimously to recommend to His Majesty’s Government that they purchase the MV Princess Ashika. The Directors present at the meeting were the Chairperson, ‘Alisi Taumoepeau, Rev. Tevita Haukinima and Mr. John Owen Jonesse. Lord Dalgety QC, the Company Secretary, was involved in the discussion and agreed with the recommendation. This is despite the evidence clearly establishing that the vessel had not been surveyed. It should be appreciated that the Directors and Company Secretary of Shipping Corporation were desirous of the Government purchasing the vessel so that it could be operated by Shipping Corporation. The suitability, including the seaworthiness of the vessel, should have been of considerable importance to the Directors and Company Secretary when they were considering whether they should be recommending the purchase of the vessel by Government. However, the evidence establishes that there was clearly inadequate material to enable them to make an informed decision on whether to recommend the purchase of MV Princess Ashika by the Government for operation by Shipping Corporation.

11.27 Section 136 of the Companies Act provides as follows:

“136 Director’s and company secretary’s duty of care

A director or company secretary of a company, when exercising powers or performing duties as a director or company secretary, shall exercise reasonable care, diligence and skill taking into account, but without limitation —

(a) the nature of the company;

(b) the nature of the decision; and
(c) the position of the director or company secretary and the nature of the responsibilities undertaken by him.”

11.28 Shipping Corporation of Polynesia Limited adopted the Standard Constitution contained in the First Schedule of the Companies Act. Consistent with section 136, Clause 71 of the Standard Constitution provides as follows:

“71 Director’s and company secretary’s duty of care

A director or company secretary of the company, when exercising powers of performing duties as a director or company secretary, shall exercise the care, diligence and skill that a reasonable director or company secretary would exercise in the same circumstances taking into account, but without limitation:

(a) the nature of the company;

(b) the nature of the decision; and

(c) the position of the director or company secretary and the nature of the responsibilities undertaken by him.”

11.29 Section 133 of the Companies Act provides:

“133 Directors and company secretaries to comply with Act and constitution

A director or company secretary of a company shall not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company.”

11.30 When considering the exercise of powers or duties by a Director or Company Secretary, regards must be had to sections 127, 130(1) and 132 of the Companies Act. Section 127 of the Companies Act provides:

“127 Management of company

(1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the board of the company.

(2) The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.

(3) Subsections (1) and (2) are subject to any modifications, exceptions or limitations contained in this Act or in the company’s constitution.”
(See also clause 63 of Shipping Corporations Constitution which is of the same effect)

11.31 Section 130(1) of the Companies Act provides:

“130 Duty of directors to act in good faith and in best interests of the company

(1) Subject to this section, a director or company secretary of a company, when exercising powers or performing duties, shall act in good faith and in what the director or company secretary believes to be the best interests of the company.” (See also clause 66 of Shipping Corporations Constitution which is of the same effect)

11.32 Section 132 of the Companies Act provides:

“132 Powers to be exercised for proper purpose

A director or company secretary shall exercise a power for a proper purpose.” (See also clause 67 of Shipping Corporations Constitution which is of the same effect)

Breach of Statutory Duty

11.33 In appropriate cases a public officer can be held personally liable for a breach of statutory duty. However, as stated in Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 482 per Brenan J:

“the statute must (either expressly or by implication) impose a duty to exercise the power and confer a private right of action in damages for breach of the duty so imposed.”

Tort of misfeasance in public office

11.34 The tort of misfeasance in public office enables “public officers” to be held personally liable in appropriate cases, thereby enabling a person aggrieved to obtain compensation for consequential losses suffered.

11.35 The tort of misfeasance in public office should be contrasted with the tort of negligence. In the former case the tort relates to intentional behaviour. In the case of negligence the Court is concerned with careless behaviour.

11.36 In Sander v Snell (1998) 196 CLR 329 at page 37 the High Court said:

“misfeasance in public office is concerned with misuse of public power. Inappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the
public good. But too narrow a definition of the ambit of liability may leave persons affected by an abuse of power uncompensated. The tort of misfeasance in public office must seek to balance these competing considerations. Not surprisingly the intention with the public official acts has a prominent place in striking that balance.”

11.37 It appears from the authorities that the Court will not find the tort of misfeasance in public office established if there is simply an “error of judgement” by a public officer. (See Northern Territory of Australia v Mengel (1995) 185 CLR 307 at page 352) However, a public official will be liable if it can be established that the official intended to cause harm; acted with express (not constructive) knowledge of the absence of power; or acted recklessly in not ascertaining whether or not the power existed.

11.38 In Mengel (supra) Deane J at page 370, considered the elements of the tort of misfeasance in public office as:

(i) an invalid or unauthorised act;
(ii) done maliciously;
(iii) by a public officer;
(iv) in the purported discharge of his or her duties;
(v) which caused harm or loss to the plaintiff.

11.39 Importantly, not only can an act found an action for the tort of misfeasance in public office, but so can an omission. As Brenan J said in Mengel (supra) at page 25:

“Any act or omission done or made by a public official in purported performance of the functions of the office can found an action for misfeasance in a public office.”

11.40 A person will be a “public officer” if that person “is appointed to discharge a public duty, and receives compensation in whatever shape, whether form the Crown or otherwise”. (Mengel (supra) at page 355 per Brenan J quoting from Henly v Mayor of Lyme (1828) 130 ER 995 at 1001) In E v K (1995) 2 NZLR 239 at 249, Morris J considered that a public officer is a “person employed to perform a statutory power or duty in which the public has an interest”.

11.41 It was seemingly accepted in Mengel (supra) that stock inspectors were government officers that could be liable for the tort of misfeasance in public office. In Edwards v Olsen (2000) SASC 438 it was held that the Director and other officers of the Fisheries Department were public officers. It has also been held that Ministers of the Crown are public officers. (See Sanders v Snell (1997) 73 FCR 569; Chan Yee Kin v
Minister of Immigration (1991) 31 FCR 29 at 39; Bourgoin v Ministry of Agriculture, Fisheries Food (1986) QB 716; James v Department of Employment (1989 QB 1)

11.42 Premiers of State and members of parliament have also been considered to be public officers (See Roncarelli v Duplessis (1959) SCR 121)

11.43 The House of Lords has held that it is clear “that the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention”. (See Three Rivers (2000) 3 All ER 1 at 8 per Lord Steyn citing Racz v Home Office (1994) 2 AC 45) Additionally, a Crown employer may be vicariously liable if there is de facto authority. (Mengel (supra) at page 347; James v Commonwealth (1939) 62 CLR 339 at 359-360) or implied authority (Racz v Home Office [1994] 2 AC 45 at 50). In Racz, the House of Lords held that the Home Office could be vicariously liable for the acts of prison officers which amounted to misfeasance in public office.

Evidence leading to any criminal act contributing to the disaster

11.44 It is not for the Royal Commission to ultimately determine, pursuant to the terms of reference, any criminal act contributing to the disaster. That is a matter for the criminal courts.

11.45 It is only required to inquire into and report upon evidence leading to any criminal act contributing to the disaster. That requires a consideration of certain relevant criminal law.

Manslaughter by Negligence

11.46 Section 92 of the Criminal Offences Act provides that homicide which does not amount to murder is manslaughter and if such homicide was caused by negligence the offence is manslaughter by negligence.

11.47 In Fisi’inaua v Rex, 1995 TLR 62, the Court of Appeal stated:

“Although the section (S.92, 1.e) does not refer to gross negligence, we are prepared to accept that the onus resting on the prosecution is to prove that the person accused is guilty of negligence to such a degree that justifies a finding of manslaughter. It may well be convenient to describe negligence of that degree as “Gross Negligence”. (Underlining added)

11.48 A classic statement of manslaughter was R v Bateman (1925) 19 C.R APP .R 8:

“The Crown has to prove that the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to a crime against the state and conduct deserving of punishment”. 
It may be important to note that Section 97 of the *Criminal Offences Act* provides that:

“Any person whose act or omission results in the death of another person shall be deemed to have caused his death notwithstanding the fact that the immediate cause of death was the act or omission of some third person or some other independent intervening event”.

The ordinary principles of the law of negligence apply to determine whether the defendant was in breach of the duty of care towards the victim; on the establishment of such breach of duty the next question is whether it caused the death of the victim and if so, whether it should be characterised as gross negligence and therefore a crime; it is eminently a jury question to decide whether having regard to the risk of death involved, the defendants conduct was so bad in all the circumstances as to amount to a criminal act or omission: *R v Adomanko [1995] 1 AC 171*.

**The Shipping Act**

There are numerous sections of the Shipping Act of relevance to the terms of reference. One of the most relevant provision of the Shipping is Section 144 “Sending unseaworthy ship to sea”. That is as follows:

“144 Sending unseaworthy ship to sea

(1) No person shall take or send or attempt to take or send an unseaworthy ship to sea.

(2) Subject to subsection (3) a person who contravenes subsection (1) commits of an offence and is liable on conviction to a fine not exceeding $250,000 or to a term of imprisonment not exceeding 15 years, or both, and the ship is subject to forfeiture to the crown.

(3) No person shall be convicted under subsection (2) if he can show that the contravention of subsection (1) occurred without his actual fault or privity, or that it was reasonable to send the ship to sea while unseaworthy.”

Section 57 provides for ships to be properly manned by sufficient crew of seafarers properly qualified and fit for their duties.

Section 110 provides for penalties for neglect of duty by a seaman.

Section 118 establishes the responsibility of ship owner and master.

Section 122 imposes duties on the owner and master proceeding to sea improperly.
11.56 Sections 123 – 126 deals with the appointment, obligations and powers of surveyors.

11.57 Section 129 provides that a ship shall not proceed to sea without certificates or marks.

11.58 Section 136 provides that every ship shall carry information concerning its stability in accordance with the regulations.

11.59 Section 155 provides for an owner or master to report to the Government where any accident has caused loss of life or serious injury.

11.60 Section 209 imposes obligations on an owner or master to use all reasonable means to ensure the seaworthiness of the ship at the commencement of the voyage and to keep it seaworthy during the voyage.

Authorities on unseaworthiness

11.61 The definition of “unseaworthy” is defined very widely in section 2 of the Shipping Act. The provision provides:

“Unseaworthy” means, in relation to a ship, that:-

(a) the material of which the ship is made;
(b) the condition of the hull of the ship;
(c) the construction of the ship;
(d) the condition of the ships equipment, boilers or machinery;
(e) the ships safety equipment;
(f) the qualification of the ships master;
(g) the number, description or qualification of the crew of the ship including its officers;
(h) the weight, description or stowage of cargo or ballast on board the ship; or
(i) the ships draft, trim or heel;

is not of a reasonable standard, is not in accordance with the ordinary practice of seamen, is in contravention of this Act or the regulations or is prejudicial to safety of life at sea and, as a consequence, the ship is not in every respect fit for the proposed voyage or service”.

11.62 It can be seen from the definition that a number of different factors and circumstances can result in a vessel being unseaworthy. The authorities establish that examples of unseaworthiness include a leaky hull (Lyon v Mells (1804) 5 EAST 428); defective propellers (Snia v Suzuki (1924) 29 COM CAS 284); a crankshaft with a flaw in a weld (The Clenfruin (1885) 10 PD 103); lack of appropriate documentation required by law (Ciampa and Ors v British India SN Co (1915) ZKB 774); inadequate
pumps (Stanton v Richardson (1874) LR 9 CP 390); and inadequate stowage of cargo (Kopitoff v Wilson [1876] QBD)

11.63 In this case, the overwhelming evidence before the Commission establishes that the MV Princess Ashika was unseaworthy, for very many different and independent reasons everytime it sailed in Tonga.

Royal Commissions Act

11.64 **Section 10 - Penalty for threats to witnesses**

“Any person who threatens, insults or inquiries any person on account of any evidence he may give or has given before the commissioners is guilty of an offence and shall be liable upon conviction to a fine of $10,000 or to imprisonment for a term of 3 years”.

11.65 **Section 12 - Penalty for refusing to give evidence**

“Any person who being summoned to attend as a witness or produce document or other thing fails without reasonable cause to do so refuses to answer any question put to him by the commissioners is guilty of an offence and upon conviction shall be liable to a fine of $2,500 or to imprisonment for a term of 2 years.

Provided that no person shall be bound to incriminate himself and every witness shall in respect of any evidence written by him for or given by him before the commissioners, be entitled to the same privileges to which he would have been entitled if giving evidence before a court of justice.”

11.66 **Section 14 - Insulting Commissioners**

“Any person who uses threatening or insulting language to the commissioners or to a commissioner at any other time or place in relation to or on account of his proceedings in the capacity of a commissioner is guilty of an offence and upon conviction shall be liable to a fine of $10,000 or to imprisonment for a term of 3 years.”
CHAPTER 12 - TRAINING AND THE TONGA MARITIME POLYTECHNICAL INSTITUTE (TMPI)

Training, Examinations and Certification

12.1 The Tongan crew of the MV Princess Ashika had all been trained at TMPI to varying levels of certification. A minority had received further training outside Tonga. TMPI was established in 1985 and it had been sponsored by the German Government and was run in conjunction with the Tongan Ministry of Education.

12.2 When it was opened, the school was led by a Captain Superintendent from Germany, but in 1990 the school was handed over to the Government of Tonga to administer and operate.

12.3 The training at TMPI was initially based on a syllabus provided by the German Government, but later the South Pacific Maritime Code (South Pacific Bureau for Economic Co-operation, 1986) was adopted to give the syllabus and basic structure for the courses in each grade of maritime certificate.

12.4 The Regional Maritime Programme of the Secretariat of the Pacific Community was the implementing agency for the IMO in the Pacific region. It offered many training courses for maritime school trainers and maritime administration personnel such as surveyors. Its technical cooperation programme provided model courses based on STCW 95 principles, which included training and assessment guides and student resource material for each subject module of the various grades of seagoing qualification.

12.5 The Code was compiled to assist member countries of the South Pacific Forum to develop uniform standards with respect to the certification of seafarers. In 2002 the Code was replaced by the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended in 1995 and 1997 (STCW 95, IMO). This Convention placed responsibility on member administrations to ensure that their seafarers were trained and certificated to a minimum standard.

12.6 Principally, TMPI was set up to train Tongan seafarers for employment on foreign-owned SOLAS ships, thus providing a source of international revenue. Eventually TMPI developed to educate up to Master and engineer classes 4 and 5. There was an intake of about 20 students per annum.

12.7 The development of seafarers started with pre-sea training that included basic safety training and a course for a deck or engine room rating, which included basic shipboard practices and routines.

12.8 Following that, the newly qualified ratings went to sea, a few going directly to overseas ships, but mostly they were engaged on local vessels, either the passenger/cargo ferries or fishing vessels.
12.9 After a period at sea of at least 6 months, they were able to return to TMPI to take a Watchkeeper Rating (Deck or Engine) course. Following further periods at sea and courses at TMPI, seafarers were able to progress to Master or Engineer Class 5 and 4.

12.10 Up until 2008, qualifications higher than Master Class-4 were obtained overseas, usually in Fiji, Australia or New Zealand. However, in July of that year TMPI, with the support of the Fiji School of Marine and Fisheries, was able to run a Master Class-3 course. Qualified trainers from the Fiji school, with assistance from the local lecturers, conducted the course at TMPI. There were 12 students, including the Master and First Mate of the MV Princess Ashika, on the course. All 12 students successfully completed the course, but 3 of those had to re-sit the oral examination before they gained their certificates.

12.11 In his evidence, Captain Sateki Manu, the Principal of TMPI, said that the training courses provided by the SPC were of good quality and to the standard required by STCW 95. (T 2903 R-T) What was also clear from Captain Manu’s evidence was the difficulty of obtaining sufficient funds to operate the TMPI effectively. Funds are allocated by the Ministry of Training, Employment, Youth and Sports out of its budget. The TMPI does not prepare its own budget but has to make do with whatever money it receives. This leaves it seriously short of funds. (T 2904 P- 2906 C) Captain Manu agreed that it would be advantageous for the TMPI staff to be involved in preparing budgets for the TMPI.

12.12 All teaching materials and the majority of instruction are in English, with some use of the Tongan language to explain the English content. Captain Manu, the Principal of the TMPI, when asked if it would be advantageous for some or all of the teaching materials should be translated into Tongan, said this would take time, extra staff and extra money. He added that if Tonga had a large fleet of ships on which to employ the seamen once trained it would be a good idea to teach in Tongan but this is not the case.

“The whole idea of running TMPI is so that people can be employed on overseas vessels, and that’s the main reason why it is better to stick to English because you speak in English - that’s the standard language you can understand Indians or whoever, on ships overseas.” (T 2933 H-J)

“And that is why it is very important to - that English should be the language used at TMPI.” (T 2933 L)

12.13 Captain Manu went on to explain that the TMPI has been forced, in the past, to take students who are not suitably qualified academically for the courses:

“But there will come a minister who will try to advocate to you, look at the Tongans, this school is putting opportunity to these Tongans who was not
very good in academic at secondary school. And when they are thrown at you like that, you have to try to do your very best to try and get them to understand, to get some opportunity at all of getting any job on local ships, and if they extend and understand more, most likely we’ll put them on the overseas vessels.” (T 2934 K-N)

“... if the schools stick to this Form 5, there will be a lot of these Tongans who will have no opportunities at all for maritime or any future at all in maritime. So what this vocational system is trying to do is to get opportunities for people who are drop-outs from the academic side of secondary school, and that’s what we are looking and that’s what - you can find it very hard at times to try to accept that.” (T 2934 P-S)

“...there are about 150 or 200 Tongan seamen working on overseas vessels, and I - it’s a pity that it’s not recorded at the Statistics Department of Tonga, but getting it from agencies, it comes up to something like 3 million Tongan pa’anga per annum, so the income growing if there are more who are seafarers who are employed on overseas vessels, especially when the condition and salaries are coming up. So there are better opportunities to help the economy of Tonga if we employ these Tongan seafarers on overseas vessels. That’s the main idea of looking at the English version of these modules, trying to explain in Tongan and staying with English, because that’s the only language they will understand other people when they join them on these overseas vessels.” (T 2934 T- 2935 D)

12.14 Captain Manu was emphasising the importance of the use of English to a seafarer who is being trained to work overseas and whose income earned overseas is important to the economy of Tonga. This requires a student to have obtained a good grasp of English at school prior to coming to the TMPI.

12.15 Captain Manu made the following suggestions for improvements at the TMPI:

“If we just continue on with that school certificate qualification for entry to TMPI, and we have to forget about this vocational and start thinking professionally about TMPI and we have to be very careful with student enrolment. We are looking of employing them on overseas vessels. If that would be the case and we have to get more instructors with high qualifications. At present we have 2nd engineer and only myself and one other part-time lecturer, who is a New Zealand master mariner. And there is one retired New Zealand chief engineer and we need more highly qualified instructors like that to TMPI. And improvement to our resources, the classrooms, we need more classrooms and, of course, the renovation of the school.” (T 2935 S – 2936 B)
12.16 Evidence at the Royal Commission hearings from a number of recent students at TMPI confirmed that many students struggled with comprehension and were likely to miss key-concepts and content while concentrating on readying themselves to pass the exams. This would be less likely if a higher academic standard was required for entry to the TMPI.

12.17 It would be beneficial if funds could be found to have basic courses in safety and seamanship taught in Tongan for those persons who would only ever want to go to sea in small vessels in local Tongan waters but this would be stretching the limited budget of the TMPI even further.

12.18 Captain Manu agreed with the concept that:

“...it would seem more appropriate that the Tongan Maritime Polytechnical Institute be under the control of the Ministry of Transport, rather than the Ministry of Training, Employment, Youth and Sports...”

12.19 Mr. Fakapelea, The Deputy Principal of the TMPI, believed that all the students at the TPMI understood English:

“They all understand the reading and speaking of (sic) English.”
(T 2946 I)

12.20 When Mr. Fakapelea was advised of the fact that some members of the crew of MV Princess Ashika appeared to have problems reading English at the Commission hearings and comprehending what they had read, he said:

“I understand from those crew from the Ashika, I think that they already understand English, but in the matter of asking questioning, like this place, I think they are in a situation of nervous. It make it surprise when I saw they said they don’t understand the lesson in teaching in the school.” (T 2947 G-H)

12.21 Dr. Fasi, who has been the Chief Executive of the Tonga National Qualifications and Accreditation Board (TNQAB), since early 2009, was chief education officer in charge of the TMPI 2000 to 2002. He gave evidence regarding the requirement to register training providers in Tonga (Qualifications and Accreditation Act 2004). He said that an education provider has to apply for accreditation in order to provide training and education courses. In the case of TMPI there were a number of criteria which were not met in their application and therefore TMPI, should not be accredited. (T 2986 - 2990)

12.22 Dr. Fasi also gave evidence on the use of Tongan by the lecturers and English in the manuals at TMPI because of the language policy of the country:
“Since all the lecturers were Tongan, and they were more comfortable in using the Tongan language, a greater proportion of the time, tutorial and lecture time, was done in Tongan. The fact that the manuals were written in English is because the language policy of the country states that English should be the medium of instruction at secondary level and above.” (T2992)

“It really depended on the lecturer himself. Because sometimes when they talk, they talk in Tongan. But if they decide just to read the manual during the tutorial, then they read it in English. So when I was working there, the teaching, the actual teaching that went on in the classroom, were mostly Tongan, even though the materials were written in English.” (T2993)

12.23 Dr. Fasi advised the Commission on the problems faced by students due to the use of both Tongan and English:

“Well, for Tongan students it is more difficult for them to learn through the English medium, because they have to go through an extra barrier of trying to understand the - or trying to get to - trying to resolve the language, English barrier. And then they have - I am talking about learning mathematics now - and then they have to understand the language of mathematics written in English. So it’s quite difficult for Tongan learners to learn via the English medium. What I found out in my work, in my research, that for students who are not competent in Tongan - in English, rather - to be taught in Tongan, in the language in which they are competent in. This is not to say that English should not be used, because there are some students who are quite competent in English and they learn much better when they are taught in English. But for students with lower abilities, lower competence in English, it’s better for learning to take place if they are taught in the mother tongue, or the language that they are comfortable in.” (T 2993)

12.24 When asked “does it mean that the pre-admission requirement as a completion of form 5 that you will inevitably accept that there will be students who will complete the course who will not understand the manuals provided to them?” Dr. Fasi said:

“That’s possible, but the admission is not as easy as that because once they get into the college, into the Institute, there are several pathways opening up for them. There may be some who will have the opportunity to go up to be officers and for that lot, the minimum requirement for them was the completion of form 7 but for form 5, it’s for those trainees who will be at the level of watchkeeper - watchkeeping and below.” (T 2995 - 2996)
12.25 In answering the question as to why it was that the crew members on MV Princess Ashika, who all trained at the TMPI, failed to follow basic safety procedures such as providing passengers with lifejackets, Dr. Fasi said:

“Probably they were not trained properly or probably they did not follow the proper training procedures. (T 2997)

12.26 Dr. Fasi agreed that there was a serious need to comprehensively review and reform the maritime Institute and a serious injection of funds was required because one cannot properly and professionally run a maritime institute unless there is adequate funding. He also agreed that funding for TMPI was about 10% of what was required. (T 2997 - 3000)

12.27 Dr. Fasi agreed that it was desirable for teaching staff to be competent ex-seafarers who were properly trained to teach and to plan and prepare lessons.

12.28 A function of the Regional Maritime Programme of the Secretariat of the Pacific Community is to conduct review of maritime training facilities and marine administrations. An audit of TMPI was conducted in December 2008. The report of the Review of the Tonga Maritime Polytechnic Institute (Secretariat of the Pacific Community, 2008) noted the repetition of non-conformities previously identified in an audit conducted on 13th June 2003. In the executive summary of the December 2008 report, the following recommendations were made:

“Essential training facilities such as the fire fighting training simulator and the life boat launching davits is not up to standards and need to be urgently renewed. These facilities are either beyond repair or in a state of total disrepair, and are considered vital components of the safety training requirements that all seafarers have to undergo;

TMPI is coming up to its second five year assessment period to satisfy the requirements of the international convention on the Standards of Training, Certification and Watchkeeping for seafarers 1978 as amended 1995, (STCW 95) and if Tonga wants to remain on the International Maritime Organization (IMO) —White List*, then it is the prerogative of the Ministry of Transport as the representative of the Contracting Government to ensure that this independent audit is conducted and results are submitted to IMO;

Assessment of training equipment, teaching aids, teaching material and college instructors has been included in the body of the report to suit current and or future course objectives. Under the STCW 95 Convention and Code all of these items must have met the Maritime Administration’s approval before courses are run;
Instructors must be qualified technically and should be able to effectively deliver training on maritime subjects at any training institution. All STCW 95 certifications are issued only after a successful competency based assessment of students;

The reviewed Quality Manual dated 17th October 2009 is current using at the school was not given to the Administration (Marine Division, MOT) for reviewing, amending and lastly approving of the Quality Manual in order to comply with STCW 95 requirements.

An appropriate remuneration package is recommended for instructors in order to attract and retain them at the institute. The package should include retraining them to become qualified instructors; and some consultation is needed between TMPI and the industry to align the training to current industry needs.”

*A list of those countries whose information communicated to the IMO has been evaluated and found to be giving full and complete effect to STCW 95.

12.29 In May 2009, an STCW audit of TMPI was conducted by the Regional Maritime Programme of the Secretariat of the Pacific Community (Secretariat of the Pacific Community, Regional Maritime Programme, 2009). The audit produced 7 System Improvement Notices.

12.30 Most of the notices had regard to the standard of the Quality Manual and adherence to it. The report also suggested that there be better monitoring by the maritime administration (the Marine and Ports Division of the Ministry of Transport) and that it should approve the courses taught by TMPI.

12.31 The standard of the fire-fighting and survival infrastructure was deficient and was due for a major overhaul; this improvement notice had not been closed out from the 2003 and 2008 audits.

12.32 Captain Hogan, the Secretariat of the Pacific Community Transport Programme, Manager /Training Advisor, Regional Maritime Programmes, gave evidence to the Commission. He said the recent audit of the TMPI showed that the results, when properly analysed, shows that there are some significant areas of improvement that need to take place. (T 4330 R-T)

12.33 Safety is the first thing taught before any seafarer goes to sea, regardless of the rank or branch of seafaring (deck, engineering or catering) to which he or she aspires. It is therefore essential that the facilities which are needed to teach safety are renovated and made fully functional. Safety instruction is the foundation for all other courses which may be provided by the TMPI.
12.34 If seafaring courses are to continue to be provided by the TMPI, funding must be forthcoming to reinstall the lifeboat davits, service and refurbish the lifeboats. If possible the Fishing Vessel “Takuo” should be made, and kept, operational for training purposes.

12.35 The Fire Training facility should be brought up to operational standard with a simulated steel ship superstructure for fire fighting exercises, and an adequate supply of extinguishers (with refills for recharging), hoses, nozzles, compressed air breathing apparatus, with an adequate supply of bottles, and a compressor for recharging the bottles. There should be a pond for exercises in fighting oil fires. The fire fighting training facility could be shared with the Kingdom’s fire brigades with funding hard to find.

12.36 Having brought the safety training facilities up to an adequate standard, the Government would need to decide on the level of training they wished to provide at TMPI. The costs of training seafarers within the Kingdom as compared to sending Tongans overseas to be trained should be considered. Limited resources may dictate that fewer courses can be provided at TMPI than in the past.

12.37 Standards for the educational level required to be achieved by potential students need to be set and adhered to. It appears that in the past, TMPI has been encouraged to take students who have not reached an adequate level of English, mathematics and science. One of the major benefits of the TMPI turning out well trained and competent seafarers is their income earned overseas and brought back to Tonga. This is made easier if the candidates for admission to TMPI have achieved an adequate level of secondary education and are motivated to do well at sea. Students should be carefully selected.

12.38 We believe that, in the light of the Princess Ashika tragedy, it is important that TMPI make their students aware of the following extracts from the Shipping (STCW Convention) Regulations 1998. It will be seen that if the principles detailed in these Regulations had been applied in the operation of Princess Ashika, disaster may have been averted in terms of lives lost, despite the atrocious condition of the vessel.

Extracts from the Shipping (STCW Convention) Regulations 1998:

9. Responsibilities of Owners and Masters

(1) Both the owners and the master to whom these Regulations applies shall ensure that -

(d) every seafarer employed on the vessel is familiarised with that seafarer’s specific duties and with all vessel arrangements.
installations, equipment, procedures and vessel characteristics that are relevant to their routine or emergency duties; and

(e) the vessel's complement can effectively co-ordinate their activities in an emergency situation and in performing functions vital to safety or to the prevention or mitigation of pollution.

(2) Both the owner and the master of a vessel to whom these Regulations apply shall ensure that every seafarer can make a knowledgeable and informed contribution to the safe operation of the vessel.

10. Responsibilities of Master

(1) The master shall take all steps necessary to implement any instructions issued in accordance with Regulation 8, which steps should include -

(a) identifying all seafarers who are newly employed on board the vessel before they are assigned to any duties; and

(b) providing the opportunity for all newly arrived seafarers to -

(i) visit the spaces, in which their primary duties are to be performed; and

(ii) get acquainted with the location, controls and display features of equipment they will be operating or using; and

(iii) activate the equipment when possible and perform functions using the controls on the equipment; and

(iv) observe and ask questions of someone who is already familiar with the equipment, procedures and other arrangements, and who can communicate information in a language which the seafarer understands; and

(c) providing for a suitable period of supervision when there is any doubt that a newly employed seafarer is familiar with the shipboard equipment, operating procedures and other arrangements needed for the proper performance of his duties.

11. Responsibilities of Seafarers
Seafarers assigned to a vessel should take full advantage of every opportunity provided to become familiar with the shipboard equipment, operating procedures, and other arrangements needed for the proper performance of their duties, and immediately upon arriving on board for the first time, each seafarer has the responsibility to become acquainted with the vessel’s working environment, particularly with respect to new or unfamiliar equipment, procedures, or arrangements.

Seafarers who do not promptly obtain the level of familiarity required for performing their duties shall bring this fact to the attention of their supervisor.”

12.39 Summary

- The TMPI is seriously underfunded at present and if standards slip, the “White Status” with regard to the IMO could be lost, and the status of seafarers from the TMPI diminished as far as overseas ship operators are concerned. These Tongans will be less “employable”. The Government must decide immediately the level of funding which can be afforded.

- A decision should be made regarding the language used at TMPI. Seafarers taught and reasonably fluent in English will be more “saleable” to overseas ship owners. English is the international language at sea. The majority of employment for trained seafarers will be overseas as there is only a small domestic fleet.

- Translating all the teaching manuals would take valuable time and resources which may be better spent elsewhere.

- Candidates for entry to seafaring courses at TMPI must at least have reached Form 5 with passes in Maths, Science and English.

- The TMPI should be subject to a full audit by SPC to determine the areas which require improvement and extra funding. SPC should not audit the teaching manuals as these have been compiled by SPC. The teaching manuals should be subjected to a separate independent audit.

- At the time of compiling this Report, anecdotal evidence suggests that there were insufficient funds to pay the salaries of the teaching staff at TMPI let alone refurbish and maintain training equipment.
Students need to be taught to be an active part of a ship’s crew and not just sit back and wait for orders from more senior crew members. They must be prepared to “challenge” in order to gain a correct “response” to avoid inappropriate actions and, as in the case of MV Princess Ashika, no actions at all.

Students should be made to understand their importance to the operation and overall success of the voyages on the ships on which they serve to encourage them to take an active part. They are part of a team. Their importance to the economy of Tonga should be emphasised.
CHAPTER 13 - SEARCH AND RESCUE

The International Maritime Convention on Search and Rescue

13.1 Under the 1979 International Maritime Convention on Search and Rescue, adopted at a Conference in Hamburg, Germany, an international SAR plan was established so that, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organisation and, when necessary, by co-operation between neighbouring SAR organisations. The Convention was substantially modified in 1998 and again in 2004 to clarify nations’ responsibilities which are detailed in a technical annex.

13.2 Following the adoption of the 1979 SAR Convention, the International Maritime Organisation’s (IMO) Maritime Safety Committee divided the world’s oceans into 13 search and rescue areas, known as Search and Rescue Regions (SRR’s). For each of these areas a specific country has the responsibility for coordinating and managing the provision of SAR services. Provisional search and rescue plans for all of these areas were completed by September 1998.

The New Zealand Search and Rescue Region (NZSRR)

13.3 The New Zealand Search and Rescue Region (NZSRR) is one of the largest SRR’s in the world. It extends from 300 nautical miles (480 kilometres) south of the Equator to the South Pole, and from about half way to Australia to half way to Chile. This area amounts to some 30 million square kilometres. Included in the NZSRR are the Pacific Island nations of Tonga, Niue, Samoa, Tokelau and the Cook Islands. The accompanying map shows the boundary of the NZSRR.

13.4 The New Zealand Government has a number of international SAR obligations arising from Conventions. The division of the world into specific areas for maritime SAR was undertaken by IMO in accordance with the International Convention on Maritime Search and Rescue 1979. Other obligations arise under the Convention on International Civil Aviation 1944 (known as the Chicago Convention), the International Convention for the Safety of Life at Sea 1974 (“SOLAS”) and the United Nations Convention on the Law of the Sea 1982.
In accordance with the requirements of the 1979 Convention, New Zealand has arrangements for the coordination of SAR services with those nations that border the NZSRR as well as arrangements with the Pacific Island nations that lie within the NZSRR. Among other issues these arrangements require respective Rescue Coordination Centres (RCC's) to assist each other in conducting Search and Rescue (SAR) missions in their respective SRRs and across their common SRR boundaries; cover how nations will work together on SAR matters within an SRR and, for areas with more than one RCC, determine which one is responsible for coordinating and managing SAR operations and outline how overall responsibility for a Search and Rescue Operation (SAROP) may be transferred between RCCs.

Tonga – New Zealand Search and Rescue Arrangements

In 2005, the Governments of Tonga and New Zealand signed an arrangement outlining the principles for coordinating SAR services and activities between the two countries. The implementing agencies were defined in the arrangement. For New Zealand the agency was the Maritime Safety Authority of New Zealand which has subsequently been re-named as Maritime New Zealand. For Tonga the agency was the Ministry of Civil Aviation of the Government of Tonga.

The arrangement lays out standard operating procedures for the general coordination and management of SAR incidents as well as provisions on the use of facilities, expenses for SAR operations and arrangements for the recovery of supplies and equipment. The format of the arrangement is similar to those used for other nations within the NZSRR and in accordance with the general arrangements made by other countries around the world.

Under the arrangement, action will be initiated by the Rescue Coordination Centre (RCC) in whose area of responsibility the incident occurs or, where the position of the incident is unknown, by the RCC in whose SAR area the vessel is located. In addition the arrangement provides that outside the territorial waters of Tonga the responsible RCC will be RCCNZ. For the MV Princess Ashika, RCCNZ assumed SAR coordination responsibility following the vessels initial radio distress call and operation of its emergency distress beacon.

The arrangement also outlines within the standard operating procedures the process whereby responsibility for overall SAR coordination of an incident may be transferred between the parties. This transfer could result from clarification over a vessels actual position or where a party is more favorably placed to assume responsibility due to factors such as communications, proximity to the incident or being better placed to provide SAR units or facilities.

There is no permanently manned RCC in Tonga. For an aviation incident, an RCC would be set up by the civil aviation authorities, and for a marine incident an RCC would be set up by the Tongan Police. In the years since the agreement was signed RCCNZ has worked with Tongan authorities on numerous occasions. On average there have been 12 SAR incidents per year where RCCNZ has cooperated with Tongan authorities.
13.11 The scope of the arrangement includes tests of communications and regular exercises. Although communications have been regularly used in operations the post incident review for the “MV Princess Ashika” operation revealed that there had not been regular formal checks of communications. Regular exercises, initiated by RCCNZ, have not been possible in recent years due to shortages of personnel and funding. There have been, however, multinational Pacific SAR workshops. In 2006 on SAR training and cooperation between adjoining states and in 2007 on SAR exercise planning and cooperation.

Role and Functions of Rescue Co-ordination Center New Zealand (RCCNZ)

13.12 RCCNZ is a Joint Rescue Coordination Centre (JRCC) meaning that it works in the sea, air and land environments. The Centre is located in Percy Cameron Street, in Lower Hutt, Wellington, New Zealand. RCCNZ is responsible for co-coordinating the responses to maritime, aviation and beacon-related SAR incidents in New Zealand’s Search and Rescue Region. These activities are termed Search and Rescue operations (SAROP’s).

13.13 RCCNZ is staffed by a team of professional Search and Rescue Officers (SARO’s), trained to international standards, who work a roster system that provides coverage by a minimum of two qualified SARO’s 24 hours a day, 7 days a week, 365 days a year. The SARO team has a wide range of experience in aviation, marine and land search and rescue. All SARO’s are also trained as Search and Rescue Mission Coordinators (SMCs), an internationally recognized qualification, which focuses on the overall management and coordination of SAROPs.

13.14 RCCNZ works in close association with the Maritime Operations Centre (MOC), which is contracted by Maritime New Zealand to provide maritime distress and safety radio services throughout Navigation Area XIV, an area of 50 million square kilometres that includes the NZSRR. These services include a continuous maritime distress and safety listening watch on VHF Ch 16 and certain medium and high frequencies. MOC is located adjacent to RCCNZ.

13.15 The actual rescue operations within the NZSRR are undertaken, typically, by a mixture of commercial helicopter and aircraft companies, commercial marine vessels, and to a limited extent, the New Zealand Defence Force. Private or recreational marine vessels may also be utilized. There are no New Zealand Government controlled and funded assets, dedicated for search and rescue.

Search and Rescue Methodology


13.17 This international manual details the search and rescue model and methodology that should be employed by RCCs across the world. It lays down guidelines, procedures
and processes that should be used in providing SAR services and allows nations to work to a common set of definitions, standards and terminology. RCCNZ operates in accordance with this manual which has been further amplified in a detailed set of Standard Operating Procedures (SOP’s).

The International Aeronautical and Maritime Search and Rescue (IAMSAR) Process

13.18 The process of coordinating a response to a search and rescue incident can be generalized under the following headings:

- Receive information
- Determine the SAR phase – Uncertainty, Alert (PAN) or Distress (MAYDAY)
- Plan the search
- Conduct of search
- Conclude the search

13.19 The first part of the process, receiving information, is critical. Often the initial information is sparse and time must be devoted to filling the information gaps to a point that the SAR phase is clear and search planning can commence. The IAMSAR Manual Volume II lays down guidelines for SAR mission coordination and at Chapter Three describes the three emergency phases, providing guidance as to the actions required at each stage.

13.20 In simple terms, the Uncertainty Phase exists when there is knowledge of a situation that may need to be monitored or to have more information gathered but that does not require resources to be dispatched. For ships, an Uncertainty Phase is declared when the craft has been reported overdue at its intended destination or has failed to make an expected position safety report.

13.21 The Alert Phase exists when there is knowledge that a ship or other craft or persons on board are having some difficulty and may need assistance but are not in immediate danger. Resources may be dispatched to provide assistance if it is believed that the situation will worsen. An Alert Phase will be declared for an overdue craft when there is a continued lack of information concerning the progress or position of the craft.

13.22 The Distress Phase exists when there is reasonable certainty that an aircraft, ship or other craft or persons on board is in danger and requires immediate assistance. For overdue craft a distress exists when the communications searches and other forms of investigation have not succeeded in locating the craft or revising its Estimated Time of Arrival (ETA) so that it is no longer considered overdue.

13.23 The IAMSAR Manual has been developed over many years and distils the best advice available from world wide experience at the most expert level. Each SAROP, however, is unique in its own way and the SAROP must use initiative, judgment and experience to formulate the best possible course of action. The entire process is dynamic and depends critically on the quality of the information available. Sometimes events unfold very rapidly and a SAROP may move almost instantly into a
Distress phase, at other times it can be days or even weeks before sufficient information is available to move out of the Uncertainty phase.

13.24 The SAROP for the MV Princess Ashika went almost instantly into a Distress Phase upon receipt of the initial radio distress call and emergency distress beacon alert.

**Emergency Distress Beacon System**

13.25 The COSPAS-SARSAT organisation is a joint, international, satellite aided SAR system, established by Canada, France, Russia and the United States and which now has over 40 countries and organisations contributing to the operation and management of the system. New Zealand is a member of the COSPAS-SARSAT organisation.

The system provides distress alert and location information to SAR services for sea, air and land users in distress. The system works through the use of satellites to detect and locate the transmissions of distress radio beacons operating on the international distress radio frequency of 406 MHz.

The (left) is a diagram of the basic system. There are at present three types of distress beacons, namely Emergency Locator Transmitters or ELTs, which are fitted to aircraft, Emergency Position Indicating Radio Beacons or EPIRBs, which are fitted to ships and Personal Locator Beaacons or PLBs, which are carried by individuals, typically for land based or small boat activities.

13.26 406 MHz beacons, specifically designed for use with the COSPAS SARSAT system, transmit a powerful signal and have a very stable transmitted frequency. To further improve location accuracy 406 MHz beacons can be equipped with a Global Positioning System (GPS) that can provide a very accurate point location. This location information is then transmitted to the satellite along with the alert message.

13.27 The beacons transmit signals that are detected by the COSPAS SARSAT polar orbiting and geostationary satellites, which are equipped with dedicated receivers and
processors. The signals are then relayed to a ground receiving station, termed a Local User Terminal or LUT which processes the signals. An alert is then generated and relayed, with any available location data and other information, through a Mission Control Centre to a national Rescue Coordination Centre or other appropriate SAR authority to begin SAR activity.

13.28 RCCNZ operates the New Zealand Local User Terminal and through the system receives all the satellite alerts and associated information for the New Zealand Search and Rescue Region.

LEOSAR Satellite Coverage

13.29 In addition to the distress signal and, for GPS equipped beacons, position information, all 406 MHz beacons transmit a digital message in every transmission which uniquely identifies the individual beacon. This identification code, effectively similar to a bar code, allows the system to distinguish a beacon from other beacons or other transmissions and, if the user registers the beacon with SAR authorities, allows information about the operator of the beacon to be stored in a database and used to help in any SAROP. Typically this information would include vessel or craft details, emergency contact details, and user activity.

13.30 For queries about registering Tongan 406 EPIRBS contact Maritime New Zealand at the email address:

406registry@maritimenz.govt.nz

13.31 RCCNZ maintains and operates a 406 MHz Distress Beacons Database for New Zealand and the Pacific Islands within the NZSRR, including Tonga. As at May 2009 there were over 17,000 beacons registered on this database and RCCNZ has used the information extensively both to save lives in actual rescues and to reduce the number of costly responses to false alerts.
It is strongly recommended that all 406 EPIRBs are registered in order that the appropriate response can be made as soon as the distress message is received. The process is further enhanced by the EPIRBs being equipped with GPS to give an immediate accurate position of the distress.

The EPIRB installed on Princess Ashika, was neither registered, nor was it fitted with GPS.

Types of Alerts

A distress beacon with GPS capability will typically provide an alert, with a position in Latitude and Longitude, within minutes of activation, via either a geostationary or low earth orbiting satellite. This is a Resolved Alert.

The signal from a distress beacon without GPS capability may also be detected by either a geostationary or a low earth orbiting satellite. If detected by a Geostationary satellite the system will report the detection as an Unlocated Alert since no position information has been supplied by the beacon. If the beacon is registered in a database SAR authorities may be able to obtain data from the registration and initiate a response sooner than for an unregistered beacon.

If detected by a low earth orbiting satellite a non-GPS equipped beacon alert will generate two possible positions, each equidistant either side of the satellite’s track. Known as an Initial Alert this “double position” alert arises whereby the satellite can judge when it is closest to the beacon, but cannot differentiate which side the beacon is on. A second pass by either the same satellite, or a different one, is required to determine which of the two positions is correct and the system then provides a Resolved Alert. The process of resolving positions via overflying satellites may take a number of hours.

MV Princess Ashika was carrying a 406 MHz EPIRB, apparently without GPS capability, at the time of the incident. The beacon was not registered in the RCCNZ database. An Unlocated Alert was received by RCCNZ eleven minutes after the vessel broadcast its distress message.

Initial Alerts were received six and twelve minutes later, and the first of several Resolved Alerts was received one hour and seven minutes after the Unlocated Alert. The correct Initial Alert positions and the Resolved Alert position were accurate in latitude and were within less than one nautical mile in longitude when compared to the position broadcast by the MV Princess Ashika in its distress message. If the beacon had been correctly registered it would have been easier for RCCNZ to obtain details about the vessel since it would have been possible to contact the nominated points of contact in the registration very quickly.

RCCNZ Procedures for a Vessel in Distress beyond New Zealand’s Territorial Waters

As seen above, RCCNZ follows the guidance, processes and procedures laid down in the IAMSAR Manual. In addition, over a number of years, detailed SOPs for a very wide range of activities have been developed.
The process followed is the same regardless of whether the location of the incident is close-to-shore, around a nation’s coast, or on the high seas. The initial vital event is the reception of information advising that a person, vessel or aircraft is either missing, overdue, in danger or actually in distress and requiring immediate assistance. For marine events RCCNZ typically receives either a radio message or a distress beacon alert and, in some cases, such as the Princess Ashika, both. On occasions information can be received via cell-phone or be relayed by a third party.

As information is obtained the SAROP will be escalated through the phases described earlier. This may be very rapid or may take some considerable time depending on the nature of the information obtained and the judgment and interpretation of the SARO. The SOP’s also contain an Aide Memoir that provides further detailed guidance for the SARO for seeking relevant information about a vessel in distress. In case of the Princess Ashika, once RCCNZ received the initial information a distress phase was immediately declared.

Once a Distress Phase has been declared RCCNZ will, in accordance with the guidelines in the IAMSAR Manual, commence search planning activity. Search planning has two distinct elements, the Search Area Determination (SAD) and Search Area Coverage (SAC).

Searching for Persons Lost at Sea.

There are significant difficulties in searching for a person or persons at sea, especially if they do not have means, such as flares, smoke generating devices or a light source such as a torch, for attracting attention to themselves. The weather, (wind, cloud cover, visibility, lighting conditions) and sea state (swell, waves, spray) all pose significant challenges. For a person in the water, if they are not wearing a flotation device, the only part that may be visible is their head, which is a very small object and very difficult to see, even in very good search conditions. The probability of seeing the person decreases markedly as environmental conditions deteriorate. Searching at night compounds these difficulties; searching with the naked eye for a person with no signaling devices is largely ineffective at night. Night vision devices, that amplify ambient light many 100s or 1,000s of times can be very helpful but are adversely affected by poor weather. Effective searching at night is extremely challenging.

Vessels at sea can search small areas quite effectively by day in good weather conditions but they have a limited visual horizon and are relatively slow. It is also difficult to maintain course and speed in such a way as to ensure a high level of confidence in the coverage of an area. Modern navigation equipment can make this task easier but it remains very difficult to spot people in the water. At night searching by vessels at sea is much more difficult.

Searches by aircraft can be very effective if the search is for vessels or other significant objects in the water, such as liferafts. An aircraft, or helicopter, can travel relatively quickly and can cover quite large areas of sea. With modern radar systems it is possible to detect quite small physical objects under certain sea conditions.
Searching for people in the water remains very challenging. Where possible aircraft and helicopters should utilise trained Air Observers; that is, people who have undertaken formal training in how to conduct visual searches from aircraft. If the weather is poor or the sea state is anything other than calm the task of searching for individual people in the water becomes increasingly difficult; in addition the searching aircraft will be travelling at speed and may be affected by turbulence. Even a trained observer will have only a few brief seconds to identify a point of interest and decide if it needs further investigation.

<table>
<thead>
<tr>
<th>ACRONYM</th>
<th>MEANING</th>
</tr>
</thead>
<tbody>
<tr>
<td>AMVER</td>
<td>Automated Mutual Assistance Vessel Rescue System</td>
</tr>
<tr>
<td>CRS</td>
<td>Coast Radio Station</td>
</tr>
<tr>
<td>DACCSO</td>
<td>Deputy Air Component Commander’s Staff Officer</td>
</tr>
<tr>
<td>DSC</td>
<td>Digital Selective Calling</td>
</tr>
<tr>
<td>ECT</td>
<td>Evening Civil Twilight</td>
</tr>
<tr>
<td>HQJF</td>
<td>Headquarters Joint Forces</td>
</tr>
<tr>
<td>IAMSAR</td>
<td>International Aeronautical and Maritime Search and Rescue</td>
</tr>
<tr>
<td>JRCC</td>
<td>Joint Rescue Co-ordination Centre</td>
</tr>
<tr>
<td>LKP</td>
<td>Last Known Position</td>
</tr>
<tr>
<td>LOP</td>
<td>Line of Position</td>
</tr>
<tr>
<td>LUT</td>
<td>Local User Terminal</td>
</tr>
<tr>
<td>MNZ</td>
<td>Maritime New Zealand</td>
</tr>
<tr>
<td>MOC</td>
<td>Maritime Operations Centre</td>
</tr>
<tr>
<td>NZSRR</td>
<td>New Zealand Search and Rescue Region</td>
</tr>
<tr>
<td>OSC</td>
<td>On Scene Co-ordinator</td>
</tr>
<tr>
<td>RCCNZ</td>
<td>Rescue Co-ordination Centre New Zealand</td>
</tr>
<tr>
<td>SAC</td>
<td>Search Area Coverage</td>
</tr>
<tr>
<td>SAD</td>
<td>Search Area Determination</td>
</tr>
<tr>
<td>SAR</td>
<td>Search and Rescue</td>
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<tr>
<td>SARO</td>
<td>Search and Rescue Officers</td>
</tr>
<tr>
<td>SAREQ</td>
<td>Search and Rescue Air Request Message</td>
</tr>
<tr>
<td>SAROP</td>
<td>Search and Rescue Operations</td>
</tr>
<tr>
<td>SITREP</td>
<td>Situation Report</td>
</tr>
<tr>
<td>SMC</td>
<td>Search and Rescue Mission Co-ordinators</td>
</tr>
<tr>
<td>SOP</td>
<td>Standard Operating Procedure</td>
</tr>
<tr>
<td>SPOC</td>
<td>Single Point of Contact</td>
</tr>
<tr>
<td>SRU</td>
<td>Search and Rescue Unit</td>
</tr>
<tr>
<td>SURPIC</td>
<td>Surface Picture</td>
</tr>
<tr>
<td>TDS</td>
<td>Tonga Defence Services</td>
</tr>
</tbody>
</table>
MV Princess Ashika Search and Rescue Operations

13.46 In the following narrative, the times and dates are taken from the Radio Log at Nuku'alofa Radio, the Incident Log of the Rescue Coordination Centre New Zealand, the Tongan Defence Force, the Tongan patrol boats VOEA Pangai, and VOEA Savea, and the Tongan Police Force. The times are all in Tongan Time.

### Source: Table below is the dates and times at which certain events occurred in relation to the Search and Rescue. The source has been numbered 1 – 8, to correspond with the table above.

<table>
<thead>
<tr>
<th>DATE</th>
<th>TIME</th>
<th>REMARKS</th>
<th>SOURCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>5/08/2009</td>
<td>23:50</td>
<td>Soane V Haseli, Principal Traffic Officer, receives the MAYDAY message on 6215kHz from MV Princess Ashika &quot;We are going to sink in position 20° 24'S 174° 56'W&quot; (Nuku'alofa Radio Station Log)</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>23:54</td>
<td>MOC reports to RCCNZ that a distress call has been received on 6215kHz from vessel the name of which sounds like Pacific Artica, call sign A3CI2, sinking in position 20° 24'S 174° 56'W. MOC tried calling but no response. Nuku'alofa Radio doing distress relays.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>23:54</td>
<td>MV Pulupaki (A3CU3) acknowledges and diverts to distress position.</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>23:55</td>
<td>Time MV Princess Ashika is believed to have foundered in position subsequently determined to be 20° 24.181 S, 174° 56.414'W. This position is approximately 11 nm south of Nomuka Island in the Ha'apai Group.</td>
<td>3</td>
</tr>
<tr>
<td>DATE</td>
<td>TIME</td>
<td>REMARKS</td>
<td>SOURCE</td>
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<td>-------------------------------------------------------------------------</td>
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</tr>
<tr>
<td></td>
<td>23:57</td>
<td>Coast Watch Principal Traffic Officer at Nuku'alofa Radio, Soane Haseli,</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>advises his Director, 'Ofa Fa'anunu, of the Mayday, and he passes this</td>
<td></td>
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<td></td>
<td></td>
<td>on to the Minister of Transport, Paul Karalus</td>
<td></td>
</tr>
<tr>
<td></td>
<td>23:59</td>
<td>RCCNZ received an unlocated 406 EPIRB alert message 11125 from Tongan</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>registered C74A4E10BAC64D1</td>
<td></td>
</tr>
<tr>
<td>6/08/2009</td>
<td>00:03</td>
<td>RCCNZ request the launch of a P3 Orion as a vessel is in distress 46</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>nm NNE of Nuku'alofa.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>00:03</td>
<td>AUMCC advised that the distress beacon heard was in the NZSRR.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>00:05</td>
<td>MOC - Nuku'alofa Radio have one vessel, call sign A3CU3 (MV Pulupaki),</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>speed 13 kts 37 nm from distress position with ETA of 02:30 hrs.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>Another vessel 70 nm away - RCCNZ requested that both vessels proceed</td>
<td></td>
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<td></td>
<td></td>
<td>to distress. Capitaine Tasman, call sign A3BN5, 70 NM West of distress</td>
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<td></td>
<td></td>
<td>position with best ETA of 6 hours.</td>
<td></td>
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<tr>
<td></td>
<td>00:05</td>
<td>Initial Alert Message 11126 received</td>
<td>1</td>
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<tr>
<td></td>
<td>00:06</td>
<td>Notification of Country of Registration Message 11127 received by RCCNZ</td>
<td>1</td>
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<td></td>
<td>00:08</td>
<td>First contact between RCCNZ and Tonga Defence Force - communication</td>
<td>1</td>
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<tr>
<td></td>
<td></td>
<td>difficult due to language problems.</td>
<td></td>
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<td></td>
<td>00:11</td>
<td>RCCNZ Duty Manager called and briefed on situation.</td>
<td>1</td>
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<td></td>
<td>00:13</td>
<td>Tongan Navy advise that they have a patrol boat available and will</td>
<td>1</td>
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<tr>
<td></td>
<td></td>
<td>report back when vessel departs Nuku'alofa.</td>
<td></td>
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<td></td>
<td>00:15</td>
<td>24 hour weather forecast requested from Metservice.</td>
<td>1</td>
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<tr>
<td></td>
<td>00:20</td>
<td>Discussion between MOC and RCCNZ as to best broadcast strategy</td>
<td>1</td>
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<tr>
<td></td>
<td></td>
<td>regarding Mayday Relay. Decision to leave it to Nuku'alofa Radio</td>
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<td></td>
<td></td>
<td>continue Mayday Relays on 6 mHz.</td>
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<tr>
<td></td>
<td>00:25</td>
<td>Central Police Station, PC Penitani, receives a call from Coast Watch</td>
<td>2</td>
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<tr>
<td></td>
<td></td>
<td>advising of the distress call.</td>
<td></td>
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<tr>
<td></td>
<td>00:31</td>
<td>AMVER SURPIC requested.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>00:35</td>
<td>RCCNZ advise DACCSO on current situation. At this stage RCCNZ believe</td>
<td>1</td>
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<tr>
<td></td>
<td></td>
<td>that there are 45 persons onboard the distressed vessel. It was agreed</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>that the Orion should be launched immediately.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>00:36</td>
<td>MOC pass on to RCCNZ information (as follows) from Nuku'alofa Radio</td>
<td>1</td>
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<tr>
<td></td>
<td></td>
<td>regarding vessel now known to be Princess Ashika. Departed Nuku'alofa</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>at 16:35, 5th., with 45 POB and 10 tonnes cargo. Bound for Ha'afeva</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Island with ETA of 03:00hrs 6th. MOC have received weather situation</td>
<td></td>
</tr>
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<td>from Pulupaki, Easterly 20 - 25 knots, moderate sea. This is the same</td>
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<td>as the Metservice forecast. Capitaine Tasman gives ETA of 07:00hrs 6th.</td>
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<td></td>
<td>00:38</td>
<td>Tonga Police contact Coast Radio for more details.</td>
<td>3</td>
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<td></td>
<td>00:41</td>
<td>RCCNZ advised by Lt.Cdr. Satisi Vunipola that the Tongan Navy Base had just advised that the patrol boat was one hour from departing.</td>
<td>1</td>
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<td>00:42</td>
<td>AMVER SURPIC received - only one vessel in the area, the Galahad in position 19° 31'S 076° 52'W (assumed the longitude should read 176° and not 076°)</td>
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<td>00:46</td>
<td>MOC advised about Tongan Patrol Boat.</td>
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<td>00:51</td>
<td>AUSSAR called RCCNZ to advise that the nearest Australian Defence Asset is in Honiara.</td>
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<td>00:52</td>
<td>SAREQ sent by RCCNZ.</td>
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<td>00:52</td>
<td>Orion P3 being fuelled up but unlikely to be airborne before 01:30 OR 02:00. Will carry extra Captain and TACO for the longer operation.</td>
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<td>01:00</td>
<td>O/C CID advised of situation (DIC I.Vaihu)</td>
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<td>01:07</td>
<td>Resolved Alert received by RCCNZ. Position 20° 24'S 174° 57'W</td>
<td>1</td>
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<td>01:07</td>
<td>MOC have become aware that Nuku'alofa Radio do not have DSC so MOC have begun broadcasting on 4, 6, and 8 mHz DSC.</td>
<td>1</td>
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<td>01:10</td>
<td>O/C PD.1 Acting Deputy Police Commander APC Talanoa advised of distress.</td>
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<td>01:15</td>
<td>Talanoa directs inquiry with Tonga Defence Service (TDS).</td>
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<td>01:20</td>
<td>Call from RCC Alamada (US Coastguard in California) after receiving DSC distress call. RCCNZ confirm the distress and that RCCNZ is coordinating.</td>
<td>1</td>
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<td></td>
<td>01:30</td>
<td>TDS report the departure of Voea Pangai for MV Princess Ashika LKP.</td>
<td>3</td>
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<td>01:38</td>
<td>MOC in contact with m.v. Southern Lily in position 18° 30.8'S 174° 10.4'W, course 209°, speed 12.3 knots with best ETA of 10:00 hrs. Requested to divert.</td>
<td>1</td>
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<td>01:45</td>
<td>Tongan Navy Patrol Boat VOEA Pangai departs Nuku'alofa</td>
<td>7</td>
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<td></td>
<td>01:58</td>
<td>Lt.Cdr Satisi Vunipola called RCCNZ to advise that Tongan Patrol Boat Pangai departed Nuku'alofa about 10 minutes earlier with ETA of three and a half to four hours.</td>
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<td>02:08</td>
<td>Police attempts to contact Ports Authority unsuccessful.</td>
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<td>02:15</td>
<td>Vessel Pulupaki reported to be at distress scene.</td>
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<td>02:31</td>
<td>Police obtain shipping detail</td>
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<td></td>
<td>02:31</td>
<td>Nuku'alofa Radio advises MOC that MV Pulupaki is at the distress site and is trying to rescue survivors. MV Pulupaki asked to advise if Princess Ashika is still afloat.</td>
<td>1</td>
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<td></td>
<td>02:45</td>
<td>P3 crew advise RCCNZ that they are about to get airborne. P3 passed names of diverted vessels, their call signs and ETA's.</td>
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<td>02:47</td>
<td>Police pass on passenger list to Navy.</td>
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<td>03:10</td>
<td>MOC advised RCCNZ that Nuku’alofa Radio had called to say that MV Pulupaki had found 7 life rafts and 40 people had been rescued. Flares sighted to west and east. Will head west first. Confirmed that MV Princess Ashika had sunk. Wind easterly at 20 kts.</td>
<td>1</td>
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<td></td>
<td>03:20</td>
<td>RCCNZ called by DACCSO reporting that he had received information from the P3 that 40 people had been rescued. DACCSO suggested that it taxi back in and shut down but remain available in case the MV Pulupaki does not locate all the survivors. DACCSO asked if it was worth sending the P3 with only 5 missing. RCCNZ thought it was and DACCSO will get P3 to hold.</td>
<td>1</td>
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<td></td>
<td>03:32</td>
<td>P3 is parked and will need 30 minutes to start up and 3.5 hours to reach the distress - total of 4 hours.</td>
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<td>03:35</td>
<td>RCCNZ SITREP TWO sent.</td>
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<td>03:36</td>
<td>Nuku’alofa Radio advised MOC that the MV Pulupaki reported that there were people in the water everywhere. They are using a spotlight to find people in the water. RCCNZ request MOC to get the Pulupaki to give an accurate head count a.s.a.p.</td>
<td>1</td>
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<td></td>
<td>03:39</td>
<td>RCCNZ called Nuku’alofa Radio about the need for an accurate count of people onboard Princess Ashika and informed there were 45 passengers and 27 crew, total 72. Requested a count of persons rescued by MV Pulupaki to determine number missing.</td>
<td>1</td>
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<td>03:42</td>
<td>RCCNZ request that the P3 be despatched due to the revised total of persons missing.</td>
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<td>03:55</td>
<td>RCCNZ SAR SITREP THREE sent.</td>
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<td>04:08</td>
<td>P3 Orion (RNZAF) departed base.</td>
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<td>04:30</td>
<td>Voea Pangai arrives in distress area.</td>
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<td>04:30</td>
<td>P3 Orion ETA at distress site 07:08 hrs.</td>
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<td>04:40</td>
<td>Second P3 held in readiness to relieve first when it needs to leave distress area.</td>
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<td>04:50</td>
<td>MOC obtain revised p.o.b. (persons onboard) Figure from Nuku’alofa Radio, 45 pax, 27 crew, 2 security officers, 1 Japanese Volunteer, total 75. Pulupaki reports rescuing Captain and 1 more crew bringing total of 42 rescued by Pulupaki.</td>
<td>1</td>
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<td>05:41</td>
<td>Tonga Police advised of Voea Pangai arrival in distress area.</td>
<td>3</td>
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<td></td>
<td>06:28</td>
<td>Search Area Determination (SAD) and Search Plan sent to HQJFNZ</td>
<td>1</td>
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<td>DATE</td>
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<td>REMARKS</td>
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<td>06:35</td>
<td>Three vessels now on scene MV Pulupaki (up to this point RCCNZ had thought MV Pulupaki was called Tupaki but had correct call sign), patrol boat Pangai, and Capitain Tasman. Vessels communicating on VHF 16 and vessels to Nuku'alofa Radio on 8291 kHz. 42 persons rescued, 25 crew and 17 passengers.</td>
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<td>07:00</td>
<td>P3 Orion on scene.</td>
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<td>08:00</td>
<td>APC Talanoa on duty at Central Police Station having remained at home since first advice of distress alert at 01:10 hrs.</td>
<td>3</td>
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<td>08:00</td>
<td>Commander Chris Kelley, Tongan Police, assumes command of “Operation Ashika”, the Tonga based emergency response.</td>
<td>3</td>
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<td>08:01</td>
<td>RCCNZ SAR SITREP FIVE sent.</td>
<td>1</td>
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<td>08:35</td>
<td>52 persons recovered. 79 believed to be onboard. A lot of empty life rafts found in west of area (drift tending to west) 2nd P3 (238) due to depart NZ 09:30 hrs.</td>
<td>1</td>
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<td>09:10</td>
<td>First Police Briefing held. Police Commanders identified and given immediate tasks.</td>
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<td>09:58</td>
<td>First contact between RCCNZ and an NZ Police Officer in Tonga.</td>
<td>1</td>
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<td>10:30</td>
<td>First 'Operation Ashika' general briefing held in Tonga. Day 1 was Wednesday, 5th August 2009. Attended by over 30 people, useful contribution of information, and all parties brought up to date. 15 separate organisations were represented.</td>
<td>3</td>
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<td>11:30</td>
<td>Boat Molonai locates and recovers body, later identified as that of British New Zealander, Daniel MacMillan, which was transferred to MV Pulupaki.</td>
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<td>12:30</td>
<td>Police Commander Kelley gives his first briefing to Acting Prime Minister and Acting Minister of Police.</td>
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<td>13:30</td>
<td>One of the searching merchant ships sighted a floating body which disappeared before recovery was possible.</td>
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<td>14:10</td>
<td>MV Pulupaki arrived in Ha'afeva</td>
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<td>14:27</td>
<td>RCCNZ call Vava'u to task the Escapade, 50' Riviera craft, which will depart about 15:30 with 4-5 observers trained in diving.</td>
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<td>15:02</td>
<td>Nuku'alofa advises that Capitaine Tasman, Pangai and Southern Lily will remain searching until released by RCCNZ. RCC advise Nuku'alofa that Escapade has been tasked to assist.</td>
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<td>16:00</td>
<td>Third Briefing held.</td>
<td>3</td>
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<td>17:45</td>
<td>By this time VOEA Pangai had recovered 8 empty life rafts, 2 lifejackets, and 1 lifebuoy.</td>
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<td>17:50</td>
<td>Fourth and final Briefing for day held with Orion Captain and senior staff.</td>
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<td>7/08/2009</td>
<td>03:00</td>
<td>VOEA Savea departs Nuku'alofa for the search area.</td>
<td>7</td>
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<td></td>
<td>04:19</td>
<td>RCC Alameda advise their helicopter assistance would take 20 hours to arrive.</td>
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<td>05:51</td>
<td>Formal request to AUMCC for helicopter support but informed that it was on a ship 4 days steaming away. USCG advise that they intend to transport helicopter by plane.</td>
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<td>06:00</td>
<td>RCCNZ ask DACCSO if airforce have C130 which could transport civilian helicopter to Tonga and how long it would take.</td>
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<td>17:53</td>
<td></td>
<td>Vessel Naia reported recovering a female body later identified as Vaefetu'u Mahe nee Taufa. The body was transferred to VOEA Pangai at 18:47 hrs.</td>
<td>7</td>
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<td>17:57</td>
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<td>Capitaine Tasman requested to be released at ECT as she was running short of fuel. RCCNZ agreed and passed thanks.</td>
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<td>18:10</td>
<td></td>
<td>Master of Southern Lily asked to be released at ECT also due to lack of bunkers and poor search ability at night. RCCNZ agreed and passed thanks.</td>
<td>1</td>
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<td>18:31</td>
<td></td>
<td>Superintendent Vern Morris called RCCNZ after de-briefing P3 Captain who said that what was required was something slow and low like a helicopter to search the flotsam. Sending a helicopter from NZ was thought by RCCNZ to involve more risk than benefit.</td>
<td>1</td>
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<td>18:46</td>
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<td>Captain of P3 suggests that three remaining vessels search through the flotsam as the P3 is too fast for this task.</td>
<td>1</td>
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<td>20:13</td>
<td></td>
<td>Response from Alameda (USCG in California) to say they could possibly fly in a helicopter but it would take ten hours. Asked by RCCNZ to process the request as there could still be survivors clinging to flotsam</td>
<td>1</td>
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<td>22:00</td>
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<td>Commander Mark Burling advised that the Tongan Government had formally requested an Australian dive team be sent to Tonga to assist in reconnaissance and recovery.</td>
<td>8</td>
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<td>22:21</td>
<td></td>
<td>Alameda advise still trying to source helicopters from Hawaii or Guam. Asked if RCCNZ had checked if Australia can supply helicopter - negative.</td>
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<td>22:28</td>
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<td>RCCNZ call AUMCC to enquire if A.D.F. can supply helicopter.</td>
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<td>23:00</td>
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<td>U.S.Coastguard, Alameda advise that U.S. Navy and Airforce are prepared to help assist with helicopter but require formal request through U.S.Embassy.</td>
<td>1</td>
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<td>23:19</td>
<td></td>
<td>RCCNZ that there are still 33 persons unaccounted for and their survival chances are good due to the water temperature.</td>
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<td>04:19</td>
<td></td>
<td>RCC Alameda advise their helicopter assistance would take 20 hours to arrive.</td>
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<td>(Time in Tonga)</td>
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<td>06:46</td>
<td></td>
<td>Vessels still engaged in searching for survivors are Pangai, Naia, and Escapade. Search plan is to have the P3 coordinate the search vessels to search down the debris fields.</td>
<td>1</td>
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<td>07:00</td>
<td></td>
<td>About this time the boat Molonai belonging to the Mormon Church in Ha'apai rejoined the search for survivors.</td>
<td>7</td>
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<td>07:04</td>
<td></td>
<td>USCG advise they have C17 available, crew require rest for next 9 hours. Time to break down helicopter is 10 hours, transit time 4 hours, and rebuild time 6 hours - total 20 hours. Estimated survival times for survivors is 24 - 36 hours which has almost expired.</td>
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<td>07:25</td>
<td></td>
<td>P3 will be on search scene in 10 minutes.</td>
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<td>07:40</td>
<td></td>
<td>RCCNZ decide that transporting helicopter from NZ not practical due to the work in dismantling larger helicopters and smaller single engine helicopters not suited to SAR.</td>
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<td>08:01</td>
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<td>USCG helicopter offer declined due to length of time involved in reaching search area.</td>
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<td>08:09</td>
<td></td>
<td>AMVER SURPIC for 300nm radius requested.</td>
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<td>08:40</td>
<td></td>
<td>Naia standing down from searching for survivors</td>
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<td>09:22</td>
<td></td>
<td>Debris found west of search area by P3.</td>
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<td>11:08</td>
<td></td>
<td>Vern Morris (Tonga Police) advises RCCNZ that the revised figure for POB is now 119. Pangai has now returned to Nuku'alofa to resupply and will return to distress area to ascertain if liferaft seen underwater is attached to the Princess Ashika.</td>
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<td>10:37</td>
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<td>Captain John Smith on Nai'a advises that there are no dive chambers in Tonga or on any vessels in the area.</td>
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<td>12:08</td>
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<td>P3 finds significant amounts of debris 4 nm from LKP and search moved to that area.</td>
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<td>12:32</td>
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<td>Ex passenger from MV Princess Ashika, Siaosi Lavaka (Agent in Ha'afeva), brought aboard VOEA Savea where he assists in directing Savea to the area of sinking from his memory of the radar picture on MV Princess Ashika just before the sinking.</td>
<td>4 and 7</td>
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<td>18:00</td>
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<td>In the area to where Siaosi Lavaka directed VOEA Savea, oil and debris found rising to the surface in position 20°24.26'S 174°56.14'W. This considered likely site of MV Princess Ashika wreck</td>
<td>4</td>
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<td>13:52</td>
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<td>RCCNZ interpreter reports having had a conversation with MV Princess Ashika master who said he thought sinking caused by cargo shifting.</td>
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<td></td>
<td>15:50</td>
<td>Tonga Police Commissioner confirms that he agrees to P3 Orion returning to NZ either today or tomorrow after a complete search of the search area.</td>
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<td>18:41</td>
<td>70% of search area has been searched. Patrol Vessel Savea directed to investigate partially inflated liferaft in psn. 20° 36'S 175° 10.5'W.</td>
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<td>19:12</td>
<td>VOEA Savea receives information from MV Pulupaki that they have sighted a white rope still attached to the sea bottom in position 20°24.1'S 174°56.4'W. When plotted this area shows a depth of 100 to 500 metres. Oil slick also noted in this area.</td>
<td>5</td>
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<tr>
<td>8/08/2009</td>
<td>02:30</td>
<td>Diving team arrives from New Zealand</td>
<td>7 and 8</td>
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<tr>
<td></td>
<td>04:00</td>
<td>Diving team arrives from Australia</td>
<td>7 and 8</td>
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<td>09:00</td>
<td>Briefing held at this time stated that there were 85 persons missing.</td>
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<td>09:38</td>
<td>P3 Orion reports it will take off from Fua’amotu at 10:00hrs 8th to resume search.</td>
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<td>12:44</td>
<td>P3 reports deteriorating weather conditions in search area - cloud base 300', mod. rain, visibility 400 metres. Conditions make any search for small objects in water impossible. RCCNZ orders P3 to return to base.</td>
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<td></td>
<td>12:54</td>
<td>JFHQ advise RCCNZ that navy vessel Manawanui (Dive Support) will be departing to assist with diving operations on the casualty.</td>
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<td></td>
<td>13:10</td>
<td>Vern Morris (Tonga Police) discuses current situation with RCCNZ. Tonga working on 141 persons onboard. When SAR control handed over to Tonga Neil Banks will be SAR advisor. Police planning to set up incident room.</td>
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<td>13:20</td>
<td>VOEA Pangai departs with 12 divers for estimated wreck site.</td>
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<td>14:48</td>
<td>JRCC Honolulu advised that there will not be any further requests for assistance from RCCNZ but possibly from Tonga.</td>
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<td></td>
<td>16:30</td>
<td>Divers dive on suspected wreck site but find water to deep to reach bottom. VOEA Pangai returns divers to Nuku'alofa.</td>
<td>7</td>
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<td>18:24</td>
<td>Transfer of Incident form sent to Neil Banks in Tonga.</td>
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<td></td>
<td>18:51</td>
<td>Neil Banks advises RCCNZ that a base will be set up at Police HQ and a forward base at Pangai Police Station, Ha'apai, and communications liaison will be carried out by Coastwatch.</td>
<td>1 and 3</td>
</tr>
<tr>
<td>9/08/2009</td>
<td>00:01</td>
<td>RCCNZ send Search Plan to Neil Banks with the suggestion that any surface vessels search down the debris trackline.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>09:00</td>
<td>Briefing held at this time stated that there were 93 persons missing.</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>10:35</td>
<td>VOEA Pangai departs with divers for suspected wreck site where oil had been seen rising to surface.</td>
<td>7</td>
</tr>
<tr>
<td>DATE</td>
<td>TIME</td>
<td>REMARKS</td>
<td>SOURCE</td>
</tr>
<tr>
<td>-----------</td>
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<td>-------------------------------------------------------------------------</td>
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<tr>
<td></td>
<td></td>
<td>Discussion between Tonga Police (Vern Morris) and RCCNZ as to best use of the light aircraft in the four hours available. Follow the debris trail. Dive teams have done 2 dives but have not found wreck yet. Local police setting up a restricted area in the LKP area.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>10:45</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>12:35</td>
<td>RCCNZ receive the return copy of the Transfer of Responsibility to the Tongan Police.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>13:25</td>
<td>Air Chatham aircraft chartered by Police for one hour search of search area.</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>17:20</td>
<td>Voea Pangai completes days search of LKP with divers. Results from REMUS showed that there was no wreck in area searched.</td>
<td>7</td>
</tr>
<tr>
<td>10/08/2009</td>
<td></td>
<td>Weather unsuitable for diving or use of REMUS</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>14:50</td>
<td>Voea Pangai departs for wreck site with divers.</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Voea Pangai reaches wreck site and diver went to maximum depth of 50 metres down the floating mooring rope at which point he could see an object of darker colour surrounded by white or brighter colour. Voea Pangai then returned to Nuku'alofa</td>
<td>7</td>
</tr>
<tr>
<td>11/08/2009</td>
<td>07:00</td>
<td>Weather unsuitable for diving or use of REMUS</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>14:30</td>
<td>Voea Pangai departs for wreck site with divers.</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Voea Pangai departs for the dive site with the diving team and the REMUS sonar.</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Combined Aus/NZ/Tonga dive team deployed a sonar system (REMUS) over the probable wreck site and the image recorded fitted the dimension of the MV Princess Ashika.</td>
<td>3</td>
</tr>
<tr>
<td>12/08/2009</td>
<td>06:00</td>
<td>Voea Pangai departs for the dive site with the diving team and the REMUS sonar.</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>15:40</td>
<td>Voea Pangai arrives back in Nuku'alofa.</td>
<td>7</td>
</tr>
<tr>
<td>13/08/2009</td>
<td></td>
<td>No search this day. Awaiting arrival of HMNZS Manawanui with ROV.</td>
<td>7</td>
</tr>
<tr>
<td>14/08/2009</td>
<td></td>
<td>No search this day. Awaiting arrival of HMNZS Manawanui with ROV.</td>
<td>7</td>
</tr>
<tr>
<td>15/08/2009</td>
<td></td>
<td>HMNZS Manawanui arrives in Nuku'alofa.</td>
<td>7</td>
</tr>
<tr>
<td>16/08/2009</td>
<td></td>
<td>No search activity this day.</td>
<td>7</td>
</tr>
<tr>
<td>17/08/2009</td>
<td></td>
<td>Diving teams depart Tonga.</td>
<td>7</td>
</tr>
<tr>
<td>10/00</td>
<td></td>
<td>HMNZS Manawanui and Voea Savea depart for wreck site.</td>
<td>7</td>
</tr>
</tbody>
</table>
**Comments and Recommendations**

**Provision of accurate information regarding numbers of persons onboard**

13.47 When MV Princess Ashika departed Nuku’alofa, a Trip Report, containing details of persons and cargo onboard, was transmitted to Nuku’alofa Radio. The numbers contained in the Report were inaccurate in the extreme. In addition, RCCNZ believed that there was a total of 45 persons onboard MV Princess Ashika when this was the figure given for passengers only. The combined effect of this was to influence decision making at RCCNZ as it was assumed that the disaster was of lesser magnitude when MV Pulupaki reported at 0310hrs 6th that 40 persons had been rescued. It took about 12 days for the Tongan Police to finally establish that MV Princess Ashika sailed with 128 persons onboard, 32 crew and 96 passengers.

**Recommendations**

A standard Ship Position Reporting System should be established along the lines of AUSREP, the Australian Ship Reporting System. The Principal Traffic Officer at Nuku’alofa Radio gave evidence that he has produced, and passed on to his superior, a Ship Reporting System for Tonga which he called TONREP. (Exhibit 94) *(Appendix 80)* He produced two Trip Report Formats, one for fishing vessels and the other for all other types of vessel, (Exhibit 96) and two forms on which the information from the Trip Reports could be recorded at the Coast Radio Station. (T 1350-1360)

It is strongly recommended that a Reporting System, along the lines above, be made mandatory within Tongan territorial waters for all vessels other than small recreational craft. It must be emphasised that the information contained in these
reports must be accurate. Copies of the final figure for persons onboard must be kept on the vessel and with the vessel’s owner or operator. Reports should be transmitted on Departure and Arrival. Where the vessel is at sea for more than 24 hours, it is suggested that intermediate reports, to include the local weather conditions, be sent at 6 hour intervals. An intermediate report should also be sent if the ETA at the next port is likely to vary more than 2 hours.

The National Emergency Management Plan for the Kingdom of Tonga

13.48 It is noted that Tonga does have an Emergency Management Act 2007 and Plan which is geared, in the main, to natural disasters. In November 2007, His Majesty’s Cabinet directed that the Ministry of Marine and Ports, now the Marine and Ports Division of the Ministry of Transport, Ministry of Police, and Tonga Defence Services meet under the Chairmanship of the Minister for Police and consider Search and Rescue and report back to Cabinet. The resulting report from the Transport Minister proposed a Cabinet Steering Committee, and National Search and Rescue Unit under the chairmanship of the Transport Ministry.

Comments and Recommendations

The initial SAR operation was coordinated by the Rescue Coordination Centre in Wellington, New Zealand (RCCNZ). Difficulties in communication between RCCNZ and the authorities in Tonga hampered the operation initially. This was partly due to language differences and partly due to the lack of an established SAR operations room and SAR team.

It is recommended that clear command structure is established with the Search and Rescue HQ set up in the Police Headquarters with the Police leading the SAR team. All parties designated to be involved in Search and Rescue by the Emergency Management Act 2007 and Plan must be fully informed of this command structure and a full list of contacts.

This list of contacts must be regularly updated (at least weekly) to reflect those persons who are acting on another designated persons behalf due to absence overseas, illness, or any other reason.

Police Commander Kelley in his statement (Exhibit 254, paragraphs 4.22 and 4.23) commented that the Police have very poor radio communications and limited information technology capability. He commented further that the Police Service relies on very limited mobile phone communications, often the personal phones belonging to individual officers.
During the preparation of this report, the Commission has become aware that the Police communications were being upgraded with a new UHF and VHF network due for completion at about the time this report is due to be published.

Tonga – New Zealand Search and Rescue Arrangements

13.49 The Government of Tonga and New Zealand signed a Memorandum of Understanding in June 2005 outlining the principles for coordinating SAR services and activities between the two countries. RCCNZ is operational continuously 24 hours a day but Tonga does not have a RCC permanently manned. (Exhibit 117)

Comments and Recommendations.

The arrangement calls for regular formal checks of communications between RCCNZ and Tonga. It is clear from the MV Princess Ashika SAR Operation that there were shortcomings in the communication setup. In some instances it took up to seven phone calls from RCCNZ to Tonga to establish contact. This is in spite of the fact that an average of 12 joint SAR operations is carried out each year.

It is recommended that regular monthly tests of communications are carried out as required by the agreement between the two countries. At these tests, the contact phone and fax numbers, and relevant email addresses, and all other means of contact must be confirmed. It is suggested that the person(s) for first contact in Tonga should have full command of both Tongan and English.

The establishment of a full Search and Rescue Operation in Tonga was slow. Contact between RCCNZ and the Coast Radio Station in Tonga was almost immediate and the Tongan Defence Force was contacted, albeit with language difficulties, at 0008hrs 6th initiating the preparations for a patrol boat to join the search. It was more than half an hour after the initial alert that the first contact was made with the Tongan Police.

It was not until 0800hrs on 6th August 2009, when the Tongan Police Commander was first informed of the sinking that a full RCC was established in Tonga.

This is regarded as a serious shortcoming (which was acknowledged by Commander Kelley) when the National Emergency Plan delegates the responsibility for “Coordination of rescue” and for “Tracing, or coordination of search for, missing members of the community”, to the Police.

In the light of evidence brought before the Royal Commission, it does not appear that the delay in establishing a RCC in Tonga affected the final outcome in any way. It is regarded as an incentive to improve SAR Operations.
The role of the Police in tracing missing members of the community became a major task in the light of the totally inadequate records of the Shipping Corporation of Polynesia (SCP), operators of the MV Princess Ashika, with regards to numbers of passengers and crew onboard MV Princess Ashika when it sank. The unnecessary extra burden on Police resources at this time could have been avoided if proper records were kept.

The Commander of the Police Force, Commander Chris Kelley, should be commended for the outstanding manner in which he co-ordinated the search and rescue from Nuku’alofa. It was an extremely challenging and emotional exercise compounded by such basic failures as the Shipping Corporation of Polynesia having no accurate list of passengers who travelled on the MV Princess Ashika when it foundered.

**Records of Persons onboard Vessels in Tongan Waters**

13.50 It is clear that the Shipping Corporation of Polynesia, did not keep proper records of crew or passengers onboard MV Princess Ashika. It is suspected that this poor recording of persons onboard vessels applies to other vessels operating locally.

**Comments and Recommendations.**

The provision of an accurate list of people onboard the MV Princess Ashika to the Port Authority must be a condition of obtaining a Port Clearance. This list should include names, gender and age as a minimum.

Coast Radio must also be given a Trip Report (as outlined above) which includes accurate figures for persons onboard, cargo, and the basic Voyage Plan. This information must be given before clearing every departure port.

It recognised that in the minor ports of Tonga, there are not the port authorities as in the major port of Nuku’alofa, but the Commission still recommends a full list of crew and passengers be landed with a designated person of authority prior to a vessel’s departure where possible.

**Provision of 406 MHz Emergency Position Indicating Radio Beacons (EPIRB’s)**

13.51 EPIRB’s are an excellent tool in saving life at sea. MV Princess Ashika was equipped with an EPIRB which was not registered with the authorities.

**Comments and Recommendations.**

If an EPIRB is registered with an appropriate authority when the EPIRB is operated and the signal picked up by an RCC, the vessel’s name is immediately known along with the owner’s/operator’s name and contact details.
In the case of MV Princess Ashika, the EPIRB was not registered. When the signal from the EPIRB was relayed to RCCNZ, all the information was that the EPIRB belonged to a Tongan vessel and the position of the distress.

It is recommended that EPIRB’s are fitted with a Global Positioning System (GPS). This will give an early accurate position of the distress rather than having to wait for a number of satellite passes to obtain a position. It is understood that for some owner/operators all added financial costs such as, fitting the EPIRB’s with GPS, are hard to bear. **We recommend that fitting an EPIRB with a GPS should be mandatory for passenger carrying vessels.**

New Zealand is responsible for maintaining the register for 406 MHz distress beacons for Cook Islands, Niue, Samoa and Tonga. It is the individual State’s responsibility, however, to ensure that vessels that are required to carry a 406 MHz beacon do register the beacons. RCCNZ maintains the register and the email contact address is:

406registry@maritimenz.govt.nz

**Crafts used in the Search and Rescue**

13.52 Nine surface crafts and three aircrafts were used in the SAR operation. As the operation progressed, it became apparent that although the Orion aircraft was good for spotting large objects of flotsam such as life rafts and oil slicks, and coordinating the activities of the surface craft, they were limited in their ability to find persons in the water due to their relatively high speed and limited size of observation windows. When this was recognised by RCCNZ attempts were made to locate a suitable long range helicopter. The following vessels and aircraft were utilised in the SAR:

<table>
<thead>
<tr>
<th>Vessel/Land</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>P3C Orion (KR 225)</td>
<td>RNZAF</td>
</tr>
<tr>
<td>P3C Orion (KR 238)</td>
<td>RNZAF</td>
</tr>
<tr>
<td>VOEA Pangai</td>
<td>Tongan Navy Patrol Boat</td>
</tr>
<tr>
<td>VOEA Savea</td>
<td>Tongan Navy Patrol Boat</td>
</tr>
<tr>
<td>Pulupaki</td>
<td>Coastal Passenger Cargo vessel, Tongan Flag</td>
</tr>
<tr>
<td>Capitaine Tasman</td>
<td>Cargo ship, DWT 8400 tonnes, Tongan Flag</td>
</tr>
<tr>
<td>Southern Lily</td>
<td>Cargo ship, 6245 GRT</td>
</tr>
<tr>
<td>Nai’a</td>
<td>Charter Yacht – Length 34 metres, 250 G.R.T.</td>
</tr>
<tr>
<td>Escapade</td>
<td>Charter Yacht</td>
</tr>
<tr>
<td>Molonai</td>
<td>Boat belonging to Mormon Church, Ha’apai, hired by Police.</td>
</tr>
<tr>
<td>HMNZS Manawanui</td>
<td>New Zealand Navy Diving Support Vessel</td>
</tr>
<tr>
<td>Air Chatham aircraft</td>
<td>Hired by Police for searching.</td>
</tr>
</tbody>
</table>
Comments and Recommendations.

Helicopters

13.53 It is regrettable that there are no helicopters available in Tonga. Helicopters are good for searching for, and recovering, persons in the water due to the area of sea visible from the cockpit, the infinite variety of speeds which they can be flown and the ability to recover survivors. Drawbacks are the relatively short range and endurance when compared to fixed wing aircraft and the high cost of maintenance.

In future, if there may be a need for a helicopter for a SAR, it will be necessary to initiate a search for one at the start of the Distress, due to the time required to bring it to Tonga. Enquiries made by RCCNZ found that the nearest helicopter that the Australian Defence Force had was on a ship four days steaming away.

The U.S. Coastguard had a helicopter and C17 transport plane available but the time for crew rest, dismantling and reassembling of the helicopter, and the flight to Tonga, was at least 20 hours.

The possibilities of bringing a helicopter from New Zealand were investigated but this was considered to involve more risk than could be justified. This was regardless of other logistical problems involved.

The BK-117 helicopter did not have the adequate ferry range, nor would it fit inside a C130 Hercules for transport to Tonga.

The AS350 Squirrel did have the range to fly to Tonga when fitted with long range tanks. The logistics associated with dismantling the AS350 to fit into the C130 Hercules made this unacceptable.

ZK-NSP is a Piper PA-31 light, twin engine, fixed wing aircraft, based in Hamilton, and operated by the Philips Search and Rescue Trust. This aircraft has been set up for marine searches and it is fitted with marine radio communications equipment and marine radar for this purpose. It can operate out to about 300 nm off-shore, however, for long range flights, such as a flight from New Zealand to Tonga, it must be fitted with auxiliary fuel tanks. The flight time would be about nine hours.

The Piper PA-31 could be ferried to any of the island nations in the NZ Search and Rescue Region, however, there would be limitations on its effectiveness for searching because of its limited capacity to carry, on the ferry flight, crew and observers for subsequent searching. Additional crews, if available, would have to be
transported to the operating base by other means to provide sufficient resources for extended search activity while taking account of crew duty time and fatigue.

Ideally, Tonga and the smaller nations in this area of the Pacific should co-operate and jointly operate a light twin engine fixed wing aircraft suitably fitted out for maritime search and rescue as well as fisheries patrols and customs operations.

The ideal for this type of search, is a vessel with its own shipboard helicopter. The vessel is then stationed in the search area maximising the time the helicopter can search. This asset is rarely in Tongan waters.

**Vessels involved in the Search and Rescue**

**MV Pulupaki**

13.54 The Tongan coastal vessel cargo passenger vessel, MV Pulupaki, was the first vessel at the distress site and rescued all the survivors.

13.55 It is interesting to note that this vessel underwent a Radio Survey in Nuku’alofa on the 5th August 2009, the day of the MV Princess Ashika sinking. The H/F (High Frequency) radio was only working effectively on the frequency of 8291kHz and the Radio Surveyor, Mr. Soane Haseli, made the arrangement with the ship that if it sailed that day, it must maintain a radio watch on 8291kHz. (T 1337).

13.56 In this instance the arrangement proved fortuitous as, when Mr. Haseli was called in to keep a watch at Nuku’alofa Radio that same evening due to the illness of the rostered operator, he was able to contact MV Pulupaki on 8291kHz, the frequency which he knew from his visit to the ship earlier in the day, MV Pulupaki would be monitoring, and pass on the MAYDAY message from MV Princess Ashika.

13.57 The MV Pulupaki reached the site of the sinking at 0231hrs 6th August 2009 and the next vessel to arrive, VOEA Pangai, arrived at 0430hrs 6th August 2009 some two hours later.

13.58 The MV Pulupaki rescued all the survivors from MV Princess Ashika. The empty liferafts were left to drift, the idea being that these would give an indication of drift of any survivors still in the water. This turned out to be counterproductive as other searching craft could not be sure that these rafts had been checked for survivors, and a second search needed to be made.
13.59 The empty liferafts should be brought aboard the rescue craft but if this is not possible, the rafts may have to be sunk to avoid this uncertainty.

**Tonga Defence Services Patrol Boats VOEA Pangai and VOEA Savea**

13.60 The VOEA Pangai was underway at short notice at 0145hrs 6th August 2009 well before the Police had set up the Rescue Coordination HQ. The VOEA Savea was undergoing repairs at the time of the sinking. These repairs were completed by 1400hrs 6th August 2009 but Savea was held alongside as it could not arrive in the search area in daylight.

13.61 The VOEA Savea was directed to depart Nuku’alofa in time to reach the search area by daylight on 7th August 2009. The patrol boats operated to the search plan provided by RCCNZ and as directed by the RNZAF Orions.

13.62 At 1232hrs 7th August 2009 a passenger from Princess Ashika, Siaosi Lavaka (Agent in Ha’afeva), was brought aboard VOEA Savea where he assisted in directing Savea to the area of sinking from his memory of the radar picture on MV Princess Ashika just before the sinking.

13.63 By 1800hrs 7th August 2009 the VOEA Savea had located what transpired to be the location of the wreck of the MV Princess Ashika, where oil and debris were rising to the surface. Soundings taken by VOEA Savea suggested that there was an object of MV Princess Ashika’s size on the sea bed in this location.

13.64 **Merchant Vessels Capitaine Tasman and Southern Lily:** This vessel followed the search pattern from RCCNZ and as directed by the RNZAF Orion on the 6th August 2009 until such time as the daylight faded and shortage of fuel dictated their departure. One of these vessels sighted a body in the early afternoon of the 6th, but was unable to recover it.

13.65 **Boat Molonai:** This vessel assisted in the search and recovered one body, later identified as that of Daniel MacMillan, a British national resident in New Zealand. This vessel also transported survivor Siaosi Lavaka to the VOEA Savea to assist it in locating the wreck site.

13.66 **Charter Yachts Nai’a and Escapade:** Assisted in the search. Nai’a recovered one female body, later identified as Vaefetu’u Mahe nee Taufa, late in the afternoon of 6th August 2009.
13.67 **HMNZS Manawanui:** Arrived in Nuku'alofa on 15th August 2009 and proceeded to the wreck site on 18th August 2009. At about 0800hrs on 18th August 2009, the remote underwater camera was deployed and formally identified the MV Princess Ashika on the sea floor.

13.68 **Air Chatham Aircraft:** This was used in the search for about an hour and a half in the afternoon of 9th August before being required to for a medical evacuation from the Niuas.

**Vessels within or adjacent to the Distress Area**

13.69 Apart from the vessels and aircraft listed above, the only vessel known to have been close to the sinking was the FMV Albacoa. There are likely to have been other vessels in the area but at a much greater distance.

**FMV Albacoa**

13.70 The skipper of FMV Albacoa, Siosiu Finau, gave oral evidence to the Commission (T2769F-G) relating to the position in which he anchored during the morning of the 5th August 2009. He gave the position as 20°28’S 174°58’W. He produced a diary entry (Exhibit 220) which gave the position more accurately as 20°28.548’S 174°59.182’W.

13.71 He gave evidence that he saw MV Princess Ashika pass close ahead (T 2771-2773) at about 23:15 hrs, and called it on VHF radio as he was concerned that the MV Princess Ashika would foul his anchor cable. He received no reply. He noticed that MV Princess Ashika appeared to have a 10° port list as it passed (T 2774 S-T).

13.72 After this he went to sleep but was awoken by his son between 00:30 and 01:00 hrs. and informed that he had sighted a number of dark red flares. Mr. Finau stated that, at first, he believed that it was a fishing vessel trying to attract attention of MV Princess Ashika. Later he observed lights to the south which he thought was the MV Pulupaki.

13.73 On calling the Pulupaki on his VHF radio, he confirmed that it was indeed the MV Pulupaki approaching, and he was informed that the MV Princess Ashika had sunk. Mr. Finau called Coast Watch to confirm the vessel had indeed sunk. Despite the fact, as he acknowledged, the position in which the MFV Albacoa was anchored was within 6 nautical miles of the sinking position, he did not join in the search and rescue operation.
Mr Finau cited a lack of fuel and insufficient lighting as his reasons. In later evidence Mr. Finau said that he returned to Nuku’alofa on the 8th August 2009 with 200 litres of fuel remaining. (T 2775-9)

Under Article 98 of the Law of the Sea (below) there is a requirement that every State shall require masters of vessels to render assistance.

“Article 98 - Duty to render assistance

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

   (a) to render assistance to any person found at sea in danger of being lost;
   (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.”

The Commission considers Mr. Finau had a duty to join the search and rescue operation for survivors from the MV Princess Ashika. He was aware that the Pulupaki would be in the area to assist but the MFV Albacoa was closer and able to give the vital early assistance to those in distress even if, once other vessels reached the area, he would need to leave due to shortage of bunkers, as did two of the searching vessels.

Nuku’alofa Coast Radio Station.

This is normally manned by one Operator and one Meteorological Officer. The radio station is situated at the Fua’amotu Airport Domestic Terminal. When emergency situations occur, the operator on duty calls his superior, the Director, for assistance.

At the time of the MV Princess Ashika sinking, the Coast Radio Station was equipped with radios with two Distress Frequencies but without the ability to transmit and receive at the same time.

During the early part of the SAR operations, the only reliable contact between RCCNZ and the Tongan emergency services was through the operator at Nuku’alofa Radio. This added unnecessary extra stress on the operators, and adding delays to the operation. The Police should have been the contact point for these communications from a time shortly after the MAYDAY message was received.
**Comments and Recommendations**

13.80 In the minutes of the Ministry of Transport Mexco Meeting of 27th August 2009 (Exhibit 349), the meeting was advised of the need to upgrade the radio equipment to be able to transmit and receive at the same time. The meeting was also informed that at that time Coast Radio was only able to send and receive on two distress frequencies.

13.81 The Commission considers that the radio equipment should be upgraded to be able to transmit and receive on the Distress Frequencies 2182kHz, (M/F), 4125, 6215, 8291,12290, and 16420 kHz (H/F).

13.82 The installing of Digital Selective Calling (DSC) in the 2, 4, 6, 8, and 12 mHz Bands is recommended.

13.83 The Operator on duty at Coast Radio when the MAYDAY was received, Mr. Soane Haseli, managed the situation well with limited resources, and the assistance of the Meteorological Officer on duty with him.

13.84 Whilst there was a procedure for calling in assistance, initial contact was not easy. Once summoned, the assisting staff had some distance to travel to the Radio Station.

13.85 It would be beneficial to have the Coast Radio Station located in or close to Nuku’alofa to cut travelling time. The Commission understands that this was the case in the past.

13.86 The Commission wishes to commend Mr. Soane Haseli, the radio operator on duty, for the way he handled the emergency. It is noted that he had worked for several hours during the day on the 5th August 2009 and then took over a sick colleague’s overnight watch that evening.

**Summary**

- The SAR was well co-ordinated by RCCNZ and Nuku’alofa Radio.

- The lack of correct numbers of persons onboard MV Princess Ashika caused unnecessary confusion and considerable extra work for the Police in Tonga.

- The setting up of the SAR HQ in Tonga was considerably delayed. This did not affect the outcome of the search and but slowed communications without a central contact point. RCCNZ had to continue using Nuku’alofa Radio as the contact for telecommunications, fax and phone, for much longer than was
necessary. This diverted the radio operator away from his communications with the vessels engaged in the search.

- An upgrade of the radio equipment at Nuku’alofa Radio is recommended. This should include the capability for Digital Selective Calling.

- Moving Nuku’alofa Radio back into Nuku’alofa would make for efficiencies in calling in extra staff during emergencies due to shorter travel distances.

- Police communications were poor due to the antiquated radio equipment in use. It is understood that a new VHF and UHF radio communications system is being installed as this report is being prepared.

- The SAR HQ should maintain a data base of vessels and aircraft which could be used in a search and rescue. This should include contact numbers, general availability, and capabilities. This should be updated regularly.

- Regular monthly communications exercises between RCCNZ and the SAR HQ in Tonga should be held with contact numbers of both parties updated at the same time.

- Tonga and the neighbouring nations should consider co-operating in owning and operating a twin engine, fixed wing light aircraft, equipped for maritime search and rescue and for other duties such as fisheries patrols and customs patrols.
CHAPTER 14 - PROPOSALS TO PROMOTE MARITIME SAFETY

14.1 This chapter contains proposals for any measures that would help to prevent the future occurrence of a similar disaster, or may assist in future search, rescue and recovery of disaster victims. [Term of Reference (f)]

General

14.2 Ship owners and operators should have persons with a maritime background and experience in their management. In the absence of such persons expert technical advice must be obtained.

14.3 Fit and proper persons of appropriate qualifications, experience and integrity, be appointed as officers of the Shipping Corporation of Polynesia Limited and other bodies associated with the shipping and maritime industry.

14.4 There should be established forthwith a Government Procurement Committee pursuant to subordinate legislation, namely Regulations, to safeguard the expenditure of public funds for major acquisitions of goods and services. (We understand that draft legislation has been prepared entitled “Draft Public Procurement Rules and Procedures”).

14.5 Every shipping operator based in Tonga should be encouraged to introduce and implement a safety management system for any ships operated by it, to suit local conditions, in line with the International Safety Management Code.

14.6 A system of planned maintenance should be introduced on all vessels to allow the management and crew to plan ahead and schedule future maintenance, and to order spare parts and equipment to be available when required.

14.7 The port of Nuku'alofa must be provided with a weighing machine for the weighing of cargo to obtain accurate manifests.

14.8 There must be an urgent review of the operation and funding of the TMPI. (It is at present grossly short of funds for the training which it is expected to provide. Government must decide the level of training which it requires from the TMPI, and then provide the necessary funds. It should be noted that additional funds will be needed initially to refurbish dilapidated facilities and equipment.) The Secretariat of the Pacific Community (SPC) should forthwith undertake a full audit of the TMPI to assist in identifying any shortcomings and needs.

14.9 The pre-requisite standard of candidates applying for a position in the Maritime Programs at the TMPI should be raised to a minimum of passes in mathematics, English and science at form five. For those who wish to progress to be navigating or
engineering officers, the minimum standard should be passes in mathematics, English and science at form seven.

14.10 Marine and Ports Division of the Ministry of Transport should be audited forthwith by the SPC.

14.11 We recommend the urgent appointment of appropriately qualified and independent persons as a Commissioner and Investigator under the Anti-corruption Commission Act to enable the operation of an Anti-corruption Commission without undue delay. There should be an independent selection committee, and the positions should be extensively advertised.

14.12 There needs to be proper enforcement of the Shipping Laws and respect for those Laws. (There has been a practice of ignoring the laws, including the *Shipping Act* and *Regulations*, which we consider will only change if the Law is rigorously enforced.)

**South West Pacific**

14.13 The Government of Tonga should promote the work of the Regional Maritime Programme of the Secretariat of the Pacific Community (SPC) in informing shipping operators, and the vessels they operate within the southwest Pacific region, about the principles of Safe Ship Management.

14.14 The Government of Tonga should promote the use of the South Pacific Maritime Code for non-convention vessels throughout the Pacific Island Territories.

14.15 The introduction of a Ship Financing Scheme which would provide access to funds at a reasonable interest rate for the purchase of new or near new vessels by ship owners in Tonga. (This proposal is not new as similar proposals have been put forward in the past without being implemented. Governments on the other hand may be able to attract donor funds for particular projects.)

**Surveys and Surveying**

14.16 A suitably qualified independent Marine Surveyor to be engaged forthwith to survey all passenger vessels on the Tongan Ship Register with:

a. Surveys to commence by the 31st May 2010 and be completed by the 30th June 2010;

b. Survey Reports to be provided to the Minister of Transport and the CEO and Secretary of Transport, with copies to the Director of Marine, Minister of Justice, Solicitor General, and the Attorney General and if a vessel is found to be unseaworthy under the *Shipping Act*, the Minister of Transport should exercise his power under *Section 145 of the Shipping Act* to detain the vessel.
14.17 The Minister of Transport must ensure that the Shipping Act (Section 144) is strictly applied and that no unseaworthy vessel is taken or sent to sea.

14.18 The maritime administration, the Marine and Ports Division of the Ministry of Transport, needs to be developed and sufficient funds should be allocated to ensure that Tonga can meet its own and international legal obligations. This will include the ability to oversee an efficient safety management system, which will require a solid base of surveying expertise, not influenced by political considerations, to allow for meaningful inspections and audits of vessels and their systems.

14.19 The Marine and Ports Division of the Ministry of Transport to maintain a record of all Tongan registered vessels with full details of their condition and dates of survey. If no application for survey has been received shortly before a vessel’s survey is due, Marine and Ports should remind the vessel owner of the requirement for a survey.

Radio Communications

14.20 Upgrade the radio equipment at Nuku’alofa Radio to include Digital Selective Calling and to send and receive on 2182kHz (M/F), and the Distress Frequencies in the 4, 6, 8, 12, and 16 mHz. High Frequency Bands.

14.21 Move Nuku’alofa Radio to a more central location in Nuku’alofa for ease of access in an emergency. Adjacent to the SAR HQ is suggested if that is possible

Search and Rescue

14.22 The Government of Tonga should require all passenger carrying vessels to have their EPIRB’s (Emergency Position Indicating Radio Beacon) fitted with GPS (Global Positioning System).

14.23 The Marine and Ports Division to encourage all vessels to have GPS fitted into their EPIRB’s.

14.24 On departure from a port, authorities ashore should be provided with an accurate list of persons onboard, including their name, gender and age. This should be a condition of obtaining a Port Clearance in Nuku’alofa. In outports the list would be included in the first Trip Report if there was no suitable person of authority ashore.

14.25 A mandatory ship reporting system with standard formats be established, similar to AUSREP, the Australian Ship Reporting System. Mr. Soane Haseli, Principal Coast Watch Officer has created a suitable format for what he calls TONREP. (Exhibit 94) (Appendix 80) This should be adopted.

14.26 An up-to-date register should be established and maintained, of search and rescue air and marine assets capable of being used for search and rescue operations within the southwest Pacific region.
14.27 Explore the possibility of cooperating with other nations in the vicinity, such as Fiji and Samoa, in owning and operating a dedicated search and rescue aircraft fitted with SAR equipment and trained crew being made available to conduct search and rescue operations in the region. This could also be used for fishery patrols and customs surveillance. It should be a twin engine light aircraft fitted with long range fuel tanks.

**Onboard**

**NOTE:** These recommendations, below, apply to all vessels but particularly to passenger vessels where many of those onboard are unaware of safety procedures and appliances. There is an added urgency with the expected arrival of a new inter-island cargo and passenger ferry in October 2010.

14.28 Planning by the Owner and Operator should commence, with regard to planned maintenance and selecting a crew.

14.29 The following extracts from the *Shipping (STCW Convention) Regulations 1998* are worth noting and implementing:

**“9. Responsibilities of Owners and Masters**

(1) *Both the owners and the master to whom these Regulations applies shall ensure that:*

...  

(d) *every seafarer employed on the vessel is familiarised with that seafarer's specific duties and with all vessel arrangements, installations, equipment, procedures and vessel characteristics that are relevant to their routine or emergency duties; and*

(e) *the vessel's complement can effectively co-ordinate their activities in an emergency situation and in performing functions vital to safety or to the prevention or mitigation of pollution.*

(2) *Both the owner and the master of a vessel to whom these Regulations apply shall ensure that every seafarer can make a knowledgeable and informed contribution to the safe operation of the vessel.*

**10. Responsibilities of Master**

(1) *The master shall take all steps necessary to implement any instructions issued in accordance with Regulation 8, which steps should include -*
(a) identifying all seafarers who are newly employed on board the vessel before they are assigned to any duties; and

(b) providing the opportunity for all newly arrived seafarers to -

(i) visit the spaces, in which their primary duties are to be performed; and

(ii) get acquainted with the location, controls and display features of equipment they will be operating or using; and

(iii) activate the equipment when possible and perform functions using the controls on the equipment; and

(iv) observe and ask questions of someone who is already familiar with the equipment, procedures and other arrangements, and who can communicate information in a language which the seafarer understands; and

(c) providing for a suitable period of supervision when there is any doubt that a newly employed seafarer is familiar with the shipboard equipment, operating procedures and other arrangements needed for the proper performance of his duties.”

11. **Responsibilities of Seafarers**

(1) Seafarers assigned to a vessel should take full advantage of every opportunity provided to become familiar with the shipboard equipment, operating procedures, and other arrangements needed for the proper performance of their duties, and immediately upon arriving on board for the first time, each seafarer has the responsibility to become acquainted with the vessel’s working environment, particularly with respect to new or unfamiliar equipment, procedures, or arrangements.

(2) Seafarers who do not promptly obtain the level of familiarity required for performing their duties shall bring this fact to the attention of their supervisor.”

14.30 Once a crew has been selected for a vessel they should be trained in good seamanship so that they will not repeat the errors of the crew of MV Princess Ashika. This should include:
(i) The importance of regular safety training including how to inform passengers of emergency and safety procedures. Absence from drills is not to be tolerated. Any crew who do not attend a safety drill ordered by the Master should be prevented from going to sea until such time as they have attended a similar safety drill.

(ii) The importance of regular checking and recording tank, bilges and void space soundings. These should be sounded daily.

(iii) The importance of reading and recording drafts. As a minimum these must be read and recorded on departure and arrival.

(iv) The Load Line to be checked before departure to ensure it is not immersed.

(v) The importance of properly securing cargo, ship stores and equipment before going to sea to be emphasised.

(vi) The importance of testing Bridge, Machinery, and Navigation equipment prior to sailing. This must include safety equipment such as public address, alarms bells and ship’s whistle.

(vii) The importance of closing all weathertight and watertight openings such as doors, hatches, ramps, tank lids, etc.

(viii) The International Safety Management Code to be fully implemented onboard vessels, and crew trained to follow it. A Safety Manual must be available onboard.

14.31 Require all passenger carrying vessels to conduct a safety demonstration for passengers before leaving port, as is done on aircraft prior to take off. This could be in the form of a recorded message in Tongan and English. Crew should demonstrate the lifejackets and routes to Muster Stations in conjunction with the oral instruction. It should include:

(i) A demonstration of donning a lifejacket

(ii) Advise passengers as to where the lifejackets are stowed.

(iii) Inform the passengers of the location of the Muster Positions and the route to these positions.

(iv) Advise passengers on how they will be summoned to the Muster Positions and when.

(v) Advise on abandon ship procedures.

(vi) Demonstrate the alarms on Alarm Bells and Ship’s Whistle.

14.32 All exits from enclosed spaces where passengers are accommodated, and stairways to muster station, must be clearly signed in Tongan and English and of adequate width to avoid passenger congestion. (Most regulations have recommended widths for exits and stairways.)
14.33 Storage of lifejackets is strategically located to facilitate easy access by passengers. The location should be close to exits on the route to muster stations, but clear of doorways. We recommend that a proportion of lifejackets be stowed in float free lockers on deck so that, if not accessed prior to a vessel sinking, they will be available in the water for anyone who was unable to obtain a lifejacket before entering the water.

14.34 The Master and crew of passenger vessels should wear a form of distinctive clothing to distinguish themselves from passengers (Should an emergency arise, passengers will know who to turn to for advice).

Dated at Nuku’alofa on the 31st day of March 2010.

Justice Warwick Andrew

Commissioner Richard A James

Commissioner Michael K Handfield
This is a Tongan Translation of the Executive Summary and Chapter 1 of the Final Report of the Royal Commission of Inquiry into the sinking of the MV Princess Ashika. It is provided as a matter of courtesy and is not the official Report of the Royal Commission, which is published in English.

*Ko e Liliu Faka-Tonga ‘eni ‘o e Fakama’opo’opo Fakanounou mo e Vahe 1 ‘o e Fakamatala Faka’osi ‘a e Komisoni Faka-Tu’i ke Faka’eke’eke ki he Ngoto ‘a e MV Princess Ashika. ‘Oku ‘oatu ‘eni ko e fie tokoni pe, ka ‘oku ‘ikai ko e Fakamatala faka’ofisiale ia ‘a e Komisoni Faka-Tu’i, ‘a ia ‘oku paaki ia ‘i he Lea Faka-Pilitania.*
KO E FAKAMA’OPO’OPO FAKANOUNOU

Princess Ashika – ‘i Siapani

Na’e fo’u ‘a e vaka MV Princess Ashika ‘i Siapani ‘i he 1972 ko e vaka MV Olive Maru Fika 1. Na’e fo’u ia ko e vaka uta pase se mo e uta me’a lele ki he ngaahi folau nounou pe ‘i he ngaahi tahi malu mo nonga ‘i he tahi lotofonua ‘o Siapani, ‘i he vaha’a ‘o Takamatsu mo Tosa. Na’e fo’u ‘a e vaka ke ne uta ‘a e kau pase se e 402 mo e kau kauvaka ‘a e 15. ‘I he mahina Sune 1983, na’e lele ‘a e vaka ni ‘i he halanga vaka mei Himjei ki Fulsada, pei mei Marukume ki Shimotsui, peai na’e fakalahi ‘a e tokolahi ‘o e kau pase se ki he toko 490 ka e holoki ‘a e kauvaka ke ki he toko 10.

Princess Ashika – ‘i Fisi


‘I he taimi nounou pe mei ai, ‘i Ma’asi 1985, na’e ‘i ai ‘a e ngaahi tokanga ‘a e Pule Savea ‘o e Poate Malini ‘a Fisi, ki he tu’unga ‘o e tau ke folau ‘i tahi mo e tu’unga fe’unga ‘a e MV Princess Ashika, koe’uhi ko e fakatu’utamakia ‘a e hake ‘a e tahi ki vaka pea mole ai ‘a hono tu’unga fakama’unga. Na’e toka ‘i he fakakaukau ‘a e Poate Malini ‘a Fisi ‘oku totonu ke tapuni malu ‘a e taumu’a ‘o e vaka ke ta’ofi ‘a e hake mai ‘a e tahi ‘i ‘olunga ‘i he taumu’a. ‘I he taimi ko ‘eni na’e fiema’u ai ‘e he Pule Savea ke “ke fekumi pea ke vakai’i mo sivi’i ‘a e vaka ‘e ha ‘Akiteki Tautahi, ‘o fekau’aki ia moe tu’unga ‘o e potautahi mo e tu’unga fakangaue ‘oku ne lolotonga ngaue ai” pea ke “omai ha fakamatala mahino ki he tu’unga fakama’unga ‘o fakatatau ki he Ngaahi Tu’utu’uni ‘a e IMO”.

Na’e fu’u mahino ‘aupito ‘a e tokanga ‘a e Poate Malini ‘a Fisi ki he vaka hange ko e MV Princess Ashika mo ‘ene fefolau’aki ‘i he ngaahi tahi ‘o Fisi pea mo e fa’unga fakamanga ‘o e vaka pea ‘ikai ke ‘i ai ha fakatafenga vai fe’unga ‘i he ‘ana uta. Na’e toe fiema’u ai ‘e he Poate Malini ‘a Fisi ‘a kinaautolu ‘a nautolu ‘a e vaka ke “fakahoko ki he Poate ‘a e ngaahi me’a fekau’aki mo hano toe liliu ‘a e fotunga fa’unga ‘o e vaka koe’uhi ke fakapapau’i ‘e ‘ikai ‘i ai ha fakatu’utamakia ki he vaka ‘i ha mole ‘a e tu’unga fakama’unga, ‘i ha taimi ‘e kovi ai ‘a e tahi pea hake ‘a e vai ki he ‘ana uta me’a lele pe ko e tu’u ‘a e ma’u’anga vai ki he tamate afi.” Na’e ‘oatu ai ‘a e fakakaukau ‘a e Poate “oku totonu ke tapuni malu ‘a e vaka ke ta’ofi ‘a e tahi ‘i he ‘ene hake mai ‘i ‘olunga ‘i he taumu’a mo e tafa’aki; ‘i he matapa toho, pea ‘oku totonu ke toe lalahi ange ‘a e fakamanava ki he tafenga vai”. Na’e ‘ikai ke fakahoko ha liliu.

‘I he ‘aho 11 Sanuali 1988, na’e fakatau atu ‘a e vaka MV Princess Ashika ‘e he North West Shipping and Agencies ki he Kautaha Vaka Patterson Brothers Shipping Company Limited.
Lolotonga ‘a e ngaahi ta’u kimu’a pea toki mavahe ‘a e MV Princess Ashika mei Fisi, na’e faka’au ki he kovangihe ‘a e tu’unga ‘o e vaka. Na’e ‘ikai tali ‘e he kautaha ‘oku ‘a’ana ‘a e vaka ke fakakakato ‘a e ngaahi fiema’u ‘a e kau Savea hili ‘a e toho ‘o e vaka ‘i he faka’osinga ‘o e 2008, pea na’e ‘ikai pe ke fakahoko ia.

‘I he mahina ‘Aokosi 2003, na’e ngoto ai ‘a e vaka ko e MV Ovalau II, ko hono fa’unga ‘oku tatau mo ia ‘o e MV Princess Ashika pea ko e vaka pe mo io na’e fakalele ‘e he kautaha vaka Patterson Brothers Shipping Company Limited. Na’e ngoto ‘a e vaka ni ofi ki he ava ko Nananu-i-Ra ‘i Fisi. Na’e fakahai ai ‘e ha Fakamaau’anga Malini Faka’ekte’eke ‘i he Fakamaau’anga Lahia ‘o Fisi ‘i he 2005, ko e tupu’anga ‘o e ngoto ko e matu’aki kovi ‘a e tu’unga ‘o e vaka.

‘I he mahina Novema 2005, ko ‘emau toki ‘ilo ia ‘i hano talaki ‘oku ‘i ai ‘a e matapa lahi malu, ‘i he vaha’a ‘o e loki misini mo e mohenga ‘o e tanolo. ‘Oku ‘ikai ‘ilo’i pe na’e fokotu’u anefê he na’e ‘ikai ko ha konga ia ‘o e mu’aki fa’unga ‘o e vaka. ‘Oku ne uesia ‘a e fakamamafa talifaki ‘a e MV Princess Ashika ‘o fakatatau ki hono fa’unga pea mo e ngaahi tu’utu’uni, ko e’uhi ke tauhi ‘a e fakamamafa talifaki pea kei malava ke têtê’aki ‘a e taha ‘o e matapa malu ‘i he sino’i vaka ‘a ia ‘oku fakaava ki tahi. Ko hano toe fokotu’u ‘o ha matapa malu ‘i he vaha’a ‘o e Loki Misini mo e mohenga ‘o e tanolo, kapau ‘e hake ‘a e tahi ki he fo’i ‘atá ko ‘eni pea ‘e tafea ai pe mo e fo’i ‘atá hoko mai. ‘E ‘ikai leva ke kei lahi fe’unga ‘a e fakamamafa talifaki ke lava ‘a e vaka ke kei têtê. ‘Oku malava ‘eni ke hoko ia ko e makatu’unga lahi ‘o e ngoto ‘a e MV Princess Ashika.

‘I he kamata’anga ‘o e ta’u 2009, hili hano toho ‘o e vaka na’e ‘ikai ke fu’u faka’iemia’i, na’e fokotu’u ‘a e ngaahi tu’utu’uni fakangatangata ki he MV Princess Ashika ‘o fekau’aki mo e halanga ke ngaue ai; ko e vave ‘o ‘ene lele; mo e lahi ‘o e uta mo e tokolahi ‘o e kau pasese ke ne uta. Ko e ngaahi Tohi Savea na’e ‘oatu na’e fakangatangata ‘a e ngofua ko e loloa taha ko e mahina ‘e taha. Na’e mahino ‘aupito ‘a e tu’unga faka’ofa ‘o e fiema’u ke monomono ‘a e vaka.

Princess Ashika – ‘i Tonga

‘I he kamata’anga ‘o e mahina Sune ‘o e 2009, ne ‘osi kakato ai ‘a hono fakatau atu ‘o e MV Princess Ashika ki he Pule’anga Tonga. Na’e mavahe ‘a e vaka mei Suva ki Nuku’alofa ‘i he aho 10 Sune 2009 mo e kau kauvaka Fisi mo e kauvaka Tonga. Na’e ‘ikai sai ‘a e tahi ‘i folau ko ‘eni, pea hoko ai ‘a e maumau ki he tapuni ‘o e taumu’a, pea homo ‘a e tapuni ‘o e taumuli mo e ngaahi maumau kehe ki he tafa’aki ‘o e sino’i vaka. Na’e fakafoki ai ‘e he ‘Eikivaka Fisi ‘a e MV Princess Ashika ki Suva ke fai ai hono monomono. ‘I he lava kakato ‘a e ngaahi monomono, na’e tukufolau hao mai ‘a e MV Princess Ashika ki Nuku’alofa ‘i ha matangi malie ‘o tu’uta mai ‘i he ‘aho 1 Siulai 2009.

Na’e kamata ‘a e fefolau’aki ‘a e vaka ‘i Tonga ‘i he ‘aho 3 Siulai 2009 ‘o fakalele ‘e he Kautaha Vaka Shipping Corporation of Polynesia Limited, ko e ‘uluaki folau ‘eni ‘o e ngaahi
folau kakato ‘e fā na’a ne fakahoko. ‘Oku fakamatala’i kakato ‘i he fakamatala ko ‘eni, ko e ngaahi folau kotoa ko ia, na’e hulutau ‘aupto ‘a e uta na’e fakaheka ‘i he MV Princess Ashika. ‘I he taimi ki he taimi na’e hulutau ‘a e tokolahi ‘o e kau pasese ‘i he tokolahi totonu.

Na’e maumau’i ‘e he tahi ‘a e tafa’aki ‘o e sino’i vaka ‘o e MV Princess Ashika lolotonga ‘a ‘ene ngaahi folau ‘e fā ‘i Tonga, ‘o fiema’u ai ke kasa’i monomono ha ngaahi konga ukamea ke fetongi ‘a e ngaahi konga ukamea kuo avaava tupu mei he ‘ume’umea. Neongo ‘a e hohoko ‘a e maumau ki he vaka mo e hake ‘a e tahi ki he ‘ana uta ‘o maumau ai ‘a e ngaahi uta, na’e ha mai ‘oku ‘ikai ke mamafa ki ai ‘a e tokanga ‘a e kautaha vaka.

Ko ‘ene tukufolau faka’osi na’e kamata pea faka’osi ko e fakaevaha, ‘i he ‘aho 5 ‘Aokosi 2009. Na’e tukufolau ‘a e MV Princess Ashika mei Nuku’alofa ‘i he houa 16.35 fakataha mo e kau pasese ‘e 96, kau kauvaka ‘e 32 mo e uta toni ‘e 110. ‘I he mavahe atu pe ‘a e vaka mei he mamalu fonua, ne kamata ‘a e hake ‘a e tahi ki he ‘ana uta ‘o takatakai ‘i he matapa ‘o e taumu’a mo ngaahi avaava ‘i he fungavaka ‘o e falekai ‘o e kau kauvaka. Na’e tanaki ai ‘a ‘a tahi ‘o kamata efia pe ‘o tupu mei he tu’unga kovi ‘a e ngaahi fakatafengai vai ‘o ‘e ‘ana uta. Na’e toutou ‘a’ahi ‘a e kau kauvaka le’o ‘o vakai’i ‘a e vaka pea nau fakahoko ki he ‘ofisa na’e le’o ‘i he fohe. ‘Oku fakamatala’i kakato ‘eni ‘i he Fakamatala ni ka ‘oku fe’unga pe faka he henu, ko e tatānaki ‘a ‘a tahi ‘i he ‘ana uta na’e ‘ikai ta’ofi ia ‘e he kau kauvaka, pe fakahoko ha ngaue fakamaatoato ke tou ‘a e vai.

Na’e fuoloa pe ia kimu’a ‘i he houa 23:30, ‘a ‘e ‘i ha tu’unga fakatu’utamaki ‘aupto ‘a e vaka, ka ko e toki taimi pe ‘eni na’e fangangu ai ‘e he ‘ofisa le’o ‘a e ‘Eikivaka. ‘I he taimi ko ‘eni, na’e si’i pea ‘ikai ha me’a ‘e toe ala fai ‘e he ‘Eikivaka ke fakahaofo ‘a e vaka. Kapau na’e fakahoko ha ngaue ki ai ‘i he taimi ofi ki he houa 22:00 ke fakatakanga ki he kau pasese mo e kau kauvaka ‘a e tu’unga fakatu’utamaki ‘o e ngoto ‘a e vaka, ke tufaki ‘a e ngaahi saketi fakahaofo mo’ui, mo teuteu’i ‘a e ngaahi vaka-leta fakahaofo mo’ui, na’e mei malava pe ke mo’ui ‘a kinautolu kotoa na’e ‘i vaka, neongo ‘a ‘e ‘ikai toe ala ta’ofi ‘a e ngoto ‘i he taimi ko ‘eni.

Na’a mau ‘ilo na’e ‘ikai ke ‘i ai ha ngaahi fangangu fakatokanga pe me’aifi. Ko e ngaahi founga mahu’inga taha ‘eni ke fakatokanga ‘aksi kiate kinautolu kotoa ‘i vaka ‘oku ‘i ai ‘a e fakatamaki. Na’e ‘ikai ke ngaue ‘a e me’a fakahoo le’olahi, ka ko e fakatokanga ‘a e ‘Eikivaka ke fakataha kotoa ki he feitu’u fakataha’anga, na’e fanongo ki ai ‘a e ni’ihi pe pea ‘ikai fu’u mahino ia ki ha taha. Ko e ngaahi founga fetu’utaki mahu’inga ko ‘eni na’e mole ia mei he ‘Eikivaka. Na’a ne lava lelei ke fakahoko ‘a e ui tokoni MAYDAY ke fakahaa‘i ai ko e MV Princess Ashika ‘oku ngoto. Na’e ma’u ‘a e ui ni ‘i he Letio Nuku’alofa pea mo e Maritime Radio ‘a Nu’u Sila pea kamata’i ai ‘a e Ngaue ki he Fekumi mo Fakahaofo.

‘I he houa 22:00 na’e kamata ke fakatafa ki hema ‘a e vaka MV Princess Ashika. Na’e faka’au ke fakalalahi mãmâlå ‘eni ‘i he miniti ‘e hivangofulu hono hoko. Ofi ki he houa 23:00 na’e hu ‘a e vai ki he loki misini mei he ‘ana uta pea kamata ke ngalo hifo ‘a e ngaahi misini ‘i he vai pea ta’e’aonga ai. ‘I he houa 23:45 kuo a’u ‘a e vai ki he misini lahi to’ohema ‘o pau ai ke
tamate’i. Taimi si’i mei henii kuo toe fakaalalihi ange ‘a e fakatafa ki to’ohema pea toe vave ange mo e hake ‘a e vai mei ‘olunga ‘i he tafa’aki to’ohema ‘o e fungavaka ki he ‘ana uta pea mei ai ki he loki misini, tanolo mo e loki ‘o e kau kauvaka.

‘I he houa 23:50 na’e mafuli vave ‘aupto ‘a e MV Princess Ashika ki he tafa’aki to’ohema, ‘o ‘efihia ai ‘a kinautolu na’a nau ‘i he loki ‘o e kau pasese. ‘I he taimi ko ‘eni na’e mo’ui ‘a e Letio Pikoni ‘o e Faka’ilonga ki he Tu’unga Fakatu’utamaki, ‘o ne tukuange ‘a e ngaahi vaka-leta fakaahaofi mei honau ngaahi tu’u’anga.

**Ko e ngaahi ‘uhi ngi fofu toko lahi ai ‘a e ngaahi mo’ui na’e mo’i hake**

Ko e ma’olunga ‘o e fika ‘o e ngaahi mo’ui na’e mo’i fakatu’una nga hi ‘i he ngaahi mo’oni, ka ‘oku fakatefito ‘i he ngaahi me’a ko ‘eni. ‘Uluaki, ko e ta’emalava ‘e he kau kauvaka ke mahino’i ‘a e tu’unga fakatu’utamaki ‘e ngoto ‘a e vaka pea ke nau fai ha ngaue ke teuteu ke mavahi me vaka ‘o hange ko ‘e oatu ha ui tokoni ‘o fakaahaa’i ‘a e tu’unga ‘o e fakatamaki, ‘o kole ha tokoni, tufaki ‘a e saketi fakaahaofi, teuteu’i ‘a e vaka-leta fakaahaofi. Ua, ko e sipinga ‘o e loki ‘o e kau pasese ‘oku ‘ikai faingofua ‘a e hu ki tu’u, ‘o tupu ai ‘a e fihia ‘i loto ‘a e toko lahi. Ko hono tolu, ko e fu’u vave ‘aupto ‘a e fo’i mafuli fakamuimui.

**Ko e Kumi mo e Fakaahaofi**

Na’e fakahoko lelei ‘aupto ‘a e ngaue ki he kumi mo e fakaahaofi ‘a ia na’e fakalele ‘e he Rescue Co-ordination Centre ‘a Nu’u Sila (RCCNZ), Letio Nuku’alofa, mo e Potungaue Polisi Tonga ‘a ia na’e tokoni ki ai ‘a e Tau Malu’i Fonua ‘o Tonga. Na’e lava ke fetu’utaki ‘a e Letio Nuku’alofa mo e MV Pulupaki ‘a ia na’e muimui atu ‘i he MV Princess Ashika ‘aki ha houa ‘e ua mo e konga nai, ‘o kole tokoni. Na’e mavahe ‘a e vaka le’o ‘a e Tau Malu’i Fonua ‘a Tonga ki he feitu’u ‘o e fakatamaki ‘i he houa 01:30 ‘o e ‘aho 6 ‘Aokosi 2009. ‘I he houa 02.31 ‘o e ‘aho 6 ‘Aokosi 2009, kuo a’u ‘a e MV Pulupaki ki he feitu’u ‘o e fakatamaki ‘o kamata hono fakaahaofi ‘o e kau hao mo’ui. ‘I he houa 04.50 ‘o e ‘aho 6 ‘Aokosi 2009 na’e lava kakato ai ‘a hono fakaahaofi ‘a kinautolu na’e hao mo’ui, ‘e he MV Pulupaki.

Na’e fakangata ‘a e ngaue ki he kumi mo e fakaahaofi ‘i he houa 12:00 ‘o e ‘aho 21 ‘Aokosi 2009 ‘e he Komanita ‘o e Potungaue Polisi Tonga. Na’e ngaue’aki ‘a e vakapuna ‘e tolu mo e vakatahi ‘e hiva.

**Ko e tu’u’anga ‘o e fakatamaki**

‘Oku lahi ‘a e ngaahi ‘uhi ngi fofu toko lahi ki he tupa’anga ‘o e fakatamaki. Ko’ene fakaloloma taha, he na’e faingofua kotoa pe hono ta’ofi ke ‘oua ‘e hoko, pea ko e ngaahi mo’ui na’e mo’i hake, na’e fu’u matu’aki ta’e’uhi ngi fofu toko. Ko e toki me’a fakama lahi mo’oni ia, ko e malava ke tukuange ke hoko ha fakatamaki pehe ‘i ngatai. Ko e ola ia, ‘o ha fu’u ta’etokanga lahi, ‘i he founga ngaue, pea mo fakafo’ituitui foki.

‘I hano to’o kongokonga lalahi, ko’eni ‘a e ngaahi tu’u’anga ‘o e fakatamaki na’e hoko:
Ko hono fakatau mai ‘o e MV Princess Ashika, neongo ko e fotunga hono fo’u, na’e matu’aki ta’e’fe’unga ‘aupito ia ke folau ‘i he tahí ‘ataa ‘o Tonga.

Ko hono fakatau mai ‘o e vaka, neongo pe na’e ‘ilo, ‘oku ‘ikai fe’unga ‘a e vaka ke folau ‘i tahi, pea ‘oku ‘ikai ke malu.

Ko hono fakangofua ‘o e vaka ke folau, neongo pe na’e ‘ilo, ko e fotunga hono fo’u, ‘oku matu’aki ta’e’fe’unga ia ke folau ‘i he tahí ‘ataa ‘o Tonga.

Ko hono tukuange ‘o e vaka ke folau, neongo pe na’e ‘ilo, ko e vaka ‘oku ta’e’fe’unga ke folau ‘i tahi pea ‘oku ‘ikai ke malu.

‘I he uho ‘o e ngaahi ‘uhianga ‘i ‘olunga, ‘oku ‘i ai ‘a e:

- Ta’emalava ke fakahoko ha ngaue fe’unga, taau mo fakapotopoto ki he vaka, kimu’a ‘i he fakatau ‘o e vaka, pea pehe, kimu’a pea tukuange ‘a e vaka ke folau ‘i Tonga.
- Ta’emalava ‘e kinautolu ‘oku ma’u mafai, ‘i he taimi ‘oku nau fakahoko ai honau mafai, pe ko e fakahoko honau fatongia, ke fai fakapotopoto pea taau.

**Ko e fotunga hono fo’u ‘o e MV Princess Ashika**

Na’e fo’u ‘a e MV Princess Ashika ‘i Siapani, ‘ihe 1972, ke fefolau’aki ‘i he tahi lotofonua ‘o Siapani, ‘i he tahí nonga, pea folau nounou pe, ‘o ota pasese mo e ngaahi me’aale. ‘E tatau ai pe, pe na’e kei fo’ou ‘a e vaka, ko e fotunga hono fo’u ‘o e vaka ia, ‘oku fu’u matu’aki ta’e’fe’unga pe ia ke fefolau’aki ‘i he tahí ‘ataa ‘o Tonga, koe’uhi ko e fakaavaavaa hono fa’unga.

Ko e ta’e’fe’unga ‘a e fotunga hono taumu’a, ‘ikai fe’unga ‘a e ngaahi fakahalinga tahi ke tafe ai ‘a e tahí ki tu’a mei he loto vaka, pea ‘ikai foki mapuni ‘a e ‘ana ‘oku fakaheka ai ‘a e uta.

Ko e ‘ikai ke lahi fe’unga ‘a e fakaheka’anga uta, na’e matu’aki kovi ‘aupito, pea kapau na’e fakafonu kotoa ‘a e ngaahi tangike vai mo e tangike lolo ‘o e MV Princess Ashika, na’e mei ‘osi to tu’a pe ai ‘a e uta ia ‘a e vaka, ‘oku te’eki heka ha pasese pe fakaheka ha uta. Ko e MV Princess Ashika, na’e fu’u to tu’a ‘ene uta, ‘o mahino ‘ene fakatu’utamaki, ‘i he ‘aho 5 ‘o ‘Aokosi 2009, he na’e hulu ‘ene uta ‘aki ‘a e toni e 150.

**Ko e fe’unga pe taau ‘a e MV Princess Ashika ke folau ‘i tahi**

Ko e ngaahi fakamatala fakamó’oni na’e fakaha ‘i he ‘ao ‘o e Komisoni, fekau’aki mo e tu’unga fe’unga ke folau ‘i tahi mo e tu’unga fakahakatoa ‘o e MV Princess Ashika, kimu’a ‘aupito pea tau mai ‘a e vaka ‘i he ‘aho 1 ‘o Siulai 2009, ‘o a’u ki he ‘ene ngoto ‘i he ‘aho 5 ‘o ‘Aokosi 2009, na’e ‘osi matu’aki mahino ‘aupito pe ia. Na’e ‘ikai toe ala fehu’ia ‘a e matu’aki ta’e’fe’unga ‘a e MV Princess Ashika ke folau ‘i tahi, pea na’e ‘i he tu’unga matu’aki fakalelemo’ui ‘aupito. Ko ha fokotu’u pe taukave fehangahangai mo e tefti’i mo’oni ko’eni, kau ai mo e fokotu’u ‘a Mr. John Jonesse, (ko e Pule mo e CEO ‘o e Kautaha Vaka Polinisia, ‘o a’u ki hono fakamalolo’i fakataimi ‘i he ‘aho 6 ‘o Novema 2009) pea mo ia na’e fai ‘e Mr.
Paul David Karalus, (ko e Minisita Malolo ‘i he Potungaue Fefononga’aki), ‘o na pehe ko e vaka, na’e ‘i he tu’unga lelei pea fakafiemalie hono tauhi, ‘oku ‘ikai ngata pe ‘i he ‘ene ngali vale, ka ‘oku ta’etotonu foki. Ko e ngaahi fakamatala fakamo’oni fekau’aki mo e ta’efe’unga ke folau ‘i tahi ‘a e vaka, pea mo hono tu’unga ta’efakafiemalie, na’e matu’aki fu’u taulofu’u pea ta’e’fa’a malava ke matu’uhekina. ‘I hano fakafehu’i ‘o Mr. Sione Mafi Kavaliku, ko e ‘Ofisa Malini ‘i he Potungaue Fefononga’aki, ‘e he Talekita Le’ole’o ‘o e Malini mo e Taulanga, ki he ‘ene fakakaukau ki he tu’unga ‘o e vaka, na’e tonu mo fe’unga ‘apitupai ‘ene tali, ‘i he ‘ene pehe, “na’a mo ha vale, ‘e sio pe ‘o ‘ilo ‘a e ta’efe’unga ‘a e vaka”.

Na’a mau ma’u ‘a e faingamalie ke mamata ki he ngaahi lau’i ‘ata laka hake ‘i he 100, ‘o e vaka, mei he ‘ene ‘uluaki tu’uta mai ki Tonga ni ‘i he ‘aho 1 ‘o Siulai 2009, ‘o a’u ki he ‘ene ngo toto faka’ofa ‘i he ‘aho 5 ‘o ‘Aokosi 2009. Na’a mau toe vakai foki mo e fo’i filimi vitio, na’e fai taa’i ‘i he ‘aho 18 ‘o ‘Aokosi, ‘o e MV Princess ‘Ashika, ‘oku ne toka ‘i he kilisi tahi. Na’e fakahaa’i faka’aullilikii ‘e he ngaahi lau’i ‘ata, mo e filimi vitio, ‘o poupou mo fakaaee’a matu’aki mata’aa’aa mo mahino ‘apitupai, ‘a e tu’unga fakalilifu mo fakailifia na’e ‘i ai ‘a e MV Princess Ashika. Na’e mahino lelei, ko e MV Princess Ashika, na’e ‘ikai toe ala fehu’ia ‘a ‘ene ta’efe’unga ke folau ‘i tahi, pea na’e ‘ikai pe ke malu ‘a e vaka ni ia. Na’a mo ha taha ‘oku ‘ikai ha’a ne taukei ‘e taha mo e folau tahi, tene lava pe ‘i he lau momeniti ‘o ha’a ne vakai ki he vaka, ‘o tala, ‘a e tu’unga fakailifia na’e ‘i ai ‘a e vaka.

‘I he ‘aho 2 mo e ‘aho 3 ‘o Siulai, 2009, na’e fakama’opo’opo’opo ai ‘e ha kau savea ‘e toko tolu mei he Va’a Malini ‘a e Potungaue Fefononga’aki, ha fakahokohoko, pe ko ha lisi, ‘o ha ngaahi maumau, pea fakamo’oni ki ai ‘a e Talekita Malini mo e Ngaahi Taulanga, Mr. Tu’ipulotu. Na’e loloa ‘apitupai ‘a e lisi ko ia ‘o e ngaahi maumau, ‘a ia na’e fiema’u ke fakalelei’i. Na’e mahino, ko e konga lahi ‘o e ngaahi maumau, ‘a ia na’e fiema’u ia ke fakalelei’i pea ‘e toki lau ‘oku malu ‘a e vaka ke folau. Ko e konga si’i pe, ‘okapau na’e ‘i ai ha me’a pehe, ‘o e ngaahi maumau ko’eni, na’e malava hano fakalelei’i, kimu’a pea ngo toto ‘a e vaka, ‘i he ‘aho 5 ‘o ‘Aokosi 2009.

Na’e toutou fai hano sivi, ‘o e MV Princess Ashika, ‘i he ngaahi ta’u lahi, ‘e ha kau savea mo ha kau ‘ofisa ‘o e Fiji Islands Maritime Safety Administration (FIMSA). ‘Oku hi ‘i he ngaahi faile ‘a e FIMSA, ko e vaka ia, na’e ‘i ha tu’unga fakatu’utamaki ‘apitupai, ‘i he ‘ikai matauhi hono monomono ‘o e vaka, pea ‘ilonga’a e ‘alu ‘a e ta’u, mo e holo ‘a e tu’unga fakakatoa ‘o e vaka. Na’a mau tali, ko e fakamatala totonu mo mo’oni ki he tu’unga totonu ‘o e MV Princess Ashika, ‘a e fakamatala ‘a e savea ‘a e FIMSA, ‘i he savea fakatu’u ‘o e vaka, ‘a ia na’e fai ‘i he ‘aho 18 ‘o Tisema 2008, ‘a ia na’a ne fakamatala ai ‘o pehe:

“Ko e ta’u 36 ‘eni ‘a e motu’a ‘o e vaka, pea ko e tu’unga ko’eni ‘oku ne lolotonga ‘i ai, kapau ‘e fakangofua ke folau, te ne fakatupu ha fakatu’utamaki fakalilifu ‘apitupai ‘i tahi, pea te ne fakatupu foki hano ‘ulii ‘i o e ‘ea. Kuo taimi pe ke fakata’e’aonga’l ‘a e vaka ni, he ‘oku ‘alu pe taimi mo’ene toe holo lahi ange hono tu’unga. Kuo a’u ‘a e vaka ni, ki he tu’unga ‘oku ‘ikai malava ia ke toe monomono, pea ‘oku ‘ikai toe
fe'unga ia ki ha fa'ahinga ngaue pe 'i tahi. 'Oku'ikai malava ke tau ta'etokanga'i, ko e vaka ni, 'oku 'ikai pe fe'unga ke folau 'i tahi."

Ko e Ngaahi Me’a na’e hoko, ‘oku ne tataki ki he Fakatau Mai ‘o e MV Princess Ashika

Ko e Kautaha Vaka Polinisia, SCP, ko e kautaha ia ‘oku fai fatongia ‘i he Pule’anga Tonga. Kuo laui ta’u ‘a e vai fatongia ‘a e kautaha ni ‘i Tonga. Ko e ma’u ‘inis ‘i he kautaha ni, ko e Pule’anga Tonga tokotaha pe.

Kuo ta’u lahi hono fakalele ‘e he kautaha ni ‘a e vaka ko e Olovaha, ko e vaka fefolau’aki fakavaha’a motu, ‘o uta koloa mo e pasese, ‘i he vaha’a ‘o Tongatapu, Ha’apai, Vava’u mo e Ongo Niua. Ko e fatongia mahu’inga ‘eni pea matu’aki fiema’u, ki he kakai pea mo e tu’unga faka’ekonomika. ‘I he ‘ene pehe leva, na’e ‘i ai ‘a e hoha’a ‘i he holoa ‘a e tu’unga ‘o e Olovaha, ‘o ikai ngata ‘i pe ‘i he ‘ene fu’u motu’a, ka e toe kanoni’aki ko e fakaholomui hono tauhi, tautefito ki he fa’a maumau ‘a e Olovaha ‘i hono misini mo e ngaahi me’a faka’uhila. Na’e ‘ilo‘i ‘ene ta’efe’unga ke folau ‘i tahi mo ‘ene ‘ikai ke malu, ‘i he faka’osi’osi ‘o e 2008, ‘o a’u pe ki he Palemia mo e kau Minisita, ‘e nau ‘ilo ki ai.


Na’e matu’aki hoha’a ‘aupito ‘a e Palemia, Dr. Feleti Sevele, ‘i he tau toloi ko’eni ke fakafolau mai ‘a e vaka fo’ou mei Siapani, ko ia na’a ne fai ai ha tohi ‘i he ‘aho17 ‘o Tisema 2009, ki he ‘Amipasitoa Siapani, ‘o fakahai ai ‘ene “matu’aki hoha’a ‘aupito mo lotomamahi”.

Na’e fakalotolahi’i ai ‘a e SCP, ke kumi ha vaka fetongi fakataimi, ke ne hoko atu ‘a e fefolau’aki, kae’oua kuo fakafolau mai ‘a e vaka mei Siapani.

‘i he ‘aho 17 ‘o Ma’asi 2009, na’e fakakaukau’i ai ‘e he Poate ‘o e SCP mo Lord Dalgety QC, ha pepa fokotu’u. Na’e sea ‘i he fakataha ko’eni, ‘a Mrs. ‘Alisi Taumoepeua. Na’e ‘i he fakataha foki ‘a e Talekita Pule, Mr. John Jonesse, pehe kia Faifekeu Tevita Haunikima, ko e Talekita, pea mo Lord Dalgety QC, ko e Sekelitali ‘a e Kautaha. Na’e mahino lelei kiate knauotolu kotoa pe na’e ‘i he fakataha, ko e me’a pe ‘e ua, ‘e ala fai ki he MV Olovaha. ‘A ia ko hono monomono ke toe hoko atu pe ‘ene fefolau’aki, pe ko hano fetongi leva.

Na’e felotoi katoa leva ‘a e kau Talekita ke:
1. Fokotu’u ki he Pule’anga ‘o ‘Ene ‘Afio, ke fetongi leva ’oua toe tatali ‘a e MV Olovaha.

2. Ke fakangofu’a e Talekita Pule, ke fakatotolo ki ha tokoni fakapa’anga pea ‘omi ha fakamatala ki he Poate, pea

3. Fakangofu’a e Talekita Pule ke ne fakamo’oni hingoa, (pea ‘ave ki he Minisita Pa’anga), ‘a e tohi ke toki faka’osi ‘i he fakataha.”

I he ‘aho 16 ‘o ‘Epeleli 2009, na’e tu’utu’uni ai ‘e he Kapineti, ‘i ha fakataha na’e sea ai ‘a e Palemia, ke tali ‘a e fokotu’u, ke tukuange ki he Minisita ki he Fefononga’aki Mr. Paul Karalus “ke ne fokotu’u mai ki he Kapineti, ‘a e fokotu’utu’u ki he fetongi ‘o e MV Olovaha”. Na’e ‘ikai ha pepa fokotu’u ia ki he Kapineti ‘o fekau’aki mo e tu’utu’uni Kapineti ko ia ‘o e ‘aho 16 ‘o ‘Epeleli 2009, ‘o fehangahangai ia pea mo e founga ngaue maheni.


I he ‘aho 21 ‘o ‘Epeleli 2009, na’e fakakaukau’u ai ‘i he Poate ‘a e Kau Talekita ‘o e SCP, mo e Sekelitali ‘a e Kautaha, ha fakamatala ‘a e Talekita Pule, Mr. John Jonesse, fekau’aki mo e vaka fetongi ‘o e MV Olovaha. Na’e ha ‘i he fakamatala, kuo faka’ilonga’i ‘a e MV Princess Ashika, pea kuo fai hano savea tau’ataina. Ko e fakamatala loi ‘eni ‘a e pehe na’e ‘osi fai hano savea tau’ataina, pea na’e ‘ikai ha tohi fakamatala ‘e oatu ki he Poate ke poupou’i ‘a e fakamatala ko’eni. ‘Oku pehe, na’e fakamatala ‘a Mr. Jonesse, ‘o pehe, ‘oku fe’unga ‘apito mo e ngaue mo e fiema’u’ ‘a e SCP.

Na’e tu’utu’uni loto taha, ‘a e kau Talekita, fakataha mo e poupou ‘a e Sekelitali ‘a e Kautaha:

“(1) ke fokotu’u ki he Pule’anga ‘o ‘Ene ‘Afio, ke fetakatau mai ‘a e MV Princess Ashika

(2) ke tukuange ki he Talekita Pule, ke alea mo e Pule’anga ‘o ‘Ene ‘Afio,(pea ke fakafoki mai ki he Poate ke tali) ha tu’utu’uni ki he taimi no ki he ngaue ‘a e vaka fo’ou ma’ae SCP, ‘i he founga ‘oku iloa ko e NYPE, pe ko e New York Produce Exchange format.

(3) ke fakangofu’a e Talekita Pule, ke folau ki Fisi, ‘oku fiema’u ke tokoni ki he savea mo sivi, pea ma’u mai ‘a e vaka (Fakamo’oni Fakahaha Fika 507).

Na’e fai tu’utu’uni ‘a e Kapineti ‘i he Tu’utu’uni Fika 2:

“2. Ke tukuange ki he ‘Eiki Minisita ki he Fefononga’aki, peka tokon ki ai ‘a e ‘Ateni Seniale mo Minisita Lao, ke na hoko atu ‘a e ngaahi alea, fekau’aki mo e MV Princess Ashika, peka koe’uhi ko e fakavave ‘a e me’a ni, ko e tipositi mo e ngaahi fia’u fakapa’anga kotaq pe, ke toki faka’osi pe pea mo e ‘Eiki Minisita Pa’anga, Palani Fakafonua mo e Fakamatala, ‘a ia ‘oku fangafoua henī ke ne poupou’i pe fakafisinga’i ‘a e fefakatau’aki ko’eni, peka toki ‘omai ‘amui ha fakamatala ki he Kapineti.”

‘I he ‘aho 24 ‘o ‘Epeleli 2009, na’e fakataha ai ‘a e Minisita Pa’anga, mo e ‘Ateni Seniale Malolo, (‘a ia ko ia pe foki na’e toe Sea ‘i he SCP), mo e Sekelitali Pa’anga pea mo Mr. Jomesse. Ko Mr. Karalus na’a ne ui ke fakahoko ‘a e fakataha ko’eni, ke alea’ai ‘a e tu’utu’uni Kapineti ‘o e ‘aho 23 ‘o ‘Epeleli 2009. Na’e fakapapau’i ai ‘e Mr. Karalus, e ala ma’u mai pe ‘a e ngaahi tohi fakamatala kotaq pe, tautautefito ki he fakamatala fekau’aki mo e tu’unga fe’unga ‘a e vaka ni ke folau ‘i tahi.

‘I he ‘aho 24 ‘o Me 2009 na’e ‘ave ai ‘e Mr Karalus ha tohi kuo faka’ilonga’i fakavavevave, ki he Fakahinohino Lao ‘o fekau’aki mo e tohi fakaangaanga ‘o e aleapau ke fakatau ‘a e vaka. Na’e tali ki ai ‘a e Fakahinohino Lao ‘i ha tohi ‘i he ‘aho 7 ‘o Me 2009 ‘o fakahaa’ai ai ‘a ehe hoh’a koe’uhi ‘oku te’eki ai ke fakahoko ‘e he Va’a Malini mo e Taulanga ‘a e Potungaue Fefononga’aki ‘a hono sivi’i ‘o e vaka, peka koe’uhi ko e kau mataotao fakaolautahi kinautolu ‘a e Pule’anga, ‘oku totonu ke nau fakamo’oni ki he sivi kuo fakahoko ‘e he kau fale’i.

‘I he ‘aho 6 ‘o Me 2009 na’e ‘ave ai ‘e Mr Karalus ha tohi kuo faka’ilonga’i fakavavevave, ki he Fakahinohino Lao ‘o fekau’aki mo e tohi fakaangaanga ‘o e aleapau ke fakatau ‘a e vaka. Na’e tali ki ai ‘a e Fakahinohino Lao ‘i ha tohi ‘i he ‘aho 7 ‘o Me 2009 ‘o fakahaa’ai ai ‘a ehe hoh’a koe’uhi ‘oku te’eki ai ke fakahoko ‘e he Va’a Malini mo e Taulanga ‘a e Potungaue Fefononga’aki ‘a hono sivi’i ‘o e vaka, peka koe’uhi ko e kau mataotao fakaolautahi kinatolu ‘a e Pule’anga, ‘oku totonu ke nau fakamo’oni ki he sivi kuo fakahoko ‘e he kau fale’i.

‘I he ‘aho 7 ‘o Me 2009, na’e fai ai ha tohi ‘e Mr. Karalus ki he Minisita Pa’anga pea mo e Fakahinohino Lao Seniale, “kuo mau fakakakato ha ngaue taau, fe’unga mo fakapotopoto ki he tohi fakamatala savea, kuo ma’u mei he Potungaue ‘a Fisi, peka kuo mau fia’male ‘oku ma’u ‘e he vaka, ‘a e tu’unga na’e fia’u he ‘i ai ‘i hono tu’unga fe’unga ke folau’i tahi, pea mo e tu’unga fakamisini.” Na’e ‘ikai ke ‘i ai ha tu’unga ‘e taha, ke pehe ai, ‘oku fe’unga ‘a e vaka ke folau ‘i tahi. Na’e ‘ikai ke fai ha ngaue taau, fe’unga mo fakapotopoto ‘e taha fekau’aki mo e vaka, pea ‘ikai ke fai ha savea ki mui mai.

Na’e ‘ikai ke fakatokanga’i ‘a e fakatokanga na’e fai ‘e he Fakahinohino Lao Seniale, pea hoko atu pe ‘a Mr. Karalus ia ‘o fakamo’oni hingoa, ki he aleapau pa’anga ta’etoe le’eia, ki he fakatau mai ‘o e MV Princess Ashika, ma’ae Pule’anga, mei he kautaha Patterson Brothers Shipping Company Limited. Na’e fai ‘a e fakamo’oni hingoa ki he aleapau, ‘i he ‘ofisi ‘o Mr. Karalus, ‘i he ‘aho 8 ‘o Me 2009. Na’a ne fekau kia Ms. Mone, ko e CEO mo e Sekelitali ki he Fefononga’aki, ke fakamo’oni hingoa moia. Na’a ne fekau foki mo Mr. Jomesse, ke ne
fakamo’oni’i ‘a e fakamo’oni hingoa kuo fakahoko. Ko e totongi kakato ki he fakatau mai ‘o e vaka, ‘o fakatatau ki he aleapau, kop e FJD$60,000. Na’e fokotu’u fakapapau’i i he aleapau, ‘o fakatatau ki he fakamo’oni hingoa kuo fai, ki he totongi kakato ‘o e fakatau, ‘o fakafofonga’i e he tipositi FJD$90,000, pea ko e toenga FJD$510,000a, ke totongi ‘i he ‘aho 8 ‘o Me 2009. Na’e fakamahino ‘i he aleapau, ‘oku fiema’u ‘a e Pule’anga ‘o Tonga, ke ne totongi kakato ‘a e mahu’inga ‘o e fakatau kuo fai, neongo ai pe pe koeha ‘a e tu’unga fe’unga mo taau mo e taumu’a ngaue ‘o e vaka.

Na’e alea’i leva ‘e Mr. Karalus ki he’ene Sekelitali, ke fakahoko ‘i he fax, ‘a e tatau ‘o e aleapau ki he Patterson Brothers ‘i Fisi. Na’e fakahoko ‘a e fekau ko’eni, pea na’e toki fakafoki mai ‘a e aleapau mei he Patterson Brothers, kuo nau ‘osi fakamo’oni hingoa ki ai, ‘i he ‘aho 8 ‘o Me 2009. Na’e alea’i leva ‘e e Minisita ki he Fefononga’aki, ‘a e FJD$90,000 ke talafi fakatelekalafi ki Fisi, ‘e he Potungaue Pa’anga, ‘i he ‘aho pe ko ia, ko e tipositi.

Na’e alea’i ‘e Mr George Patterson, mo Mr. Jonesse, ke na “iliu”, ‘a e aleapau ‘o e ‘aho 8 ‘o Me 2009, ke fai ‘a e totongi faka’osi ‘o e fakatau vaka ko’eni, ke toki fakakakato ki he ‘aho 5 ‘o Sune 2009. Na’e alea’i leva ‘e Mr. Karalus, ke fakahoko ‘a e totongi faka’osi ‘o e pa’anga ki he fakatau vaka ko’eni, ‘i he ‘aho 5 ‘o Sune 2009, hili ia ‘ene ma’u ‘a e tohi facsimile meia Mr. Jonesse, kuo ne ‘osi siu tonu ki he ngaahi tohi fakamatala fekau’aki mo e vaka, pea ke totongi ‘i he Potungaue Pa’anga ‘a e toenga pa’anga ki he fakatau vaka, ‘i he ‘aho 5 ‘o Sune 2009. Na’e lolotonga ‘i Fisi ‘a Mr. Jonesse ‘i he taimi ko’eni, pea na’e ‘ilo lelei pe ki ai ‘a Mr. Karalus.

Ko e ‘ikai malava ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto, ‘e he Kautaha Vaka Polinisia

Na’e ‘osi mahino pe kimu’a, ko e taumu’a ia, ke fakalele ‘e he Kautaha Vaka Polinisia (SCP), ‘a e vaka fetongi ‘o e MV Olovaha. Ko e ma’u ‘inasi ‘i he SCP, ko e Pule’anga tokotaha pe. Na’e ‘ikai pe ke fakahoko ‘e he SCP ia ha ngaue taau fe’unga mo fakapotopoto tau’ataina, ‘o fekau’aki mo e MV Prince Ashika, ‘o fai ki mu’a ‘i hono fakatau, pe ‘I he hili ‘a e fakatau pea kimu’a ‘i he ngo’o ‘a evaka ‘i he ‘aho 5 ‘o ‘Aokosi 2009.

‘Oku fakamo’oni’i pe ‘e Lord Dalgety QC, ‘a e Sekelitali ‘a e Kautaha, na’e fokotu’u ia ki he lakanga ko ia, koe’uhi ko ‘ene ‘ilo ki he lao ki he fefolau’aki. ‘Oku ne fakamo’oni’i pe, ko e taha hono teftoi’i fatonga mahu’inga ki he Kautaha ke fale’i ‘a e Poate ‘a e SCP, ke malava ai ke nau fai ha ngaahi tu’utu’uni fakapotopoto mo mahu’inga, ki he lelei ‘a e kautaha. Na’e ‘ikai pe ke ne fakakaukau’i ‘i ia mo e Poate ‘a e SCP, ‘oku totonu ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto, fekau’aki mo e MV Prince Ashika, pea na’e ‘ikai ke fai ‘e Lord Dalgety QC, ha fale’i ko e me’a ko’eni ‘oku fiema’u ke fakahoko. Ko e ‘uhinga koe ne na’a ne fakah ki he ‘ikai ke ne fai ‘a e fale’i ko’eni, ko ‘ene pehe, ko e Pule’anga Tonga, ko ia ‘oku ne fakatau ‘a e vaka, ‘o ‘ikai ko e SCP. Ka neongo ia, na’e fakamo’oni’i pe ‘e Lord Dalgety QC.
• Kimu’a pea fakatau ‘e ha taha ha vaka, hange ko e MV Princess Ashika, ko e me’a totonu ia ke fai, ha ngaue taau, fe’unga mo fakapotopoto ki he vaka.
• Na’a ne ‘osi ‘ilo’i pe ko e Pule’anga Tonga, ko ia ‘oku ‘amanaki ke ne fakatau ‘a e vaka.
• Ko e ma’u ‘inasi ‘i he SCP, ko e Pule’anga Tonga tokotaha pe.
• Ko e ngaue taau, fe’unga mo fakapotopoto ‘oku totonu ke fakahoko, ‘oku kau ai ‘a e savea tau’ataina, ‘o fakahoko ‘e ha taha ‘oku ne ma’u paasi fe’unga mo ha taukei ngaue; ko ha fakamahu’inga tau’ataina mo e sivi mo fakapapau’i ‘a e ngaahi tohi fakamatala fekau’aki mo e vaka.
• ‘E ‘ikai tau’ataina fe’unga ‘a e Potungae ki he Fefononga’aki, ke ne fai ‘a e savea ‘o e vaka.
• Ko e ‘ikai malava ko ia ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto tau’ataina kimu’a pea fakatau ‘a e vaka, ko e tokoni lahi ia ki he fakatamaki na’e hoko.
• Na’e mahino lelei pe ‘a e ta’efe’unga ‘a e MV Priiincess Ashika ke folau ‘i tahi, pea ‘ikai ke malu fe’unga, kimu’a ‘i hono fakatau, pea hokohoko ai pe ‘o a’u ki he ‘ene ngoto ‘i he ‘aho 5 ‘o ‘Aokosi 2009.
• Ko e mahu’inga ko ia FJD$600,000, na’e fakatau ‘aki ‘a e vaka, ko ha ‘inivesi mahu’inga ia ki he Pule’anga Tonga.
• Na’e ‘i ai ‘a e ngaahi fehu’i mahu’inga ‘apito na’e ‘ohake ‘i he fakataka ‘a e Poate ‘a e SCP, fekau’aki mo e tu’unga falala’anga mo fe’unga ke folau ‘a e MV Olovaha, pea mo e taau ke ‘i ai hano fetongi.
• Ko e ma’u’anga pa’anga hu mai ‘a e SCP, na’e fakafalala ia ki he ola lelei hono fakalele ‘o e vaka pe ‘e taha, ‘a ia na’e ‘i ai ‘a e ‘amanaki ke fakahoko fakataimi pe ‘e he MV Princess Ashika.
• Ko e taumu’a pe ia, ko e SCP tene fakalele ‘a e vaka fetongi’
• Na’a ne ‘ilo’i lelei pe, ko e ngaahi hia mamafa ia ki ha taha ‘oku ‘o’ona ha vaka, pe ha taha ‘oku ne fakalele ha vaka, ‘okapau ‘e ‘ikai malava ke ne tokanga’i ‘a e malu’i ‘o ha mo’ui ‘i tahi.
• Na’a ne “ta’etokanga” ki he faka’uhinga ‘o e lea “’o’ona ‘a e vaka”, fakatau ki he lao ki he Folau Tahiti, ‘oku ne kapui ‘e ia, ‘a e lea “fakalele ‘o e vaka”. ‘o hange ko e SCP.
• Na’e ‘i ai ‘a e fatongia ‘o e SCP, ke ne fakapapau’i ‘oku ‘ikai ke ne tuku atu ha vaka ke folau ‘i tahi, ‘oku ‘ikai fe’unga ke folau, pea ‘i he lea pe ‘a’ana, “ko ha me’a fakasele ia ke fai.

Ko e faakaukauvau ‘a Lord Dalgety, kapau ko e SCP na’a ne fokotu’u ke fakatau mai ‘a e vaka, ‘oku ‘i ai ‘a e ngaahi tefito’i me’a mahu’inga ‘e fa, te ne tokanga ki ai:

• ‘oku fe’unga ‘a e vaka ke folau ‘i tahi?
• ‘oku fe’unga ‘a e vaka ke ngaue’aki ‘i he tahi ‘o Tonga?
• ‘oku malava ke malu’i ‘a e vaka?
• ‘E malava ke ngaue’aki ‘a e vaka ‘i ha ta’u ‘e 2, kimu’a pea fiema’u ke toho?
  (he na’e fiema’u ia ha ta’u ‘e 2).

Ko e ngaahi me’a mahu’inga ko ia ‘e fa na’e lave ki ai ‘a Lord Dalgety QC, ko e ngaahi me’a mahu’inga katoa ia ‘oku felave’i mo e SCP. Ko e SCP, ko ia na’e fokotu’u ke ne fakalele ‘a e vaka, pea ne fokotu’u ai ki he tokotaha ma’u ‘inasi tokotaha ‘i he SCP, ke ne fakatau ‘a e vaka. Na’e tonoto ke pehe ‘a e fale’I ‘a Lord Dalgety ‘a e Poate, ka na’e ‘ikai ke ne fai ia ‘e ia, ‘a e me’a ko ia. Na’e fakamatala’i ‘e Lord Dalgety QC ‘a e MV Princess Ashika, ko e “kane popo”, mei he fakamatala ‘oku ne taukave’i, na’a ne toki ma’u hili ‘a e ngoto ‘a e vaka. Kapau na’e fai ha ngaue ki he ngaahi tefito’i me’a mahu’inga ko’eni ‘e fa, na’e meimei lava pe ‘o ta’ofi e hoko ‘a e fakatamaki ko’eni.

Na’e mo’oni pe hono tali ‘e he Sekelitali ‘a e Kautaha, pea pehe ki he kau memipa ‘o e Poate ‘a e SCP, ‘o pehe, ‘oku ‘ikai tonoto ke fai ‘e he Poate ha tu’utu’uni, ka’e’oua kuo ne ma’u ‘a e fakamatala fe’unga ‘iate kinautolu, ke nau toki fai ha tu’utu’uni fakapotopoto. Ko hono mo’oni, na’e ‘ikai ma’u ‘e he Poate ‘o e SCP, ha fakamatala fe’unga, ke malava ai ke nau fokotu’u ki he Pule’anga ‘o ‘Ene ‘Afio, ke fakatau ‘e he Pule’anga ‘a e MV Princess Ashika. Na’e ‘ikai foki te ne ma’u ha fakamatala fe’unga ke makatu’unga ai ha’a ne fakakaukau ke fakalele ‘e he SCP ‘a e vaka.

Ko e mo’oni, na’e ‘ikai pe fakahoko ha ngaue taau, fe’unga mo fakapotopoto, ma’a e SCP, ‘o a’u pe ki he ‘aho na’e ngoto ai ‘a e vaka, ‘i he ‘aho 5 ‘o ‘Aokosi 2009.

Ko Mr. Jonesse, ‘a e CEO, mo e Talekita Pule ‘o e SCP, na’a ne taki halai ‘i ‘a e Poate pea mo e Sekelitali ‘o e SCP, ‘o fekau’aki mo e tu’unga tonoto ‘o e MV Princess Ashika, pea mo e kakai kehe pe foki. Ko ‘ene to’onga, mo ‘ene ngaue, na’e matu’aki fulikivanu. Na’e ilo lelei pe ‘e he kau memipa ‘o e Poate, mo e Sekelitali ‘a e Kautaha, ko ‘ene ngaahi fakamatala ki he Poate, na’e matu’aki “fakatamulu”, pea ‘ikai ke ‘i ai ha fakamatala fe’unga, ke makatu’unga ai ha tu’utu’uni fakapotopoto. Na’e tonoto ke vilitaki atu ‘a e Poate mo e Sekelitali ‘a e Kautaha, ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto, ke ta’ofi ‘a e me’a ko ia na’e hoko, ‘a hono taki halai kinautolu, tokua, ko e tu’utu’uni na’e fai ‘i he ‘aho 21 ‘o ‘Epeleli 2009, ki he Pule’anga ke fakatau ‘a e vaka. Pea neongo ‘a e ‘ikai fakahoko ‘a e ngaue taau, fe’unga mo fakapotopoto, na’e kei tonoto pe ke nau kei vivili ki ai.

Ko e ‘ikai malava ke fakahoko ‘a e ngaue taau, fe’unga mo fakapotopoto ‘e he Pule’anga.

Ko e Pule’anga Tonga, ko ia ‘oku ne fakatau ‘a e vaka, na’e ‘i ai hono fatongia ke ne fakapapau’i ‘oku fakahoko ‘a e ngaue taau, fe’unga mo fakapotopoto, kimu’a pea fakahoko ‘a e fakatau. Ko e Pepa Fokotu’u ko ia ki he Kapineti, ‘o e ‘aho 23 ‘o ‘Epeleli 2009, , fekau’aki mo e fakatau mai ‘o e MV Princess Ashika, na’e fokotu’ai ai ki he Potungae ki he Fefononga’aki, ke fakakakato ‘a e ngaue taau, fe’unga mo fakapotopoto, fekau’aki mo e fe’unga fakatekinikale, mo e taau ke folau ‘a e vaka’i tahi, ‘a e MV Princess Ashika. Ko e
‘Asenita ki he fakataha ‘a e Kapineti ‘i he ‘aho 23 ‘o ‘Epeleli 2009, na’e lava mo ia ki he fiema’u ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto.

Ko e tu’utu’uni ko ia ‘a e Kapineti, na’e ‘ikai ha lava ia ai felave’i mo e fiema’u ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto. Ka neongo ia, na’e ‘amanaki ‘a e Palemia ‘e fakahoko ha ngaue taau, fe’unga mo fakapotopoto, kimu’a ‘i hono fakatau mai ‘o e vaka, pea fakatau ki he tu’utu’uni ‘a e Kapineti, “ke ‘i ai ‘a e fakamatala ke fakahoko ki he Kapineti ‘amui ange”.

‘Oku mahino, kapau na’e fakahoko ha ngaue taau, fe’unga mo fakapotopoto, ma’aе Pule’anga, ‘a ia na’e totonu ke fakahoko, na’e ‘ikai ke mei fakatau mai ‘a e vaka, pe ke fefolau’aki ‘i Tonga. Na’e ‘ilo lelei pe ‘e Pule’anga, ‘a e totonu ke fakahoko ‘a e ngaue taau, fe’unga mo fakapotopoto ‘e he Pule’anga, ‘o kau ai ‘a e savea tau’ataina, fakamahu’inga tau’ataina, pea mo e ‘omai mo e ngaahi tohi fakamatala mahu’inga ‘o hange ko ha setifikeiti savea, pea fakahoko hano vakai’i ‘o e ngaahi tohi fakamatala ko ia.

Neongo ‘a e tu’utu’uni Kapineti ‘o e ‘aho 23 ‘o ‘Epeleli 2009, fekau’aki mo e fakatau mai ‘o e MV Princess Ashika, pe a e toto mo e fiema’u, “ke ‘i ai ‘a e fakamatala ke fakahu mai ki he Kapineti”, ko’ene mahino lelei koe ke ki he Palemia, (‘i he ngaahi ‘uhinga lelei), ‘oku ‘ikai totonu ke fakahu mai ‘a e MV Princess Ashika, te’eke ai ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto; pea koe’uhi, “ko e tokanga ma’u pe ‘a e Palemia ke ‘i ai ha fefolau’aki ‘oku malu mo falala’anga”, ko e MV Olovaha ‘oku fakangofua ke kei folau holo ‘i he tu’unga ‘oku ‘ikai ke malu, pea ‘ikai fe’unga ki he fefolau’aki, pea ‘ikai ke falala’anga; ko e fiema’u ko ia ke toe foki ‘a e MV Princess Ashika ki Fisi, koe’uhi koe maumau na’e hoko ki ai lolotonga ‘ene feinga folau mai ki Tonga ni; ko e hoha’a ko ia na’e fekinga’e ‘i he Fale Alea fekau’aki mo e vaka ‘i he ‘aho 9 ‘o Sune 2009; ko e pule lelei mo e fakakaukau lelei, na’e ‘ikai ke ‘i ai ha fakamatala ‘e fakahu ki he Kapineti, ‘o fekau’aki mo e fakahoko ha ngaue taau, fe’unga mo fakapotopoto. Ko e mo’oni ia, na’e ‘ikai pe fakahoko ha ngaue taau, fe’unga mo fakapotopoto ia, fekau’aki mo e MV Princess Ashika, ma’aе Pule’anga. Ko e tonounou mahu’inga ‘aupito ‘eni, ‘a ia na’e ‘ikai totonu ke tukuange ke hoko.

‘E tatau ai pe, pe na’e lava ke fakahoko ha ngaue taau, fe’unga mo fakapotopoto, pea fakahoko ki he Kapineti, ‘o a’u pe ki he taimi kimu’a pea mavahe ko ia ‘a e vaka ‘i he ‘aho 5 ‘o ‘Aokosi 2009, na’e kei malava pe ‘a e Kapineti ‘o fai ha ngaue ke ta’ofi ‘a e vaka ke ‘oua ‘e folau, pea ‘ikai ai ke hoko ha fakatamaki. Neongo ko hono faka’osi, kuo fakamole noa ai ‘e he Pule’anga, ‘a e FJD$600,000, ka kuo mole noa ai mo e ngaahi mo’ui ia.

Kuo ‘osi fokotu’u ‘aki ‘a e ngaahi ‘uhinga lelei, ‘a e Komiti Fakangofua ke Fakatau mai ha koloa ‘a e Pule’anga.

Ko e aleapau ki hono fakatau mai ‘o e MV Princess Ashika ‘a ia na’e fakafofonga’i ‘e Paul Karalus pea mo ‘Eleni Mone ‘a e Pule’anga, na’e maumau ai ‘a e ngaahi fakahinohino ‘a e Komiti Fakangofua ke Fakatau mai ha Koloa, ‘a ia koe ke na’e fakahu mai ‘e he Palemia ‘i he
lolutonga ‘o ‘e ne fakamatala fakamô‘oni. Ko e ngaahi fakahinohino foki ko eni ‘oku ‘ilohia ia ‘o kau ai ‘a Paul Karalus. Ko e Kupu 19 ‘o e Ngaahi Fakahinohino ‘a e Komiti Fankangofua ke Fakatau mai ha koloa ‘a e Pule‘anga ‘oku ha ia ‘i he ‘ulu‘ito hi “ Felotoi ‘o o Aleapau” ‘oku pehe ai:

“Ko e ngaahi aleapau pe felotoi kotoa pe ki ha ngaahi poloseki fakalalakala, kuo pau ke fakahu atu ia ki he Komiti Fankangofua ke Fakatau mai ha me’a ‘a e Pule‘anga ke vakai‘i mo tali kimu’a pea toki fakamô‘oni ki ai ‘a e ngaahi fa‘ahi fekau‘aki. (Fakamô‘oni fakahahaha 428)

Kuo fakamô‘oni‘i foki ‘e he fakamatala fakamô‘oni, neongo ‘a e lahi ‘o e pa‘anga, na‘e ‘ikai ke ‘i ai ha makatu‘unga ia ‘o e aleapau na‘e fakamô‘oni‘i ‘i he ‘aho 8 ‘o Me 2009 pea mo e tipositi pa‘anga Fisi ‘e $90,000 na‘e totongi pe he ‘aho tatau, na‘e toki fakahoko pe ‘e he kau memipa ia ‘o e Komiti Fankangofua ke Fakatau mai ha Koloa ‘a e Pule‘anga ‘a ‘enau ngaahi fokotu‘u ‘i he ‘aho 20 mo e 29 ‘o Me 2009. ‘I he taimi ko ia na‘e toki a‘u atu ai ‘a e me‘a ni ki he Komiti Fankangofua ke Fakatau mai ha Koloa ‘a e Pule‘anga, na‘e ‘osi ha mahino ‘a ‘e ‘i ai ‘a e fatongia fakalao ia ‘a e Pule‘anga ke totongi ‘a e pa‘anga Fisi ‘e $600,000 ‘o tatau ai pe pe ko e ha ha ngaahi fokotu‘u ‘e ‘omi mei he Komiti Fankangofua ke Fakatau mai ha Koloa ‘a e Pule‘anga pe a‘u toki ai pe pe ko e ha ‘a e tu‘unga mo e mahu‘inga ‘o e MV Princess Ashika. Ko e tokolahi ‘o e o kau memipa na‘a nau pehe, pea ‘oku mahino pe ia, ‘i he taimi ko ia na‘e ‘oatu ai kiate kinautolu ke fakakaukau‘i eni, kuo ‘osi fakahoko ‘a e tu‘utu‘uni ia ‘a e Kapineti ke fakatau ‘a e MV Princess Ashika.

Paul Karalus pea mo e Va’a Malini mo e Taulanga ‘a e Potungaua Fefononga‘aki


pe ko Tu’ipulotu ‘o fokotu’u atu ki ha taha ‘o e kau ‘ofisiale mei he Va’a ‘o e Malini mo e Ngaahi Taulanga ke sivi ‘a e vaka ‘i Fisi. Na’e totonu ke na fakahoko ia.

Na’e ha mahino mai mei he ngaahi fakamo’oni, na’e ‘ikai fiema’u ia ‘e Karalus ha fa’ahinga lipooti fakatoihi nima mei ha taha ‘o e kau ‘ofisiale mei he va’a Malini mo e Ngaahi Taulanga fekau’aki mo e tu’unga taau mo fe’unga ko ia ‘o e MV Princess Ashika ke folau. Na’e a’u pe ki he ‘ikai ke ne kumi ha talatalaifale mei he Pule mo e Sekelitali ‘o e Fefononga’aki. ‘Oku ‘ikai foki ke ‘uhinga eni ia ke nau fakahoko ‘a e fakapapau’i ke ‘oua ‘e folau ha vaka ‘oku ta’efe’unga ke folau ke mahino ai ‘oku fakahoko honau fatongia.

Na’e mahu’inga pea faka’iate ia ‘a e fatongia ‘o Karalus ‘i hono fakatau ko ia ‘o e vaka. Na’a ne teuteu ‘iate ia pe ‘a e ngaahi tohi ki he Kapineti ‘o e ‘aho 20 ‘Epeleli felave’i mo hono fakatau ko ia ‘o e MV Princess Ashika ; ko e memipa ia ‘o e Kapineti na’a nau fakahaukau’i mo poupou’i hono fakatau ‘o e MV Princess Ashika ‘i he fakataha ‘a e Kapineti ‘o e ‘aho 23 ‘Epeleli 2009 ; na’a ne fakamo’oni ‘e ia ‘i he ‘aho 8 Me 2009 ki he aleapau fakatau pa’anga ta’efakangatangata ‘o e vaka; na’a ne fakapapau’i kuo totongi ‘i he ‘aho 8 Me 2009 ‘i ha talafi ‘a e pa’anga Fisi ‘e $90,000 ki Fisi ; pea ne toe fakapapau’ai na’e totongi ‘a e pa’anga Fisi ‘e $510,000 ‘i he ‘aho 5 Sunu 2009 ‘i hano talafi ki Fisi ; na’e ‘i ai ha ngaahi taimi na’a na talanoa ai mo John Jonesse (Pule ‘o e SCP) fekau’aki pe ‘e malava pea mo hono fakatau ko ia ‘o e vaka pea ne toe tauhi foki ‘i hono ‘ofisi ‘a e ngaahi tohi ngaue fekau’aki mo e MV Princess Ashika.

Ko e Minisita Fefononga’aki malolo, ‘a ia ko e tangata pisinisini taukei pea kuo laka hake ‘i he ta’u e 20 ‘a ‘ene kaunga ki he ngaahi ngaue’anga fefolau’aki vakapuna, na’a ne ‘osi mea’i lelei pe na’e pau ke fakahoko ‘i he founga matu’aki tokanga ‘a e ngaahi ngaue ko ia kimu’a pea toki fakatau ‘a e vaka. ‘A ia na’e pau ke kau ai ‘a e savea tau’ataina, fakamahu’inga tau’ataina pea ma’u mai mo hono sivi ‘o e ngaahi tohi ngaue (kau ai ‘a e ngaahi tohi ngaue savea) felave’i mo e MV Princess Ashika.

Me’apango, kuo fakamo’oni’i ‘e he fakamatala fakamo’oni na’e fakahoko ‘e Karalus ‘a e fakatau ‘o e MV Princess Ashika pea ne fakangofua ia ke folau ‘i Tonga neongo ‘a e tu’unga na’e ‘i ai e vaka. Na’a ne ‘oatu ha ngaahi fakamatala ta’epoupou’i mo hala ki He’ene ‘Afio, Falealea, Kapineti, Palemia, Minisita Pa’anga, Fakahinohino Lao Pule pea mo e ngaahi kautaha faiongoongo felave’i mo e vaka. Na’a ne mea’i lelei pe ko e lahi ‘o e ngaahi fakamatala mo fakafofonga lelei na’a ne fakahoko felave’i mo e MV Princess Ashika ‘oku matu’aki loi ia.

Kapau na’e fakahoko fakalelei ‘e Karalus hono fatongia ko e Minisita Fefononga’aki, he’ikai pe fakatau ‘a e MV Princess Ashika ia. ‘I he’eene tau mai ko ia ‘i he ‘aho 1 ‘o Siulai 2009, kapau na’e fakahoko lelei ‘e Karalus ‘a hono fatongia, na’e ‘ikai pe fakangofua ‘a e MV Princess Ashika ia ke folau. He’ikai ke situ’a ‘a Karalus mei hono ngaahi fatongia faka-Minisita ‘aki ‘a ‘ene pehe na’e takihala’i ia ‘e Jonesse pe ko ‘ene pehe na’e fakafalala ia ‘i ha ni’ihi kehe. Kapau na’a ne fakahoko fakalelei pe ‘a hono ngaahi fatongia, na’e fakahoko ‘a e
ngaahi ngaue ‘i he founga tokanga pea tau’ataina ma’ae pule’anga. Na’e mei hā mahino mei ai ko ha ngaahi fakamatala ‘a Jonesse ki he Minisita fekau’aki mo ha ngaahi tu’unga lelei pe ko hono tauhi lelei ‘o e vaka, na’e loi ‘o tatau pe ia mo e lahi ‘o e ngaahi fakamatala na’e fakahoko ‘e Karalus ki he tokolahi. Tatau aipe pe ko e ha e me’a na’e talaange ‘e Jonesse kia Karalus, na’e pau pe ko e taimi ko ia na’e ngoto ai e vaka ‘i he ‘aho 5 ‘Aokosi 2009, na’a ne mea’i ko e vaka na’e “‘ikai sai”.

Ko e Ngaahi fakamatala fakamо’oni ‘oku tataki ki ha ngaue hia, ‘o tupunga ai ‘a e fakatamaki

Ko e fakamatala fatongia ‘a e Komisoni, (‘Kupu c”), ‘oku pehe ai:

“Ko e ngaahi me’a ke fai ki ai ‘a e faka’ekte’eke, pea fai ki ai mo ha fakamatala ‘e he Komisoni FakaTu’i, ‘oku kau ai ‘a e ngaaghi me’a ko’eni, ka e ‘ikai fakangatangata ki ai:

(c) ko ha ngaahi fakamatala fakamо’oni ‘oku tataki ki ha ngaue hia na’e tokoni ki he tupu’anga ‘o e fakatamaki.”

‘Oku ‘ikai ‘a e Komisoni ia ke fokotu’u atu ha taha fakafo’ituitui ke faka’ilо. ‘Oku mau tokanga’i, kuo ‘i ai ha ni’ihi kuo fakai’ilo ‘e he kau ma’u mafai. ‘Oku ‘i he kau ma’u mafai pe ia, pe ‘oku toe ‘i ai ha ni’ihi ‘oku kei toe ke nau faka’ilо.

‘Oku fiema’u pe ‘a e Komisoni ia, ke fakamatala ki ha ngaahi fakamatala fakamо’oni, ‘oku ne tataki ki ha ngaue hia, na’e tokoni ki he hoko ‘a e fakatamaki. Kuo mau ngaue ki he ngaahi lao ‘oku fekau’aki pea mo ha ngaue hia, ‘a ia ‘oku mau pehe, ‘oku ‘i ai ‘ene felave’i pe kaunga ki ha hia, hange ko e tamate tangata tu’unga ‘i he ta’etokanga, pea mo ha ngaahi hia fakatatau ki he Lao ki he Foluak Vaka, kau ai ‘a e kupu 144 ‘o e lao ko ia, ‘aia ‘oku fekau’aki mo e tukuange ha vaka ke folau lolotonga ‘oku ta’efe’unga ke folau ‘i tahi. ‘Ikai ko ia pe, ka kuo mau fokotu’u atu mo e ngaahi maumaulao fekau’aki mo e Lao ki he Komisoni FakaTu’i.

Ko e ngaahi fakamatala fakamо’oni, ‘oku mau tui ‘oku ‘i ai ‘ene felave’i, ‘a ia ‘e ala tataki ki ha ngaue hia ‘e tokoni ki he fakahoko ‘o e fakatamaki, ‘oku fokotu’u atu ia ‘i he fakamatala. ‘Oku kau henи ‘a e ngaahi fakamatala fakamо’oni fekau’aki kakato mo e fakatau mai ‘o e MV Princess Ashika; ko’ene fe’unga pe ‘ikai ke folau ‘i tahi; ko’ene fe’unga pe ‘ikai, ke fefolau’aki ‘i he potu tahi ‘o Tonga; ko hono laiseni, leisita mo e savea ‘o e vaka pea mo e founga ko ia na’e fakangofua ai ke folau; ko e fekau’aki mo e Kautaha Vaka Polinisia, ko e Potungaue ki he Fefononga’aki, Kapineti pea mo e Pule’anga ‘o Tonga; ko e to’o fatonga ‘a e kau kauvaka ‘o a’u ki he fo’i folau fakaloloma ko ia ‘o e ‘aho 5 ‘o ‘Aokosi 2009; pea mo e ni’ihi pe ‘oku ‘i ai ‘enau kaunga ki he me’a fakamamahi ko’eni na’e hoko. ‘Oku mahino pe ‘oku ‘i ai mo e ngaahi fakamatala fakamо’oni ‘oku tu’u atu ‘i he Fakamatala, ‘oku ‘i ai ‘ene felave’i mo e ngaahi kupu kehe ‘o e Fakamatala Fatongia.
Ko e ngaahi Fakamataла Fakamo’oni, ‘oku tataki ki ha fatongia sivile, na’e tu’unga ai ‘a e hoko ‘a e fakatamaki

Ko e kupu (“d”) ko ia ‘o e Fakamataла Fatongia ‘a e Komisoni, ‘oku pehe ai:-

“Ko e ngaahi me’a ke fai ki ai ‘a e faka’eke’eke, pea fai ki ai ha Fakamataла ‘e he Komisoni FakaTu’i, ‘oku kau ai ‘eni, ka ‘e ‘ikai fakangatangata ki ai:-

(d) ko e ngaahi fakamataла fakamo’oni, ‘oku tataki ki ha fatongia fakasivile, na’e tokoni ki he hoko ‘a e fakatamaki ko’eni”.

‘Oku ‘ikai fiema’u ia ki he Komisoni, ‘o fakatatau ki he fakamataла fatongia ko’eni, ke fokotu’u atu ‘i he faka’osi, ha fa’ahinga tonounou pe ha fatongia fakasivile, na’e tu’unga ai ‘a e hoko ‘a e fakatamaki ko’eni. ‘Oku fiema’u pe ia ke ne fakakaukau’i ha ngaahi fakamataла fakamo’oni, ‘oku tataki ki ha fatongia fakasivile na’e tokoni ki he fakahoko ‘o e fakatamaki. ‘Oku ‘i he Fakamaau’anga ia, ‘i he fakahoko hono mafai, ke ne toki fai ‘a e fifili ki ha tonounou fakasivile, ‘a ia na’e tokoni ki he fakahoko ‘o e fakatamaki. ‘I he’ene lava ia, ‘oku totonu pe ke fai ha fakakaukau nounou, ki he lao fekau’aki mo e fatongia fakasivile, he ‘e hange pe ‘e ‘i ai ‘ene tokoni ki he faka’eke’eke mo e fakamataла, fekau’aki mo ha fa’ahinga fatongia fakasivile ‘oku tataki ke ha tupu’anga ‘o e fakatamaki.

Kuo mau lave nounou pe ki he lao fekau’aki mo e maumau’i ‘o ha aleapau, ko e ta’etokanga, ko e pa’usi’i ‘o e fatongia, pea mo e fai ha ngaue pe fatongia ‘oku hala, lolotonga ‘oku ngaue fakapule’anga’

‘Oku mahino pe ‘oku ‘i ai ‘a e ngaahi fakamataла fakamo’oni ‘oku ha ‘i he Fakamataла, ‘oku ‘i ai ‘ene fekau’aki mo e ngaahi kupu kehe, ‘o e fakamataла fatongia.

Ko e ngaahi fokotu’u ke fakalakalaka ‘a e malu mo’ui ‘i tahi

Ko e fakamataла fatongia ‘a e Komisoni “(f)” ‘oku fakahaa’i ai ‘a ‘eni:

“Ko e ngaahi me’a ke fai ki ai ‘a e faka’eke’eke pea ke fakamataла ki ai ‘a e Komisoni FakaTu’i ‘oku kau ki ai ka ‘oku ‘ikai fakangatangata ki he ngaahi me’a ko ‘eni :

(f) ‘Oatu ha ngaahi fokotu’u ki ha ngaahi ngaue ke fakahoko ke tokoni ki hano ta’ofi ha to e hoko ha fakatamaki tatau ‘i he kaha’u pe ala tokoni ki he ngaue kumi, fakahaofo mo’ui mo e ma’u ‘o e kau mo’ua ‘i ha fakatamaki.”

Ko e ngaahi fokotu’u ki ha ngaue ke tokoni ki hano ta’ofi ‘o ha toe hoko ha fakatamaki pehē ‘i he kaha’u, ‘oku fakamataла’i ia ‘i he vahe faka’osi ‘o ‘ulu’i tohi “‘O e ngaahi fokotu’u ke fakalakalaka ‘a e malu mo’ui ‘i tahi”. ‘E ala lava ke mahino pe ‘a e ngaahi fokotu’u ‘e ni’ihi. Kaekehe, koe’uhi ko e ngaahi ‘atakai makehe na’e fekau’aki mo e ngoto ‘a e MV Princess Ashika, ‘oku mau kei ‘oatu pe ‘a e ngaahi fokotu’u. Na’e lava ke fakanounou pe ‘a e ngaahi fokotu’u ni ka ‘oku mau fakakaukau ‘oku totonu ke fakamataла’ai ia ‘i ha vahe kakato.
‘Oku tatau pe ‘eni mo e ngaahi fokot'u ke tokoni ki ha ngaue kumi mo fakahaofi mo ma’u mai ‘a kinautolu ne mo’ua ‘i he fakatamaki ‘i he kaha’u, ‘oku ‘i loto kotoa ‘i he vahe faka’osi ‘o e Fakamatala.
VAHE I - KO E TALATEU

1.1 ‘I he po’uli hifo ‘o e ‘aho 5 ‘o ‘Aokosi 2009, fakafuofua ki he taimi 11.50 efiafi, na’e ngoto ai ‘a e MV Princess Ashika, (ko e vaka uta pasese mo e koloa ki he ngaahi ‘otu motu), lolotonga ha’ane folau mei NUKU’ALOFA ki Ha’apai, ‘i ha feitu’u na’e toki fakapapau’i ki mui, ko e tikili ‘e 20 miniti’e 24. 181 faka-tonga, pea tikili ‘e 174 miniti ‘e 56.414. Ko e fakafuofua ‘enì ki he maile tahi ‘e 11 ki he Tonga-Hihifo ‘o e motu ko Nomuka, ‘i he ‘otu HA’APAI, ‘i he Pule’anga Tonga. Ko e ui tokoni ko ia ‘MAYDAY, MAYDAY”, na’e ma’u ia fakafuofua ki he toe mimiti ‘e 10 ki he 12 tu’apo.

Na’e fakapapau’i mei he kau Polisi Tonga, ko e kau pasese mo e kau kauvaka ‘e toko 128 fakakatoa, na’e heka ki he vaka, ‘i he ‘ene mavahe mei NUKU’ALOFA, fakafuofua ki he taimi toe mimiti ‘e 25 ki he 5 efiafi, ‘o e ‘aho Pulelulu, 5 ‘o ‘Aokosi 2009.

Na’e toe fakapapau’i ‘e he Polisi Tonga, kimui ange, (hili ha ngaahi faingata’a lahi), na’e ‘i ai ‘a e kakai tangata ‘e toko 87, kakai fefine ‘e toko 29 mo e fanau iiki ‘e toko 12, ( toko 7 tangata mo e toko 5 fefine), ko e kau pasese ia mo e kau kauvaka na’e fakapapau’i, na’a nau ‘i he vaka.

Na’e fakahaofi ai ha toko 54 (ko e kakai tangata katoa), na’e ma’u mo e sino ‘o e toko ua, ko e tangata mo e fefine, pea ko e toko 72, na’e ‘ikai toe ‘iloa kinautolu, ‘o mahalo’i pe, kuo nau melemo.


1.2 ‘I he hili pe ‘a e ‘aho 5 ‘o ‘Aokosi 2009, na’e fakato’oto’o leva ‘a e ngaue ‘a e Minisita malolo ki he Fetononga’ai, Paul Karalus, ‘o ne fekau ke fakahoko ‘a e faka’eke’eke ki he ngo to a e MV Princess Ashika.

Ko e Fokotu’u ‘o e Komisoni FakaTu’i ki he Faka’eke’eke

1.3 Ko e Lao ki he Folau Tahi (Vahe 136), Na’e fakatonutonu ia ‘i ‘Aokosi 2009, ke fakaingofua ‘a e ngaue ‘a e Komisoni Faka-Tu’i, ‘i he faka’eke’eke ki ha fa’ahinga fakatamaki ‘oku hoko.

1.4 Fakatau ki he Lao ki he Komisoni Faka-Tu’i, (Vahe 41) (“ko e Lao”), pea fenapisi mo e fakatonutonu ‘i ‘Aokosi 2009 ki he Lao ki he Folau Tahi. (Vahe 136) Na’e fokotu’u ai ‘a e Komisoni Faka-Tu’i, ke fakahoko ha faka’eke’eke, pea ke fa’u ha fakamatala fakataimi, ki he ‘aho 30 Novema 2009, pea mo ha fakamatala faka’osi, ke ‘oua toe tomui ‘i he ‘aho 31 ‘o Ma’asi 2010 (“ko e Komisoni”).
1.5 ʻOku faʻa fokotuʻu pe ha Komisoni Fakatuʻi i he hokoria ha ngaahi fakatamaki lahi. Ko hono ʻuhinga, he ʻoku faʻa maʻau e he Komisoni FakaTuʻi, a e ngaahi mafai lahi ʻaupito ke nau fakahoko ʻa e fakaʻekeʻeke mo fakatotolo ʻa e ngaahi meʻa lahi, pea fai ʻa e fakamatala ki ai. Ko e meʻa ia naʻe hoko ʻi Tonga.

Ko e Ngaahi Fakamatala Fatonga

1.6 Ko e ngaahi meʻa ke fai ki ai ʻa e fakaʻekeʻeke pea fai ki ai ha fakamatala ʻe he Komisoni Faka-Tuʻi, ʻoku kau ai ʻeni, ka ʻe ʻikai fakangatangata ki ai:

a. Ko e ngaahi tefitoʻi moʻoni, fekauʻaki mo e fakatamaki naʻe hoko, pea mo e ngaahi fekumi, mo e fakahaofo moʻui o kinautolu naʻe moʻua i he fakatamaki ko ia;

b. Ko e tupuʻanga ʻo e fakatamaki naʻe hoko;

c. Ko ha ngaahi fakamatala fakamoʻoni fekauʻaki mo ha ngaue hia naʻe fai o tuʻunanga ai ʻa e fakatamaki naʻe hoko;

d. Ko ha ngaahi fakamatala fakamoʻoni fekauʻaki mo ha ngaue taʻetokanga fakasivile o tuʻunanga ai e hoko ʻa e fakatamaki;

e. Ko e ngaahi ʻuhinga, naʻe aʻu ai ʻa e moʻui naʻe mole ʻi he fakatamaki naʻe hoko, ki he tuʻunanga maʻolunga, naʻe aʻu ki ai, pea,

f. Fokotuʻu ha ngaahi fakakaukau, ʻe tokoni ki hano taʻofii ha toe hoko ha fakatamaki pehe ihe kahaʻu, pe tokoni ihe kahaʻu, ki he fekumi mo e fakahofio moʻui o kinautolu, ʻe moʻua i he fakatamaki pehe.

Ko e Kau Komisiona mo e Kau Ngaue ʻa e Komisoni

1.7 Ko e Sea ʻo e Komisoni, ko e Fakamau Lahia ko Mr Justice Warwick Andrew, C.B.E, C.R.H. Ko e ongo Komisiona kehe ʻe ua, ko Mr. Richard A. James, (ko e ʻAkiteki Fakautahi), pea mo Mr. Michael K Handfield, (ko e taukei i he Malini).

1.8 Ko Mr. Handfield, ko e taukei ki he malini, pea kuo laka hake ihe taʻu ʻe 50, ʻa ʻene taukei ihe tapa kehekehe o mamani. Naʻa ne kamata hake pe ihe ngaahi tuʻunega i lalo, o aʻu ki he tuʻunega Meti Ua, Meti ʻUluaki, ʻOfisa Ua, ki he tuʻunega Master Mariner, mo e tikite taukei ihe he fefolauʻaki fakavahaʻapuleʻanga. ʻOku lauta ʻene ngaahi tohi fakamoʻoni ako, kau ai mo e setifiqueiti pailate. Ko e Master Mariner Kalasi ʻUluaki ia, mo e taukei o e ngaahi taʻu lahi.

1.9 Ko Mr. Richard James, ko e ʻAkiteki Fakautahi mo e ʻEnisinia taukei ihe taʻu ʻe 50 tupu, lolotonga haʻa ne ngaahi fakaʻiate ia pe. Kuo ne faʻu ha palani o ha ngaahi vaka kehekehe ʻe 240 tupu, ʻo kau ai ʻa e ngaahi vaka uta pasese mo uta koloa, ko e ngaahi lafalafa uta koloa, ngaahi vaka tauanino mo e ngaahi vaka ngaue mo e ngaahi
vaka toutai mo ha ngaahi vaka kehekehe pe. Na’e ‘i ai foki mo’ene kaunga ki he fokotu’u ‘o e ngaahi tu’unga ngaue ke a’u ki ai ‘a e ngaahi vaka uta fakakomesiale. ‘Oku faka’apa’apa’i ‘aupito ‘a ‘ene taukei ‘akiteki fakatautahi.

1.10 Fakatatau ki he Kupu 4 ‘o e Lao, ko e fatongia ia ‘o e kau Komisiona, ke fai ‘a e faka’eke’eke kakato, mo’oni mo ta’efilifilimanako, ‘o fakatatau ki he ngaahi fakamatala fatongia ‘a e Komisoni, pea ke fai ‘a e fakamatala ki he ola ‘o e faka’eke’eke ko ia, ki he ‘Ene ‘Afio. Pea makatu’unga ‘i he fiema’u ko ia, kuo fakahoko ai ‘e he kau Komisiona, ‘e nau fuakava, ke nau fakahoko kakato, mo’oni mo ta’efilifilimanako ho nau fatongia, pea ‘i he ‘enau lelei taha, ‘o fakatatau pea mo e falala ‘oku hilifaki kiate kinautolu. ‘Oku ‘i ai foki pea mo e fatongia ‘o e ngaahi fakamatala faka’osi, ki he Fale Alea.

1.11 Ko e Sekelitali ki he Komisoni, ko Mrs. Lola Koloamatangi.

1.12 Na’e fokotu’u foki pea mo Mr. Manuel M. Varitimos, (Barrister at Law mo e Law Practioner), pea mo Mr. James B. Lutui (Law Practioner), ko e ongo Loea ke tokoni ki he Komisoni. Ko e fatongia ia ‘o e ongo Loea tokoni ki he Komisoni, ‘a e fekumi mo e fakatahataha’i mo fokotu’u ‘o e ngaahi fakamatala fakamono’oni, ke tokoni ki he Komisoni, ‘o fakafaingofua ai ‘a e faka’eke’eke mo e fakamatala fekau’aki mo e ngaahi fiema’u, ‘a e fakamatala fatongia.

1.13 Fakatatau ki he Kupu 8 ‘o e Lao, na’e fokotu’u ai ‘e he kau Komisiona, ‘a Mr. Siosiua Fonua, Dr ‘Ungatea Kata pea mo Mrs Meleane Tonga, ko e kau liliu lea ‘a e Komisoni.

Ko e Faka’eke’eke ʻoku ʻatā ki he kakai

1.14 ‘I he ‘aho 1 ‘o ‘Okatopa 2009, na’e fai ai ‘a e fuofua faka’eke’eke ‘a ia na’e ‘ataa ki he kakai, ‘I he Fale Fakataha’anga Fa’onelua. Kimu’a pea fai ‘a e ‘uluaki faka’eke’eke ko’eni, na’e fai ai ‘a e ngaahi fanongonongo ‘i he ngaahi nusipepa mo e letio.

1.15 Kimu’a ‘i he ‘uluaki faka’eke’eke ko’eni na’e ‘ataa ki he kakai, na’e ‘osi fakahoko pe ‘a e ngaahi fakatotolo lahi ‘aupito. Na’e tokoni lahi ‘aupito ‘a e Komisoni ‘a Nu’u Sila ki he fakatotolo ki he fakatutumaki ‘i he fefononga’aki, (New Zealand Transport Accident Investigation Commission, (TAIC), pea tokoni foki ki ai mo Mr. Ian C Tu’ihalangingie, ‘i he ngaue koia.

Ko Kinautolu na’e Fakafofonga ‘i e ha kau Fakafofonga Lao

1.16 Ko e kupu 13 ‘o e Lao, ‘oku fekau’aki ia mo e hā ‘a ha kau fakafofonga lao, ma’a kinautolu ‘oku ‘i ai ha’a nau kaunga ki he me’a na’e hoko. ‘Oku pehe ‘i he kupu ko ia:

“13 Ko e ha ‘a ha Fakafofonga Lao
Ka ‘i ai ha taha, ko ‘ene to’onga, ko e makatu’unga ia ‘o e faka’eke’eke, ‘o fakatatau ki he Lao ko’eni, pe ‘oku ‘i ai ha’a ne kaunga ‘i ha fa’ahinga founga pe, pe ‘oku ‘i ai ha’a ne fekau’aki mo e faka’eke’eke ‘oku fai, ‘oku ‘i ai ‘ene totonu, ke fakafofonga’i ia ‘e ha Fakafofonga Lao, ‘i he katokatoa ‘o e faka’eke’eke, pe ko ha taha pe ‘oku ne pehe, ‘oku totonu ke fakafofonga’i ia ‘e ha Fakafofonga Lao, ‘e ‘ataa ke ‘oange ‘e he kau Komisiona, ‘a e ngofua ke fai pehe,’ i he ngaahi ‘uhinga ko ia kuo ha ‘i mu’a”.

1.17  ‘I he ‘aho 1 ‘o ‘Okatopa 2009, ‘i he ‘uluaki faka’eke’eke na’e fai, na’e fakahoko ai ‘a e ngaahi kole ki he ngofua ki ha ni’ihi ke fakafofonga’i kinautolu ‘e ha fakafofonga lao ‘i he faka’eke’eke ka fai. Ko kinautolu ‘eni na’e foaki ki ai ‘a e ngofua ke fakafofonga’i kinautolu ‘e ha Fakafofonga Lao.

Amicus Curiae (Tokotaha Tokoni)  Mr. John Gauchi, ‘Ateni Seniale
Potungaue Fefononga’aki  Mr. Siosifa Tu’utafaiva
Mr. Paul David Karalus  Mr. Kahu Barron Afeaki SC
Kautaha Vaka Polinisia  Mr. Tavake Barron Afeaki


Ko e Founga Fakahoko ‘o e Ngaue

1.19  Ko e Kupu 6 ‘o e Lao, ‘oku pehe, “ko e mafai ‘o e kau Komisiona, ke fokotu’utu’u ‘a e founga fakahoko ‘o e ngaue,” ‘o pehe ai:

“E fokotu’u ‘e he Kau Komisiona ‘a e ngaahi tu’utu’uni ki hono fakahoko mo hono pule’i ‘o e ngaue, ‘o fakatatau ki he ‘e nau fakahaukau ki he me’a ‘e taau”.

1.20  ‘I he ‘aho 15 ‘o ‘Okatopa 2009, fakatatau ki he kupu 6 ‘o e Lao, na’e ‘oatu ai ‘e he Komisoni ‘a e Fanonganongo Tohi Fika 1(Fakalahi 1), ‘a ia na’e fekau’aki pea mo e founga fakahoko mo pule’i ‘o e ngaue. ‘I he ‘aho 11 ‘o Sanuali 2010, na’e toe tuku atu ai ‘e he Komisoni ‘a e Fanonganongo Tohi Fika 2 (Fakalahi 2) fekau’aki ia mo e fiema’u ‘o e fakahau mai ‘a e malanga tohi mo e malanga lea. Ko e Fanonganongo Fika 3, (Fakalahi Fika 3), na’e tuku atu ia ‘i he ‘aho 20 ‘o Fepueli 2010, ke fakatonutonu ‘a
e 'aho ki he ngaahi malanga tohi mo e malanga lea, 'a ia na'e ha 'i he fanongonongo fika 2. Ko e ngaahi fakatonutonu ko'eni, na'e fiema'u, tu'unga 'i he hoko mai 'a e matangi fakatalopiki ko Rene, 'a ia na'e hoko ai 'a e toloi 'o e ngaue 'a e Komisoni.

1.21 Mei he 'aho 27 'o 'Okatopa 2009, na'e kamata ai 'a e ngaahi faka'ekte'ekte lahi 'aupito, 'a ia na'e 'ataa ki he kakai, 'i he Fale Fakataha'anga Fa'onelua. Ko e ngaahi faka'ekte'ekte ko'eni, na'e fakahoko mei he 'aho 27 ki he 'aho 30 'o 'Okatopa, pea hoko atu ki Novema 2,3,5,6,9-13 mo e 16-19 'o Novema. Na'e toe hoko atu 'a e faka'ekte'ekte ki he 'aho 7, 10, 11 Tisema 2009, pea mei he 14 ki he 18Tisema 2009; pea mei he 12 ki he 15 Sanuali 2010; mei he 18 ki he 22 Sanuali 2010; 25 ki he 29 Sanuali 2010; 17 ki he 19 Fepueli 2010; 22 ki he 27 Fepueli 2010, pea mo e 12 'o Ma'asi 2010. Na'e 'i ai 'a e kakai pea pehe ki he kau faiongoongo, kau ai mo e kau fai ongoongo mei muli, na'a nau ma'u 'a e ngaahi faka'ekte'ekte na'e fai.

Ko e Paenga (Website)'a e Komisoni 'i he Ngaluope

1.22 'I he 'aho 27 'o 'Okatopa 2009, na'e fokotu'u ai 'e he Komisoni 'e ne Paenga 'I he Ngaluope (website)'a ia ko e hala ki ai, ko e www.rcimvprincessashika. Na'e 'i ai 'a e ngaahi fakamatala matu'aki 'aonga 'aupito 'i he paenga ko'eni, hange ko e ngaahi fakamatala ki he founga fetu'utaki ki he Komisoni, ko e ngaahi 'aho ki he faka'ekte'ekte, ko e ngaahi Fanongonongo 'a e Komisoni, pea pehe foki ki he fakamatala kakato ki he ngaahi faka'ekte na'e fai faka'aho. Ko e fakamatala ko ia ki he faka'ekte na'e fai, na'e a'u ki he peesi 'e 6455 ki he 'aho ko ia 'e 54 na'e fakahoko ai 'a e faka'ekte'ekte ko'eni.

Ko e Filimi Vitio 'o e MV Princess Ashika

1.23 Hili ha fakakaukau lahi 'aupito, na'e tu'utu'uni ai 'e he Komisoni, makatu'unga 'i he fiema'u ke mahino 'a e 'ataa mo e tau'ataina 'a e Komisoni, ke hulu'i ke mamata ai 'a e kakai, 'i he fo'i filimi vitio 'o e MV Princess Ashika, 'a ia na'e faitaa'i 'i he 'aho 18 'o 'Aokosi 2009, lolotonga 'oku ne tokoto 'i he kilisi tahi. Tu'unga 'i he fiema'u ke faka'apa'apa'I 'a e ngaahi famili 'o kinautolu na'e pekia, na'e 'i ai 'a e ki'i konga si'i 'o e fo'I filimi vitio ko'eni, na'e 'ikai ke hulu'i.

1.24 'I he 'aho 13 'o Novema 2009, na'e hulu'i ai 'a e fo'i filimi vitio ko'eni 'I he taimi 4.30 efiafi, 'a ia 'oku miniti 'e 90 hono loloa. Makatu'unga 'i he fu'u tokolahi 'a e kakai na'a nau fie mamata ki he fo'i filimi vitio ko'eni, na'e laka hake 'i he kakai 'e toko 1,000 tupu, na'e pau ai ke toe hulu'i 'i he 6.30 efiafi, mo e 8.15po'uli 'o toki 'osi ki he 9.45 po'uli.
Ko e Mafai ‘o e Kau Komisiona

1.25 Ko e Kupu 7 ‘o e Lao, ‘oku foaki ai ‘a e mafai lahi ‘aupito ki he Kau Komisiona. Ko e Kupu ko ia, ‘oku fakalea pehe ni:

“7. Ko e ngaahi mafai’o e Kau Komisiona

‘E ‘i he Kau Komisiona ‘a e ngaahi mafai ko’eni:

a. Ke ‘oatu ‘a e ngaahi tohi fekau ki he kau fakamo’oni, ‘i he foomu kuo tu’utu’uni ‘e he lao ko’eni, pea ke fekau ke ‘omai ‘a e ngaahi tohi, palani, pe fakamatala tohi, pea ke faka’eke ‘a e taha fakamo’oni pe ko kinautolu ‘oku nau kaunga, pea kuo ‘osi honau fakafuakava’i;

b. Ke fakahau mai ha fakamatala fakamo’oni, pe ‘oku ‘i ha tohi pe fakamatala lea, ‘o tatau ai pe pe ‘e malava ke ngaue’aki ‘a e ngaahi fakamatala fakamo’oni ko ia ‘i ha fakamaau’anga sivile pe fakamaau’anga hia;

c. Ke fakangofua pe tapui ha kau faiongoongo mei he ngaue ‘a e kau Komisiona;

d. Ke tapui ha taha pe mei he ‘ene kau mai ki he faka’eke’eke ‘a e kau Komisiona, ko’e’uhi ke faka’afingofua ‘a e ngaue pe ko e tauhī ‘o e maau;

e. Ke ngofua ke hu ki ha konga kelekele ‘i he ‘uhinga ke ma’u mai ha fakamatala ‘e tokoni ki he kau Komisiona”.

Ko e Ngaahi Fakamatala Fakamo’oni ‘i he ‘Ao ‘o e Komisoni

1.26 Fakatatau ki he ngaahi mafai ko ia kuo foaki ki he Kau Komisiona, ‘o hange ko ia ‘oku ha ‘i he kupu 7 ‘o e Lao, kuo fai ai ‘e he Kau Komisiona ‘a e Tohi Fekau ki he kau Fakamo’oni tokolahi, ke nau ‘omai ‘a e ngaahi tohi fakamatala fakamo’oni, pea ke nau fai foki mo e ngaahi fakamatala fakamo’oni, ‘osi, kuo fai honau fakafuakava’i. Na’e ‘i ai foki ‘a e ni’ihī, na’e ‘ikai malava ke ‘oatu ki ai ha tohi fekau, makatu’unga ‘i he’enau ‘i he tu’a mafai ‘o e Komisioni. Na’e kau ai ‘a Mr. George Patterson, ‘o e Kautaha Vaka Patterson Brothers ‘o Fisi, ‘a ee na’e ‘anautolu ‘a e MV Princess Ashika. Fekau’aki mo ia, na’e ‘oatu ki ai ‘a e ngaahi tohi, emails, mo e faxes, pea kau ai mo e tohi na’e ‘oatu hangatoni ku ai, ‘o kole ki ai ke ne fetu’utaki mai ki he Komisioni, ke ne tokoni mai (fakamo’oni fakahaha 410). Na’a ne paetaku kotoa ‘a e ngaahi fetu’utaki na’e fai atu ku ai. Ko e hingoa ‘o kinautolu kotoa na’e ‘oatu ki ai ha tohi fekau, pea na’a nau ha ‘i he ‘ao ‘o e kau Komisiona, ‘i he faka’eke’eke na’e fai, ‘oku ha honau hingoa, ‘o fakahokohoko, faka’alefapeti, ‘oku ha atu ia ‘i lalo ni. Ko’e’uhi ke faingofua
Ko e Kau Fakamo’oni

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<td>3 DALGETY QC, RAMSAY (Sekelitali, Shipping Corporation of Polynesia Limited)</td>
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<td>(Pule Fefononga’aki Port Authority of Tonga)</td>
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<td>KULUNI, LEONAITASI PULI KI POLUTO</td>
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<td>(Physician consultant at Vaiola Hospital medical ward)</td>
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<td>NEER, DR. LUCIEN van</td>
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(Ko e Sea, Shipping Corporation of Polynesia Limited) | 4519-4601  
641-648  
3657-3715  
3748-3781  
3814-3850  
3859-3967 | 7  
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| 63  | TAUMOEPEAU, SIONE  
(Talekita Ntgaue mo e Tokoni Sea, Government Procurement Committee) | 1270-1284 | 13  
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| 64  | TA’UATINA, UOKALANI FILIPE  
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| 65  | TA’UFO’OU, LEHOPOAME KAINGA  
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| 66  | TELEFONI, TASIMANI  
(‘Ofisa Fefolau’aki ngaue ‘i he Mla’evakapuna) | 2762-2763  
3124-3125 | 26  
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| 67  | TIUETI, TIOFILUSI  
(Tokoni Sekelitali Pa’anga mo e Palani) | 22-23  
850-851  
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Falaita, 19 Fepueli 2010 | |
| 68  | TUPOU, ALASIU  
(Computer Operator; Ministry of Transport, Marine Division) | 2407-2414  
3645-3650  
3726-3729  
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4397-4431 | 23  
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345-374 | 4  
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Ko e ngaahi Fakamo’oni Fakahähä, ngaahi Fakamatala Tohi na’e faka’ilonga’i ke toki fakapapau’i

1.27 ‘I he ‘aho ni, kuo a’u ki he fakamo’oni fakahähä ‘e 496 kuo fakahū mai ki he Komisoni, lolotonga ‘a e ngaahi faka’eke’eke ko ia na’e ‘ataa ki he kakai. ‘Oku ha ‘i he Fakalahi 4, ‘a e hokohoko katoa ‘o e ngaahi Fakamo’oni Fakahaha ko ia. Ko e ngaahi tohi fakamatala ko’eni,’oku kau ai ‘a e ngaahi faille, ko e ngaahi fakamatala fuakava, ko e ngaahi setifikiteiti savea, ko e ngaahi lau’i ‘ata mei he MV Princess Ashika, ko e ngaahi faile mei he ngaahi Potungae kehekehe ‘a e Pule’anga ‘a ia na’e ‘oatu ki ai ha tohi fekau. ‘Oku tanaki atu ki ai mo e ngaahi fakamatala tohi mo e ngaahi faile, kuo ‘osi faka’ilonga’l pe ke toki fakapapau’i. Ko e fakahokohoko ‘o e ngaahi fakamatala tohi ko’eni, ‘oku ha katoa ia ‘I he Fakalahi 5.

Ko e ngaahi Fakamatala Fakamo’oni ‘oku ‘ikai ala ngaue’aki ‘i ha Hopo Faka-Fakamaa’anga

1.28 ‘Oku fakamahino’i pe ‘e he Lao, ko e ngaahi fakamatala fakamo’oni ‘oku ma’u ‘e he Komisoni, ‘e ‘ikai malava ke ngaue’aki ia ‘i ha hopoa hia pe hopo sivile. Ko e kupu 9 ‘o e Lao ‘oku pehe ai:

“9 Ko e ngaue’aki ‘o e ngaahi fakamatala fakamo’oni ‘i ha Lao ko’eni ‘i ha fakatonutonu faka-fakamaa’anga.

‘E ‘Ikai ngofua ke ngaue’aki ha fakamatala fakamo’oni kuo ma’u ‘i he Lao ko’eni, ki ha taha, ‘i ha hopoa hia pe hopo sivile, tukukehe kapau kuo ‘i ai ha taha kuo tukuaki’i ‘o fakatatau ki he kupu 11 ‘o e Lao ko’eni, ‘o fekau’aki mo ha liliu kaka, pe ko e fai ha fakamatala loi ki he Komisoni.

1.29 Ka ‘i ai ha taha ‘oku ne tokanga pe fiema’u ‘a e ngaahi fakamatala fakamo’oni kuo fakahā ki he Komisoni, ‘e malava pe ke ne ma’u kakato ‘a e ngaahi tohi fakamatala,
Ko e puipuitu’a ‘o e fakamatala

1.30 Kuo vahevahe ‘ae fakamatala ni ki ha voliume ‘e ua, ‘a ia ko e voliume hono 2, ko e ngaahi fakamatala fakalahi ia. ‘Oku kamata ‘a e Voliume I, ‘aki ha fakama’opo’opo fakamafai. Ko e konga ko’eni, fakataka mo e Talateu, ‘oku fa’o ai ‘a e liliu fakaTonga, he ‘oku mau tui ‘e tokoni ‘eni ki he kakai ke mahino ngofua kiate kinautolu ‘a e fakalukufua ‘o e fakamatala ko’eni. ‘Oku mau kole fakamolemole, koe’uhi ko e ‘ikai ke lahi ‘a e taimi ke fakakakato ‘a e fakamatala ni, pea pehe foki ki he ‘ikai ha pa’anga fe’unga, ‘oku ‘ikai ai malava ke liliu fakaTonga katoa ‘a e fakamatala ni.

1.31 ‘Oku ‘ikai malava ‘i he tu’utu’uni ‘a e ngaahi Fakamatala Fatongia, ke hanga ai ‘e he Komisoni, ‘o fakapapau’i pe tuhu’i pau, ‘i he faka’osi, ha mo’ua sivile, pe fatongia fakasivile, ki he ‘uhi nga hia na’e tu’una ai ‘a e fakatamaki ko’eni. Ko e fatongia na’e fai, ko e faka’eke’eke pe ki ha fa’ahinga fatongia fakasivile, na’e tonounou ‘o makatu’unga ai ‘a e fakatamaki ko’eni na’e hia. Ko e fatongia ia ‘o e ngaahi fakamaau’anga, ke nau toki fifili ki he mo’ua fakasivile.

1.32 ‘Oku ‘ikai ko e fatongia ia ‘o e Komisoni, ‘o fakatai kia ki he fakangatangata ‘o e ngaahi fakamatala fatongia, ke fakakaukau’a ha fa’ahinga to’onga pe ngaue hua na’e tu’unga ai ‘a e fakatamaki na’e hia. ‘Oku ‘ikai ko e fatongia ia ‘o e Komisoni ko fokotu’u atu, ‘oku ‘i ai ha taha ‘oku tonotonu ke faka’ilo. ‘Oku mau tokanga’i kuo ‘i ai ha ni’ihi kuo ‘osi faka’ilo ‘e he kau ma’u mafai, pea ‘oku ‘i he kau ma’u mafai, pe ‘oku toe ‘i ai ha ni’ihi ke faka’ilo. ‘Oku mau tui ai ‘oku tonotonu pe ke fai ha ki’i lave nounou ki he lao ‘oku fekau’aki tonotonu mo e fatongia kuo hia a ha hia.

1.33 ‘Oku fie faka’ilongai’i ‘e he Komisoni FakaTu’i, ‘a ‘enau houngai’ia ‘i he tokoni lahi na’e fai ‘e he TAIC (Transport Accident Investigation Commission), ‘o Nu’u Sila, fakataka mo e tokoni ‘a e Martime New Zealand, pea mo e Australian Transport Safety Bureau. Hili pe ha ngaahi ‘aho s’i mi he he ngoto ‘a e MV Princess Ashika, kuo kamata leva ‘a e fakatotolo ia ‘a e TAIC ki he tupu’anga ‘o e fakatamaki na’e hia. Na’e ma’u ‘e he TAIC ha kole mei he Pule’anga Tonga ke tokoni mai ‘i he faka’ake’ake ke ki he fakatamaki na’e hia ‘aki hono tanaki mai ‘o e ngaahi fakamatala fakamo’oni, fakataka mo e ngaahi fale’i fakatekinikale. Na’e fokotu’u leva ‘e he TAIC ha’a ne timi fakatotolo fakatekinikale, ‘o nau kamata ngaue leva ‘i he ‘aho 10 ‘o ‘Aokosi 2009, ko e ‘aho pe ia ‘e nima hili e hia ‘a e fakatamaki. ‘I he taimi ko ia na’e fokotu’u ai ‘a e Komisoni FakaTu’i, na’e kamata ngaue mai leva ‘a e TAIC ‘o ‘omai ‘e nau ngaahi lipooti ki he Komisoni. Na’e lahi ‘apito ‘e nau ngaahi faka’ake’ake, ‘o komata pe mei Tonga ki Fisi ‘o a’u ki Nu’u Sila. ‘Oku mau fakamalo’i’ia ‘a e tu’unga ma’olunga fakapolofesinale ‘e nau ngaue mo e tokoni na’e fai mai ki he Komisoni, pei ki Tonga foki, ‘o fakafou mai ‘i he Pule’anga Nu’usila pe mo e TAIC.
Ko e fakamatala faka’osi ‘a e TAIC, ‘oku fakahu ia ko e Fakamo’oni Fakahaha Fika 423.

‘Oku ‘ikai ke mau lava ‘o tuhu’i ha tokotaha pe ‘i he timi TAIC, ka ‘oku fie fai ha fakamalo makehe kia Mr. Doug Monks, ‘i he ‘ene taki fakapotopoto ‘a e ngaahi fakatotolo mo e faka’eke’eke na’e fai, pea pehe foki ki he ‘ene ngaue ‘osiakiavelenga ‘i he teuteu ‘o e fakamatala faka’osi ‘a e TAIC ‘aki aipe ‘ene anga lelei mo fakakaume’a.

Na’e ngaue ‘a e TAIC ‘o fakatatau ki he ‘ene ngaahi tu’utu’uni ngaue pe ‘a’ana, ‘a ia ko e fakatotolo ki he ngaahi ‘uhinga mo e tupu’anga ‘o ha ngaahi fakatutamaki, ‘o fakataumu’a ki he ngaahi fokotu’utu’u founa ke ta’ofi ‘aki ha’a ne toe hoko ha fakatamaki pehe ‘i he kaha’u, ka e ‘ikai ko e fakatotolo ke tukuaki’i ha taha. ‘Oku ‘ikai ko e fatongia ia ‘o e TAIC ke tuhu ki ha tonounou fakasivile, pe ko ha fatongia ngaue hia kuo hoko.

‘Oku totonu pe ke tau fakatokanga’i, ko e Fakamatala Faka’osi ko ia ‘a e TAIC, ‘oku faka’aho ia ki he ‘aho 15 ‘o Fepueli 2010, peha hange pe ko ia kuo fakahau ‘e he TAIC, na’a nau ngaue pe ‘o fakakaukau’i ‘a e ngaahi fakamatala fakamo’oni ‘o a’u ki he ‘aho 20 ‘o Sanuali 2010, ‘a ia ko e ‘aho pe ia hono 32 mei he ‘aho fakakatoa ‘e 54 ‘o e faka’eke’eke ‘a e Komisoni, ‘a ia na’e ‘ataa ki he kaha. ‘Oku mahino pe mei he Fakamatala Faka’osi ‘a e TAIC, na’e ‘ikai malava ke nau fakakaukau’i katoa ‘a e ngaahi fakamatala fakamo’oni na’e fakahau ‘i he ‘ao ‘o e Komisoni. Na’e ‘i ai ‘a e ngaahi fakamatala fakamo’oni mahu’inga na’e toki fakahau ‘i he ‘ao ‘o e Komisoni hili ‘a e ‘aho 20 ‘o Sanuali, hange ko ia ko e fakamalo ‘a Mr. Paul David Karalus, ‘a e Minisita Fefonga’aki Malolo, ko e ‘Eiki Palemia, Dr Feleti Vaka’uta Sevele, ko e ‘Eiki Minisita Pa’anga, ‘Otenifi Afu’alo Matoto, ko e ni’ihi ia na’e ‘ikai kau ‘i he fakakaukau ‘a e TAIC.


1. ke ‘oua ‘e tali ke fokotu’u ha Master Mariner Tonga, ke hoko ko e Memipa ‘o e Komisoni Fakatu’i ki he MV Princess Ashika.

2. ke fakakaukau’i ‘a e fokotu’u ‘o ha Master Mariner mei muli ‘oku ‘ikai ha’a ne fekau’aki mo e Pule’anga Tonga ke ne hoko ko e Memipa ‘o e Komisoni FakaTu’i.